

DECISION OF ICP-ANACOM

Amendments to the Reference Duct Access Offer

(RDAO)

ICP-ANACOM

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1. FRAMEWORK

Since the liberalisation of the electronic communications sector, ICP-ANACOM has been working towards the establishment of effective and sustainable competition, making use, in particular, of wholesale access to the infrastructure of the operator with significant market power (SMP). The obligation to provide access to the network has been complemented by other associated obligations, including the obligation of non-discrimination and of cost orientation of prices. It is this context that formed the framework for measures put forward by ICP-ANACOM with regard to access by alternative operators to the local loop.

Portugal was a pioneer, particularly at a European level, in making the ducts of the incumbent operator available for the deployment of competing infrastructure, with a view to establishing sustained competition in the electronic communications market for the benefit of consumers. It is a journey that had its first political expression in the wording of the public telecommunications service concession contract (article 7 of its bases), reinforced by Law no. 5/2004 of 10 February (article 26.) and was subsequently reflected at a regulatory level in ICP-ANACOM decision of 17.07.2004. This decision led to the provision of a reference ducts access offer (RDAO), which took on particular importance in terms of the availability of information on the routes and occupation of ducts.

The pioneering nature of the RDAO proved equally prominent in terms of its importance, insofar as it assumes, by its size and capillarity, a key role in achieving the political objective enshrined in Council of Ministers Resolution no. 120/2008 of 30 July: to determine the promotion of investment in next generation networks (NGN) as a national strategic priority. Furthermore, by enabling electronic communications companies to gain access to ducts and associated infrastructure with a view to housing the electronic communications networks of these companies, the RDAO acquired a key role in the development and installation of these networks. This importance also stems from the dynamics of the regulatory process itself, which has moved towards a position in which significant parts of the market are viewed as competitive, increasing the need to ensure expeditious, equivalent and efficient means for deploying new infrastructure.

In this context, the conditions governing access to and use of ducts and associated infrastructure of PT Comunicações, S.A. (PTC) in the context of the RDAO¹ are determinant if the process of deploying optical fibre access networks and the development of services supported on such networks is to proceed in a competitive manner; meanwhile note should be made of the imposition of measures which ensure enhanced equivalence and equality of access between the regulated operator and the beneficiary operators.

It is also in this respect, in the context of building the internal market, that the European Commission (EC) saw fit to address the issue of the regulatory approach to Next Generation Access Networks (NGA).

¹ Notwithstanding the possibility that operators can resort to the use of ducts belonging to other entities which, in certain areas, may complement access to the duct network of PTC.

Accordingly, at the current juncture in the evolution of electronic communications networks, with a view to the provision of speeds above those available on the access networks supported over traditional copper pairs, the EC launched a consultation² on a first version of the Recommendation on the regulatory approach to NGA in September 2008 and published on 12/06/2009³ published a second version (with a second public consultation) of the recommendation. On 28.04.2010 the EC requested an opinion from the Body of European Regulators for Electronic Communications (BEREC)⁴ on a new draft recommendation. The Recommendation was published on 20.09.2010⁵.

This Recommendation, as anticipated, sets out the need to guarantee non-discriminatory access, particularly, to the ducts of the SMP operator. It also states that the goal of ensuring sustainable competition – a level playing field - can be pursued through provision of equivalent access by the SMP operator to the passive elements of its network⁶ (principle of equivalence).

Broadly speaking, this principle of equivalence means that the SMP operator is required to apply the same processes and procedures when responding to requests from their own internal services and subsidiary companies as when responding to requests from third parties. Otherwise, the SMP operator would find itself in a position of competitive advantage over other operators. Without prejudice to the measures included in this decision, a more comprehensive analysis of the principle of equivalence of access will be performed subsequently, in the light of this Recommendation.

Furthermore, ICP-ANACOM, in the public consultation report on the regulatory approach to NGA, approved by determination of 18.02.2009⁷, recognized the importance of access to PTC's ducts as a means favoured by alternative operators for promoting investment in their own networks, reducing the main cost component in NGA deployment - the civil engineering works⁸ required for the installation of optical fibre networks. In the same report, ICP-ANACOM reported that it planned to conduct a thorough examination of matters related to the RDAO, including the issues raised and the proposals presented in the responses to the public consultation. The present determination is the appropriate vehicle for such an examination.

Considering the increased importance of the RDAO, an offer which stems from the obligation imposed pursuant to article 26 of Law no. 5/2004 of 10 February and which was identified as an obligation subsequent to the analysis of markets 4 and 5, and also considering the fact that this offer has been established for some years and that in this period ICP-ANACOM has

²<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1370&format=HTML&aged=0&language=EN&guiLanguage=en>

³http://ec.europa.eu/information_society/policy/ecomm/doc/library/public_consult/nga_2/090611_nga_recommendation_spc.pdf

⁴ See http://www.erg.eu.int/doc/berec/bor_10_25.pdf.

⁵ See http://ec.europa.eu/information_society/policy/ecomm/library/recomm_guidelines/index_en.htm.

⁶ The principle of equivalence is detailed in Annex II of the recommendation.

⁷ [Regulatory approach to new access networks - expired consultation \(determination 18.02.2009\)](#).

⁸ For example, construction of trenches, installation of ducts and inspection chambers.

received various contributions and suggestions for change⁹, it was deemed appropriate to make changes in its formulation.

As such, by determination of 17.11.2009¹⁰, approval was given to the draft decision on the amendments to the RDAO and its submission to the prior hearing of interested parties, pursuant to articles 100 and 101 of the Administrative Proceeding Code and to the general consultation procedure, under article 8 of Law no. 5/2004 of 10 February, with a period of 30 days established in both cases.

The comments received were reviewed in the report on the prior hearing and the public consultation on the draft decision regarding amendments to the RDAO, which report is an integral part of the present determination.

Approval was likewise given to notification to the EC and the national regulatory authorities of other Member States, pursuant to paragraph 1 of article 57 of the same Law no. 5/2004, whereas the EC has not communicated any comments regarding the draft presented to it.

2. ANALYSIS

2.1. The reference duct access offer of PTC

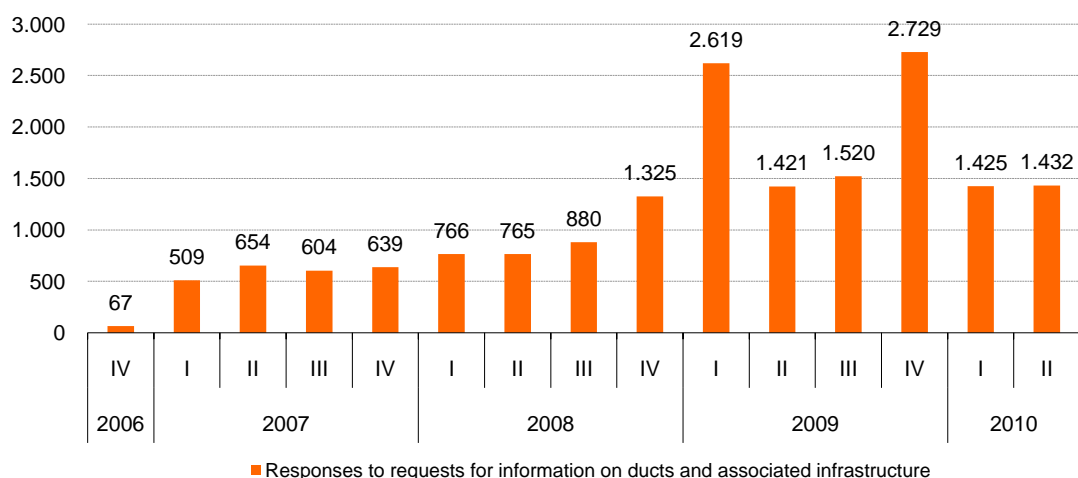
The obligation that PTC make available access to the ducts which it owns or with whose management it is charged was imposed by article 26 Law no. 5/2004 of 10 February, which further established the obligation that an RDAO be made available by the concessionaire, setting out the conditions governing access and use, under terms to be established by ICP-ANACOM.

The RDAO entered into force on 14.07.2006 and since then has seen increased take-up by beneficiaries, as evidenced by the growth in the number of requests for information about ducts and in the number of requests for occupation feasibility analyses.

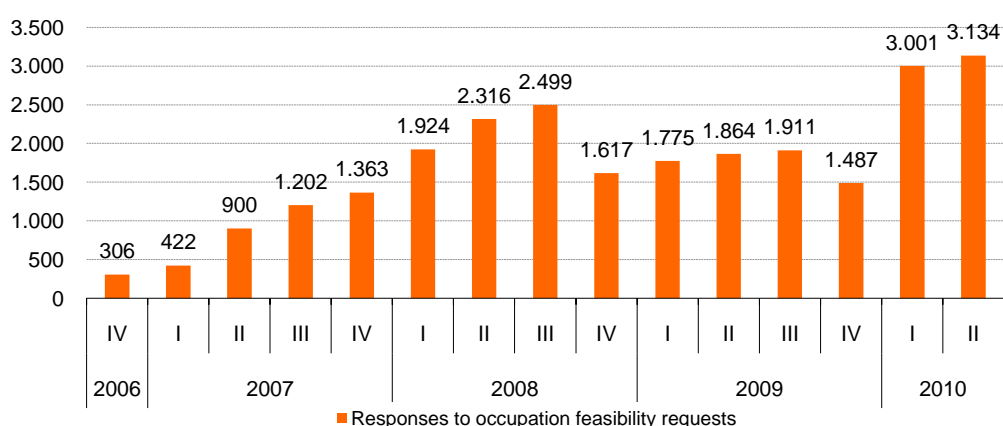
⁹ Contributions submitted to ICP-ANACOM in the context of the public consultation on the regulatory approach to NGA and containing a specific question about suggestions for improving the RDAO, notwithstanding others (contributions) which were also sent to the authority subsequent to this consultation.

¹⁰ See [Amendments to the RDAO \(draft decision\) - 17nov2009](#).

Graph 1. Number of responses to requests for information on ducts



Graph 2. Number of responses to occupation feasibility requests



This growing use of the RDAO makes this offer increasingly important in the current market environment, whereby it now needs to be made more efficient, thorough and extensive.

2.2. Inclusion of information on duct occupation on the *Extranet* and the duct occupation feasibility service

A key aspect in the context of moving towards equivalent access will be for the beneficiary to be able to assess whether the installation of cables in the ducts of PTC is feasible on a determined route and to make this assessment for itself and in real time.

In this respect, by ICP-ANACOM determination of 17.07.2004, which defined the minimum elements of PTC's RDAO, the obligation was established that PTC shall create, maintain and update a database (*Extranet*¹¹) which makes information available on ducts and associated

¹¹ An aspect that was put in place by ICP-ANACOM determination of 26.5.2006.

infrastructure, including information on the dimensions of the ducts and the volume occupied for purposes of availability of space¹². Meanwhile, by determination of 26.05.2006, a time limit of 18 months was established by which time this database was required to be operational (i.e. no later than 26/11/2007).

Notwithstanding that special administrative action has been brought, seeking a declaration of invalidity with regard to the determinations of ICP-ANACOM of 17.07.2004 and 26.05.2006, since 26.11.2007, PTC has made access available to an Extranet, which contains details of the identification/location of infrastructure, including the mapping of duct routes, access routes to buildings and location of inspection chambers. However the Extranet does not contain any information about size, occupied volume and space in ducts, and as a result does not comply with the determinations issued by ICP-ANACOM.

Following clarifications sought by ICP-ANACOM on 07.12.2007, on 21.12.2007, PTC reiterated its position that the requirement to provide information on the occupation of ducts was disproportionate, since it would involve information fields to be appended with respect to cables and ducts in infrastructure management applications and would require a comprehensive field survey to compile information on duct occupation, with the identification of the cable or cables installed in each hole of the duct/sub-duct (entailing opening more than 250,000 inspection chamber, an operation which PTC estimates would result in very significant investment and maintenance costs, amounting to at least around 7% of the value of this investment per annum).

The non-inclusion of information on the occupation of PTC's ducts on the Extranet implies that beneficiaries of the RDAO have had to use the duct occupation feasibility analysis service; in the provision of this service, PTC is required to give a response within 15 calendar days; this time limit is applied to 100% of cases¹³ and has not seen compliance¹⁴ by PTC. However, it must be stressed that while the target time limit is established for 100% of cases, it may occur that, for example, PTC is compliant in 999 out of 1000 cases and non-compliant in one case, which in terms of results renders PTC as non-compliant.

Since the determination of 17.07.2004, some changes have been seen in the situation.

¹² In its report on the prior hearing, ICP-ANACOM took the view that the provision by PTC of information on dimensions, occupied volume and space in ducts was key in promoting situations of transparency.

¹³ In its response to the feasibility analysis, PTC provides the beneficiaries with:

- (a) Information on whether or not the request is feasible (and where it is not feasible, the reason and possible alternative routes);
- (b) Where the request is feasible, a description of the ducts to be occupied.

¹⁴ Although reference is sometimes made to non-compliance by PTC with respect to the indicators set out in the RDAO or even with respect to the decisions issued in this area, the present determination is not concerned with examining such non-compliance, which examination is necessarily conducted under a dedicated and separate process.

In this respect:

- (a) In 2004, some of the entities with major interest in gaining access to PTC's ducts were operators of cable distribution networks that were operating outside the urban areas of Lisbon and Porto.
- (b) Currently, there is increased need for access to ducts, particularly in the context of deployment of NGA, which is viewed as a national strategic priority, as established in Resolution of the Council of Ministers no. 120/2008 of 30 July.
- (c) Despite the effort to extend NGA to rural areas, especially through public tenders promoted by the Portuguese government for NGN deployment in the Centre, North, Alentejo and Algarve, Madeira and the Azores¹⁵, the deployment of these networks has begun in the major urban areas, which are the areas with strongest competition and where access to ducts by several operators on a determined route may occur more frequently, in the context of investment options which they naturally favour. NGN in rural areas should be explored as open networks, whereby the provision of a wholesale offer must be ensured, guaranteeing that all operators and providers of electronic communications services interested in their use to provide services to end-users have access to these networks.
- (d) Different conditions of competition in geographic terms were identified in the analysis of the market for the supply of wholesale broadband access, which market was subjected to analysis in conjunction with the market of wholesale network infrastructure access at a fixed location (which comprises the obligation of access to ducts).
- (e) Despite the nationwide scope of the obligation of access to ducts included in the analysis of Market 4, certain specifications of this obligation may vary according to each geographical area, given the different levels of competitive intensity in different geographic areas of the country, as identified in the analysis of Market 5.
- (f) The availability of information on the occupation of ducts is key in promoting conditions of transparency, contributing to predictability and efficiency in the deployment of NGA by competitors.
- (g) Under Decree-Law no. 123/2009, the list of entities required to give access to infrastructure suitable for housing electronic communications networks was significantly extended. This legislation also established obligations of information and access, structuring a Centralized Information System (CIS) and, maintaining the access of obligation which is incumbent on the concessionaire pursuant to article 26 of Law no. 5 / 2004, whereas ICP-ANACOM was charged with adapting the terms governing the provision of information on access to ducts, masts and other facilities.

¹⁵ See <http://www.moptc.gov.pt/cs2.asp?idcat=2141>.

- (h) Additionally, entities that, pursuant to the tenders for the installation, management, operation and maintenance of high-speed electronic communications networks were selected and who were awarded deployment of networks are subject to access obligations, which involves an increase over time in the total set of infrastructure which can be used by electronic communications companies benefiting from the RDAO.
- (i) Given all these circumstances and also because the burden related to the registration of information on the state of occupation of ducts in "areas NC" may result in higher costs in the use of this infrastructures, hampering the development of electronic communications networks in areas where such development is desirable, it is fitting to review the terms according to which the obligation to provide information on access to PTC's ducts was imposed, in particular regarding their state of occupation throughout the national territory. This review consists of intervention of a regulatory nature that is incumbent upon ICP-ANACOM.
- (j) The percentage of requests for duct occupation feasibility analyses formulated by RDAO beneficiaries referring to "areas NC" is under 25%¹⁶.
- (k) This leads to the conclusion that maintaining the obligation to register and conduct a global survey of the state of occupation of ducts in all areas of the country would constitute the imposition of an unfair burden on PTC while not bringing major advantage to the market. This has no impact in terms of PTC's obligation to grant access to its ducts in all areas of the national territory, including in "areas NC".
- (l) Under the current framework and with a view to pragmatism, it is deemed acceptable that priority be given to the provision of information "*on-line*" about the occupation of ducts in areas where greater demand is expected, subject to the maintenance of mechanisms, although less timely, applying to the entire country.
- (m) It is expected that, given efficient management of infrastructure, there is already updated information available on recently constructed ducts and their occupation, whereby this information should also be included on the Extranet.
- (n) Taking into account that PTC has carried out more than 20,000 feasibility analyses since the RDAO came into effect, it is deemed that the obligation to include information on the Extranet on the occupation of new ducts constructed in 2009 and thereafter should also apply to ducts built before that date where these have been the subject of such feasibility analyses, although information may refer to the dates of these analyses.
- (o) The definition of a time limit of 10 calendar days for PTC to respond to requests for occupation feasibility analyses (for "areas NC" and "areas C" when this information is not available on the Extranet) is in line with the time limit provided for in Decree-Law no. 123/2009, according to which companies in possession of ducts shall provide

¹⁶ According to information submitted by PTC with reference to the first half of 2009.

electronic communications companies with precise details regarding the location and existence of available capacity in existing infrastructure whenever requested, within a maximum period of 10 working days.

- (p) Since feasibility analysis requests are triggered by the fact that information about duct occupation is not yet available on the Extranet, no charge should be made to beneficiaries in areas where the obligation is imposed to make information on occupation of ducts available on the Extranet.
- (q) The beneficiaries of the RDAO should be compensated for any non-compliance regarding the provision of information on occupation of ducts on the Extranet according to the determined time limits, whereas there is a need to encourage compliance with these deadlines.

Given the above considerations, ICP-ANACOM takes the position that:

- D 1.** A geographically segmented and phased approach is adopted with regard to the provision of information on the Extranet on occupation of ducts, with the following time limits, counted from the date of approval of the final determination:
- Greater Lisbon and Greater Porto: 3 months
 - All other "areas C" of the analysis of market 5:6 months
 - "Areas NC" of the analysis of market 5¹⁷: There is no requirement to include occupation information on the Extranet except in the case of new ducts built during 2009 and thereafter¹⁸ and in the case of ducts which, regardless of the date of their construction, were the object of feasibility analyses¹⁹; this information shall be included on the Extranet within a maximum period of 6 months.
- D 2.** With respect to ducts where the "on-line" provision of information is obligatory as set out in **D 1** and while the information is not available on the Extranet:
- The time limit for responses to requests for occupation feasibility analyses is reduced from 15 calendar days to 10 calendar days (for 100% of cases).

¹⁷ Although these are separate markets, it is deemed an expedient approach in this case to adopt "areas NC" as the boundary of zones in the case under present review.

¹⁸ In which case it should be ensured that online information is available within a period of 30 days following the respective conclusion.

¹⁹ In this case the information on occupation refers to the date on which the feasibility analysis was performed.

-PTC may not make any charge, in these areas, to respond to occupation feasibility analysis requests (irrespective of whether the response is negative or, if positive, it subsequently leads to a request for access and installation submitted by the beneficiary) where the requests for feasibility analysis are triggered by the fact that information about duct occupation is not yet available on the Extranet.

- D 3.** In "areas NC" the time limit for responding to occupation feasibility analysis requests is reduced from 15 to 10 calendar days for 100% of cases, following the process currently set out in the RDAO.
- D 4.** In the event of non-compliance with the time limits established in **D 1**, compensation will be applicable for each feasibility analysis, paid in favour of the beneficiary, to the value of 50 euros multiplied by the number of days taken to reply (given that in using the Extranet, information on occupation feasibility is obtained in real time). This compensation shall be payable on a quarterly basis to each operator, without prejudice to possible application of mandatory monetary sanctions pursuant to article 116 of Law No. 5/2004 of 10 February.

With regard to the provision of information on the Extranet, Sonaecom and APRITEL (on 05.09.2008 and 17.07.2008 respectively), advocated the inclusion of the following items (with identification, in each case, of unused cables and their dates of installation):

- (a) Usable space per section;
- (b) Space used by the concessionaire;
- (c) Space reserved for the concession (with start date of reservation);
- (d) Space used for the companies of Grupo PT (non-concession);
- (e) Space used by third parties.

It is noted that the reservation of space by PTC for its own future use for the provision of concession services has already been established in the RDAO since its entry into force, whereby PTC is bound to provide ICP-ANACOM with the reasoning for such reservation.

Therefore, taking into account the arguments presented by ICP-ANACOM in the report attached to the present decision, such detail of information is deemed to be excessive. As such, for the purposes of feasibility analysis and the installation of beneficiary cables and for the promotion of situations of transparency, it is only relevant to know the profile of the duct, the diameter of the duct sections and information on the occupation of duct sections (in %) based on a system of levels (intervals) of occupation, accounting for the space already reserved for future use.

- D 5.** The information to be made available on the Extranet consists of information that PTC proposes to introduce, including the following by obligation:

- (a) profile of the duct (with the representation of the formation of tubes between adjacent IC), allowing indication of the tubes to be occupied;
- (b) information on the occupation of duct sections, based on a system with at least four levels (intervals) of occupation (in %);
- (c) information on the clearance diameter in cm, of the duct sections corresponding to the entirety of the duct section.

PTC must submit to ICP-ANACOM, no later than thirty days following notification of the present determination, detailed information on how the level of occupation is determined in each section.

From the time and in the areas in which the information referred to in D 5 is available on the Extranet, the service of analyzing the feasibility of duct occupancy will no longer make sense in its existing form. For these areas, after checking whether there or not there is space available²⁰, the beneficiary must immediately make an installation request, as set out in the RDAO²¹, and may subsequently (after scheduling with PTC pursuant to the RDAO) install²² cables (following a rule of upward occupation of tubes) preferably in an occupied tube, provided there is space available, to ensure efficient management of the occupation of the ducts; as such, with the elimination of the feasibility analysis service, the time taken until installation is reduced by fifteen calendar days.

Accordingly:

D 6. In the areas where information is available on the occupation of ducts (see **D 1**), after checking whether or not there is space available, the beneficiary must immediately make a request for installation, as set out in the RDAO, and may subsequently (after scheduling with PTC pursuant to the RDAO) install its cable following a rule of upward occupation of tubes and giving priority to tubes which are already occupied, provided that there is space available.

In this regard, ZON suggested that the RDAO should enable the beneficiary to request that installation be performed simultaneously with the feasibility request, which would enable the immediate scheduling of installation. With the present elimination of the feasibility analysis process (in "areas C"), this question is rendered irrelevant.

²⁰ Of course, the criteria for assessing the existence of space, as defined in Annex 2 of the RDAO, is maintained, as are the rules concerning the reservation of space for maintenance and repair operations and the reservation of space for currently provisioned future use.

²¹ Under the terms of RDAO, PTC responds to requests for the installation of beneficiaries within 5 working days, with the beginning of the work scheduled between the seventh working day and the fifteenth working day following receipt of the request. The beneficiary has a maximum period of 30 calendar days to implement the request for installation.

²² According to the procedures and technical instructions for the installation of cables in ducts listed in Annex 7 of the RDAO.

In the following sections, any reference to the duct occupation feasibility service refers to the areas or the time period in which this applies, as determined in D 1.

2.2.1. Errors in the results of feasibility analyses

A request for occupation feasibility analysis of PTC's ducts, as submitted by an RDAO beneficiary, may contain one or more duct sections between inspection chambers, up to a maximum of 20 sections per request (as determined by ICP-ANACOM in the decision to amend the offer, dated 26/05/2006).

PTC is always required to respond to each feasibility request formulated by a beneficiary, which response may be "feasible" or "not feasible". For the response to a request for feasibility to be given as "feasible", it is considered that this happens when occupation with the cables of the beneficiary is deemed feasible in all duct sections (and adjacent IC) comprising the request²³. The response to a request for feasibility is given as "not feasible" when the respective analysis identifies at least one section of the duct comprising the request where occupation by the cables of the beneficiary is not deemed feasible by PTC.

One of the limitations identified by the beneficiaries of the RDAO is that, after PTC has responded positively ("feasible") to a request for the feasibility of occupation by cables (of the beneficiary operator) in their duct, these ducts do not exist or are not located as indicated in the plans. Furthermore, when responses to requests for feasibility indicate alternative routes, beneficiaries have reported that, in several situations, ducts were identified which were not indicated in the initial plans.

In cases where PTC responds positively to a feasibility analysis request and sends the global project to the beneficiary with the details of the route to be occupied by the cables of the beneficiary, but where the beneficiary later reports that, in light of the situation on site, occupation is not possible, which error is due to PTC, it is considered that the beneficiary should not suffer loss (incorrect feasibility is only considered in such cases for reasons attributable to PTC, excluding feasibility which is incorrect because updated record information on the occupation of ducts by any beneficiary has not yet been received - see section 2.6.2). In such cases of incorrect feasibility PTC shall be bound to:

- (a) indicate an alternative route without additional cost to the beneficiary, within the time limit specified in the RDAO, in the event that there are no ducts on the route in question, without the beneficiary being required to submit a new feasibility request;
- (b) remove cables, if the ducts are filled with dead PTC cables preventing feasible installation, according to the time limits specified in the RDAO and at its own expense, and enable the beneficiary to use (occupy) the duct whose occupation was made feasible.

²³ Under the terms of RDAO, this means the existence in the sections concerned, of space for installation of cables indicated in the request, as well as space for maintenance and operation of all cables installed in the sections and space for the planned expansion of PTC's networks.

Furthermore, ICP-ANACOM takes the view that errors in infrastructure records are undesirable, whereby there are grounds to make provision for compensation mechanisms which encourage PTC to ensure that record information is corrected. Accordingly, where error or inaccuracy is attributable to PTC (for example, where it is not due to omission of information by the RDAO beneficiaries), PTC shall be bound to make the payment of compensation whose value shall exceed the daily value applicable in the event of delays in responding to feasibility requests. This is deemed fitting since during the time elapsing between the positive response and verification that this response was incorrect, the beneficiary will have incurred costs as a result of staff travelling to the installation site with their equipment but being unable to immediately carry out the installation works.

- D 7.** In cases where PTC gives a positive response to a feasibility analysis request that proves to be incorrect, or in cases where the information on the Extranet results in incorrect indication of feasibility, except in situations where absence of responsibility can be demonstrated before the beneficiary and ICP-ANACOM, PTC shall introduce in the RDAO the obligation to:
- (a) make payment of compensation of 200 euros to the beneficiary and, cumulatively;
 - (b) indicate a feasible alternative route, at no additional cost to the beneficiary and in accordance with the time limit specified in the RDAO, in the absence of ducts on the route in question, without the beneficiary being required to submit a new application for feasibility request;
 - (b) remove cables within the time limit specified in the RDAO and at its own expense, and enable the beneficiary to use (occupy) the duct whose occupation was thereby made feasible, in the event that the ducts are occupied with dead cables of PTC preventing feasible installation.

Where a negative response is given to a request for an occupation feasibility analysis, PTC is required to demonstrate to the beneficiary the grounds for the non-feasibility of occupation on the duct routes in question, whereas ICP-ANACOM may carry out inspections upon request and where deemed appropriate. In the event that the negative response is proved as incorrect, PTC is bound to pay compensation of 200 euros to the beneficiary, for the losses incurred, especially in preventing the beneficiary from installing the cables on the routes in question more quickly.

Considering that it would be useful to implement a service of joint visits (PTC and beneficiary) to check situations where occupation is not feasible, it is recommended that PTC include a service of joint visits in the RDAO available in cases of negative responses to feasibility analysis requests or otherwise that PTC accompanies negative responses to such requests with photographic evidence.

- D 8.** In the case of negative response to an occupation feasibility analysis request, PTC shall substantiate the non-feasibility of the occupation in the duct sections in question before the beneficiary, whereas ICP-ANACOM may carry out inspections, upon request and where deemed appropriate. In the event that the negative response is proved to be incorrect, PTC is bound to pay compensation of 200 euros to the beneficiary.

2.2.2. Alternative Routes

APRITEL and Sonaecom consider that the limits on the introduction of additional sections to the original route should be removed as follows²⁴: *"The alternative routes should represent the shortest length alternative available to ensure satisfaction of the beneficiary's initial request"* and that the procedure and time limits regarding feasibility requests must be adapted to the availability of registration information on the Extranet.

Also according to APRITEL and Sonaecom, the availability of feasibility information on the Extranet should entail the alteration of the procedure for the definition and presentation of alternative routes, handing over control to the beneficiary. That is, the beneficiary should be able to determine the applicable alternative route, using the same tool used to gauge the feasibility of the original route.

In the present forms in which the feasibility analysis service is provided, which may require the opening of several PTC inspection chambers (IC) to check the cables installed in a given duct section and ascertain the amount of space available for beneficiary cables, it is deemed that the limit of 10 sections on the alternative route over the original route is broad enough to cover most cases and should not therefore be removed.

In areas where information is available on the Extranet about the space available in the ducts, the beneficiary can determine whether its intended route is feasible or seek alternative routes, whereby the very concept of an alternative route no longer makes sense in these areas.

2.3. Scope of RDAO

Sonaecom and APRITEL take the view that the RDAO should cover all types of routes and infrastructure covered by article 26 of Law no. No. 5/2004, including:

- (a) aerial routes (e.g., masts);
- (b) technical chutes, cable paths, ducts or sub-ducts in exchanges to enable the beneficiary's network to be connected directly to the co-located equipment and the installation of their own connections between the distribution frame and the connection point to the beneficiary network;
- (c) IC which are connected to the cable input tunnel in buildings;
- (d) infrastructure providing transition from underground access to aerial wall access (access to extension).

2.3.1. Access to masts

²⁴ See 2nd sentence of the eighth paragraph of page 13 of the RDAO (v2.9).

The report on the public consultation on the regulatory approach to NGA recognized the growing importance of access to masts in the extension of optical fibre to the most remote areas, where there isn't (such an extent of) underground infrastructure. It was considered that access to masts constitutes a strong incentive for operators to invest in their own infrastructure and may contribute to the promotion of greater certainty and predictability in the expansion of the NGA, particularly into these more remote areas, with ultimate benefit for end-users and with a probable reduction in info-exclusion. This position is also in line with Council of Ministers Resolution no. 120/2008.

According to Cabovisão, simultaneously with feasibility requests regarding the use of ducts under the RDAO, as a rule, a request could be sent for use of masts in the same locality and in the context of the same project. According to this beneficiary, it is possible that PTC might comply with the procedures that are required under the RDAO, enabling the use of ducts, while at the same time strategically and opportunistically hindering or delaying use of masts, without which there is no useful effect derived from the feasibility of using ducts.

Furthermore, ZON reports that, since June 2008²⁵, it has only managed to gain access to 1% of the masts it has requested from PTC.

ICP-ANACOM has decided, in the past²⁶ not to include the conditions of access to posts and masts in the RDAO, since there had been no reports of the problems which have been identified in relation to access to ducts and associated infrastructure.

However, given more recent claims by alternative operators of difficulties with regard to both the procedures and to prices and proposed levels of service, ICP-ANACOM considers that the provision of access to masts, to which PTC is subject under article 26 of Law no. 5/2004²⁷ requires more rigorous monitoring, taking on greater structure (compared to the commercial offer) and encompassing aspects normally included in the reference offers regulated by ICP-ANACOM, which may intervene if the terms offered are not the most appropriate.

Accordingly:

D 9. PTC shall publish, within 30 working days of notification of the present determination, a masts access reference offer, including all applicable procedural, technical and economic conditions, specifically with respect to the installation of cables, and considering the general principles adopted in the RDAO. The detailed reasoning therefor must be submitted to ICP-ANACOM within the same time limit, giving grounds for any deviation from the provisions of the RDAO.

²⁵ And until the end of that year.

²⁶ For example, in determination of 17.07.2004, available at [Offer for access to the PTC concessionaire ducts \(consultation report and decision\)](#).

²⁷ According to which "*the concessionaire of the telecommunications public service shall, by agreement, provide undertakings providing publicly available electronic communications networks and services with access to ... masts.*"

2.3.2. Access to technical chutes within the exchanges of PTC

With respect to the use of technical chutes inside the exchanges of PTC, given the nature and location of these infrastructure elements, the view is taken that respective conditions should be laid down pursuant to the RUO (as has already been effected in the decision of 17.02.2010 on amendments to the RUO) and not within the scope of the RDAO. In this respect it is deemed fitting that²⁸ beneficiaries are able to extend their cables, using for this purpose the chutes installed by PTC, whereas it is deemed excessive to grant beneficiaries the right to install chutes inside the exchange, notwithstanding any agreements made between the Parties on this matter.

2.3.3. Access to multi-operator IC

The RDAO, as currently in force, sets out that *"The following infrastructure is not deemed eligible in the context of the PT RDAO:*

- (a) Cable access tunnels to the PTC exchanges;*
- (b) Multi-operator IC, provided in the context of the signal transport service associated with the RUO/RIO/"Rede ADSL PT" offers;*
- (c) Ducts and associated infrastructure which are the property of third parties and which are not managed by PTC."*

Firstly, the position is taken that multi-operator IC should not be used in the context of the RDAO, since these were built specifically for use by the beneficiaries of other offers who have contributed equally to their construction. Furthermore, PTC's exchange buildings should not be considered an exception to the other buildings, but in line with the infrastructure listed in Annex 1 of the RDAO (which includes the IC providing access to buildings and the extension providing access to buildings), by which it is deemed that the IC of PTC providing access to buildings and the extension providing access to this buildings should be included within the scope of the RDAO.

It is also noted that the signal transport service currently provided pursuant to the RUO²⁹ was defined before the RDAO was operational, whereby there are presently no grounds for restricting access to the exchange buildings pursuant to this offer.

Furthermore, in the report on the public consultation held on the regulatory approach to NGA, ICP-ANACOM argued that entry of optical fibre cables into the exchange cable access tunnels, as already provided for in the RDAO, should be effected by the alternative operators (i.e., by technicians accredited by PTC). In this context, in the decision on amendments to the RUO adopted on 17.02.2010³⁰, ICP-ANACOM stated that PTC should eliminate any

²⁸ See decision of ICP-ANACOM of 17.02.2010 on amendments to the RUO.

²⁹ See [Alterations to the RUO \(draft decision\)](#) .

³⁰ See [Amendments to the RUO](#) .

restrictions on the installation of operator optical fibre cables in the cable access tunnels of PTC exchanges.

Accordingly:

D 10. Reference to ineligibility of the cable access tunnels of PTC exchanges should be deleted from the RDAO, and the IC of PTC providing access to exchange building and the access extension to this building should be included within the scope of the RDAO accordingly.

2.3.4. Access to infrastructure providing transition from underground access to aerial access

Notwithstanding the recognition that the infrastructure providing transition from underground access to aerial access is of limited capacity, ICP-ANACOM takes the position that provision should be made for access to PTC riser tubes wherever capacity is available, ensuring whenever possible the continuity of a given route through access to the access extension of mast riser tubes.

To this end, in the RDAO and/or in the reference masts access offer, PTC is bound to make provision for a common feasibility analysis service for access to ducts and masts.

In any case, in order to make provision for situations where it is not possible to access PTC riser tubes, ICP-ANACOM takes the view that it is important that beneficiaries be assured, at a minimum, access comprising transition from the duct to aerial access (in riser tubes constructed by the beneficiaries on PTC masts), without which there cannot be any real continuity in their networks; as such, PTC is bound, in its reference masts access offer, to set out the operating procedures and technical standards which beneficiaries will be required to observe in the construction of riser tubes on PTC masts.

D 11. PTC shall establish the conditions applying to the transition from underground access to aerial access (masts) using riser tubes, and shall specifically:

- (a) provide access to PTC riser tubes, whenever these have available capacity;
- (b) define, in the reference masts access offer, the operating procedures and technical standards which beneficiaries are bound to observe in the construction of the rise tubes on the masts of PTC
- (c) include in the RDAO, a service of access to the access extensions of mast riser tubes, whenever a beneficiary requires transition from ducts to masts (both for PTC riser tubes and for riser tubes of beneficiaries on the masts of PTC);
- (d) include in the RDAO and/or in the reference masts access offer, a common feasibility analysis service for access to ducts and masts.

2.4. Information on ducts and associated infrastructure of PTC

2.4.1. Automatic printing of plans by beneficiaries

According to ZON, access to information on ducts - i.e., the service of providing plans through the Extranet - is dependent on the intervention of PTC personnel and does not allow RDAO beneficiaries to print out plans with the location of ducts automatically when consulting them.

Regarding the possibility that a beneficiary might directly print out the plans which it requires, the current procedure sets out that the beneficiary needs to confirm generation of the plans and is only able to collect the plan later (after one working day³¹). In fact, according to the RDAO, the service of access to information via the Extranet allows beneficiary users to view a map on a national scale, select different plans and access them in PDF format, whereas according to the Extranet user manual, the PDF files are only processed following confirmation of the user's generation of the plan. The plans are thereby provided with a scale of 1:1000 and are made available in each beneficiary's area within a target period of one working day.

In this respect, the issue arises of compromise between efficiency in the handling and use of information and its confidentiality and ownership. The position is taken that since there is not a period of one working day between the identification of the route by the beneficiary and the time at which this information is made available for printing, it can be affirmed that the process is inefficient. This procedure could give greater control of (the confidentiality of) information that is owned by PTC on the route that is the object of interest of the beneficiary (with a view to the potential deployment of optical fibre cables), provided that it is ensured that PTC does not use this information for its own benefit. Nevertheless, PTC is required to inform ICP-ANACOM on the activities which it undertakes and the respective reference times between the time when the plans are generated by the user and when the files are available in each beneficiary's area. Provision must also be made for daily compensation applicable for each additional day that these plans remain unavailable, in line with the compensation available for requests for information submitted using forms and the provision of plans in PDF format by e-mail.

It is noted that the service of access to information on ducts (plans), using forms sent by email, was discontinued on 1/11/2008. Nevertheless, the position is taken that, on an exceptional basis, this service should be used when there are technical problems affecting the Extranet. For all remaining situations, especially for requests made through the Extranet, no reasons are found as to why the information should not be made available within one working day - see section 2.14.1.

It is noted that, in response to the draft decision, as regards the justification of the internal processes associated with the provision of plans, PTC reported that it was working to improve the Extranet's level of automation, noting that the implementation of these improvements is expected in the short term; as such, PTC is requested to give details about

³¹ It is noted that since RDAO version v3.0 of 05.03.2010, PTC has unilaterally altered this time limit in the Extranet manual to 5 working days, which is not accepted as shall be seen below.

these developments and their impact with respect to the possibility of printing put plans automatically and immediately upon their consultation.

- D 12.** PTC shall introduce into the RDAO daily compensation of 50 euros for each additional day that the generated plans remain unavailable.
- D 13.** With a view to more detailed analysis, PTC is required to notify ICP-ANACOM within 30 working days following notification of the present determination as to the developments that it is implementing in order to improve the level of automation of the Extranet and the date indicated for their implementation, identifying the impact that such developments will have in terms of the possibility of printing plans automatically and immediately upon their consultation, and detailing possible "*off-line*" interventions which might affect this procedure.

Mapping data in vector format

According to Sonaecom and APRITEL, the Extranet allows RDAO beneficiaries to obtain maps in PDF format but does not allow them to obtain mapping information in vector format (*shape file*) to which PTC has access.

As in the previous case, the question also arises in this respect as to a compromise between efficiency in handling and use of information and the confidentiality and ownership of such information. In fact, from a strictly technical point of view, no reasons are found as to why mapping information cannot be made available in vector format from the outset (instead of PDF format as currently available), whereas the use of mapping data in vector format (as for example *shape file*) allows editing, verification and correction of vector objects, giving this map a level of accuracy and timeliness which is far superior to the maps available only in PDF format, and it also makes it easier to update records.

Accordingly, in line with the position outlined in the previous paragraph, it is deemed that:

- D 14.** With a view to more detailed analysis, PTC is required to notify ICP-ANACOM within 30 working days following notification of the present determination as to the reasons why mapping data is not made available in vector format.

2.5. RDAO IS

According to ZON, the Extranet should not be just a means of obtaining plans, but first and foremost it should constitute a favoured vehicle of communication – a "one stop shop" for transactions between PTC and RDAO beneficiaries. As such, the Extranet would enable the introduction of access feasibility, installation and intervention requests using uploadable forms, the provision of responses and scheduling of interventions without prejudice to the possibility of contact with the areas of client management, sales service and operator call centre.

In this regard, in response to public consultation on the regulatory approach to NGA, PTC acknowledged the possibility of enhancing the automatic exchange of information with operators (such as under the RUO), requiring their involvement. In a presentation³² on the subject, PTC reported that the development of this system was scheduled for the first half of 2009.

In the report on this public consultation, ICP-ANACOM agreed that it would be advantageous to reduce, as far as possible, the level of complexity and manual intervention involved in operational procedures underlying the wholesale reference offers. This Authority considered that an "Information System (RDAO IS)" could be developed, possibly along the lines of the RUO IS or as an extension to the Extranet, which would enable the automatic processing of operator requests (and responses from PTC), automating and streamlining procedures for information, feasibility and urgent and non-urgent intervention requests. As such, it falls to PTC, together with the beneficiary operators, to discuss and implement an information system which is more efficient and suited to their needs, as has occurred with respect to the other reference offers. If no agreement is reached on the specific aspects of technical implementation within a reasonable period of time, ICP-ANACOM may intervene. Also in this case, beneficiaries should seek maximum efficiency, since they are an active part of the process (and have responsibility in many of the activities and interactions involved).

In fact, the view is taken that a solution that would promote a move towards equivalence of access to information entails the implementation of an information system (RDAO IS), possibly similar to the RUO IS (as PTC stated in the context of the consultation on NGA) or an extension to the Extranet (as proposed by Sonaecom under the same consultation). As such, the RDAO IS would enable the automatic processing of operator requests (and responses from PTC), automating and streamlining procedures for information, feasibility and installation requests and scheduling of interventions in ducts and the provision of responses to such requests by PTC. The implementation of this system, with reduced response times would represent a move towards equivalence of access, even if PTC itself does not use the system, since the results would be substantially equivalent.

As such, any gains with respect to the streamlining of bureaucracy/process automation will be passed on to the operators, if possible also in the form of reducing response times to requests for information, feasibility, installation or intervention scheduling. Ultimately, this will benefit the consumer, who will be able to access the services supported by such infrastructure more quickly.

In any case, it is noted that PTC reported to ICP-ANACOM that it has had electronic interfaces available since 06.03.2010, based on structured files for transferring requests and responses associated with the feasibility analysis, access and installation and record services. It also reported that it had put a four month transition period in place of, during which period these interfaces will coexist with the current forms; subsequently this period was extended further (as provided for in the RDAO v3.1 of 07/05/2010).

The view is taken that the availability of the interfaces referred to above is useful in order to optimize and automate RDAO procedures (feasibility analysis, installation and records),

³² See http://www.cullen-international.com/cullen/cipublic/presentations/5_jorge_duct_sharing_offer.pdf.

making them more streamlined and enhancing their efficiency, which cannot be achieved using paper forms.

Furthermore, it is considered that there might be cooperation at this point in order to improve the system developed by PTC, whereby it is recommended that PTC consider any suggestions which have been addressed to it by APRITEL or individually by the RDAO beneficiaries, within a period of two months following notification of the present determination.

Accordingly:

D 15. ICP-ANACOM recommends that PTC consider any suggestions which are addressed to it by APRITEL or individually by the RDAO beneficiaries regarding the RDAO IS, and, where it does not accept such suggestions, respond to such effect, with its reasoning, to the entity concerned and with notification to ICP-ANACOM. Such suggestions must be sent within a period of two months following notification of the determination.

2.6. Record information to be submitted by the beneficiary

2.6.1. Recommendation for the formulation of record information

Under the terms of RDAO, on concluding the installation (or) intervention (or) removal (or) diversion of routes by the beneficiary, the beneficiary sends an updated record of the occupation to PTC within thirty days.

According to Annex 3 of the RDAO, the occupation record must include plans with the ducts sections, length of duct sections, inspection chambers, building access extensions, points of entry and exit, schemes of mirrors in inspection chambers, type and number of installed cables, section of cables installed, start date of occupation, length in meters of ducts and sub-ducts, material used and excess cable. This record information is submitted using RDAO form 4.6, known as the occupation record form, which must be accompanied by plans showing route information

On this matter, PTC has formulated a "*Recommendation for the formulation of record information under the RDAO PT offer*", whose instructions ZON considered to be equivocal in nature insofar as it makes reference to binding procedures for RDAO beneficiaries.

ICP-ANACOM does not consider that this recommendation on the formulation of record information (of which it was informed though ZON) forms part of the RDAO, considering that it is not binding for the beneficiaries. Nevertheless, it takes the view that the recommendation is useful in providing for greater precision in the aspects related to duct occupation by the operators, contributing to better identification of the elements involved, including cable routes, connection points, entry points and excess cable, and, as such, benefits from the representation of holes and operators cables in the mirrors of inspection chambers.

Therefore, it is important that PTC and the RDAO beneficiaries are able to compile and identify the same type of information during the installation, intervention or removal of cables in ducts, whereas the rules (recommended by PTC) for the presentation of information on cable routes, connection points, entry points, excess cable, holes and cables in the mirrors of inspection chambers, provides for even greater efficiency and transparency if included in the database on the ducts currently available through Extranet access.

2.6.2. Deadline for updating the register

As mentioned in the previous section, subsequent to intervention (affecting the record) by an RDAO beneficiary in the ducts of PTC, the beneficiary is obliged to send to PTC, within 30 calendar days, updated duct occupation record information, whereas ICP-ANACOM may develop measures which encourage such transmission if it sees that this procedure is not being followed.

In this context, PTC, as manager of the Extranet, upon receiving updated duct occupation information from beneficiaries, must enter this information in the Extranet, whereas it is considered proportionate and useful to establish a period of 10 days to perform the respective update. There are no grounds for imposing compensation in this case, since compensation is already applicable in the case of erroneous feasibility information.

D 16. PTC shall introduce into the RDAO a target of 10 working days, following receipt of information of beneficiaries, with respect to updating duct occupation record information on the Extranet, which target shall be applicable to 100% of cases.

2.7. List of refusals to grant passage of new cables for technical reasons

APRITEL and Sonaecom consider that the RDAO should include a list of properly characterized refusals, which PTC may present in response to a request from a beneficiary. In particular, these companies argue that restrictions on the passage of new cables, due to the physical characteristics thereof, should be based on the form of specification³³ of the type of cable that may be used.

ICP-ANACOM takes the position that the specification on the type of cable that can be used and any restrictions on the passage of new cables due to their physical characteristics may be added to Annex 7 of the RDAO - which consists of a manual of procedures and technical specifications. In this context, the parties are encouraged to negotiate these specifications, whereas ICP-ANACOM may intervene at a later stage, if justified and in the light of any specific situations presented to it by the beneficiaries and/or by PTC. However, some situations can only be identified on a case-by-case basis, and it is not possible, from the outset, to foresee all cases that could jeopardize network integrity.

It is noted that the RDAO already contains some restrictions³⁴ noting that:

- (a) constitution or casing of the cables to be installed, together with the type of installation (e.g., cables with outer tensor or rough casing that could act as an abrasive, to be installed directly in occupied ducts) might cause damage to existing cables;
- (b) cables that are intended, even partially, to carry electrical power (tele-power) and which lack adequate protection may jeopardize network integrity.

³³ To which, they argue, should be carried out taking as a starting point the characteristics of the cables already installed, and subject to negotiation with the parties.

³⁴ See page 15 of the body of the RDAO.

2.8. Feasibility of connecting new PTC access points (AP)

APRITEL and Sonaecom consider that express guarantee should be provided in the RDAO, in all cases, of the feasibility of beneficiary requests for connection to new AP of PTC from exchanges which comprise originally relocated loops.

In practice, there are two different situations:

- (a) situations where it is necessary to construct entirely new ducts and associated infrastructure to access the new AP - this situation, and the reservation of space for the real needs of beneficiaries, is already established in the RDAO³⁵;
- (b) situations where access to the new AP is performed wholly or partially, through existing ducts and associated infrastructure - in this case, feasibility cannot be guaranteed from the outset and should be evaluated on a case by case basis, given the existing conditions in terms of available space.

In the report of the public consultation on the regulatory approach to NGA, ICP-ANACOM set out the position that, where PTC decides to install new street cabinets or AP, it should, with reasonable notice, send RUO beneficiaries relevant information for the assessment of economic viability, such as the location of the AP or street cabinet, the number of loops to relocate and the respective numbering and coverage area. If there is firm intent on the part of operators to move towards a solution similar to that of PTC (FTTCab or sub-loop unbundling), PTC shall be bound to give due regard to the interest expressed.

Subsequently, in the decision of 17/02/2010, on amendments to the RUO³⁶, ICP-ANACOM argued that *"Where there are firm intentions on the part of the operators to co-locate in a new AP, PT shall take the interest expressed into full account when scaling the AP, including in the design of any new ducts (guaranteeing at all times, the provision of dark fibre in the event that there is no space in the duct)."* This situation is therefore dealt with in this context.

2.9. Relationship with local authorities regarding the installation of cables/unblocking of ducts

Sometimes a request for feasibility submitted to PTC, which has obtained a positive response cannot be matched by the beneficiary (i.e. with a request for installation) for reasons related to the untimely issue of local authority licensing. This delay makes a new deferred feasibility request necessary, thereby causing the operator financial loss and loss in terms of time.

It is recalled that under the RDAO, the time limit for the beneficiary to execute a request for the installation of cables in ducts (to which PTC has given feasibility) is 60 days, whereas in the situations outlined above, it may be that there are various feasibility requests referring to the same installation.

³⁵ See pages 21-24 of the body of the RDAO.

³⁶ See [Amendments to the RUO](#) .

Regarding this matter, ICP-ANACOM takes the view that, since it falls to the beneficiary to submit the request to the local authority³⁷, the beneficiary is responsible for the higher / lower speed with which it submits the request and performs any steps/follow up in order to obtain a response, and in this respect it is noted that, save some exceptions, the installation and operation of the infrastructure of companies which offer electronic communications networks and services remains subject to the prior notification procedure laid down in article 3 and 36 of the local authority licensing scheme - see article 19, paragraph 6, of Law no. 5/2004 of 10 February and article 7 of Decree-Law no. 123/2009.

On the other hand, according to RDAO beneficiaries, whenever they need to undertake a clearance operation, PTC has to submit an authorization request to the local authority, which, according to these beneficiaries, may cause delays and give rise to considerable costs, in contrast to what happens in the case of works initiated by PTC (subject to *ex-post* notification). As such, APRITEL and Sonaecom consider that the RDAO should provide for a time limit of 3 working days for the delivery of processes to municipalities, regardless of the situation whereby this is required.

With regard to clearance operations, it is clarified that under the terms of paragraph 1 of article 7 of Decree-Law no. 123/2009 of 21 May, works to undertake clearances are exempted from the requirement of local authority prior notification, whereas, under the terms of paragraph 2 of the same article, the local authority must be notified on the following working day as to the execution of works.

In this context, there is no need to define a deadline for the delivery of clearance processes to local authorities.

2.10. Extension of reservation period

According to the current process, the beneficiary may submit a request for access and installation in ducts only after receiving a positive response to their feasibility analysis request (within not more than 60 days following PTC's submission of its response to the feasibility analysis request); this means that in practice there is a 60 day reservation period.

At the outset, except in exceptional situations (e.g., where there are difficulties in obtaining local authority licenses or permits), no reasons are found whereby, after the expression of firm interest (definite feasibility analysis request) the beneficiary may not commence installation works with the speed inherent to a period of 60 days. Should situations of force majeure arise (which it is accepted will be occasional), as a last resort, a new feasibility request can be lodged.

On the other hand, since it is the beneficiary's responsibility to submit the request to the local authority, the beneficiary is responsible for the speed with which it submits the request and for the steps/follow up undertaken with a view to obtaining an answer; the view is therefore taken that the licensing period should not be deducted from the reservation period. In the event that it is found that the time taken by local authorities to respond to requests is

³⁷ As stated in the RDAO (page 9), "All licenses required to operate on public highways should be requested from the competent bodies by the Beneficiary and prior to access and installation".

repeatedly incompatible with the "reservation period" of 60 days, ICP-ANACOM may intervene.

2.11. Supervision of interventions (urgent and non-urgent) and installations

ZON informed ICP-ANACOM of the following limitations on the scheduling and supervision of interventions:

- (a) Failure by PTC to communicate, in a timely manner, the availability of technicians for supervision, giving notice only on the actual day of installation, and in some cases, after the date of installation.
- (b) Lack of knowledge on the part of the PTC technician with regard to the intervention work to be carried out by the beneficiary.
- (c) PTC billing beneficiaries for intervention supervision service in cases where PTC chooses not to schedule this supervision.

According to ZON, while limitations (a) and (b) do not cause harm to the beneficiaries, limitation (c) appears unacceptable, since it refers to the billing by PTC in respect of a service not actually rendered.

Sonaecom and APRITEL consider that the period for "*scheduling passage of cable on the chosen route*" should be eliminated, insofar as interventions are the sole responsibility of the beneficiary and are performed by approved staff (according to the methodology and criteria established by PTC).

APRITEL and Sonaecom consider that the prices applicable to the monitoring/supervision of the work of the beneficiaries should be eliminated, unless the service is specifically requested by the beneficiary.

With respect to these last proposals, it is noted that PTC's supervision is the logical consequence and a necessary safeguard given the ability of beneficiaries to carry out installations and interventions in ducts and associated infrastructure of PTC. This supervision service is important, while not essential in all cases (it is for PTC to decide whether or not to supervise the work, from a standpoint of reasonableness and non-discrimination), in a context where the beneficiaries are responsible for the installation of their own cables. In this case, the costs of supervision stem from the activities of beneficiaries themselves and should be recoverable by PTC. Therefore, the elimination of the current price applicable to PTC's supervision service with regard to the work of the beneficiaries is not justified.

Nevertheless, it can evidently be agreed, as put forward by ZON that, where PTC chooses not to supervise the intervention/installation of the beneficiary or while opting for supervision, does not perform the service as scheduled, in such cases PTC should not charge for the supervision service, which in fact was not rendered.

In terms of the time limits for scheduling interventions (urgent and non-urgent) and compensation for non-fulfilment of these limits, this matter will be discussed in sections 2.14.3 and 2.15.2 of this document.

D 17. PTC shall not charge for the intervention/installation supervision service in cases where PTC chooses not to carry out such service or, where choosing to do so, does not appear as scheduled.

Nevertheless, in the event that supervision by PTC has been scheduled with regard to intervention/installation operations to be carried out by the beneficiary, but the technician(s) of PTC fail to appear at the appointed time and location, in such cases the beneficiary may proceed with the work in question (where there is no impediment arising from the non-appearance of PTC's technician), whereas it is recommended that the beneficiary's technician contact PTC in advance.

D 18. In the event that supervision by PTC has been scheduled with regard to intervention/installation operations to be carried out by the beneficiary, but the technician(s) of PTC do not appear at the time and at the location as scheduled, the beneficiary may proceed with the work in question (where there is no impediment arising from the non-appearance of PTC's technician), whereas it is recommended that the beneficiary's technician contact PTC in advance.

2.12. Unblocking of ducts

2.12.1. Procedure applicable to the clearance of obstructions

According to ZON, provision should be made for an SLA governing the execution of works to clear duct obstructions, with a time limit for their conclusion, counted from the date of acceptance by the beneficiary of the quotation (or, alternatively, the beneficiary must choose to carry out the clearance work).

On occasions, following a positive response by PTC to an occupation feasibility request, the duct (or duct section) in question is found to be obstructed (i.e. with physical obstacles to the passage of cables). In such cases, provision is made in the RDAO that the beneficiary informs PTC as to the situation and requests clearance of the obstruction (via a clearance application form). Presently, provided that clearance is feasible, under the terms of the RDAO, PTC shall send the beneficiary a quotation for the completion of the clearance work within ten working days, together with the proposed deadline for the execution of these works.

Given that quotations for the clearance of blockages are prepared on a case-by-case basis, and since the deadline for completion of works is indicative, albeit an important reference, ICP-ANACOM deems that is not acceptable to define an SLA and respective compensation. This situation has also occurred, for example, in the case of constraint resolutions under the RUO. Moreover, according to data with reference to the first half of 2010, the number of responses to requests for clearance of obstructions is very low.

It is further reported that, pursuant to paragraph 1 of article 7 of Decree-Law no. 123/2009 of 21 May, works to clear obstructions are exempted from the local authority prior notification scheme, and in these cases (under paragraph 2 of the same article), *"the company may notify the local authority as to the execution of works on the following working day"*.

Nevertheless, ICP-ANACOM takes the view that the deadline for PTC to send the beneficiary the quotation for the clearance of obstructions should be set out in an SLA and be subject to compensation for non-compliance, which issue is addressed in points D 24 and D 27.

Finally, it is considered that access concession infrastructure for the installation of cables requires skills which differ from those required for the clearance of this infrastructure, whereby the beneficiary should not be permitted to carry out clearance works. Moreover, the maintenance of ducts remains the specific responsibility of the concessionaire.

2.12.2. Costs of obstruction clearance

According to APRITEL and Sonaecom, the cost of obstruction clearance should be shared by all users of the route involved (including PTC), whereas PTC should be solely responsible when the obstruction results from lack of maintenance or force majeure.

As stated in ICP-ANACOM decision of 26.05.2006 on amendments to the RDAO, the opening of a duct section is not exclusively in the interests of one beneficiary, and the beneficiary should not be liable for the entire costs of clearance, considering that, following clearance, the section of duct may subsequently be used by PTC itself and/or other beneficiaries.

In this context, the RDAO already makes provision with respect to the costs of clearance whereby if a section is occupied by a beneficiary, it must pay (1/2) the cost of any obstruction clearance (i.e., PTC incurs 50% and the beneficiary 50%). If the same section is subsequently occupied by another beneficiary, this beneficiary shall pay (1/3) of the cost of clearance, and PTC shall pay the difference back to the first beneficiary ((1/2) - (1/3)) and so on.

2.13. Removal of cables

2.13.1. Use of freed space

According to ZON, when a beneficiary wishes to remove a cable and install another (replacing the first), there is no guarantee that the space occupied by the cable which is to be removed can be subsequently used by the same beneficiary to accommodate a different cable. It therefore proposes that the installation of another cable (of equal or smaller size than the cable to be removed) could be requested at the same time as the request for removal, with both operations undertaken in a single intervention. If the beneficiary does not wish to install a new cable, ZON proposes to allow a transfer of space in the duct in favour of another beneficiary, in duly substantiated specific cases.

In situations where the beneficiary intends to remove copper pair or coaxial cables (which may have relatively large diameters) and replace them with optical fibre cables (with smaller diameters), no reason is found that would not enable the space occupied by the cable that is removed to be used by the same beneficiary for the installation of a new cable. Furthermore, PTC shall do likewise.

Therefore, the position is taken that a new field should be added to the form used to request removal of cables, enabling the beneficiary to inform PTC whether they want to use the space

occupied by the cables to be removed for subsequent installation, within a maximum of 60 days, whereby PTC shall ensure that the area will not be used by itself or by other beneficiaries during that period.

It is considered however that the rule proposed by ZON with regard to transferring space in favour of another beneficiary (if the beneficiary who removed the cable does not intend to install a new cable in the space made available) could constitute a restriction of competition and is therefore unacceptable. Therefore, if the recipient does not intend to use the space which is made available by the removal, it is deemed that this space should be used, as now, by other operators on a first come, first served basis, with the whole process managed by PTC and not by the beneficiary.

D 19. PTC shall add a new field to the form used to request removal of cables, enabling the beneficiary to indicate to PTC as to whether they intend to use the space occupied by the cables to be removed for subsequent installation within a maximum of 60 days, whereby PTC shall ensure that the area will not be used by itself or by other beneficiaries during that period.

2.13.2. Joint interventions by beneficiaries for detecting dead cables situations

APRITEL and Sonaecom consider that a process of joint interventions should be implemented in order to detect dead cable situations, with scheduling deadlines which are identical to those applicable to obstruction clearance (5 working days).

According to the RDAO, both PTC and the beneficiary may identify dead (or obsolete) cables. However, unclear situations may arise, in which case it is appropriate to implement a process of joint interventions. It is noted that a process of joint interventions has been agreed between the beneficiaries under the RUO.

This is therefore a matter which should be agreed between the parties in the first instance, whereas there may be grounds for the subsequent intervention of this Authority in the event that there is no agreement and if the number of cases in dispute is such that the efficient implementation of the offer is undermined.

2.14. Quality of service indicators

APRITEL and Sonaecom consider that all services should have an associated SLA, and that all SLA should have provision for compensation in the event of non-compliance.

ICP-ANACOM considers that if the service provided under the RDAO corresponds to a response from PTC to a request by the beneficiary regarding a process over which PTC has complete control, the SLA must be assigned a target deadline for the time taken to provide that response. Failure to meet deadlines must be subject to compensation which acts as a deterrent and encourages compliance.

Furthermore, the definition of SLA which are appropriate to the processes of the RDAO, adapted to the existence of an Extranet is a principle advocated by ICP-ANACOM, which considers that it is beneficial in this context to create an RDAO IS with the definition of SLA adapted to this tool.

In this context, seen below, it is deemed necessary to define two new QSP in the RDAO (QSP6 and QSP7) respectively for the time taken to respond to requests for installation and the time taken to submit clearance quotations.

Nevertheless, to address any future cases, the general decision is included as follows:

D 20. In the RDAO, any service involving a response by PTC to a request by a beneficiary on a process which is fully controlled by PTC should be associated with a target deadline for said response time and compensation established for failure to comply therewith.

2.14.1. Time taken to respond to requests for information on ducts (QSP1)

In light of section 2.4.1, and taking into account that this service is now exclusively provided through the RDAO Extranet, and notwithstanding the analysis that will be performed with respect to point D.13, the target time limit applicable to the provision by PTC of information on PTC ducts (i.e. PDF files containing plans requested by the beneficiaries of the RDAO) is amended to 1 working day.

D 21. PTC shall amend the RDAO to establish the time taken to respond to requests for information at 1 working day, for 100% of cases.

2.14.2. Time limit applicable to responses to occupation feasibility analysis requests (QSP2)

Over time, with information about the occupation of ducts provided over the Extranet, the service of responding to feasibility analysis requests, as it presently exists, will apply only in "areas NC", and hence have a smaller scope. In this context, the proposal to establish deadlines for responding to requests for feasibility analysis differentiated according to the number of requests made does not appear reasonable. With respect to the review of the time limits applicable to responses occupation feasibility analysis requests and the reasons therefor, see section 2.2.

2.14.3. Time limit applicable to the scheduling of supervision – non-urgent and urgent (QSP3 and QSP4)

ZON, considers that PTC frequently fails to comply with the time limits currently established in the RDAO for scheduling non-urgent and urgent interventions. This is not compatible with the quality levels required for the provision of electronic communications services, and as such ZON proposes to reduce the target deadline of QSP3 from 24 to 12 hours and QSP4 from 8 to 4 hours.

Regarding non-urgent operations, given the planning required by the beneficiary, a reduction in the target deadlines of QSP3 from 24 to 12 consecutive hours does not appear relevant. Therefore, the time between the beneficiary's request for non-urgent intervention and the scheduling of such intervention should remain with the target time limit of 24 consecutive hours as currently established.

According to the principle of equivalence referred to in the EC Recommendation on access to next generation networks, beneficiary requests should be processed with the same timeliness as equivalent requests made by the services or business of the SMP operator (in the present case, PTC).

In the case of urgent interventions and with a view to the principle of equivalence, it is noted that, under the terms of the RDAO, PTC supervises (or may supervise) interventions by beneficiaries in the ducts (with the consequent need to advance schedule), whereas no supervision by operators is required for interventions by PTC in the same duct. As such, there is an urgent need to introduce an amendment that promotes a better balance between the parties.

Therefore, it is agreed that the time required for scheduling should be reduced, particularly in situations of urgent intervention - currently subject to the target established in the RDAO of 8 consecutive hours - to 4 consecutive hours (note for example that there are services in the LLRO where PTC guarantees re-establishment in 4 hours, whereby, although these terms do not normally apply to 100% of cases, it is not reasonable that the minimum advance notice for intervention/scheduling is longer than repair time) .

Meanwhile, more recently, ZON (which had already proposed the shortening of QSP4 target-time limit to 4 hours) proposed that it be reduced to 1 hour, considering that:

- (a) the time taken for scheduling urgent interventions of 4 hours would clearly be extended, resulting in a degradation of quality of service provided to ZON customers;
- (b) the interruption of services for a period longer than one hour would lead to customer discontent and would be incompatible with the quality of service that ZON aims to provide, especially with regard to the television service;
- (c) in recent months a significant increase has been observed in the number of faults in ZON cables installed under the RDAO.

According to information provided on a quarterly basis by PTC to ICP-ANACOM, the failure to meet QSP4 targets was due to intervention requests by the RDAO beneficiaries³⁸ with respect to scheduling for dates later than those applicable according to the objectives, whereby non-compliance has been reported with respect to quality of service indicators which is not attributable to PTC.

In determination of 11.03.2009 on the levels of performance in the quality of wholesale offers, with respect to the RDAO, ICP-ANACOM considered that where alternative operators request interventions with advance notice exceeding the established time limits, such situations should not be counted in indicators for supervision scheduling (in this case according to ZON, in the accomplished values of QSP4). In the report on the prior hearing approved in the same determination, ICP-ANACOM also noted that to take such situations into account in the indicators would be to *"skew the results and give an image of quality of service provision which may not correspond to reality"*.

³⁸ Notably Sonaecom and ZON.

Therefore, since the alleged occurrences of non-compliance with respect to QSP4 are not attributable to PTC, the previous position is maintained whereby the target-target time limit of QSP4 shall be reduced from 8 to 4 consecutive hours.

D 22. PTC shall amend the RDAO, reducing the deadline for scheduling supervision of urgent intervention (QSP4) from 8 to 4 (consecutive) hours.

2.14.4. Time-limit applicable to the cable installation service (after granting feasibility) (QSP6)

Under the terms of the RDAO, installation requests are submitted by the beneficiary³⁹ (subsequent to a positive response to a feasibility request) with a response given by PTC within 5 working days, which is now established as the target time limit for a new RDAO quality of service parameter - QSP6- so that compliance therewith by PTC can be monitored.

D 23. PTC shall amend the RDAO, establishing the time-limit for responses to requests to install cables in ducts at 5 working days for 100% of cases.

2.14.5. Time-limits applicable to the duct clearance service (QSP7)

APRITEL and Sonaecom proposed that a time-limit of 5 working days should be introduced into the RDAO for the clearance service subsequent to local authority authorization⁴⁰. Furthermore, these entities have proposed the introduction of a time limit of 5 working days for the presentation of quotations for clearance by PTC (in applicable cases).

When a beneficiary operator is faced with an obstruction on a section of duct, it may send PTC a request for clearance⁴¹, whereas, according to the RDAO, PTC has a period of 10 days in which to send a quotation to the beneficiary, along with the deadline applicable to the execution of the clearance works in question, where such clearance is feasible.

However, when PTC itself identifies an obstruction that affects the passage of their cables, it is not clear that they will wait 10 working days to decide on the best way to proceed; rather it is more likely that PTC will go to the site to clear the duct or make immediate use of an alternative route. Therefore, in order to promote greater balance between the parties (and with a view to the principle of equivalence), the position is taken that the deadline for the submission by PTC of quotations for clearance should be reduced. In this context, the position is taken that a period of 5 working days is appropriate for the establishment of a target time limit for QSP7.

³⁹ Through the form - Annex 4_5 of the RDAO.

⁴⁰ It is noted that, under the terms of paragraph 1 of article 7 of Decree-Law no. 123/2009 of 21 May, works undertaken to conclude the clearance of obstructions are exempt from the local authority prior notification scheme, whereas in these cases (pursuant to paragraph 2 of the same article), *“the company shall notify the municipality on the working day following the execution of the works”*.

⁴¹ Using form - RDAO Annex 4_10.

D 24. PTC shall include in the RDAO a quality of service parameter (QSP7) corresponding to the time limit applicable to the sending (by PTC to the beneficiary) of quotations for the clearance of ducts, with a target time limit of 5 working days applicable to 100% of cases.

2.14.6. Publication of reports of levels of quality of service

APRITEL and Sonaecom consider that reports should be published on accomplished levels of quality of service for the RDAO, with respect to Grupo PTC (excluding PTC), PTC and the beneficiaries.

In the determination of 11.03.2009, on the publication of performance levels in the quality of service of the RUO, LLRO, RDAO, "Rede ADSL PT" and WLRO wholesale offers, provision has already been made for the publication of reports on accomplished levels of quality of service and with disaggregated information.

2.15. Compensation for non-compliance

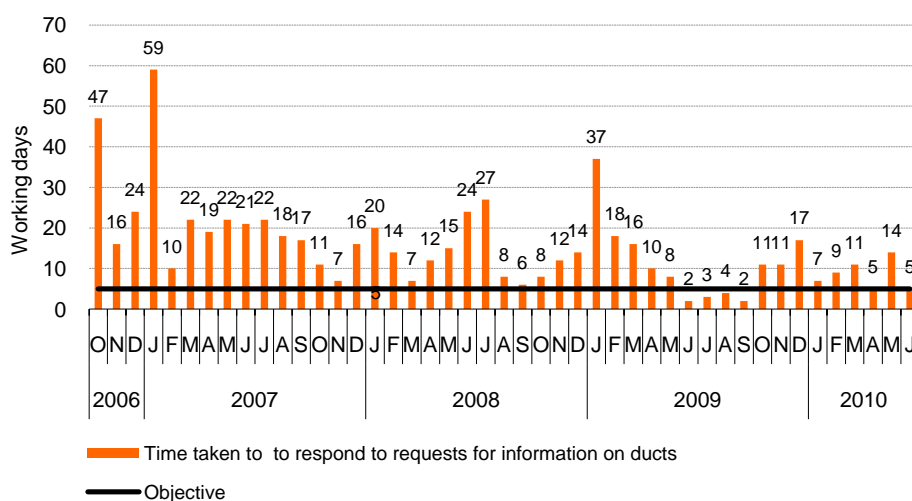
2.15.1. Compensation for failures to comply with time limits for responding to requests for information about ducts and to feasibility analysis requests

ZON proposed that compensation currently applicable in the event of failures to meet time limits for responding to requests for information about ducts and to duct occupation feasibility analysis requests should be adjusted to 100 euros per day, not considering current values as significant.

It is recognized that when requests for information about ducts were made using forms sent by email - in which case the target time limit (maximum obtained for 100% of occurrences) for PTC's response was 5 working days - PTC generally failed to comply with the maximum time limit (see graph 3).

However, with the service of access to information about ducts now provided exclusively using the Extranet, the indicated response time limit is now 1 working day (according to the manual of this Extranet) - see **D 21**.

Graph 3: Evolution in the time limit applicable to responses to requests for information on ducts



So, at this moment, the position is taken that instead of increasing the daily amount of compensation, which is generally already a significant deterrent, the review of the conditions whereby eligibility for compensation is presently made subject to the submission of forecasts is more relevant to compliance with the target time limits by PTC (see section 2.17).

2.15.2. Compensation associated with failure to schedule supervision within the established period, or failure to provide supervision of (urgent/non-urgent) interventions where scheduled

ZON considers that established compensation should be extended to cases where PTC attends with delay with respect to the scheduled time for the supervision of beneficiary interventions, as follows:

- (a) non-urgent operations - 25 euros/hour, up to a limit of 400 euros per occurrence;
- (b) urgent interventions - 50 euros/hour, up to a limit of 250 euros per occurrence.

ZON considers that compensation associated with late attendance by PTC technicians/inspectors with respect to the scheduled time, does not apply if PTC informs the beneficiary that it is unable to attend according to the scheduled time with 6 hours advance notice, indicating, from the outset, the new scheduled date and time. According to ZON, the new scheduled date and time should be no later than two days subsequent to the originally scheduled date and time, in the case of non-urgent operations, and 4 hours in case of urgent interventions. If PTC does not schedule intervention within these limits, ZON proposes that this company should be liable to compensation of 100 euros/day elapsing subsequent to the 2 day limit, in the case of non-urgent operations and 50 euros/hour, after the limit of 4 hours, in case of urgent interventions.

APRITEL and Sonaecom consider that, if the PTC technicians fail to appear, and only in cases where attendance is requested/considered necessary by PTC, compensation should be payable.

Firstly, it must be stressed that, with respect to the determination of 26.05.2006 on amendments to the RDAO, and given the initial state of the offer, ICP-ANACOM decided not to establish penalty values for failure to comply with QSP3 and QSP4, stating that it would monitor the development of the RDAO and establish values subsequently for such compensation in the proper forum.

With the development of the offer, it is important to distinguish between two situations:

- (a) failure to meet deadlines for scheduling supervision of non-urgent (QSP3) and urgent interventions (QSP4);
- (b) late or non-attendance of PTC technicians in the supervision of beneficiary interventions (which were previously scheduled with PTC).

With respect to the deadlines for scheduling supervision of urgent and non-urgent interventions, it is deemed necessary to encourage compliance with the target-deadlines of QSP3 and QSP4 in order to prevent delays, which are harmful (and discriminatory) for beneficiaries.

In this context, the position is taken that:

D 25. In the event of non-compliance with the time limit for scheduling supervision of interventions to be performed by beneficiaries, compensation will be applied at a rate of 25 euros (scheduling of non-urgent interventions) and 50 euros (scheduling of urgent interventions) for each hour of delay.

With respect to late or non-attendance of PTC technicians in the supervision of beneficiary interventions (which were previously scheduled with PTC), as stated in D 18, in the event that supervision by PTC is scheduled in relation to interventions to be performed by the beneficiary, and where on the ground, PTC technicians fail to attend at the scheduled time and place, the beneficiary may proceed to carry out the work in question (provided that there is no impediment arising from the non-attendance of PTC's technician) and in such situation, there shall be no payment with respect to the supervision service (which did not take place) and no compensation payable by PTC.

When PTC staff fail to attend at the scheduled time and place, which non-attendance somehow prevents the beneficiary from carrying out the intervention, it is reasonable that provision be made for the payment of additional compensation, in accordance with the following table. It is noted that the date/time scheduled for the intervention is entered on the intervention request form and is known to the parties who agree on the scheduling in advance.

Type of intervention	Compensation for lack of timely attendance*
Non-urgent	25 euros/hour
Urgent	50 euros/hour

*Only when failure to attend prevents the scheduled intervention from being carried out.

Furthermore, since there is currently no IS support for recording the attendance of PTC (or beneficiary) technicians on site, ICP-ANACOM considers that at present such situations may be recorded using the intervention request form itself, signed by both parties. The absence of

the signature of either of the parties may indicate their non-attendance, whereas it is recommended that the beneficiary contact PTC (within no more than two hours, and preferably while on-site) which can also be an important factor for the verification of non-compliance.

D 26. When failure by PTC staff to attend at the scheduled time and place prevents, in some way, the beneficiary from carrying out the intervention, 25 euros (scheduling of non-urgent operations) and 50 euros (urgent scheduling) of compensation shall be applied for each hour of delay; whereas it is recommended that, within a maximum of two hours following the time of scheduling, the beneficiary shall contact PTC with respect to said non-attendance.

2.15.3. Compensation associated with the time taken to respond to requests for installation and the time taken to respond to requests for clearance

With the introduction of new indicators (QSP6 and QSP7), and in order to encourage compliance for 100% of cases, it is seen as fitting to establish compensation for non-compliance, which compensation should be proportionate and act as a disincentive.

In this context, it is considered that the value of 50 euros per day (as already provided for in the RDAO) fulfils these requirements, encouraging compliance with the target time limits of QSP6 and QSP7.

D 27. In the event of failure to comply with QSP6 or QSP7, compensation will be applied, amounting to 50 euros per day, limited to a maximum of 60 working days.

2.16. Pricing

According to APRITEL and Sonaecom, there is no justification for payment for services related to responses to information requests and feasibility requests, since all users of the RDAO will contribute to the enrichment of the database.

PTC's duct database provided to beneficiaries through the Extranet has until now essentially provided information of a geographical nature (locations of duct routes, building access extensions and inspection chambers), with an annual price charged for access to information concerning specific groups of districts.

However, when the database is inaccessible and requests have to be answered in the old way (i.e. using paper plans), there is no justification for payment by beneficiaries of a price per response to requests for information on ducts, since they already pay an annual price to PTC for access to the Extranet.

With regard to responses to feasibility requests, to date, the database contains no information on the dimensions of ducts and occupied volume, whereby the response to each feasibility request has been charged independently from the database access service.

2.17. Forecast plans

Under the terms of RDAO, to ensure the proper planning and optimization of PTC resources, the beneficiary is bound to submit a duct demand forecast plan by geographical area, covering a period of two years. PTC only considers itself liable to pay compensation for failure to comply with the targets established in the offer where the beneficiary has provided the forecast plans accordingly and where the forecasts are considered accurate, i.e., the actual monthly amounts per area are within 20% of the value provided by the beneficiary.

According to APRITEL and Sonaecom, the submission of forecasts should no longer be a necessary condition for the payment of compensation, since requests for information, feasibility and interventions in PTC ducts no longer require action by PTC (and the cases in which some action by PTC is a necessary condition for the execution of works, these are unrelated to the volume of access requests over a given period).

Furthermore, within the scope of the public consultation on the regulatory approach to NGA, Sonaecom stated that, as with regards to other reference offers, where RDAO beneficiaries submit advance demand forecast plans, PTC is given advance knowledge of the business plans of its competitors, placing it in a privileged position which would enable it to head off the deployment of optical fibre cable by the operators, ensuring that - on the routes in question - PTC itself comes first. In the same context, ZON stated that under the RDAO, there is a difference in treatment between PTC and the other operators, which, in addition to facilitating access of the former, would also imply that PTC has advance knowledge of the expansion plans of its competitors, without the contrary being true.

It is considered that the submission of demand forecast plans was justified at an early stage of the offer, to allow the regulated operator (PTC) to scale its human and material resources so as to adapt its wholesale offer to demand and to satisfy any requests by beneficiaries within the established time limits. However, the RDAO is already in its third year of application (see graphs 1 and 2), whereby it is concluded that, given the resulting knowledge, the current situation, whereby the value of compensation payable for non-compliance with the quality of service parameters under the RDAO is subject to the advance submission of demand forecast plans, requires modification.

ICP-ANACOM also recognizes that submission by beneficiaries of demand forecast plans regarding (access to) ducts, has given PTC significant notice, in advance of the actual deployment of access, of the plans that these operators have for the development of optical fibre networks. This places the operators concerned at a potential disadvantage, which is especially relevant at an early stage in the deployment of next generation access networks.

In this context, having considered the advantages and disadvantages associated with the relationship between the submission of forecasts and the payment of compensation, ICP-ANACOM takes the position that, without prejudice to encouraging the delivery of forecast plans as set forth in the offer, amendment should be made to the provision by which payment of compensation for non-compliance with quality of service parameters pursuant to the RDAO is made subject to the advance submission of duct demand forecast plans. In any case, the forecast plans to be submitted by RDAO beneficiaries should not quantify requests for information on ducts, requests for urgent and non-urgent intervention nor requests for duct clearances.

Accordingly:

D 28. PTC shall amend the RDAO in respect of the conditions governing payment of compensation for non-compliance with the established targets, as follows:

-Where the beneficiaries submit duct demand forecasts to PTC, in accordance with and with the reliability stipulated in the offer, such beneficiaries shall receive compensation in full;

-Otherwise, the beneficiary shall receive 75% of the amount of compensation established under the RDAO.

In any case, the forecast plans to be submitted by RDAO beneficiaries shall not include quantities of requests for information on ducts, quantities of requests for urgent and non-urgent intervention nor quantities for requests for duct clearances.

2.18. Method of compensation allocation

In the determination on amendments to the RUO of 17.02.2010, it was decided that PTC should proceed, on its own initiative, to pay compensation for its failures to comply with established quality of service targets, subject to subsequent review and adjustment taking into account the figures established by the OSP.

As referenced in this determination, this matter was, for example, also the object of decision by OFCOM⁴², wherein it was decided that the regulated operator - in this case *Openreach* - should be proactive in the payment of compensation. According to OFCOM, *Openreach* should monitor its performance in terms of the established targets and where it finds that there is non-compliance, it shall compensate the OSP concerned without the OSP being required to claim compensation or having to demonstrate entitlement. The same rationale is applied in Spain⁴³.

According to OFCOM, this measure strengthens incentives for *Openreach* to meet the established quality of service targets and makes it possible for the OSP to receive the compensation to which they are entitled in the event of non-compliance more quickly and without administrative or procedural difficulties.

ICP-ANACOM shares the position taken by OFCOM, considering that a measure such as the one described above contributes to the improvement of the compensation allocation process and provides further incentive to the accomplishment of the established targets.

Accordingly, as defined in said determination of amendment to the RUO, it is considered that PTC should effect payment of compensation no later than the end of the second month following the end of the half-year period in question. That is without prejudice to provision for a mechanism for the re-assessment of the values of compensation in light of the figures recorded by the beneficiaries.

Accordingly, the position is taken that:

⁴² See Decision of 20 March 2008 on "Service level guarantees: incentivising performance", available at <http://www.ofcom.org.uk/consult/condocs/slg/statement/>.

⁴³ See Section A.3 - Annex 1.

D 29. PTC shall introduce into the RDAO the obligation to undertake, on its own initiative, the payment of compensation for failure to comply with established quality of service targets, making said payment no later than the end of the second month following the end of the half-year period in question, notwithstanding subsequent review and adjustment, taking into account the figures established by the OSP.

2.19. Reciprocity of liability for damages

According to APRITEL and ZON, the RDAO⁴⁴ and standard contract⁴⁵ should reflect reciprocity of liability for damages, both of PTC and of the beneficiaries. In particular, they advocate the express statement in the RDAO of the right of beneficiaries to be compensated for any damage which PTC causes to their cables.

The standard RDAO contract sets out that the beneficiaries are responsible for all damages which PTC may incur due to interruption, suspension or any failure in the provision of services to its customers, provided that such interruption, suspension or other failure is caused or exacerbated by the resources of the beneficiary installed in its ducts, during the installation, operation or removal of cables.

In accordance with the principles of non-discrimination and equivalence, it is considered that the RDAO should provide for the reciprocity of liability for damages (and also in the standard contract), whereby the RDAO should lay down the right of beneficiaries to be compensated for damage caused to their infrastructure by PTC; as such, PTC shall be held liable for any damages which the beneficiaries incur in respect of their networks, provided that such damage is caused by PTC during the installation, operation or removal of cables in its ducts. It is noted that, in this context, beneficiaries are already under obligation to take out public liability insurance.

As such, there is a need to ensure reciprocal compensation payments in respect of actions (PTC and the beneficiaries) affecting the integrity of the networks (of beneficiaries and of PTC), whereby the RDAO and the standard contract require amendment accordingly. It must be noted however that these cases relate to compensation for damages and not to compensation for failure to comply with quality of service parameters.

D 30. PTC shall amend the RDAO and the standard contract in order to lay down the right of the beneficiary (or PTC) to obtain compensation for losses incurred in their networks, provided such losses result from access or from works or from resources installed in ducts during installation, operation or removal, by PTC (or by beneficiaries).

2.20. Settlement of disputes

ZON considers that in the case of unauthorized occupation of ducts which may require the removal of beneficiary cables by PTC, the resolution of disputes with recourse to ICP-

⁴⁴ See section 4.3 of the RDAO.

⁴⁵ See paragraph 2 of clause 18 of Annex 5 of the RDAO.

ANACOM should have suspensive effect, i.e., PTC should be prevented from carrying out this removal until such time as any dispute is settled.

It is already set out in the RDAO that, in the event that unauthorized occupation of ducts and associated infrastructure is found, PTC shall notify all beneficiaries that they shall have 30 days to respond, presenting valid arguments to justify the occupation in question. Only after said period has elapsed may PTC take such measures as, for example, the removal of the cable(s) in question from their infrastructure.

Accordingly, the position is taken that in the event that the ducts are occupied by the cable(s) of the beneficiary and where PTC considers such occupation to be unauthorised, thereby giving rise to a dispute between PTC and the beneficiary, PTC may not remove such cables until such time as the dispute is properly resolved in accordance with the contract.

In any case, in the event of improper removal of cables by either party (giving rise to a dispute), ICP-ANACOM may intervene, in particular by making provision for compensation payable by the injurious party, which will have to be based on a case by case analysis of the situation in question.

3. DETERMINATION

In view of the analysis and considering that:

- (a) Resolution of Council of Ministers no. 120/2008 of 30 July establishes investment in NGN as a national priority;
- (b) Following this resolution, Decree-Laws no. 123/2009 and no. 264/2009 were published, involving, in particular, the expansion of the total set of ducts which can be used for the installation of electronic communications networks and establishing rules applicable with regard to access to networks by electronic communications companies, which rules, under article 97 of Decree-Law no. 123/2009, neither displace nor undermine the regime which in this area applies to the concessionaire of the public telecommunications service;
- (c) A significant portion of investment in electronic communications networks has been directed at NGN, which is indicative of the important role that such networks can have in terms of market competition levels; in particular, note is made of the NGA tenders conducted in rural areas, whose networks must be operated as open networks. As such, provision must be made for a wholesale offer ensuring that all operators and providers of electronic communications services interested in the use of such networks to provide services to end users have access thereto.
- (d) Competition in the deployment of NGA has important repercussions in terms of price, quality of service and the diversity of offers available to end-users;
- (e) Access to ducts, including of the concessionaire of the public telecommunications service, plays a key role in the deployment of NGA, both by other operators and by the concessionaire itself which, therefore, is incentivised to have the best possible

information about its own ducts in order to be able to install optical fibre cables in a more efficient manner;

- (f) It is likely that the deployment of NGN by operators without their own ducts will initially take place in major urban centres, expanding progressively to other regions, particularly to major district capitals or to other areas where there is currently increased competition;
- (g) Grupo PT is subject, as regards the offer of ducts, and as a result of the analysis of the market for supply of wholesale network infrastructure access (physical) at a fixed location, among others, to obligations of:
 - Access to and use of specific network resources (including access to ducts);
 - Transparency in the publication of information, including reference offers;
 - Non-discrimination in the provision of access, with the possibility of imposing conditions of equivalent access (in this case to ducts), applicable to Grupo PT and the RDAO beneficiaries.
- (h) The market analyses adopted by ICP-ANACOM, with the involvement of the European Commission as provided for by law, now require development, especially with regard to putting into practice the obligations stipulated therein;
- (i) Maintaining the obligation of access to ducts included in the analysis of Market 4 on a national basis, certain specifications of this obligation may be varied according to each geographical area, given the different levels of competitive intensity observed in different geographical areas of the country, as identified in the analysis of Market 5;
- (j) ICP-ANACOM in setting out its regulatory approach to NGA, stated that the RDOA would be made subject to reformulation under a separate determination;
- (k) ICP-ANACOM is bound to conduct a periodic review of the wholesale offers in general and of the RDAO in particular;
- (l) The principles of transparency and non-discrimination require a greater level of reliability in information on ducts;
- (m) The beneficiaries of the RDAO must have access to information on occupation of ducts at a national level, whereas the manner in which such information is made available may vary according to market characteristics, and in more critical areas an obligation is imposed to provide information online over an Extranet, which is already available; meanwhile in other areas, provision is made for an information mechanism based on feasibility analyses conducted on a case-by-case basis according to reasonable time limits;

- (n) It is the responsibility of ICP-ANACOM to promote competition in the offer of electronic communications networks, which aspect assumes even greater importance in the current context of the early stages of NGA deployment;
- (o) Enhanced efficiency of wholesale services, the elimination of unjustified barriers and the respective reduction in costs are important to ensure balanced competition, with clear benefits for end-users;
- (p) Since the entry into force of the RDAO (imposed by ICP-ANACOM in 2004), alternative operators have increased their demand for services within this wholesale offer;
- (q) Any delays in responding to requests for information or to feasibility analysis requests or in the scheduling/supervision of interventions in ducts have a negative impact on the activity of the RDAO beneficiaries, whereby it is necessary to reformulate the time limits and/or establish mechanisms which provide a disincentive to non-compliance therewith through the application of compensation for non-compliance at a value which acts as a deterrent;
- (r) Under the EC Recommendation on access to next generation networks, the SMP operator should provide access to its passive infrastructure in accordance with the principle of equivalence, as defined in Annex II to this recommendation;
- (s) By determination of 17.11.2009, the Management Board of ICP-ANACOM decided to conduct the preliminary hearing of interested parties and the general consultation in respect of the draft determination whose adoption was proposed, consisting of comments received, the respective analysis and reasoning giving basis to the decision of the prior hearing report, which forms an integral part of the present determination;
- (t) Approval was likewise given to the notification to the EC and national regulatory authorities of other Member States, pursuant to paragraph 1 of article 57 of the same Law no. 5/2004, whereas the EC has not communicated any comments regarding the draft presented to it.

the Management Board of ICP-ANACOM, pursuant to the powers set forth in points 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 set forth in points b) and g) of article 9 of the same Statutes, taking into account the regulatory objectives set forth in points a) and c) of paragraph 1 and point c) of paragraph 2, both of article 5 of Law no. 5/2004 of 10 February, and in execution of measures determined subsequent to the analysis of the market for wholesale (physical) network infrastructure access at a fixed location, determines the following:

1. PTC shall amend the RDAO, within a period of not more than 20 working days subsequent to the notification of the final decision of ICP-ANACOM, in respect of the following:

D 31. A geographically segmented and phased approach is adopted with regard to the provision of information on the Extranet on occupation of ducts, with the following time limits, counted from the date of approval of the final determination:

- Greater Lisbon and Greater Porto: 3 months
- All other "areas C" of the analysis of market 5:6 months
- "Areas NC" of the analysis of market 5⁴⁶: There is no requirement to include occupation information on the Extranet except in the case of new ducts built during 2009 and thereafter⁴⁷ and in the case of ducts which, regardless of the date of their construction, were the object of feasibility analyses⁴⁸; this information shall be included on the Extranet within a maximum period of 6 months.

D 32. With respect to ducts where the "on-line" provision of information is obligatory as set out in D 1 and while the information is not available on the Extranet:

- The time limit for responses to requests for occupation feasibility analyses is reduced from 15 calendar days to 10 calendar days (for 100% of cases).
- PTC may not make any charge, in these areas, to respond to occupation feasibility analysis requests (irrespective of whether the response is negative or, if positive, it subsequently leads to a request for access and installation submitted by the beneficiary) where the requests for feasibility analysis are triggered by the fact that information about duct occupation is not yet available on the Extranet.

D 33. In "areas NC" the time limit for responding to occupation feasibility analysis requests is reduced from 15 to 10 calendar days for 100% of cases, following the process currently set out in the RDAO.

D 34. In the event of non-compliance with the time limits established in D 1, compensation will be applicable for each feasibility analysis, paid in favour of the beneficiary, to the value of 50 euros multiplied by the number of days taken to reply (given that in using the Extranet, information on occupation feasibility is obtained in real time). This compensation shall be payable on a

⁴⁶ Although these are separate markets, it is deemed an expedient approach in this case to adopt "areas NC" as the boundary of zones in the case under present review.

⁴⁷ In which case it should be ensured that online information is available within a period of 30 days following the respective conclusion.

⁴⁸ In this case the information on occupation refers to the date on which the feasibility analysis was performed.

quarterly basis to each operator, without prejudice to possible application of mandatory monetary sanctions pursuant to article 116 of Law No. 5/2004 of 10 February.

D 35. The information to be made available on the Extranet consists of information that PTC proposes to introduce, including the following by obligation:

- (a) profile of the duct (with the representation of the formation of tubes between adjacent IC), allowing indication of the tubes to be occupied;
- (b) information on the occupation of duct sections, based on a system with at least four levels (intervals) of occupation (in %);
- (c) information on the clearance diameter in cm, of the duct sections corresponding to the entirety of the duct section.

PTC must submit to ICP-ANACOM, no later than thirty days following notification of the present determination, detailed information on how the level of occupation is determined in each section.

D 36. In the areas where information is available on the occupation of ducts (see D 1), after checking whether or not there is space available, the beneficiary must immediately make a request for installation, as set out in the RDAO, and may subsequently (after scheduling with PTC pursuant to the RDAO) install its cable following a rule of upward occupation of tubes and giving priority to tubes which are already occupied, provided that there is space available.

D 37. In cases where PTC gives a positive response to a feasibility analysis request that proves to be incorrect, or in cases where the information on the Extranet results in incorrect indication of feasibility, except in situations where absence of responsibility can be demonstrated before the beneficiary and ICP-ANACOM, PTC shall introduce in the RDAO the obligation to:

- (a) make payment of compensation of 200 euros to the beneficiary and, cumulatively;
- (b) indicate a feasible alternative route, at no additional cost to the beneficiary and in accordance with the time limit specified in the RDAO, in the absence of ducts on the route in question, without the beneficiary being required to submit a new feasibility request;
- (c) remove cables within the time limit specified in the RDAO and at its own expense, and enable the beneficiary to use (occupy) the duct whose occupation was thereby made feasible, in the event that the ducts are occupied with dead cables of PTC preventing feasible installation.

D 38. In the case of negative response to an occupation feasibility analysis request, PTC shall substantiate the non-feasibility of the occupation in the duct sections

in question before the beneficiary, whereas ICP-ANACOM may carry out inspections, upon request and where deemed appropriate. In the event that the negative response is proved to be incorrect, PTC is bound to pay compensation of 200 euros to the beneficiary.

- D 39. PTC shall publish, within 30 working days of notification of the present determination, a masts access reference offer, including all applicable procedural, technical and economic conditions, specifically with respect to the installation of cables, and considering the general principles adopted in the RDAO. The detailed reasoning therefor must be submitted to ICP-ANACOM within the same time limit, giving grounds for any deviation from the provisions of the RDAO.
- D 40. Reference to ineligibility of the cable access tunnels of PTC exchanges should be deleted from the RDAO, and the IC of PTC providing access to exchange building and the access extension to this building should be included within the scope of the RDAO accordingly.
- D 41. PTC shall establish the conditions applying to the transition from underground access to aerial access (masts) using riser tubes, and shall specifically:
- (a) provide access to PTC riser tubes, whenever these have available capacity;
 - (b) define, in the reference masts access offer, the operating procedures and technical standards which beneficiaries are bound to observe in the construction of the rise tubes on the masts of PTC
 - (c) include in the RDAO, a service of access to the access extensions of mast riser tubes, whenever a beneficiary requires transition from ducts to masts (both for PTC riser tubes and for riser tubes of beneficiaries on the masts of PTC);
 - (d) include in the RDAO and/or in the reference masts access offer, a common feasibility analysis service for access to ducts and masts.
- D 42. PTC shall introduce into the RDAO daily compensation of 50 euros for each additional day that the generated plans remain unavailable.
- D 43. With a view to more detailed analysis, PTC is required to notify ICP-ANACOM within 30 working days following notification of the present determination as to the developments that it is implementing in order to improve the level of automation of the Extranet and the date indicated for their implementation, identifying the impact that such developments will have in terms of the possibility of printing plans automatically and immediately upon their consultation, and detailing possible "*off-line*" interventions which might affect this procedure.

- D 44. With a view to more detailed analysis, PTC is required to notify ICP-ANACOM within 30 working days following notification of the present determination as to the reasons why mapping data is not made available in vector format.
- D 45. ICP-ANACOM recommends that PTC consider any suggestions which are addressed to it by APRITEL or individually by the RDAO beneficiaries regarding the RDAO IS, and, where it does not accept such suggestions, respond to such effect, with its reasoning, to the entity concerned and with notification to ICP-ANACOM. Such suggestions must be sent within a period of two months following notification of the determination.
- D 46. PTC shall introduce into the RDAO a target of 10 working days, following receipt of information of beneficiaries, with respect to updating duct occupation record information on the Extranet, which target shall be applicable to 100% of cases.
- D 47. PTC shall not charge for the intervention/installation supervision service in cases where PTC chooses not to carry out such service or, where choosing to do so, does not appear as scheduled.
- D 48. In the event that supervision by PTC has been scheduled with regard to intervention/installation operations to be carried out by the beneficiary, but the technician(s) of PTC do not appear at the time and at the location as scheduled, the beneficiary may proceed with the work in question (where there is no impediment arising from the non-appearance of PTC's technician), whereas it is recommended that the beneficiary's technician contact PTC in advance.
- D 49. PTC shall add a new field to the form used to request removal of cables, enabling the beneficiary to indicate to PTC as to whether they intend to use the space occupied by the cables to be removed for subsequent installation within a maximum of 60 days, whereby PTC shall ensure that the area will not be used by itself or by other beneficiaries during that period.
- D 50. In the RDAO, any service involving a response by PTC to a request by a beneficiary on a process which is fully controlled by PTC should be associated with a target deadline for said response time and compensation established for failure to comply therewith.
- D 51. PTC shall amend the RDAO to establish the time taken to respond to requests for information at 1 working day, for 100% of cases.
- D 52. PTC shall amend the RDAO, reducing the deadline for scheduling supervision of urgent intervention (QSP4) from 8 to 4 (consecutive) hours.
- D 53. PTC shall amend the RDAO, establishing the time-limit for responses to requests to install cables in ducts at 5 working days for 100% of cases.

- D 54. PTC shall include in the RDAO a quality of service parameter (QSP7) corresponding to the time limit applicable to the sending (by PTC to the beneficiary) of quotations for the clearance of ducts, with a target time limit of 5 working days applicable to 100% of cases.
- D 55. In the event of non-compliance with the time limit for scheduling supervision of interventions to be performed by beneficiaries, compensation will be applied at a rate of 25 euros (scheduling of non-urgent interventions) and 50 euros (scheduling of urgent interventions) for each hour of delay.
- D 56. When failure by PTC staff to attend at the scheduled time and place prevents, in some way, the beneficiary from carrying out the intervention, 25 euros (scheduling of non-urgent operations) and 50 euros (urgent scheduling) of compensation shall be applied for each hour of delay; whereas it is recommended that, within a maximum of two hours following the time of scheduling, the beneficiary shall contact PTC with respect to said non-attendance.
- D 57. In the event of failure to comply with QSP6 or QSP7, compensation will be applied, amounting to 50 euros per day, limited to a maximum of 60 working days.
- D 58. PTC shall amend the RDAO in respect of the conditions governing payment of compensation for non-compliance with the established targets, as follows:
- Where the beneficiaries submit duct demand forecasts to PTC, in accordance with and with the reliability stipulated in the offer, such beneficiaries shall receive compensation in full;
 - Otherwise, the beneficiary shall receive 75% of the amount of compensation established under the RDAO.

In any case, the forecast plans to be submitted by RDAO beneficiaries shall not include quantities of requests for information on ducts, quantities of requests for urgent and non-urgent intervention nor quantities for requests for duct clearances.

- D 59. PTC shall introduce into the RDAO the obligation to undertake, on its own initiative, the payment of compensation for failure to comply with established quality of service targets, making said payment no later than the end of the second month following the end of the half-year period in question, notwithstanding subsequent review and adjustment, taking into account the figures established by the OSP.
- D 60. PTC shall amend the RDAO and the standard contract in order to lay down the right of the beneficiary (or PTC) to obtain compensation for losses incurred in their networks, provided such losses result from access or from works or from

resources installed in ducts during installation, operation or removal, by PTC (or by beneficiaries).

2. To notify the European Commission as to the present decision, under the terms of paragraph 3 of article 57 of Law no. 5/2004 of 10 February.