



EUROPEAN COMMISSION

Brussels, 15.12.2023  
C(2023) 9128 final

Autoridade Nacional de  
Comunicações (ANACOM)

Avenida José Malhoa No. 12  
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Portugal

For the attention of:  
Mr João Cadete de Matos  
Chairperson

**Subject: Case PT/2023/2478: Wholesale local access provided at a fixed location in Portugal;**

**Case PT/2023/2479: Wholesale central access provided at a fixed location for mass-market products in Portugal;**

**Case PT/2023/2480: Physical infrastructure access in Portugal**

**Article 32(3) of Directive (EU) 2018/1972: No comments**

Dear Mr João Cadete de Matos,

## **1. PROCEDURE**

On 17 November 2023, the Commission registered three notifications from the Portuguese national regulatory authority, *Autoridade Nacional de Comunicações* (ANACOM) <sup>(1)</sup>, concerning the Portuguese market for wholesale local access provided

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<sup>(1)</sup> Under Article 32 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the Code) (OJ L 321, 17.12.2018, p. 36).

at a fixed location <sup>(2)</sup>, market for wholesale central access provided at a fixed location for mass-market products <sup>(3)</sup> and market for physical infrastructure access <sup>(4)</sup>.

The national consultation <sup>(5)</sup> ran from 3 May 2023 to 7 July 2023.

The Commission sent a request for information <sup>(6)</sup> to ANACOM on 28 November 2023, and received a reply on 4 December 2023.

## **2. DESCRIPTION OF THE DRAFT MEASURE**

The notifications concern the definition and the assessment of the competitive conditions on the analysed retail and wholesale markets, including assessment of whether there are operators with significant market power (SMP) on these markets in Portugal, and imposition of remedies.

### **2.1. Background**

In its last review of the market for wholesale local access provided at a fixed location market and on market for wholesale central access provided at a fixed location for mass-market products in Portugal (cases PT/2016/1888-1889 <sup>(7)</sup>), ANACOM included in the retail market, as well as in both wholesale markets, services based on copper, fibre and cable.

At the retail level, ANACOM found two separate geographic markets: competitive areas (comprising 56% of households) and non-competitive areas (comprising 44% of households), based on criteria applied at the level of a parish.

As to the wholesale local access market, ANACOM found the geographic scope to be national, while the wholesale central access market was divided in competitive and non-competitive areas, based on the segmentation identified at retail level. MEO – Serviços de Comunicação e Multimédia, S.A. (MEO) was found to hold SMP in the whole wholesale local access market as well as in the non-competitive areas of the wholesale central access market.

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<sup>(2)</sup> Corresponding to market 1 in Commission Recommendation (EU) 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with the Code (the 2020 Recommendation on Relevant Markets) (OJ L 439, 29.12.2020, p. 23.).

<sup>(3)</sup> Corresponding to market 3b in Commission Recommendation (EU) 2014/710 of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (the 2014 Recommendation on Relevant Markets) (OJ L 295, 11.10.2014, p. 79.).

<sup>(4)</sup> The market for physical infrastructure access is not identified on the list of relevant product and service markets in the 2020 Recommendation on Relevant Markets.

<sup>(5)</sup> In accordance with Article 23 of the Code such consultation should be in any event not shorter than 30 days.

<sup>(6)</sup> In accordance with Article 20(2) of the Code.

<sup>(7)</sup> C(2016) 7674.

On both wholesale markets ANACOM imposed on MEO the full set of regulatory obligations with respect to its copper network <sup>(8)</sup>. In addition, MEO was required to provide access to its ducts and poles <sup>(9)</sup>, at cost-oriented prices, under transparent and non-discriminatory terms. <sup>(10)</sup>

The Commission raised serious doubts in relation to ANACOM's proposal not to regulate access to the fibre network of MEO. Following an in-depth investigation, the Commission issued a Recommendation <sup>(11)</sup> under Article 7a of the Framework Directive. <sup>(12)</sup> The Commission recommended ANACOM to impose on MEO a wholesale obligation to provide access to the unbundled fibre line, as well as to bitstream over fibre. The recommendation also called on ANACOM to consider whether to grant MEO a degree of pricing flexibility for the fibre access products. In its adopted measure ANACOM did not follow the Commission's Recommendation and kept fibre unregulated.

Under case PT/2009/1012 <sup>(13)</sup>, ANACOM notified changes in MEO's reference offer for access to ducts (ORAC) related to the scope, the quality of service (including compensations), the level of transparency (including information on duct space), operational issues and demand forecasts. Under case PT/2013/1494 <sup>(14)</sup>, ANACOM notified the lowering of some penalties in ORAC. Under case PT/2019/2193 <sup>(15)</sup>, ANACOM notified changes to technical details in ORAC and in MEO's reference offer for access to poles (ORAP). The Commission had no comments in any of the three cases.

Under case PT/2022/2382 <sup>(16)</sup>, ANACOM notified the review of monthly fees in ORAC and ORAP. The Commission commented on the urgent need to timely review markets <sup>(17)</sup> and prices as well as on the need to notify to the Commission any future amendments to the reference offers. The Commission also urged ANACOM to avoid setting prices with a retroactive effect, as this creates legal uncertainty for market players.

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<sup>(8)</sup> Including the obligation for MEO to provide access to copper unbundling local loop (LLU) and to copper-based bitstream services.

<sup>(9)</sup> MEO was obliged to provide access to dark fibre in case of no available space in its ducts and poles.

<sup>(10)</sup> For access to ducts and poles ANACOM imposed on MEO non-discrimination on Equivalence of Inputs (EoI) basis.

<sup>(11)</sup> C(2016) 7674.

<sup>(12)</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), (OJ L 108, 24.4.2002, p. 33), as amended by Directive 2009/140/EC (OJ L 337, 18.12.2009, p. 37) and Regulation (EC) No 544/2009 (OJ L 167, 29.6.2009, p. 12).

<sup>(13)</sup> C(2009) 10661.

<sup>(14)</sup> C(2013) 5949.

<sup>(15)</sup> C(2019) 6266.

<sup>(16)</sup> C(2022) 5174.

<sup>(17)</sup> The wholesale local and central access markets, as well as the dedicated capacity market.

Under case PT/2022/2400 <sup>(18)</sup>, ANACOM notified amendments to ORAC and ORAP. The Commission commented on the urgent need to timely review markets and prices as well as on the significant time lag between public consultation and notification to the Commission.

So far, ANACOM has not identified a separate market for physical infrastructure access.

## **2.2. Product and geographic market definition**

### *2.2.1. Retail mass market for broadband access in Portugal*

ANACOM defines the retail product market as comprising mass broadband access services at a fixed location (retail fixed broadband access market) over copper, coaxial cable, fibre, satellite, fixed wireless access (FWA) and mobile infrastructure networks at a fixed location and directed towards large consumer and residential segment.

In order to detect the different competitive dynamics at geographical level, and taking a modified greenfield approach, ANACOM considered the following factors: (a) the number of networks and their coverage; (b) the distribution of market shares and their evolution; (c) differences in prices and behavioural patterns; (d) supply-side substitutability, including favourable business case and alternative networks in nearby parishes.

ANACOM carries out the geographic analysis on the basis of parishes, which are in total 3092 in Portugal. ANACOM separates the geographic retail market into (i) retail broadband access market in competitive areas (Area A), and (ii) retail broadband access market in non-competitive areas (Area B).

“Area A” comprises 2086 parishes which comply with the following (non-cumulative criteria):

- Parishes where three or four high-speed fixed networks are deployed;
- Parishes where two high-speed fixed network operators are present with coverage exceeding 90.0%;
- Parishes where the retail market share of the leader falls between 40.0% (inclusive) and 50% (exclusive), and has been declining since 2019, or parishes where the leader has a market share below 40%;
- Parishes located in predominantly urban areas.

The remaining parishes were included in “Area B” (1006 parishes) which is divided according to the market leader: “Area B-MEO” (812 parishes), “Area B-NOS” (191 parishes), “Areas B-Vodafone” (2 parishes) and “Area B-NOWO” (1 parish). However, ANACOM finds certain 599 parishes no longer belong to “Area B” as they are subject to potential competition based on the following criteria:

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<sup>(18)</sup> C(2022) 5174.

- Parishes in which the coverage of open-access networks will be greater than 60% following the future so-called “white areas”/ “target areas” public tenders and also operators’ expansion plans (584 parishes);
- Parishes where the leader's position is associated with fixed wireless broadband (based on mobile networks in fixed locations), and where competitors have customers supported on the same type of networks (3 parishes);
- Parishes where alternative operators have managed to overcome entry barriers, install new generation networks, and achieve high market share (4 parishes);
- Parishes in Areas B-NOS (7 parishes) and B-NOWO (1 parish), given that these operators were able to overcome entry barriers and build their networks supported in significant part in MEO’s infrastructures, and so can be imitated by other operators.

On that basis ANACOM concludes that in all of the parishes where NOS, Vodafone and NOWO are the market leaders they are sufficiently constrained, and therefore are not subject to further SMP assessment. Further to that the number of parishes belonging to Area B which are not subject to potential competition is 407 and ANACOM expects no development of competition in these areas in the absence of regulation.

#### *2.2.2. Definition of the market for wholesale local access provided at a fixed location*

ANACOM concludes that the characteristics, uses, prices and substitutability analyses relating to access supported in fibre to the home (FTTH), cable TV networks, copper and fixed location mobile networks established with regard to the retail market definition are considered to be reproduced also with regard to the definition of the market at wholesale level. This similarity between the products offered at retail level is a strong indication that the wholesale level accesses on the various networks under consideration do in fact impose mutual constraints on the provision of wholesale local access at a fixed location. The definition of a wholesale product market that includes FTTH, hybrid fibre-coaxial (HFC) and, to a more limited extent, mobile networks at a fixed location and asymmetric digital subscriber line (ADSL), according to ANACOM allows an analysis of the wholesale level market as regards the terms on which it operates. Thus, ANACOM has included into the wholesale market definition all types of technologies and networks as used for the retail market definition, including self-supply.

Geographical definition of the relevant market follows the geographical definition of the retail mass market for broadband access in Portugal.

#### *2.2.3. Definition of the market for wholesale central access provided at a fixed location for mass-market products*

ANACOM refers to its analysis of this market carried out in year 2016. On the boundaries of the latter ANACOM applied the ‘three criteria test’ to the previously defined market in order to determine whether, in national circumstances, such market is competitive or not. Thus, ANACOM includes into the market both

copper-supported products and products supported on fibre or cable networks, even in the absence of wholesale offers supported on the latter networks.

ANACOM concludes that MEO as the only wholesale central access provider at a fixed location in Portugal and does not conclude on the geographical aspects of the relevant market.

#### 2.2.4. *Definition of the market for physical infrastructure access*

According to ANACOM the definition of an autonomous market for physical infrastructure access is appropriate as in the relevant national circumstances the competitive conditions are different in downstream geographic markets and the deregulation of certain downstream geographic markets is dependent on the use of the SMP operator's physical infrastructure. It is also justified when a single operator owns a ubiquitous physical infrastructure, and in the Portuguese case these factors are present.

ANACOM identified the offers of access to physical infrastructure suitable for the accommodation of equipment and cables of electronic communications networks, including underground ducts and associated infrastructure (including call boxes and access to buildings), and poles. At this stage ANACOM took into account the characteristics and prices under regulated offers of MEO (ORAC and ORAP) and also its physical infrastructure offers.

Subsequently, ANACOM proceeded to the analysis of substitutability between access to ducts and access to poles, and it concluded that there is a substitutability relationship between the two types of infrastructure, since there are areas where air support and underground civil engineering infrastructure can be used simultaneously on the same sections. This is the case, *inter alia*, when MEO's civil engineering pipelines coexist with the electric power distribution poles.

ANACOM also assessed the substitutability between infrastructures built to house fixed elements of electronic communications networks and infrastructures built for other purposes. It concluded that prices and uses of the various offers available, in Portugal the infrastructures built to house fixed elements of electronic communications networks and infrastructures built for other purposes have similar characteristics, namely prices. However, the level of ubiquity and the geographical availability of these alternative physical infrastructures means that they are not a complete alternative to the development of national electronic communications networks and there are also barriers to change linked to the cost and complexity of the operations involved. Thus, ANACOM concluded that there is limited and insufficient demand-side substitutability between infrastructure built to house fixed elements of electronic communications networks and infrastructures built for other purposes.

The product market includes all physical infrastructure, such as ducts, manholes and poles, capable of hosting electronic communications networks. Wholesale services included in the scope of this market relate to the occupation of physical infrastructure and other related services, such as physical infrastructure information services and occupancy feasibility analyses, among others.

ANACOM concludes that the geographical definition of the relevant market is national.

### 2.3. Finding of significant market power and the ‘three criteria test’

#### 2.3.1. Wholesale local access

On the market for wholesale local access ANACOM proposes to designate MEO as holding SMP in the 407 parishes of Area B-MEO which are identified as not subject to potential competition. The criteria considered by ANACOM for this purpose were:

- (i) market shares <sup>(19)</sup>;
- (ii) barriers to entry and expansion, namely economies of scale and scope;
- (iii) difficulties in duplication of infrastructure;
- (iv) potential competition and
- (v) bargaining power.

#### 2.3.2. Wholesale central access

On the market for wholesale central access ANACOM concludes that this market does not qualify as a market susceptible to *ex ante* regulation as it does not meet the ‘three criteria test’.

With regard to the first criterion on presence of strong and non-transitory barriers to entry, ANACOM concluded that the barriers to entry and expansion in the wholesale central access market at a fixed location for large consumer products in the non-competitive areas have been significantly reduced as a result of the expansion of the high-speed networks of all operators and the consequent replacement of copper supported accesses with own high-speed infrastructure. Indeed, operators have been expanding their fibre-optic transport networks, including their own nodes, benefiting from the regulation of access to ducts, poles and associated infrastructure. Even in rural areas, where the deployment of next-generation networks has been taking place in a more limited and fragmented way, regional asymmetries have been blurring over time. The expansion of own high-speed networks, coupled with the fact that operators located in Portugal are essential vertically integrated operators, has led to a migration of copper supported access to high-speed access. Access supported by ADSL has been significantly reduced. The interest of alternative operators in the wholesale copper offers has also decreased. Thus, the evidence shows that the expected development of the market for wholesale central access at a fixed location does not make it possible to identify the presence of strong and non-transitory barriers to entry into the market. In view of the above, ANACOM considers that the market for wholesale central access at a fixed location for high

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<sup>(19)</sup> The market shares in Area A based on fixed broadband subscriptions in 2022 were as follows: MEO 39.5%, NOS 34.9%, Vodafone 22.4% and NOWO 3.2%. In Area B-MEO containing 407 parishes the market shares in 2022 were as follows: MEO 79.4%, NOS 16.6%, Vodafone 2.5% and NOWO 1.4%.

consumer products in non-competitive areas does not fulfil the first criterion for the identification of a market as susceptible to ex ante regulation.

With regard to the second criterion, dealing with market trend towards effective competition, ANACOM analysed indicators relative to investment into coverage, the current level of coverage in rural areas and what is expected from the launch of calls for tenders to cover 'white areas' and the growing role played by access at a fixed location supported by mobile networks, in particular as a substitute for copper access, particularly in remote areas. ANACOM concludes that the characteristics of the wholesale central access market at a fixed location for large consumer products in the non-competitive areas are considered to lead to effective competition within the relevant time horizon, and therefore this market does not fulfil the second criterion for defining a relevant market susceptible to ex ante regulation.

With regard to the third criterion, on insufficiency of competition law, ANACOM concludes that the competition law instruments appear to be sufficient to ensure competitive market conditions on the wholesale central access market at a fixed location for large consumer products in the non-competitive areas from a forward-looking perspective.

On that basis ANACOM considers the market no longer being susceptible to *ex ante* regulation and suppresses the existing access obligations to the copper network with regard to LLU and bitstream access after a derogation of 24 months.

### 2.3.3. *Market for physical infrastructure access*

ANACOM carried out the 'three criteria test' on the newly defined market for physical infrastructure access.

As regards the first criterion (existence of high barriers to entry and expansion), ANACOM considers that physical infrastructure, which represents a significant proportion of network investment, generates economies of scale and constitutes an infrastructure that is difficult, if not impossible, to be replicated by any other investor in the electronic communications networks and services sector. In addition, there are demand-side features that translate into additional barriers to entry and expansion. Possible switching would involve high costs and is subject to a level of complexity limiting such switching. Even in the case of future installations, the fact that an undertaking has access to ubiquitous physical infrastructure is an advantage over the alternative of combining several non-ubiquitous infrastructures, or complementing the use of non-ubiquitous infrastructure with its own partial infrastructure. Moreover, MEO's physical infrastructures still remain the only ones with sufficient extent and capillarity to allow physical access by operators of electronic communications networks throughout the national territory. New entrants however continue to develop their networks using MEO's wholesale offers. As a result of the analysis carried out, ANACOM concluded that it is not expected that technological changes will occur in the near future or that innovative competitors will emerge that may reduce these barriers to entry and expansion.

As regards the second criterion (market structure which does not tend towards effective competition within a relevant time horizon), there is no provision for the construction of new physical infrastructure with the extension and capillarity of MEO's network or those likely to emerge (provided by undertakings other than MEO). Furthermore, wholesale commercial offers allowing access to physical



infrastructure have not been, sufficient to improve competitive dynamics in this market.

As regards the third criterion (inadequacy of competition law), ANACOM considers that competition law is insufficient to ensure effective competition.

On the market for physical infrastructure access ANACOM proposes to designate MEO as holding SMP. The criteria considered by ANACOM for this purpose were:

- (i) market shares <sup>(20)</sup>;
- (ii) barriers to entry and expansion, namely economies of scale and scope;
- (iii) difficulties in duplication of infrastructure;
- (iv) vertical integration;
- (v) potential competition and
- (vi) bargaining power.

## **2.4. Regulatory remedies**

### *2.4.1. Wholesale local access*

ANACOM proposes to impose on the SMP operator the following remedies:

- Access to and use of specific network resources: the scope of this remedy includes unbundled access to fibre optics (PON/ODF unbundling), *Bitstream* GPON with local and/or regional access points to address uncompetitive area B-MEO parishes which are not subject to potential competition; and an obligation to negotiate in good faith with companies requesting access to services;
- Non-discrimination: the scope of this remedy includes specific notification duties, regular reporting, Key Performance Indicators (KPIs), Service Level Agreements (SLAs) and Service Level Guarantees (SLGs) to be included in reference offers for wholesale access to fibre optic (PON/ODF unbundling and bitstream); Equivalence of Input (EoI) in the provision of unbundled access to fibre optic, Equivalence of Outputs (EoO) within the scope of bitstream;
- Transparency including publication of reference offers: the scope of this remedy includes publication of PON/ODF unbundling offers and fibre bitstream within 6 months of the decision on the current market analysis, one month's notice of changes, provision and publication of indicators and performance levels in quality of service in wholesale offerings;

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<sup>(20)</sup> The market shares counted on the basis of the physical infrastructure supply quotas counted per kilometre of cables in ducts and poles in 2022 were as follows: MEO 82%, E-REDES 10%, NOS 3%, DSTelecom 1%, others 4%.

- Price control, cost accounting and financial reporting: the scope of this remedy includes application of ‘fair and reasonable’ prices, cost accounting and financial reporting.

#### 2.4.2. *Physical infrastructure access*

ANACOM proposes to impose on the SMP operator the following remedies:

- Access to and use of specific network resources: the scope of this remedy includes access to ducts, poles, call boxes and any other infrastructure capable of housing networks, access to dark fibre when access to ducts and poles is not possible, duty to negotiate in good faith with access seekers, obligation not to withdraw access already granted to certain resources;
- Non-discrimination: EoI in the provision of ORAC and ORAP, EoO within the scope of the provision of access to dark fibre;
- Transparency including publication of reference offers: the scope of this remedy includes publication of ORAC and ORAP, one month’s notice of changes, provision and publication of indicators and performance levels in quality of service in the ORAC and ORAPs and comparable indicators for the provision of equivalent services internally;
- Price control and cost accounting: the scope of this remedy includes application of cost-oriented pricing in ORAC, ORAPs and in access to dark fibre which includes consideration of the SMP operator’s internal transfer prices;
- Accounting separation and financial reporting: the scope of this remedy includes application of specific income statements in the system of costing and accounting separation and provision of accounting records (ACSs) including data on revenues from third parties.

### 3. No COMMENTS

The Commission has examined the notifications and the additional information provided by ANACOM and has no comments: <sup>(21)</sup>

Under Article 32(9) of the Code, ANACOM may adopt the draft measure and, where it does so, shall communicate it to the Commission.

The Commission’s position on these particular notifications is without prejudice to any position it may take on other notified draft measures.

Pursuant to Point 6 of Recommendation 2021/554 <sup>(22)</sup> the Commission will publish this document on its website. If ANACOM considers that, in accordance with EU and national

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<sup>(21)</sup> In accordance with Article 32(3) of the Code.

<sup>(22)</sup> Commission Recommendation (EU) 2021/554 of 30 March 2021 on the form, content, time limits and level of detail to be given in notifications under the procedures set in Article 32 of Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic

rules on business confidentiality, this document contains confidential information that you wish to have deleted prior to publication, please inform the Commission <sup>(23)</sup> within three working days of receipt <sup>(24)</sup>. Please give reasons for any such request.

Yours sincerely,

*For the Commission*  
*Roberto Viola*  
*Director-General*

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Communications Code OJ L 112, 31.3.2021, p. 5.

<sup>(23)</sup> By email: [CNECT-markets-notifications@ec.europa.eu](mailto:CNECT-markets-notifications@ec.europa.eu)

<sup>(24)</sup> The Commission may inform the public of the result of its assessment before the end of this three-day period.