Body of European Regulators for Electronic Communications

BEREC

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BEREC Opinion on

Phase II investigation

pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC:

Case PT/2016/1888

Wholesale local access provided at a fixed location (market 3a) in Portugal

Case PT/2016/1889

Wholesale central access provided at a fixed location (market 3b) in Portugal

8 September 2016

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1. EXECUTIVE SUMMARY

On 1 July 2016, the Commission registered a notification by the Portuguese Regulatory Authority, ANACOM, concerning the markets for wholesale local access (market 3a - WLA, case PT/2016/1888) and wholesale central access (market 3b - WCA, case PT/2016/1889) in Portugal.

ANACOM proposes to continue to regulate access to the copper loops, ducts and poles of the incumbent MEO in the WLA market on a nationwide basis. Moreover, ANACOM imposes access to dark fibre on a subsidiary basis, in areas where there is no additional space available in ducts and on poles. As to the WCA market, ANACOM proposes to maintain regulated access to the specific bitstream services via copper in the non-competitive areas.

However, ANACOM intends not to impose an obligation on MEO to provide any form of access to its fibre network in either the WLA market or WCA market.

On 29 July 2016, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC. The Commission's doubts concern failure to impose regulatory remedies with regard to fibre networks on either local or central access markets in Portugal.

On the basis of the economic analysis set out in this Opinion, BEREC considers that the Commission's serious doubts are justified.

BEREC suggests that, in order to deliver a sufficiently convincing argument for not including a fibre access obligation on market 3a and (secondary) on market 3b in the NC areas, ANACOM should include in its forward looking assessment a more thorough analysis regarding how future investments may influence future market shares, assess the future demand for access to MEO's fibre network, and analyse whether MEO's commercial fibre offer has the characteristics that could make a fibre access obligation in the non-competitive areas unnecessary.

2. INTRODUCTION

On 1 July 2016, the Commission registered a notification by the Portuguese Regulatory Authority, *Autoridade Nacional de Comunicações* (ANACOM), concerning the markets for wholesale local access provided at a fixed location, and wholesale central access provided at a fixed location for mass-market products, both in Portugal. On 12 July 2016, a first request for information (RFI) was sent to ANACOM and a second one on 14 July 2016. A response to the requests was received on 15 July 2016.

The Commission initiated a phase II investigation, pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC, with a serious doubts letter on 29 July 2016. In accordance with the BEREC rules of procedure, the Expert Working Group (EWG) was established immediately after that date with the mandate to prepare an independent BEREC opinion on the justification of the Commission's serious doubts on the case.

On 5 August 2016 the EWG sent a first list of questions to ANACOM. Answers were received from ANACOM on 9 August 2016.

The EWG met on 11 August 2016 in Stockholm. During this meeting the EWG held an audition with ANACOM to gather further information and clarification in response to the questions sent the week before and to additional questions. The objective of the EWG was to reach clear conclusions on whether or not the Commission's serious doubts are justified. The EWG reached preliminary conclusions on these issues, by analysing the relevant documents and exchanging information with ANACOM.

A draft opinion was finalized on 1 September 2016 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 8 September 2016. This opinion is now issued by BEREC in accordance with Article 7a(3) of the Framework Directive.

3. BACKGROUND

Previous notifications

The previous review of the market for wholesale (physical) network access at a fixed location and the market for wholesale broadband access at a fixed location in Portugal were notified to and assessed by the Commission under cases PT/2008/0850 and PT/2008/0851. In these decisions, ANACOM concluded that access products based on copper, cable and fibre were part of the relevant market for wholesale (physical) network access, as well as the market for wholesale broadband access. Furthermore, at retail level, ANACOM concluded that mobile broadband services could not be considered a substitute for fixed broadband services, not bearing on the market definition in either of the aforementioned relevant wholesale markets.

In terms of the geographic market definition, ANACOM concluded that the market for wholesale (physical) network access had national scope. However, ANACOM identified two relevant geographical markets for wholesale broadband access (based on the competitive conditions at retail level):

(i) competitive areas ('C areas'): areas covered by an MDF where there is at least one co-installed (LLU) operator and at least one cable operator, and where the cable penetration of the MDF area is above 60%[1]. Thus the 'C areas' were comprised of 184 MDF areas which accounted for 61% of the total broadband accesses; and

(ii) non-competitive areas ('NC areas'): all other areas.

PT Group (now MEO)[2] was found to have significant market power (SMP) in the national market for wholesale (physical) network access and in the NC areas in the market for

[1] ANACOM concluded that by using an indicator of 60% of cabled households per MDF, the homogeneity of market shares at MDFs can be maximized.
[2] On 29 December 2014, PT Group merged with MEO and since then uses its brand name.

wholesale broadband access. As to the C areas, ANACOM found no SMP in the market for wholesale broadband access.

Wholesale (physical) network access to the copper loops and sub loops and associated facilities, including ducts and poles, was regulated, together with the imposition of the cost-orientation, cost accounting, accounting separation, transparency (including reference offers), non-discrimination and financial reporting obligations. Furthermore, ANACOM established the possibility to impose access to dark fibre when access to ducts is not possible. Lastly, ANACOM established the possibility of imposing an access obligation to fibre, following the evolution of next generation access networks, after specific deliberation.

In the market for wholesale broadband access, ANACOM regulated access to and use of specific broadband services (including access to a naked DSL offer) with respect to the copper network. This access was regulated by means of imposing the following obligations: price control, non-discrimination, cost accounting, accounting separation, transparency (including reference offers) and financial reporting.

In relation to the above cases, the Commission commented that ANACOM did not sufficiently justify that cable should be included in either of the relevant wholesale markets based on indirect constraints. Furthermore, the Commission invited ANACOM to impose remedies on fibre access products in the market for wholesale (physical) network access. As to the market for wholesale broadband access, the Commission invited ANACOM to carefully examine the need for the imposition of access remedies.

Current notification and the Commission's serious doubts

Current notification

Similar to the previous market review, ANACOM defines the retail product market as comprising broadband services over copper, fibre and cable (excluding high quality broadband access for business users). ANACOM does not include mobile broadband access in the same retail market. ANACOM concludes that the degree of substitutability between fixed and mobile broadband access continues to be limited because there is a fundamental difference in the intrinsic value for its users. Furthermore, ANACOM identifies differences in prices, costs, speeds and (limits on) monthly traffic volumes between fixed and mobile broadband access. ANACOM stresses the introduction of LTE offers for fixed locations in mid-2013, but states that it is too early to fully analyse the substitutability of these products, particularly with regard the possible limitations to TV services, in the context of the high number of broadband internet access services bundled with TV services provided throughout Portugal.

In terms of the geographic definition, ANACOM concludes that the retail market can be separated into two markets corresponding to:

(i) competitive areas ('C areas'):

- there are at least two alternative operators to MEO, each with NGA (fibre or DOCSIS 3.0) coverage higher than 50% in the parish[3]; or

[3] ANACOM used to perform its geographical analysis based on exchange areas in the previous market review. In the current review, the choice of geographical unit was changed to a parish (the smallest

- there is one alternative operator to MEO with NGA coverage higher than 50% in the parish and MEO's retail market share in the parish is below 50%.

(ii) non-competitive areas ('NC areas'): all other areas.

Based on the above-mentioned criteria, C areas cover 56% of the Portuguese households, while 44% of the households correspond to the NC areas.

MEO's retail market share at the end of 2015 in the C areas was 36% and 84%[4] in the NC areas.

Concerning the wholesale markets, ANACOM is of the view that cable belongs to the relevant markets for WLA and WCA based on direct constraints and indirect constraints. Because of the national coverage of MEO's network and the uniform wholesale prices throughout Portugal, ANACOM considers the WLA market to have a national geographical scope. However, ANACOM concludes that the geographical differences in competitive conditions both at wholesale and retail level result in two separate geographical markets for WCA, corresponding to the C and NC areas in retail markets.

MEO is designated as the operator with SMP in the WLA market nationwide as well as in the WCA market in the NC areas. On the contrary, ANACOM does not find SMP in the WCA market in the C areas.

In the NC areas, ANACOM concludes the retail market is uncompetitive, since MEO has a very high market share (even higher than since the previous market review[5]). ANACOM does not expect a significant change in these conditions of competition in the short or medium term. In particular, MEO continues to benefit from significant economies of scale given that the development of (copper) access networks in these less populated NC areas is less attractive from a commercial point of view and requires substantial investments that would only be possible over decades of monopoly[6]. Furthermore, with respect to the C areas, ANACOM concludes that they are only competitive in the presence of market 3a regulation (especially access to ducts and poles)[7].

ANACOM proposes to continue to regulate access to the copper loops, ducts and poles of MEO in the WLA market on a nationwide basis. Moreover, ANACOM imposes access to dark fibre on a subsidiary basis, in areas where there is no additional space available in ducts and on poles. The cost-orientation, non-discrimination, cost accounting, accounting separation, transparency (including reference offers) and financial reporting obligations are also maintained. As to the WCA market, ANACOM proposes to maintain regulated access to the

administrative unit in Portugal). Accordingly, given that a parish is a smaller geographical unit than an exchange area, ANACOM considers it more suited to analyze the coverage of fibre and cable networks in specific areas.

[4] This takes into account the effects of current wholesale regulation with respect to ducts and poles, but does not take into account LLU regulation and wholesale broadband access regulation in place. Without the regulation of ducts and poles, the market share of MEO is expected to be significantly higher.

[5] Although the choice of the geographical unit has a bearing on the evolution of the market shares presented in the draft decision, as explained above.

[6] According to par. 2.195 of ANACOM's draft decision.

[7] According to par. 2.178 of ANACOM's draft decision.

specific bitstream services via copper in the NC-areas[8]. This access is proposed to be regulated by means of cost-orientation (plus margin squeeze test, instead of previously applied retail-minus), non-discrimination, cost accounting, accounting separation, transparency (including reference offers) and financial reporting.

However, ANACOM intends not to impose an obligation on MEO to provide any form of access to its fibre network in either the WLA market or WCA market. ANACOM states that fibre regulation is not needed in the C areas due to the competitive forces in those areas, especially considering the access regulation to ducts and poles in place. As to the NC areas, ANACOM states that fibre regulation would not be proportionate given the limited fibre roll-out by MEO in those areas. Moreover, according to ANACOM, imposing fibre regulation could deter fibre roll-out by MEO. In this respect[9], ANACOM also states that MEO has announced to its shareholders the roll-out of 3 million new fibre lines which, combined with their existing 2.2 million fibre lines, would give MEO almost nationwide coverage with fibre[10]. Furthermore, ANACOM refers to a wholesale commercial fibre access offer of MEO which was recently published (March 2016). Lastly, ANACOM states in its draft decision that it will monitor the market developments, especially in the NC areas, and may revise its decision to not impose fibre access at any time within the coming three years.

Commission's serious doubts

The Commission considers that ANACOM's proposal threatens to distort and restrict sustainable competition on the retail market for mass-market broadband services in the NC areas because of the failure to impose regulatory remedies with regard to fibre networks on either local or central access markets in Portugal.

Firstly, with regard to the wholesale local access market (market 3a), the Commission holds that ANACOM fails to impose on the SMP operator an obligation to provide access to the unbundled fibre line, in both C and NC areas. The Commission argues that ANACOM's regulatory proposal is insufficient because a high percentage of retail customers located in NC areas will not be able to benefit from an effectively competitive retail market neither at present nor on a forward looking basis.

The Commission acknowledges ANACOM's legitimate interest for efficient investment in NGA roll-out and also the important role of pole and duct access regulation registered so far in the Portuguese market. However, it points out to the low likelihood of competitive deployment of alternative broadband access networks in less densely populated areas in the short or medium term. According to the Commission, ANACOM's draft measure does not provide a sound reasoning on how the non-imposition of fibre access could allow the emergence of a sustainable competitive market at retail level in the NC areas.

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[8] There is a single wholesale central access product provided at a fixed location for mass-market products (the ADSL PT network offer, imposed on MEO), which is regulated since 2005 and was limited to the NC areas in 2009.

[9] The following information was incorporated and detailed in the answer to the Commission's requests for information.

[10] There are 5,859,661 HH in Portugal.

Concerning the information on MEO's commercial fibre access offer referred to in ANACOM's draft measure, the Commission is of the opinion that it is insufficient to establish that without an access obligation MEO would grant third party access to its fibre lines at reasonable terms.

Taking that into account, since MEO intends to deploy an NGA network at a larger scale and eventually replace the existing copper infrastructure, the Commission opines that ANACOM should have considered imposing an access remedy in view of the need to safeguard competition. In this regard, the Commission reminds ANACOM that the Recommendation on Non-Discrimination and Costing[11] allows the non-imposition of direct regulatory price controls linked to access obligation to NGA networks, especially in the presence of elements such as (i) certain pricing constraints on the SMP operator (e.g. from cost oriented regulated wholesale access to the copper network, or from other infrastructures), (ii) guarantees of non-discriminatory access and (iii) economic replicability of retail offers.

Secondly, concerning the wholesale central access market (market 3b), the Commission considers that ANACOM has failed to demonstrate how the non-imposition of an access obligation with respect to the fibre infrastructure of the SMP operator ensures the emergence of a sustainable competitive market at retail level and safeguards competition in the long term. Due to the specific economics of density in the NC areas, the Commission is of the view that the emergence of sustainable competition in the respective areas is highly unlikely without a central access product based on fibre, especially where the fibre lines subsequently replace copper lines as the principal form of retail broadband access. For the above reasons, the Commission concludes that ANACOM fails to impose the obligation of wholesale bitstream access over fibre in NC areas, even in a situation where no appropriate wholesale local access to the SMP's operator fibre network is commercially provided or imposed.

4. ASSESSMENT OF THE SERIOUS DOUBTS

On 29 July 2016, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC. The Commission's doubts concern compliance with Articles 8(4) and 12(1) and 12(2)(d) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 16(4) of the Framework Directive, in particular:

The Commission is concerned that, according to Articles 8(4) and 12(1) and 12(2)(d) of the Access Directive, ANACOM failed to (i) impose obligations that are based on the nature of the identified problem, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive and in relation to the imposition of access to, and use of, specific network elements and (ii) take into account – when considering how access obligations would be imposed proportionate to the objective set out in Article 8 of the Framework Directive – the need to safeguard competition in the long run, with particular attention to economically efficient infrastructure based competition.

[11] Commission Recommendation of 11.09.2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, OJ L 251, 21.9.2013, p.13.

The Commission refers also to Article 16(4) of the Framework Directive which requires NRAs to impose the appropriate regulatory obligations on the identified SMP undertakings.

Furthermore, in pursuit of the policy objectives referred in Article 8 (2) – (4) of the Framework Directive, according to Article 8(5) of the same act, NRAs have to apply objective, transparent, non-discriminatory and proportionate regulatory principles by, *inter alia*, safeguarding competition to the benefit of consumers as well as promoting efficient investment and innovation in new and enhanced infrastructures, which the Commission considers that ANACOM failed to do through its draft notified measure.

In particular, taking account of the specific provisions of these Directives, ANACOM's proposal would have the effect of distorting and restricting sustainable competition on the retail broadband access market for mass-market products in the NC areas as a consequence of the failure to impose regulatory remedies with regard to the SMP operator's fibre infrastructure at either local or central level.

Concerns of the Commission

As previously mentioned, the Commission's main concern relates to the inability of ANACOM's proposed regulatory measures to safeguard retail competition for broadband access for mass-market products in the areas of Portugal identified as not competitive, the ultimate aim of *ex ante* regulation being linked to the benefit of consumers.

Concerning the market for wholesale local access, the Commission believes that, without imposing any obligation with respect to the SMP operator's fibre infrastructure, the proposed remedies are not likely to alleviate the competition problems identified, especially in the NC areas, which accounted for 44% of the Portuguese households.

Given that the economic prospects of alternative operators deploying their own infrastructure in the NC areas are limited, the Commission considers that there is no reasoned justification by which the proposed remedies would foster retail competition in the less densely populated areas. Also, taking into account the growth prospects for high speed broadband access services in Portugal[12], the Commission is of the view that there is growth potential for fibre in these areas, once the adequate infrastructure is deployed.

Even though, as mentioned before, MEO launched recently an offer for access to its fibre network on a commercial basis, the reasonableness of this offer in terms of prices and, accordingly, its attractiveness for alternative operators, was not examined by ANACOM. Accordingly, the Commission states that there is no reason to believe that MEO would grant reasonable access to its fibre network without an access obligation. Also, the Commission is of the view that ANACOM has not analysed the possibility of designing an appropriate access remedy in the NC areas or how the deployment incentives of the SMP operator would be hindered by such a regulatory approach. Indeed, the absence of a wholesale regulated local access may remove the SMP operator's incentive to enter into reasonable co-investment agreements with alternative operators.

In the case of the market for wholesale central access provided at a fixed location for mass-market products in NC areas, the Commission mainly raises the same concerns, taking into

[12] 30% of the broadband access in Portugal already enable at least 100 Mbps download speeds.

account the fact that no regulatory access obligation for fibre would be imposed in the market for local access provided at a fixed location. However, the Commission notes that "*where NRAs consider that, in a given geographical area, there is effective local access to the SMP operator's fibre network and that such access is already likely to result in effective competition on the downstream level, NRA should consider removing the obligation of wholesale access in the area concerned"*.

Views of ANACOM

ANACOM considers, in the light of the market developments in Portugal, that the imposition of fibre access remedies would be neither proportionate, nor justified.

First, ANACOM argues that in the NC areas the SMP operator has hardly any fibre coverage (it covers [redacted] households, or 3% out of the [redacted] households in NC areas). According to ANACOM, the current NGA coverage share of MEO in NC areas is just 8%. Furthermore, the current broadband penetration in the concerned areas is relatively low (30%), resulting in limited constraint on alternative operators' capacity to acquire broadband users.

Second, ANACOM highlights that the regulated access to MEO's ducts and poles has been extremely successful in alternative NGA network deployment (fibre and cable) and fostering infrastructure-based competition, while reducing significantly the investment costs by alternative operators. In this respect, ANACOM shows that in the period 2013 to 2015 alternative operators increased the homes passed at a national level significantly: Vodafone passed almost 7 times more new households with fibre than MEO and NOS 2.5 times more than MEO. Furthermore, Vodafone has increased significantly the use of MEO's poles in June 2016. ANACOM also shows that the monthly price of duct access in Portugal is the lowest in the EU, while the overall price of this type of access seems consistent with prices of fibre unbundling in other EU countries. In ANACOM's view, this regulated access to ducts and poles has made the use of the more downstream wholesale products (LLU and bitstream) less attractive and led to the result that service based retail offers plays an insignificant role in the Portuguese market today.

Third, ANACOM explains that, even though not part of the same relevant product market, fixed broadband connections offered by mobile operators based on LTE impose a significant competitive constraint on the provision of broadband access services at retail level. Taking into account these fixed LTE-based connections, between 2014 and 2015, 75% of the new broadband subscribers chose to subscribe to the alternative providers and only 25% opted for MEO's offers. Furthermore, the prices of the offers based on fixed infrastructures and on mobile infrastructures respectively are highly similar. Both Vodafone and NOS serve the Portuguese market as mobile network operators with national coverage.

Fourth, ANACOM points to the fact that MEO has already launched a commercial fibre PON access offer in NC areas that, although it had not been thoroughly analysed at the moment of the notification of the draft decision, seems to comprise reasonable pricing, both taking account of the monthly fee and the installation fee. This offer is currently under negotiation with the main alternative operators – Vodafone and NOS.

Fifth, ANACOM argues that MEO's market share has not increased over time in the NC areas, showing that there is a certain degree of competitive pressure exerted by alternative operators. In this respect, taking account of the change in the geographical unit for market definition purposes, ANACOM shows that MEO's market share decreased from 85% in the third quarter of 2014 to 84% in 2015[13]. Moreover, it is worth mentioning that overall the C area increased in size since the previous market review in 2009.

Last, concerning the proportionality issue, given that the competition problem in the NC areas stems from MEO's high market share (which is based on its copper broadband subscribers), MEO's scope for fibre roll-out is limited in the NC areas, the market is highly unsaturated and the switching costs are low, ANACOM's reinforcement of the access obligations to ducts and poles and, respectively, the need to ensure investment incentives in NGN networks by both MEO and the alternative operators, the Portuguese NRA considers that fibre access remedies would not be appropriate. Imposing such an obligation could harm investments of both the SMP operator and the alternative providers, by also preventing commercially based co-investment arrangements or sharing agreements.

BEREC's Assessment

After having analysed in detail ANACOM's draft decision, the answers to the requests for information, as well as the additional information presented by ANACOM, BEREC is of the view that there are several considerations in assessing the compatibility of the current market review notification with the European legislation which need to be taken into account, considering the particularities of the Portuguese broadband access market.

First of all, BEREC considers that network deployment investments play a key role in the future competitive environment in the broadband access markets in Portugal. In this respect, the announced investment plans of the main operators active in the market should be taken into account[14]. MEO plans[15] to deploy optical fibre to 3 million additional homes and businesses through the construction of 30,000 km of fibre optical cables in the next 5 years (starting in 2016), with a deployment rate of 600,000 homes per year until 2020. Vodafone[16] aims at extending its fibre network to over 550,000 homes and businesses by the end of 2016. NOS targets the expansion of its network to 574,000 additional households. Based on this, it is expected that NOS will have a 71% national NGA coverage by the end of 2016 (4.2 million HH compared to 3.6 million HH currently covered)[17], MEO will reach 48% national NGA coverage by the end of 2016 and 89% national NGA coverage by the end of 2020 (5.2 million HH in 2020 compared to 2.2 million HH currently covered), while Vodafone will cover 45% of the country

[13] ANACOM notes that in the last 15 months alternative operators were able to attract customers in the NC areas by providing broadband access with LTE on a fixed location. ANACOM considers LTE on a fixed location as a very important competitive constraint to any future investments of MEO in the NC areas. Indeed, the market share of MEO decreases from 84% to 72% when including this technology in the market definition. ANACOM expects that this trend will increase in the near future. However, LTE on fixed location has not been included in the market definition.

[14] BEREC notes that, since the investment plans have been publicly announced, there is a relatively high probability of their fulfillment. However, it should be noted that these plans are not binding and that the regulatory assumptions on which they are based are not known.

[15] Public statement dated 5 November 2015.

[16] Public statement dated 25 November 2015.

[17] This includes the Docsis 3.0 cable networks of NOS. New network deployments by NOS are fiber-based.

with NGA by the end of 2016 (2.6 million HH compared to 2.1 million HH currently covered)[18].[19] Furthermore, there are two operators, DSTelecom and Fibroglobal, which have deployed high speed broadband infrastructure based on EU funding, that provide open access for any operator interested in providing retail services, mainly in rural areas[20]. Together, they cover 4% of Portugal (0.4 million HH).

BEREC believes that it is likely that a significant part of these investments will be in the NC areas. In particular, given that MEO has already covered 66% of the HH in the C areas with fibre, it is reasonable to assume that within 2 years' time it will have covered all the C areas, starting deployment in the NC areas (under the restrictive assumption that all the investments are targeted to C areas at first).[21] Therefore, at least 1.9 million of the total 3 million new fibre lines of MEO will be in NC areas, giving MEO an almost full fibre coverage in Portugal in 5 years' time (89% of HH in Portugal and at least 76% of HH in NC areas). This corresponds with the announced plans of MEO to (almost) fully replace its copper network with FTTH by 2020[22].

Vodafone and NOS might also start rolling out fibre in NC areas. However, the currently available information provided by ANACOM does not make reference to any investment plans of these operators after 2016. Therefore, it is not clear if these operators have the same large scale fibre roll-out prospects in the NC areas, as MEO does.

Following the information provided by ANACOM, BEREC notes that Vodafone and NOS are both mobile operators operating backbone networks covering the whole territory of Portugal and providing services on a nationwide basis. In fact, 50% of the Portuguese broadband users have a 5P bundles, which includes mobile services. Operators like Vodafone and NOS, that have a significant market share in the mobile sector, could take advantage of its large mobile customer base when competing for broadband users. In this respect, it might be that these circumstances, together with the regulated access to ducts and poles in place, will lead to a sustained fibre deployment in the concerned areas. In the additional information provided, ANACOM[23] gives some indication that Vodafone has started to invest in fibre in areas with lower population density, by showing that the use of pole access (primarily used in such areas) has increased significantly by June 2016. However, ANACOM has provided no analysis of the likelihood of further fibre deployment by alternative operators in the NC areas in its draft

[18] BEREC notes that there is another relevant player in the retail market, Apax, which currently covers 15% of the national territory. However, public information about its investment plans is not available. ANACOM has also stated that Apax is currently internally restructuring its organization and therefore large investments are unlikely in the short run.
[19] According to page 9 of ANACOM's answers to the Commissions RFI.
[20] The deployment of these networks was part of incentivizing infrastructure development in areas where economic grounds to invest are typically low.
[21] MEO already has deployed fibre to 2.2 million of the 3.3 million HH in C areas. Given the deployment rate of 600,000 HH per year, MEO needs less than two years to connect all HH in the C areas to its fibre network.
[22] For further reference, see http://www.totaltele.com/view.aspx?ID=493077, https://www.telegeography.com/products/commsupdate/articles/2016/03/10/portuguese-incumbent-to-ditch-copper-network-by-2020/, https://www.telecom.pt/en-us/media/noticias/Pages/2016/marco/chegou-a-campanha-que-mostra-a-fibra-dos-portugueses.aspx.
[23] ANACOM's paper: Why imposing fibre access in the NC areas would not be proportionate, adequate or justified.

decision but states that the replication of MEO's copper network (presumably by new fibre networks) is not viable specifically in the NC areas:

> "*As for barriers to entry and expansion, MEO continues to benefit from significant economies of scale, due to the high fixed costs of construction of local network infrastructure in* [less] *densely populated areas, as it already owns an extensive set of infrastructure (such as buildings, ducts and masts) and a copper network with universal coverage (and significant coverage in fibre in some areas), constructed over years of monopoly, and which now require high investment from alternative operators. It is therefore not viable to duplicate MEO's access network (in copper) in full.* […]"[24]

Accordingly, ANACOM draws the conclusion that competition problems are likely to exist in the timeframe of the market review in the NC areas:

> *"Faced with these and previous conclusions, ANACOM does not expect, in the short to medium term, a significant change in conditions of competition in this retail market, given the previously described circumstances, namely at the level of developments of the access network (of the OPS) in these areas, less attractive from the commercial point of view and which require substantial investments that would only be possible over decades of monopoly."*[25]

BEREC highlights that there seems to be a high degree of uncertainty concerning the development of competition in the retail market for fixed broadband access in Portugal. On the one hand, the prospective fibre roll-out by MEO and its expected coverage in the coming years point to the option of regulating fibre access as a viable and effective means of alternative operators to compete. On the other hand, it seems that the established regulation so far has resulted in a certain degree of infrastructure based competition at retail level, evidenced by the high level of infrastructure deployment in the C areas based mainly on MEO's duct and pole infrastructure access. In this respect, ANACOM further points out that the previous investments undertaken by the main operators led to an increase in the C areas between 2009 and 2015. This increase was of 14 percentage points in terms of HH covered in a period of seven years (42% of HH in 2009 compared to 56% of HH in 2015)[26] and it is not clear to what degree the comparison is affected by the change in ANACOM's choice of the geographical unit, moving from exchange areas to parishes. At the end of 2014, there were 386 parishes in the C areas, while, at the end of 2015, the number of parishes in the C areas increased to 466, according to ANACOM's data. Furthermore, it is worth mentioning that a commercial agreement concerning the sharing of MEO's and Vodafone's fibre networks was concluded, providing for access to 450,000 HH fronted by each operator's network to the advantage of the other operator.

BEREC acknowledges ANACOM's argument that MEO's current NGA market share is low and that it is hard to predict the evolution of competition in the Portuguese market. Nevertheless, it considers that there is a risk that, given ANACOM's proposals, MEO will deploy the fibre network with the highest coverage in the NC areas, becoming the main (fibre) operator in the retail market and correspondingly maintaining its high market share (currently, 84%). This would result in consumer harm, particularly if the copper network is switched off and the options

[24] According to par. 2.188 of ANACOM's draft decision.
[25] According to par. 2.195 of ANACOM's draft decision.
[26] According to par. 2.161 of ANACOM's draft decision.

of customers are restricted. This scenario seems realistic given MEO's official announcements concerning its fibre roll-out[27]. BEREC therefore considers that ANACOM failed to substantiate sufficiently its conclusions and, in particular, it should give more weight to the arguments concerning the foreseeable development of competition in the retail broadband access market in Portugal, taking into account, but not restricted to the investment plans of MEO and alternative the operators and their impact on the development of retail competition. Even if ANACOM were unable to investigate the current investment plans of operators, the Portuguese NRA should at least assess the credibility and commitment determined by the current announcements (especially by MEO) and the likelihood of a business case for large scale fibre roll-out by alternative operators in the NC areas in detail. Should ANACOM make a convincing argument for the development of competition on the retail market not being hindered by its regulatory proposal, fibre obligations might not be deemed necessary.

BEREC is of the opinion that ANACOM should also include in its market review a thorough analysis of MEO's fibre access commercial offer, and a reasonable explanation of why a light touch access remedy would deter the investment incentives of the operators present in the market.

In this respect, although ANACOM notes that in March 2016 MEO announced its offer concerning access to its fibre infrastructure on a commercial basis, it is not yet clear how competitive these offers are. Although ANACOM stated in its recent answers that the price for this offer seems competitive[28], it is worth mentioning that the negotiations between MEO and Vodafone have come to a halt. While there are several potential reasons for this turn, one should also take into account the likelihood that the operators are waiting for the results of the current market review before moving forward with the negotiations. Also, MEO subsequently started negotiations with NOS, currently with no agreement. Further notice needs to be taken of the fact that the existence of this commercial offer had limited bearing on ANACOM's initial assessment of the appropriate regulatory remedies. BEREC therefore agrees that there is no reason to believe that MEO would have an interest in providing access to its fibre lines at reasonable conditions. This aspect needs to be analysed in detail by ANACOM.

BEREC takes notice of the fact that access based competition (retail offers based on LLU and bitstream) is limited and does not play a significant role in the Portuguese market. However, BEREC believes ANACOM should also analyse whether this is likely to be the case with regard to the corresponding fibre based retail offers. If this is the case, it could strengthen ANACOM's argument that a fibre obligation is disproportionate as it would be redundant – given the access to ducts and poles – and therefore unwarranted. The analysis should encompass the geographical dimension to ensure that the conclusion holds true even in the less dense populated NC areas with a relatively low broadband penetration (30%). In other words, ANACOM should closely assess how likely it is that there is no or very limited demand from alternative operators for access to MEO's fibre network.

[27] Public statement dated 17 March 2016: http://www.theportugalnews.com/news/fibre-optics-spread-to-more-portuguese-homes/37749.

[28] Apart from prices, other parameters in this offer are also relevant in order to assess the viability of this offer for alternative operators. ANACOM has pointed out that the offer implies (i) a relative small point of handover with a coverage of on average 200 households which is even smaller than the ODF location and (ii) that alternative operators should buy a minimum of 30% of all ports.

ANACOM states that if it sees significant changes in the competitive conditions in the relevant markets calling for a stronger regulatory intervention, it could review its market decision sooner than the three years envisaged. However, it is not clear that any such ex-post intervention would be swift enough to address the competition issue emerging, particularly given the fast pace of change in the Portuguese market.

BEREC also understands ANACOM's legitimate desire not to deter infrastructure investment, which is also acknowledged by the Commission. However, BEREC agrees with the Commission that ANACOM failed to provide convincing arguments as to why access remedies, in particular with pricing freedom, could not be made compatible with investment incentives. ANACOM argued that MEO may not be rewarded for the risk it took in investing in fibre. However, as suggested in the Commission's Recommendation on Non-Discrimination and Costing, this risk could be rewarded by pricing freedom, as opposed to a charge control, where fibre is constrained by the copper network. ANACOM was also concerned that the regulated operator may be accused of margin squeeze if it replicates other firms' strategies, but BEREC considers this risk can be mitigated by appropriately designed margin squeeze tests. Another relevant point is that ANACOM did not provide an explanation as to why a commercial agreement for access concluded with MEO would have no negative effects on investments, while, in the case of a similar regulated offer, the effect would be to deter investments.

Furthermore, BEREC considers that ANACOM already explicitly mentioned in its 2009 market decision that regulation of access to MEO's fibre networks was a possibility after specific deliberation anytime during the previous regulatory period. Also, in its draft decision ANACOM explicitly alerts the market that it will monitor mainly the NC areas, which could result in ANACOM revising their decision not to regulate MEO's fibre anytime during the coming regulatory period.[29] ANACOM does not explain how despite such statements, MEO and other operators have not already incorporated the regulatory risk of fibre regulation in their current investment plans, especially given that any large investor has to take into account relevant future risks for long term investments. Therefore, BEREC agrees with the Commission that ANACOM has not substantiated why the imposition of a fibre access remedy in the NC areas would be disproportionate.

The Commission also believes that the absence of a regulated wholesale local access offer would largely remove any incentive by the SMP operator to engage in alternative and more competitive forms of deployment, such as co-investment. BEREC considers that the correlation between regulation and co-investment is not always clear, given that some co-investment initiatives have been observed in regulatory contexts where access obligation was not imposed.

Overall, on balance of the considerations presented in the current opinion, BEREC considers that ANACOM did not manage to deliver a sufficiently convincing argument for not imposing a fibre access obligation on either market 3a or on market 3b in the NC areas in the notified draft measures. At the same time, BEREC recognises that ANACOM is dealing with a complicated case. In this respect, BEREC believes that ANACOM tried to hit the right balance of regulation in the Portuguese market. It is clearly a finely balanced decision, and ANACOM should be in the best position to judge on what regulatory approach will best balance the goals of competition and investment. Therefore, BEREC recommends the Portuguese NRA incorporate

[29] According to par. 5.98 of ANACOM's draft decision.

more convincing argument concerning the evolution of the retail market for fixed broadband access services in Portugal, the impact of the announced investments in the market (by both MEO and the alternative operators), the impact of MEO's commercial fibre access offer, the reasoning about how investment would be deterred by a potential fibre access remedy, based on the information available. In BEREC's opinion, this information is absent from the draft decision.

BEREC is concerned that sustainable competition might not continue its development in the Portuguese broadband market, given the evidence and reasoning provided in the currently proposed draft measures.

Therefore, from BEREC's point of view, several issues (mentioned above) need to be considered further and/or substantiated in ANACOM's final decision, with the overall objective of establishing that infrastructure based competition will occur in the NC areas, in the event of not imposing fibre regulation.

Only on this basis can BEREC support the non-imposition of fibre based wholesale access products in the NC areas.

5. CONCLUSIONS

On the basis of the economic analysis set out in section 4 above, BEREC considers that the Commission's serious doubts regarding the draft decision of the Portuguese Regulatory Authority on the draft measure of ANACOM on the markets for wholesale local access and wholesale central access in Portugal, as expressed in the EC's letter to ANACOM of 29 July 2016, are justified.

BEREC is of the opinion that ANACOM has failed to deliver sufficiently convincing argumentation for not including a fibre access obligation on market 3a and (secondary) on market 3b in the NC areas.

On the basis of the information obtained from ANACOM, BEREC is uncertain whether the suggested regulation will support sustainable competition in the Portuguese broadband market. From BEREC's point of view several issues need to be elaborated upon and/or substantiated in ANACOM's final decision, with the overall objective of explaining how it is likely that the foundation for infrastructure based competition in NC areas exists.

BEREC agrees with the Commission that ANACOM has not substantiated why the imposition of a fibre access remedy in the NC areas would be disproportionate.

In its analysis, ANACOM should give more weight to the arguments concerning the foreseeable development of competition in the retail broadband access market in Portugal, taking into account the investment plans of MEO and the alternative operators as well as their impact on the development of retail competition. Even if ANACOM were unable to investigate the current investment plans of operators, ANACOM should at least assess the credibility of the current announcements (especially by MEO) and the likelihood of a business case for large scale fibre roll-out by alternative operators in the NC areas.

BEREC agrees with the Commission that ANACOM failed to provide convincing arguments as to why access remedies, in particular with pricing freedom, could not be made compatible with investment incentives.

ANACOM should also thoroughly analyse MEO's commercial fibre access offer. In particular, it should focus on how likely it is that there is demand from alternative operators for access of this commercial offer, taking into account the reasonableness of the access conditions.

To conclude, in order to deliver sufficiently convincing argumentation for not including a fibre access obligation on market 3a and (secondary) on market 3b in the NC areas, ANACOM should include in its forward looking assessment more thorough analysis of how future investments may influence future market shares, assess the future demand for access to MEO's fibre network, and analyse whether MEO's commercial fibre offer has the characteristics that could make a fibre access obligation in the NC areas unnecessary. Otherwise, BEREC cannot support the non-imposition of fibre based wholesale access products in the NC areas.

ANNEX

Reservations as requested in accordance with Article 4, paragraph 9 of the BEREC Regulation:

ANACOM:

“ANACOM has reservations to the Opinion since the following was not taken into account:

- the specific Portuguese circumstances and dynamics related to investments and the development of competition in broadband market, reflected in the highest coverage of optical fibre in Western Europe (and the third all over the EU).

- the fact that imposing an access obligation on fibre in areas where MEO has practically no fibre for the time being in the concrete and particular Portuguese circumstances would not be adequate, proportionate or justified.

- the strong measures imposed in due time by ANACOM related to access to physical infrastructure (in particular ducts and poles) and in-house wiring infrastructure that have lowered barriers to expansion and have fostered infrastructure competition in NGA networks and are, in ANACOM’s view, sufficient to promote investment and competition in the current identified non-competitive areas, ensuring the necessary level playing field.

- the possible negative impact that imposing a fibre access obligation could have in terms of overall investment in these areas.

- the fact that the decision not to impose for the time being a fibre access obligation in the non-competitive areas is adequately reasoned in the draft measure and that the draft BEREC opinion is not clear/concrete about the kind of additional information that is needed.

- the important changes that are occurring in the Portuguese market and the commitment of ANACOM to closely monitor the market evolution, namely in the current non-competitive areas and to act swiftly imposing additional measures, should the market so require.”

ARCEP:

"While Arcep generally shares the analysis of the BEREC Opinion, we wish to raise a comment regarding the conclusion. We believe it is important to define the conditions under which a commercial offer can constitute a sufficient justification for the absence of ex ante regulation. The mere existence of a commercial offer, in particular where no agreement has actually been signed and no access has actually been provided, cannot in itself constitute a sufficient guarantee for access seekers. It is therefore necessary to check whether the commercial agreement passes a fit for purpose test, ensuring inter alia that access is proposed under transparent, fair and reasonable terms, and that the NRA is able to ensure that the offer will be maintained for a sufficient period of time and to intervene if such conditions are no longer met."