

FINAL DECISION OF ICP-ANACOM ON

**Billing and collection of penalties applied to the Beneficiaries of Reference Poles Access
Offer of PT Comunicações, S.A.**

ICP-ANACOM

- PUBLIC VERSION -

INDEX

1.	BACKGROUND	1
2.	ANALYSIS	3
2.1.	Allegations of ZON	3
2.2.	Allegations of Cabovisão	5
2.3.	Clarifications and allegations of PTC.....	6
2.4.	Analysis performed by ICP-ANACOM	7
2.4.1.	<i>Publication of the RPAO, justification for deviations from the provisions of the RDAO and possibility of intervention by ICP-ANACOM.....</i>	<i>7</i>
2.4.2.	Time limit for the submission of demands for compensation and deadline for submission of records.	11
2.4.3.	Impact on PTC caused by delays in the submission of records by Beneficiaries (maximum penalty limit).....	13
2.4.4.	Conditions for the payment of penalties by PTC	16
3.	DETERMINATION	18

1. BACKGROUND

By communications sent respectively on 24.09.2012¹ and 08.11.2012², ZON TV Cabo, S.A. (ZON) and Cabovisão - Televisão por Cabo, S.A. (Cabovisão) requested ICP-ANACOM's intervention regarding the collection, by PT Comunicações, S.A. (PTC), of penalties for non-compliance pursuant to the Reference Poles Access Offer (RPAO), as published by PTC.

At issue are penalties charged to ZON and Cabovisão by PTC, in both cases pursuant to section 6.2 of the RPAO - Penalties for non-compliance by the Beneficiary³ -, and dissent manifested both by ZON and by Cabovisão as regards the penalties imposed, the terms on which they were charged and the values payable⁴.

ZON, considering the conduct of PTC to be abusive, unfair and without basis - and as such contrary to the regulatory framework governing the RPAO - requested that, under the terms of paragraph 4 of article 26 of Law no. 5/2004 of 10 February 10, as amended and republished by Law no. 51/2011 of 13 September - Lei das Comunicações Eletrónicas (Electronic Communications Law, hereinafter "LCE"), ICP ANACOM order PTC:

- (a) To delete section 6.2 and the last paragraph of section 4.8 of the RPAO, as regards the payment of penalties for non-compliance with the deadline for submission of records by the Beneficiary (ZON calls for this deletion to have retroactive effect to 22.12.2010, as the date on which the original version of the RPAO was published);
- (b) To replace the credit note by which PTC has charged ZON penalties under section 6.2 of the RPAO with another credit note with all penalties charged to ZON removed;
- (c) To extend the deadline applicable to the submission of records by the Beneficiary to PTC, under the terms of section 4.8 of the RPAO, to 90 days.

In a communication received on 19 October 2012, PTC has also brought details to ICP-ANACOM's attention regarding the conduct of ZON within the scope of the RPAO, which conduct it deemed to be inconsistent with the terms of the Offer's use, considering that ZON's claims, as regards the compensation values charged in respect of delays in the delivery of valid records, to be without basis.

As well as ZON, Cabovisão also requested the intervention of ICP-ANACOM, although under article 10 and paragraph 3 of article 26 of the LCE, for administrative resolution of its dispute with PTC, also requesting deletion of section 6.2 of RPAO in relation to the imposition of penalties on beneficiaries as a result of delays or failure to deliver of records, as

¹ Subsequently reiterated by communications sent on 22.10.2012, 13.11.2012 and 17.12.2012.

² Reiterated by communications sent on 16.11.2012 and 12.12.2012.

³ Company offering publicly available electronic communication services or networks

⁴ Pursuant to section 4.8 of the RPAO, upon conclusion of services of access and installation, intervention, removals and diversion of routes, the Beneficiary is required to submit valid records to PTC, within a period not exceeding 30 calendar days. Failure by the Beneficiary to submit such records within the stipulated deadline shall determine the payment of compensation as shown, in particular, in section 6.2 of the RPAO. In accordance with Section 6.2 of the RPAO, where a Beneficiary fails to meet the deadline set for the submission of valid records for reasons solely attributable to that Beneficiary, except for reasons of force majeure, it is required to pay compensation to PTC totalling 50 euros for each day of delay beyond the deadline set for this purpose (up to a maximum of 60 working days).

well as extending the time-limit specified in section 4.8 of the offer (for the Beneficiary to submit records) to 90 days.

On 11.01.2013, ICP-ANACOM informed Cabovisão that, in the context of the preliminary analysis, it would not, in principle, concur with the prospect of a decision in the context of a dispute resolution process. It would view such a decision as insufficient and inappropriate for the intended purpose, which is to consider and decide on an amendment to RPAO, as will take effect on all potential Beneficiaries of the Offers and so require a specific adoption procedure, entailing consultation processes as applicable under law. In this context, notice was given that ICP-ANACOM will only decide definitively on the procedure applicable to Cabovisão's request for intervention at a later date, after concluding analysis of the underlying issue in question.

On the same date, ICP-ANACOM gave PTC notice as to the requests for intervention received from ZON and from Cabovisão and requested clarification on issues related to the RPAO and to penalties for non-compliance introduced by PTC (hereinafter "the information request"), since ICP ANACOM was unaware as to the grounds upon which PTC had made provision to charge Beneficiaries penalties of the amount established in the RPAO, as a result of failing to meet the deadline for submission of valid records; the company responded to ICP-ANACOM by letter dated 25.01.2013.

By determination of 16 May 2013, ICP-ANACOM's Management Board decided to conduct a prior hearing of interested parties and a general consultation procedure regarding the draft decision⁵ whose approval is proposed, on billing and collection of penalties charged to RPAO beneficiaries; these procedures were completed between 23 May 2013 and 21 June 2013. The comments received, the respective analysis and reasoning of the decision are set out in the "*Report of the prior hearing and general consultation on the draft decision on the billing and collection of penalties charged to the beneficiaries of the Reference Poles Access Offer (RPAO)*", which forms part of the present decision.

Subsequently, by determination of 1 August 2013⁶, ICP-ANACOM's Management Board approved:

- (a) The report on the prior hearing and on the general consultation procedure to be notified, along with the draft decision, to the European Commission, BEREC and NRAs of other Member States, as regards the billing and collection of penalties charged to the beneficiaries of RPAO.
- (b) Notification of the draft decision to the European Commission, BEREC and NRA of other Member States, in accordance with paragraph 1 of article 57 of Law no. 5/2004 of 10 February, as amended by Law no. 51/2011 of 13 September.

On 13 September 2013, the European Commission gave its view on the notified draft decision, making no comment.

⁵ See [Faturação e cobrança de penalidades às Beneficiárias da Oferta de Referência de Acesso a Postes da PT Comunicações, S.A.](#)

⁶ [Billing and collection of penalties under the Reference Poles Access Offer of PTC](#) - draft decision 01.08.2013.

2. ANALYSIS

Given the subject matter, the following analysis was structured as shown below:

- (a) Allegations of ZON;
- (b) Allegations of Cabovisão;
- (c) Clarifications and allegations of PTC;
- (d) Analysis of ICP-ANACOM;
- (e) Decision.

2.1. Allegations of ZON

ZON considers that PTC should be prohibited from charging Beneficiaries any penalty in the context of a reference offer such as the RPAO (or such as the Reference Duct Access Offer - RDAO) where the offer is made available as a result of a legal requirement that stems from the fact that the company is the concessionaire of the public telecommunications service and that stems from recognition by the legislator that, in the absence of such a requirement, the market would never have access to the (essential) infrastructure in question (at least on reasonable terms) (see Article 26, paragraph 4 of the LCE).

Given the importance of the Offers for the existence of alternative services in the market and the promotion of competition, according to ZON, the emphasis should be placed on having penalties and compensatory mechanisms which deter PTC from adopting attitudes which seek to block or restrict Beneficiary access to infrastructure. Accordingly, ZON holds that the RDAO does not envisage subjecting Beneficiaries to any penalties, which in its view is fully justified.

ZON also mentions that ICP-ANACOM's determination of 28.10.2010⁷, as regards amendments to the RDAO, by which PTC was ordered to publish the RPAO, stated that this offer should take into account "*the general principles adopted in RDAO*", which, in its view would mean that, in no case, should the RPAO make provision for the imposition of penalties on Beneficiaries.

According to ZON, the communication which PTC sent to it on 23.12.2010, relating the most important changes introduced to the RPAO in respect of the previous (commercial) poles access offer, made no mention of the introduction of penalties, whereas PTC stated that the RPAO "*has no major impact on the procedures and technical standards prevailing in PT's previous poles service, and its development will be processed in the traditional way*". ZON adds that, although the RPAO made provision for the submission of records by Beneficiaries to PTC within 30 calendar days, no provision is made in PTC's poles access service, which forms the basis of the RPAO, and much less in the RDAO, which also includes an identical time-limit, for a financial penalty associated with this delay. In any case, ZON affirms that it has always sought that the companies at its service comply with the deadline.

⁷ Available at [Amendments to the RDAO](#).

ZON also notes that delays in the submission of records, after 30 calendar days, does not cause any harm to PTC (already being in possession of the essential information as a result of the process submitted by the Beneficiaries when making requests for access to and use of infrastructure); meanwhile delays in the fulfilment of procedural rules laid down by the RPAO have potential to cause substantial damage to the Beneficiary, to the extent that such delays significantly restrict the Beneficiary's ability to compete freely in the market.

Also according to ZON, PTC has not established any deadline in the RPAO for the submission, by PTC, of requests for compensation in the form of penalties to the Beneficiary; this is not the case as regards the submission of Beneficiary compensation requests, which is subject to time-limits. In ZON's view, this violates the principle of equality and non-discrimination, giving PTC an unwarranted advantage. Accordingly, ZON considers that PTC's intention to charge penalties for claimed delays in submitting records constitutes an abuse when they refer to cable installations occurring as long ago as February 2011 and when ZON had not been alerted by PTC as to such claimed delays. Accordingly, ZON argues that, if PTC were subject to the same deadline as applies to the presentation, by Beneficiaries, of compensation claims for breach of service levels, ZON would now be secure in being able to refuse payment of the penalties in question based on the simple fact of the respective request for payment being untimely (according to ZON, the most recent submission of records subject to a penalty is dated in early June 2012 and as such would have exceeded the maximum period of 60 days⁸).

On the other hand, ZON states that even if one accepts the application of penalties to the Beneficiary under the RPAO - which it does not accept for the reasons explained - the amount established in the offer (which can reach 3,000 euros per record, and in the case of ZON, as a result of the company's intensive access to poles, can lead to the imposition of penalties exceeding one million euros) is manifestly unlawful. This is because the penalties in question are imposed pursuant to a reference offer (RPAO) whose terms and conditions are not negotiated with the Beneficiary but imposed pursuant to a standard contract (as set out in Annex 5 to the offer), and therefore violate the regime governing general contract clauses approved by Decree-Law no. 446/85 of 25 October, in particular article 19 c), which prohibits "*penalty clauses which are disproportionate to the damages to be compensated*", whereby, any such penalties are held null and void.

ZON also notes that the RPAO was brought to the market without a general consultation procedure (article 8 of the LCE) - a formality which, in its view, is essential, given the significant impact of this offer on the market, and should be concluded by ICP-ANACOM.

Finally, ZON expresses consternation at the fact that PTC deliberately allowed the sender to accumulate a significant number of alleged record delays pursuant to the RPAO, thereby corresponding to a very large amount of penalties; this has had the effect of significantly

⁸ When ZON refers to the submission of compensation claims by PTC as exceeding the maximum period of 60 days, it is assumed that ZON is referring, on a hypothetical basis, to PTC being made subject to the same deadline as applies in the case of Beneficiaries, pursuant to the RPAO, with respect to the submission of claims for compensation, given that, in accordance with section 6.1 of the offer, these "*will not be accepted by PT unless they are submitted by the end of the second month of the quarter following the quarter of the respective occurrence*".

offsetting an amount, wrongly charged to ZON pursuant to the RDAO, which the company is currently owed and which has been due to ZON for a long time⁹.

Therefore, for the reasons stated, ZON formulates the above requests.

2.2. Allegations of Cabovisão

Cabovisão reports that, according to explanations that have been provided by PTC, the penalties applied refer to delays or failures on Cabovisão's part in the submission of records occurring since January 2011.

As grounds for its refusal to make payment of such invoices, Cabovisão cites the unlawfulness of section 6.2 of the RPAO, given its lack of compliance with:

- (a) ICP-ANACOM determination of 28.10.2010;
- (b) The regime governing general contract terms, established by Decree-Law no. 446/85 of 25 October, subject to subsequent amendments.

With reference to point (a), Cabovisão takes the view that the above determination resulted from PTC's obligation to publish a reference offer providing access to poles, including all procedural, technical and economic conditions, specifically as relates to cable installation, and considering the general principles adopted in the RDAO, notwithstanding ICP-ANACOM's reserved right to intervene if the conditions offered were not deemed appropriate. Cabovisão also states that the RDAO does not provide for any application of penalties in the event of delay or failure to submit records, despite specifying an equal time - 30 calendar days - for such submission by the Beneficiary (see section 4.9 of the RDAO). Therefore, Cabovisão considers that there should be no imposition of penalties under the RPAO for delay or failure to submit records.

Cabovisão also holds that delay or failure to submit records does not cause harm to PTC, since whenever a Beneficiary of RPAO sends a request for access and installation or a removal request, it provides details from the outset about the cables it intends to install or remove, as well as the corresponding graphical plan. Indeed, in Cabovisão's view, this information is sufficient for PTC to charge Cabovisão for successive requests for access/installation and removal presented pursuant to the offer.

With regard to the argument set out in point (b) above, Cabovisão considers that section 6.2 of RPAO is contrary to the provisions of paragraph c) of article 19 of the regime governing general contract terms, under which general contract terms as, depending on the negotiating framework, lay down penalty clauses disproportionate to the damages to be compensated are prohibited and therefore held null and void. Cabovisão argues that this provision applies to section 6.2 of RPAO, insofar as it results in excessive compensation, without regard to potential damages or costs. This compensation - as already mentioned - can reach a

⁹ It is noted that, on 31.08.2012, PTC issued ZON a credit note in respect of adjustments related to the clearance of a set of infrastructure under the RDAO; however, PTC then deducted amounts referring to penalties for non-compliance under the RPAO from this credit.

maximum of 3,000 euros per record, multiplied by the numerous and recurring occasions where Cabovisão has obtained access to infrastructure pursuant to the RPAO.

To reinforce its conclusion on the unlawfulness of section 6.2, Cabovisão adds that, under the RPAO, PTC may demand payment of penalties without time-limit - a provision which PTC has exploited in order to collect amounts allegedly owed since January 2011, thereby violating the principle of legal certainty.

Therefore, Cabovisão requested the intervention of ICP-ANACOM, under the terms already indicated.

2.3. Clarifications and allegations of PTC

In response to the request for information addressed to it, PTC claimed that the penalties charged to ZON and Cabovisão for non-compliance under the RPAO had basis in section 6.2 of the offer, according to which, "*where a Beneficiary fails to meet the deadline set for the submission of valid records for reasons solely attributable to that Beneficiary, except for reasons of force majeure, it will pay compensation to PTC*". Accordingly, PTC reports that it debited the penalties due, following delays in the submission of valid records by ZON and Cabovisão.

PTC noted that the RPAO was launched on 22.12.2010, and that it informed ICP-ANACOM on 23.12.2010 as to its publication. Since it did not receive any requests for clarification from ICP-ANACOM in respect of section 6.2 of the Offer, PTC held that the Offer was in full compliance with the stipulations of the determination of 28.10.2010. PTC states therefore, that it was with surprise that, after more than two years, it was confronted with the arguments raised in the requests for intervention put to ICP-ANACOM by ZON and Cabovisão.

PTC noted that in the prior hearing that led to the decision of ICP-ANACOM of 28.10.2010, it had argued for the inclusion of a set of penalties in the Offer aimed at encouraging compliance, considering the timely submission of records as being essential to ensure the reliability of information provided by PTC to Beneficiaries. In this context, PTC recalls statements made by ICP-ANACOM:

- (a) In the decision of 28.10.2010, "*in the event that PTC were to present a significant number of specific and documented situations, such as installation of cables in ducts without authorization, intervention by unaccredited Beneficiary technicians in ducts or delays in records, ICP-ANACOM will examine and consider the application of other fitting measures to remedy such situations*";
- (b) With respect to the complaint put by Optimus - Comunicações, S.A., (Optimus) on the invoicing of RDAO services, "*recognizing the importance of timely submission of records, ICP-ANACOM..., given the number of entries that continue to be submitted on an untimely basis, may examine the implementation of appropriate measures to minimize these delays*".

PTC reported that the number of Beneficiaries subject to penalties under the RPAO has fallen; a trend which, in its view, demonstrates the effectiveness of applying penalties, which are seen as strong deterrents to non-compliance by Beneficiaries. Furthermore, according to PTC,

in addition to a decline in the number of non-compliant occurrences, the penalties have decreased (see table below), which is evidence, according to PTC, of an effort by Beneficiaries to comply with RPAO rules; as such, PTC argues that the timely delivery of records should continue to be encouraged.

Period	2012				
	August	September	October	November	December
Total amount of penalties (euros)	>1,000.000	>100.000	>50.000	<15.000	<15.000

Source: PTC (actual amounts of penalties replaced with value ranges).

PTC reiterated the importance of the submission of records taking place on a timely basis with a view to the goal of maintaining updated and reliable record information. As such, it refutes the argument made by ZON and Cabovisão that delay or failure in the delivery of records does not cause it harm (according to PTC, failures to submit records on a timely basis may have consequences for the company, at a legal level and in terms of network security and integrity, whereby a lack of knowledge as regards exactly what is installed and how it is installed, may "*lead to a dynamic likely to rapidly create conditions of structural instability as regards the actual route*").

As regards the deletion of section 6.2 of the RPAO (as supported by ZON and Cabovisão) PTC holds that this could result in a severe imbalance in the conditions governing supply and supporting the RPAO (at a time when the provisions established in this section of the RPAO were producing clear benefits), leading to a deterioration in current conditions. PTC also noted that the RPAO is legitimized by the LCE (paragraph 4 of article 26) and does not stem from a commercial initiative of PTC.

PTC expresses doubts as to the possible application of the legal regime governing general contract terms, since, while Beneficiaries are offered a standard contract in the RPAO, there is nothing which prevents them from proposing amendments to the contract, notwithstanding the fact that the content remains subject to amendments ordered by ICP-ANACOM under the LCE.

In summary, taking into account the obligation to update RDAO records within 10 working days and applying this term to the RPAO, PTC states that it is required to respond to Beneficiary feasibility analysis requests within 30 days (under penalty of a payment of 50 euros per day, with a maximum of 60 working days); as such, PTC may be held civilly liable if it gives an inaccurate answer that causes loss to the Beneficiary. PTC therefore considers that the amount charged in penalties is not excessive, but proportional to the losses that may result from non-compliance.

2.4. Analysis performed by ICP-ANACOM

2.4.1. Publication of the RPAO, justification for deviations from the provisions of the RDAO and possibility of intervention by ICP-ANACOM

In the first place, it should be noted that ZON's comments as regards ICP-ANACOM omitting to conduct a public consultation on the RPAO are without basis, since, in this case, the issue at hand was the publication of an offer by PTC and not the adoption of a measure by

ICP-ANACOM with significant impact on the relevant market, as would require performance of the general consultation procedure in accordance article 8 of the LCE. Nevertheless, the draft decision that determined amendments to RDAO and which also resulted in a requirement to publish the RPAO in accordance with the general principles adopted in the RDAO was submitted to the appropriate consultation procedures¹⁰.

Furthermore, the RPAO Beneficiaries may, if they see fit, always and at any time request that ICP-ANACOM review the terms of the Offer, as indeed has occurred in the present case.

Therefore, it is necessary to put the issue at hand into context; it is noted that, by determination of 28.10.2010, preceded by a prior hearing and public consultation, ICP-ANACOM ordered PTC to publish, within 30 working days, a Reference Poles Access Offer (RPAO), including all applicable procedural, technical and economic conditions, specifically for the installation of cables, "*and considering the general principles adopted under the RDAO*", whereby PTC was required to justify any deviations between the new Offer and the provisions of the RDAO.

It is considered that the introduction of a penalty for failure to comply with the deadline applying to the submission of records, in the first version of the RPAO (of 22.12.2010), where failure is due to reasons that are solely attributable to the Beneficiary (except for reasons of force majeure), is not incompatible with the principles of the determination of 28.10.2010. Therefore, there is no impediment, at the outset, to making provision for the application of penalties to Beneficiaries, provided that said penalties have justification, as PTC has now provided.

ICP-ANACOM takes the view that the inclusion of a penalty applicable to Beneficiaries that fail to meet the deadline for the submission of valid records pursuant to Section 4.8 of the RPAO is warranted, as demonstrated by the experience gained in the two years since the introduction of the Offer, with a significant number of systematic delays in the submission of such information by Beneficiaries. Furthermore, ICP-ANACOM had mentioned, in the context of the RDAO, that measures could be taken as would encourage the timely submission of records upon the completion of works, which, as noted above, is justified in respect of the RPAO given the non-compliant situations which were listed by PTC in its letter of 25.01.2013.

In this regard, PTC's argument that not having knowledge of the records relating to Beneficiary activities on its poles network may jeopardize the integrity of networks and may "*lead to a dynamic likely to rapidly create conditions of structural instability as regards the actual route*" is deemed valid.

Indeed, at the time, ICP-ANACOM allowed that the RPAO may have particularities that distinguish it from the RDAO, whereby PTC's justification for charging Beneficiaries penalties for delays in the submission of records is reasonable, as discussed below in greater detail.

¹⁰ ICP-ANACOM Determination of 17.11.2009, available at [Amendments to the reference ducts access offer \(RDAO\)](#).

None of the Beneficiaries made any comments or requested action in relation to the introduction of the provision in question, either upon publication of the RPAO, nor in the subsequent 20 months (until September 2012).

In this context, it is noted that ICP-ANACOM is motivated to intervene in the present determination not by the inclusion of penalties for failures to comply with the deadline for record submissions under the RPAO, but rather, is motivated to intervene by the fact that PTC has allowed the cases which gave basis to the application of these penalties to accumulate for around 18 months. This, together with their maximum value, which is excessive in relation to the damage resulting from the Beneficiary's delay or failure (as will be seen below), resulted in disproportionate values being charged, giving rise to the justified protest to ICP-ANACOM by certain RPAO Beneficiaries.

As such, the most grievous situations arise largely from the fact that (according to the current RPAO and contrary to rules governing the Beneficiary), PTC is not subject to a time-limit when giving notification of penalty payments due to failures to comply with deadlines for submission of records.

Indeed, if PTC had notified the RPAO Beneficiaries on a timely basis, i.e. within a reasonable period following detection of non-compliant situations, and not long after the event (in some cases about 18 months later), certainly the conduct of the operators would be different as regards compliance with the deadline for submitting records. Nevertheless, the situation seen before and after notifications of non-compliance and application of the respective penalties shows that the existence of penalties provides a fitting incentive to the fulfilment of certain obligations by the Beneficiary.

Therefore, the fact that PTC is able to present Beneficiaries with demands for compensation following non-compliance without time-limit and the accumulation, over around 18 months, of a series of situations which have led to disproportionate billing amounts are two factors which ICP-ANACOM believes have caused an imbalance with clear benefit to PTC, in terms of penalties charged for non-compliance; this is a situation that must be corrected.

In this context, ICP-ANACOM considers it necessary to undertake: (i) a review of the maximum value applicable to penalties charged for failure by RPAO Beneficiaries to submit records in a timely manner, with retroactive effect, as well as (ii) stipulation of a time limit by which PTC must present compensation claims to RPAO Beneficiaries; these issues will be addressed in the following sections of this document.

Considering PTC's claim that, the fact it had not received any request for clarification from ICP-ANACOM in respect of section 6.2 of RPAO, led PTC to be convinced that the Offer was in full compliance with the stipulations of the determination of 28.10.2010, whereby it was with surprise that, almost two years after the publication of the Offer, it was confronted with the arguments set out in ZON and Cabovisão's requests for ICP-ANACOM intervention when PTC decided to levy penalties which it considered due for non-compliance with regard to situations that occurred more than one year ago, ICP-ANACOM highlights the following points:

- (a) The LCE does not provide a mechanism for the approval of reference wholesale offers prior to publication, but does give ICP-ANACOM the option to intervene at any time, including with retroactive effect;
- (b) ICP-ANACOM has the power, and also the duty, of oversight, which it exercises on an ongoing basis;
- (c) In light of the requests from ZON and Cabovisão for intervention, ICP-ANACOM, could not, in the exercise of its powers, refrain from examining and seeking clarification from PTC, as the undertaking responsible for RPAO, as regards all aspects raised therein, directly and indirectly, having in respect thereto the duty of decision;
- (d) The intervention requests of ZON and Cabovisão, as RPAO Beneficiaries are recent, and were not submitted to the examination of ICP-ANACOM until the end of 2012, clearly reflecting the fact that PTC did not issue billing in respect of the amounts charged for delays in the submission of records until August of that year; the beneficiaries only reacted to the situation when confronted with the first invoices in respect of penalties due under the RPAO, and only then called for ICP-ANACOM's intervention.

It should also be noted that both ZON and Cabovisão invoked the nullity of the penalties provided for in section 6.2 of the RPAO under the regime governing general contract terms.

General contract terms which are formulated without prior individual negotiations, and where the input of indeterminate counter-parties is limited to acceptance, are governed by Decree-Law no. 446/85 of 25 October, as subsequently amended.

Under the terms of point c) of article 19 of this law, general contract clauses as establish penalty provisions which are disproportionate to the damages to be compensated are prohibited and made null and void (see article 12).

Section 6.2 of the RPAO may be considered a penalty clause that is disproportionate to the damages to be compensated. As mentioned above, the penalties - which can reach 3,000.00 euros per untimely record submission - appear disproportionate to the adverse impact resulting from a failure to submit record information.

In parallel, the RPAO makes no mention as to the maximum period within which the Beneficiary may be presented with demands for compensation by PTC, in the form of a penalty for breach of the deadline for submission of records; this has led to situations such as those reported by ZON and Cabovisão, in which PTC is seeking to charge for delays in record submission relating to interventions occurring as far back as the beginning of 2011.

It is noted, however, that even while the clauses of the RPAO as are transposed to standard contracts concluded in its scope constitute clauses which are pre-determined by PTC without prior individual negotiation with the Beneficiary, an analysis as regards the regime of general contract terms is not required, since, this legal regime does not apply to "contracts subject to stipulations of public law" (see Article 3, paragraph c) of Decree-Law no. 446/85 of 25 October). And, since the RPAO is published in fulfilment of obligations imposed by ICP-ANACOM under its statutory powers and responsibilities, it is so subject to stipulations of public law.

In this context, ICP-ANACOM considers that the regime governing general contract terms is not appropriate as a framework for analysis and decision in this matter.

2.4.2. Time limit for the submission of demands for compensation and deadline for submission of records

As noted above, there is a provision in the RPAO, at the end of section 6.1, which determines that compensation claims submitted by Beneficiaries will only be accepted by PTC where they are submitted "*by the end of the second month of the quarter following the quarter in which the respective occurrence took place*"¹¹. PTC's collection of penalties related to delays in the submission of records on interventions/installations after the elapse of a period since occurrence that is greater than the time-limit by which the Beneficiaries of the Offer are required to submit their own requests for compensation represents an unbalanced situation that favours PTC.

In this regard, note is made of PTC's position as regards this situation, whereby it stated, in response to a request for information from ICP-ANACOM, that "*PTC did not include a time limit in the RPAO for its own submission of compensation claims directed at Beneficiaries because inclusion of such a time limit was not deemed to be in their interest (...)*".

In addition to the deadline governing the submission of demands for the payment of compensation due in the form of penalties, there is another issue: that payment of compensation due in the form of penalties from PTC is held subject to the prior fulfilment of other obligations by the Beneficiary, specifically the provision of "*forecast plans setting out the services to be contracted*", the consideration of these forecasts as effectual and the full and timely payment of overdue invoices in respect of services provided by PTC"¹², as well as the condition that the Beneficiary sent the record information prior to the applicable deadline¹³, which does not apply in the case of PTC. In other words, the RPAO makes provision for a second penalty for failure to submit record information in a timely manner, a provision which again is not matched by a parallel obligation applicable to PTC in respect of the RPAO's beneficiaries.

Furthermore, and also with respect to the lack of a deadline in the RPAO for the submission by PTC of compensation claims for non-compliance payable by the Beneficiary, PTC states in response to the request for information from ICP-ANACOM that "*the Beneficiary may always invoke limitation, under general law, so that the respective rights are always guaranteed*".

Without prejudice to the possibility of the Beneficiary invoking limitation, it is held that the availability of wholesale offers (in this case the RPAO), not only results from legal stipulation, but also results from obligations imposed based on a market analysis conducted by ICP-ANACOM, and is largely regulated on this basis; the respective conditions should be

¹¹ In Annex 5 to the RPAO (standard contract) it is stated that "*The penalties must be claimed and reported by the BENEFCIARY within a period of three (3) months following the date of the event that giving basis to the claim. After a period of three months has lapsed, PTC has the right to refuse payment of the amount corresponding to the amounts requested*"(see paragraph 3 of clause 12, which is not in line with the provisions in the body of the offer.

¹² In accordance with paragraph 4 of clause 12 of Annex 5 to the RPAO.

¹³ In accordance with section 6.1. of the RPAO, which issue is being analyzed below.

those which best ensure access conditions where undermined, or in danger of being undermined, by the significant market power of the company required to present such offers.

Indeed, in light of the above, it is shown that the RPAO, as currently worded and as the conduct of PTC has demonstrated, allows the company, in an unbalanced manner, to charge the Beneficiary for penalties long after occurrence of the failure to comply and regardless of the date of the interventions for which there was a failure to update records.

To correct this imbalance, it is recognized, therefore, that there is a need to bring the time-limit by which PTC, pursuant to paragraph 6.2 of the RPAO, is required to exercise the right to collect penalties for non-compliance with the deadline for the submission of records, into line with the time-limit by which RPAO Beneficiaries have to submit claims for compensation to PTC. The alignment of these time-limits shall enter into force for situations of non-compliance occurring from the date of notification of the final decision.

Legal transactions through which special cases of forfeiture through expiry are established are deemed valid under law (see article 330, paragraph 1 of the Código Civil (Civil Code)), whereby PTC could, on its own initiative i) amend the RPAO by adding a time-limit to section 6.2, within which it would be required to submit any claims to Beneficiaries for compensation, in the form of a penalty, for failures to comply with the deadline for the submission of records and ii) to have this deadline reflected in the service contract governing provision of access to and use of poles and associated infrastructure, whose standard text is given in Annex 5 to the RPAO. It is doubtful, however, that PTC would do this on its own initiative, given a presumed lack of incentive, as referred to above. Therefore, it is deemed necessary to have this rule enshrined in the RPAO, which justifies the intervention of ICP-ANACOM accordingly.

The possibility of establishing the time-limit in question by determination of ICP-ANACOM must therefore be evaluated in the context of the obligations imposed on PTC subsequent to the analysis of the relevant market (market 4 - wholesale (physical) network infrastructure access at a fixed location).

To this purpose, by determination of 28.10.2010, ICP-ANACOM ordered PTC to publish a Reference Poles Access Offer, given the alleged difficulties faced by alternative operators in regard to the processes, the pricing and levels of service offered, and given the need for closer oversight of access to the infrastructure in question, on a more structured basis (compared to the commercial offer) and encompassing aspects usually included in the reference offers regulated by ICP-ANACOM, which is able to intervene in the event that the conditions offered are not the most appropriate.

It should, however, be kept in mind that, under the terms of article 72, paragraph 1 of the LCE, ICP-ANACOM, pursuant to the analysis of Market 4¹⁴ imposed the obligation on PTC to meet reasonable requests for access to and use of specific network elements and associated infrastructure, particularly in situations where denial of access or unreasonable conditions would hinder the emergence of a sustainable competitive market at retail level or harm end-

¹⁴ ICP-ANACOM determination of 14.01.2009, available at [Markets for wholesale network infrastructure access at a fixed location and broadband access](#).

user interests. In exercising this power, ICP-ANACOM imposed the obligation on PTC to negotiate in good faith with undertakings requesting access (current article 72, paragraph 2, point 1) of the LCE).

Thus, considering it fitting to establish a penalty in the RPAO for failure to meet deadlines for submission of valid records to PTC, it is equally important that this penalty is executed in a reasonable manner and according to conditions that do not restrict access by interested companies to relevant infrastructure, given the importance of the RPAO, as well as other offers, to the existence of alternative services on the market and to the promotion of competition.

One of the conditions that will be important to apply in this context is, in addition to the amount, the period within which the payment of penalties may be demanded under the RPAO. PTC is not unaware of the relevance of this condition, setting out in section 6.1 of the RPAO that requests for compensation in respect of non-compliance with levels of service, submitted by Beneficiaries will only be accepted by PTC, if they are submitted prior to the end of the second month of the quarter following the quarter in which non-compliance occurred.

Giving equivalent treatment to that which is equivalent - the penalties provided for in sections 6.1 and 6.2 of the RPAO can both be characterised as true penalty clauses - this right to issue penalties shall, in all cases, be exercised in accordance with the principle of good faith.

As such, PTC is required, as a result of the obligation imposed under paragraph 1 and paragraph 2, point 1) of article 72 of the LCE, to amend the RPAO to bring the period available to submit the respective claim for compensation to the Beneficiary into line with the period available to the Beneficiary to submit claims for compensation to PTC.

Finally, as regards ZON and Cabovisão's wish that the time-limit, as governs submission of records to PTC after the completion of access and installation services, interventions, removals and route diversions, be extended to 90 days, ICP-ANACOM considers that the maximum period currently provided for in section 4.8 of RPAO (30 calendar days) provides RPAO Beneficiaries with sufficient time, after completion of their works, to update the occupation record and submit it to PTC in a timely manner; as such, this suggestion is not accepted. It should be noted in this respect that under the RDAO, the deadline for the submission of records by Beneficiaries, following conclusion of access and installation services, removals and route diversions is also 30 calendar days.

2.4.3. Impact on PTC caused by delays in the submission of records by Beneficiaries (maximum penalty limit)

In the first version of RPAO, PTC introduced a penalty to be paid by the Beneficiary for the non-timely submission of records, set at 50 euros per working day of delay, with a limit of 60 working days, whereby a delay in the submission of records had a limit of 3,000 euros.

The established rule was justified by the fact delays in the submission of records have an impact in terms of penalties which PTC may incur in the event that it supplies a Beneficiary with inaccurate feasibility information. On this basis, PTC considers that the penalties due from the Beneficiary should be set based on the value (and limits) of the penalties payable by

PTC where it fails to comply with the time-limits applicable to responses to feasibility analysis requests.

In fact, the record information submitted by the RPAO Beneficiaries upon completion of works is relevant to PTC insofar as it ensures that PTC is able to respond accurately to requests put to it by Beneficiaries as to the existence (or inexistence) of available space on a given aerial route for the installation of their cables. However, as indicated by ICP-ANACOM in the prior hearing report approved by decision of 28.10.2010 on amendments to the RDAO, failures by Beneficiaries to submit record information in a timely manner primarily harms other Beneficiaries making feasibility requests to which PTC, based on the information available (information which is out-of-date due to the failures of the first Beneficiary), may give a positive response; as a result of this response the second Beneficiary may allocate resources to the site, while subsequently finding that installation is not possible. A similar situation may occur under the RPAO.

From another perspective, it is recognized that PTC is entitled to have updated information about its network at all times, both for the purposes of its own planning and to ensure that it is able to provide accurate information to third parties; this may be compromised in certain situations where there is a delay in the submission of records, justifying application of a daily value in the calculation of penalties for untimely submission of records, as currently set at 50 euro. ICP ANACOM sees no reason to impose changes with regard to this mechanism, notwithstanding any future reassessment of the matter.

In relation to application of a maximum limit on the penalty, it should be taken into account that failures by PTC to respond to feasibility analysis requests in a timely manner have direct impact on RPAO Beneficiaries, since the lack of timely information on feasibility delays or even prohibits network planning and installation (i.e., cables) on the poles of PTC - as such, RPAO Beneficiaries suffer actual loss. On the other hand, the impact on PTC caused by delays in the submission of records by Beneficiaries essentially constitutes a failure to update information on its poles network, which can be remedied by a visit to the site by technicians to check what was installed and how it was installed.

Accordingly, ICP-ANACOM considers that it is not possible to make a direct analogy between the maximum limit of the penalty charged to PTC for non-compliance with the time limits applicable to responses to feasibility analysis requests - which is 60 working days - and the maximum limit of the penalty charged to Beneficiaries for non-compliance with the deadline applicable to record submissions. Therefore, the reasoning given by PTC for the limit applicable to penalties due in the latter case is not accepted.

In this context, it is also important to ascertain what occurs in terms of the submission of records by companies subcontracted by PTC following installations/interventions on its poles. Based on available information, it appears that, in cases where subcontractors fail to submit records on a timely basis, PTC **[confidential information starts]** **[confidential information ends]**.

Furthermore, this type of non-compliance is characterized, in these contracts as **[confidential information starts]**

[confidential information ends] which shows a clearly disproportionate attitude that is to the detriment of RPAO Beneficiaries.

Therefore, it is considered that where, following the completion of works undertaken by RPAO Beneficiaries on their poles, PTC does not receive records on a timely basis, the damage to PTC is, in principle, constituted by the cost associated with sending out a team to the site and the time taken to identify what was actually installed by the Beneficiaries on the poles in question.

As regards the calculation of the limit of the penalty, the maximum accumulated value, as currently provided for in the RPAO for monitoring and supervision by PTC of works carried out on the poles, is considered a good proxy, assuming that 50% of these call-outs occur during normal periods and 50% in other periods - which may be justified so as not to affect the normal work of PTC's technicians. This provides a cumulative maximum of 162.50 euros. This is, therefore, an estimate for the maximum loss which PTC is liable to incur by having to send technicians to the site to confirm what has been installed, removed or changed if the Beneficiary concerned fails to submit the record information on the work performed on a timely basis. However, there must be a factor to deter non-compliance by Beneficiaries, which is defined in this case as being twice the cost incurred by PTC in checking what was in fact installed or removed. That is to say, it is considered that the maximum value for each failure by the Beneficiary to submit records shall be set at 325 euros.

There are grounds for applying the maximum limit to penalties due as a result of delays with retroactive effect, i.e. to the date of the RPAO's publication on 22 December 2010, not only because the current limit provided in the RPAO is clearly excessive, but also because the delay with which PTC has demanded payment of penalties incurred by Beneficiaries has exacerbated the imbalance introduced in the Offer.

The option of giving the determination in question retroactive effects is supported by the provisions of point a) of paragraph 3 of article 68 of the LCE, under which "*the NRA may further determine changes to published reference offers, at any time and where necessary with retroactive effect, to give effect to obligations imposed under the provision of article 66;*" (emphasis added) and is permitted under article 128, paragraph 2, point c) of the CPA.

Under the terms of article 66, paragraph 1 of the LCE, the NRA is charged with determining the imposition, maintenance, amendment or withdrawal of a set of obligations, in respect of access or interconnection applicable to undertakings designated as having significant market power. This includes the obligation to respond to reasonable requests for access, in accordance with article 72 of the LCE, as well as the obligation to publish reference offers, in accordance with articles 68 and 69 also of the LCE (see points a) and d) of paragraph 1 of article 66, obligations which ICP-ANACOM imposed on PTC subsequent to its analysis of Market 4.

As laid down in paragraph 3 of article 72 of the LCE, imposition of the obligation to respond to reasonable requests for access, in its various components (see points a) to l) of paragraph 2 of article 72) may be supplemented by the NRA with conditions which safeguard fairness, reasonableness and timeliness.

The decision to retroactively apply this new maximum value, for the purpose of penalising the Beneficiary for failure to comply with the deadline for the submission of records, seeks to bring the Offer published by PTC into line with the terms of the obligation in question, as imposed by ICP-ANACOM by determination of 28.10.2010. This obligation was imposed with a view to establishing reasonable conditions in the Offer of access provided by PTC, which would not undermine competition in the market, ensuring that the conditions established by PTC in the RPAO are fair and reasonable and that negotiations with Beneficiaries are conducted respecting the principle of good faith (as laid down in paragraphs 1 to 3 of said article 72 of the LCE).

The maximum value specified in the RPAO, associated with the absence of a deadline for the presentation, by PTC, of demands for compensation for delays in the submission of records, led to an unbalanced and unfair situation, as has been demonstrated by the conduct adopted by PTC - the accumulation, over a period of about 18 months, of the values charged to Beneficiaries in the form of penalties.

The amendments that ICP-ANACOM now seeks to impose, retroactively, are therefore justified, both insofar as they fulfil the provisions of article 68, paragraph 3, point a) of the LCE and article 128 of the CPA and in light of the need to fulfil the obligations imposed in accordance with article 66 of the LCE, in particular the obligation to provide access on reasonable terms (fair and balanced).

Accordingly, and as a result, PTC is required to correct the identified situation and, in the first invoice for wholesale RPAO services, issued after a period of 20 working days from the date of notification of the final decision, rectify the values that were billed under point 6.2 of the RPAO in the form of penalties for failures to comply with the deadline applicable to the submission of records (according to the deadline that is now established) and simultaneously reimburse the Beneficiary for the amounts that have already been paid and which exceed the new values that are calculated as a result of this correction.

It is noted that the maximum limit of the penalty that was introduced by PTC in the first version of RPAO, for each delay in submitting records by Beneficiaries, may be as much as 3,000 euros, a figure significantly higher than the limit of 325 euros as now estimated.

2.4.4. Conditions for the payment of penalties by PTC

Under section 6.1 of the RPAO, payment to the Beneficiary for penalties for non-compliance with QSP1 (time limits applicable to responses to information requests) and QSP2 (time limits applicable to responses to feasibility analysis requests) is made subject to the timely submission of record information by beneficiaries.

ICP-ANACOM considers that the introduction of such a condition is unjustified, since, in section 6.2 of the RPAO, provision is already made for the payment of penalties to PTC by

RPAO Beneficiaries in the event that records are not submitted on a timely basis after they complete works on PTC poles. As such, for the Beneficiary, this condition would act as a double penalty for the same occurrence.

Accordingly, PTC is required, within 10 days from the date of the final decision, to amend section 6.1 of the RPAO, removing the condition (submission of record information by the Beneficiary) to which payment of penalties to beneficiaries for breach of QSP1 and QSP2 has been made subject.

Conclusion

Given the above:

- A. ICP ANACOM holds that the maximum limit applicable to the penalties payable by Beneficiaries for non-compliance with the deadline governing submission of record information, under the terms of section 6.2 of the RPAO, is not reasonable and is therefore to be amended (with effect from the date of introduction of this provision).

As such, within a period not exceeding 20 working days following the date of the final decision, PTC shall amend section 6.2 of RPAO, having effect from the date on which the first version of this Offer was published, setting a limit of 325 euros for the penalty provided for therein for failures by Beneficiaries to comply with the deadline governing the submission of records.

- B. Consequently, and due to the established retroactive effect, PTC shall also rectify, in the first invoice for wholesale RPAO services, issued after a period of 20 working days from the date of notification of the final decision, rectify the values that were billed under section 6.2 of the RPAO in the form of penalties for failures to comply with the time-limits applicable to the submission of records (according to the limit that is now established) and simultaneously reimbursing the Beneficiary for the amounts that have already been paid and which exceed the new values that are calculated as a result of that correction.
- C. PTC shall, within a period not exceeding 20 working days following the date of the final decision, amend the RPAO to bring the period available to submit respective claims for compensation to Beneficiaries into line with the period available to Beneficiaries when submitting claims for compensation to PTC. The alignment of these deadlines shall enter into force for situations of non-compliance occurring from the date of notification of the final decision.
- D. PTC shall, within a period not exceeding 20 working days following the date of the final decision, amend section 6.1 of the RPAO, removing the condition in point iii) thereof (submission, by Beneficiaries, of record information within the period stipulated in the Offer) to which the obligation to pay penalties to Beneficiaries in respect of non-compliance with QSP1 and QSP2 is made subject.

- E. In light of this decision amending the RPAO, and in line with the preliminary analysis performed and transmitted to Cabovisão, ICP-ANACOM's decision scenario in respect of a dispute resolution process under Article 10 of the LCE remains separate.

3. DETERMINATION

In light of the analysis detailed above, and taking into account the lack of comment from the European Commission following the specific consultation procedure laid down by paragraph 1 of article 57 of Law no. 5/2004 of 10 February, as amended by Law no. 51/2011 of 13 September, the Management Board of ICP-ANACOM, pursuant to the powers set out in point b), e), f), h) and n) of paragraph 1 of article 6 of its Statutes, as approved by Decree-Law no 309/2001 of 7 December, in the exercise of its remit as set out in points b) and g) of article 9 of the same Statutes, taking into account the regulatory objectives set out in points a) and c) of paragraph 1, b) of paragraph 2 and c) of paragraph 5, all of article 5 Law no. 5/2004 of 10 February, as amended by Law no. 51/2011 of 13 September, and pursuant to powers laid down by paragraph 4 of article 26 and point a) of paragraph 3 of article 68 of the same Law, and in execution of the measures determined following the analysis of the market for wholesale (physical) network infrastructure access at a fixed location, determines as follows:

1. PTC shall, within a period not exceeding 20 working days following notification of the final decision of ICP-ANACOM:
 - D1. Amend section 6.2 of the RPAO, having effect from the date on which the first version of this Offer was published, so as to set a limit of 325 euros for the penalty provided for therein in respect of failures by Beneficiaries to comply with the deadline governing the submission of records.
 - D2. Amend the RPAO so as to bring the period available to submit respective claims for compensation to Beneficiaries into line with the period available to Beneficiaries when submitting claims for compensation to PTC. The alignment of these deadlines shall enter into force for situations of non-compliance occurring from the date of notification of the final decision.
 - D3. Amend section 6.1 of the RPAO, so as to remove the condition in point iii) thereof (submission, by Beneficiaries, of record information within the period stipulated in the Offer) to which the obligation to pay penalties to Beneficiaries in respect of non-compliance with QSP1 and QSP2 is made subject.
2. PTC shall, in the first invoice for wholesale RPAO services, issued after a period of 20 working days from the date of notification of the final decision, rectify the values that were billed under section 6.2 of the RPAO in the form of penalties for failures to comply with the time-limits applicable to the submission of records (according to the limit that is now established in D1 above) reimbursing the Beneficiary for the amounts that have already been paid and which exceed the new values that are calculated as a result of that correction.