

## Decision

### **Applications for access of television operators to Additions to Contracts for the Provision of the Signal Encoding, Multiplexing, Carrying and Broadcasting Services over the Digital Terrestrial Network and Complementary Coverage (DTT)**

#### **I. Background and description of facts**

At the request of ANACOM, taking into consideration, specifically, the procedure under way at the time for amendment of the Right of Use for DTT Frequencies (MUX A)<sup>1</sup>, MEO – Serviços de Comunicações e Multimédia, S.A. (MEO) submitted, by letter of 26 January 2017<sup>2</sup>, a copy of additions to contracts for the provision of the signal encoding, multiplexing, carrying and broadcasting services over the digital terrestrial network and complementary coverage (DTT) concluded with RTP – Rádio e Televisão de Portugal, S.A. (RTP), and TVI – Televisão Independente, S.A. (TVI), having submitted, by letter of 7 February 2017<sup>3</sup>, a copy of the addition to the contract concluded with SIC – Sociedade Independente de Comunicação, S.A. (SIC), in the same scope (hereinafter “Additions”).

In this context, it was found that, in both communications, MEO declared that “*data now made available is of a confidential nature, as it contains trade and business secrets of MEO, and may not be disclosed without its prior consent...*”.

#### ***SIC’s application for access***

In the meantime, ANACOM received an application from SIC for access to procedural data<sup>4</sup>, namely full access to contracts for the provision of the carrying and broadcasting service of the DTT signal associated to the operation of MUX A, concluded, following Law No. 33/2016, of 24

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<sup>1</sup> Final decision on the amendment to the Right of Use of DTT Frequencies (MUX A) available at: <https://www.anacom.pt/render.jsp?contentId=1395898>.

<sup>2</sup> MEO letter with reference S0038.

<sup>3</sup> MEO letter with reference S0068.

<sup>4</sup> Application submitted under articles 83 to 85 of APC - SIC letters dated 10.03.2017 and 08.05.2017.

August<sup>5</sup>, between MEO and RTP, as well as between the former and TVI - that is, in the view of ANACOM, SIC applied for access to the above-mentioned Additions.

In its application, SIC specifically invokes that it *“is entitled to become fully acquainted with contracts identified above, as this is the only way it will be effectively able to assess for itself whether its right to enjoy non-discriminatory conditions for the provision of that service, which is conferred on it under the mentioned legal provision in paragraph 3 of article 4 of referred Law No. 33/2016, was and is respected.”* For the purpose of gaining access to a *“full copy, no information being omitted”*, SIC claims that:

- (i) *“Case law of our higher courts is unanimous in considering that «business secrecy» is not an absolute value, rather a protected value which must be brought into line with other assets and values”;*
- (ii) *In this case, “the only way SIC is able to assess whether the principle of non-discrimination has been respected - a right which is itself expressly protected - is to have access to the full contents of contracts”;*
- (iii) *“By nature, the principle of non-discrimination, when applied to conditions of service provision available only to three television operators (...) requires that these three operators are aware of such price”;*
- (iv) *“If Law No. 33/2016 is to be observed, knowledge on the part of SIC of the full contents of those contract does not even raise the issue of access to “business secrecy”, given that SIC already holds this information via the contract of the same subject-matter”, concluded with MEO...”; and*
- (v) *“Paragraph 3 of article 4 of Law No. 33/2016 expressly lays down that the price to be charged by MEO must abide, not only by the principle of non-discrimination, but also by the principle of transparency, which also suggests that the legislator would have decided that any right to the protection of a “business secret” would not be upheld in this case”.*

SIC referred also that, in case its application was approved, it would not present a problem if RTP and TVI were notified of the full contents of the Addition with the same contents it had concluded

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<sup>5</sup> Available at: <https://www.anacom.pt/render.jsp?contentId=1394191>.

with MEO, under the condition that on the same date it was notified of Additions concluded with those operators.

Following this application, by letter of 24.05.2017<sup>6</sup>, ANACOM, acknowledging SIC's right to access information<sup>7</sup> and bearing in mind the legal framework applicable to the right of information, namely the right to procedural information - article 268, paragraph 1 of the Constitution of the Portuguese Republic and articles 82 to 85 of the Administrative Procedure Code (APC) - requested MEO to review<sup>8,9</sup>, in the light of the regime provided for in the law, namely the above-mentioned provisions of APC, as well as article 108, paragraph 3, of the Electronic Communications Law<sup>10</sup> (ECL), the general classification indicated in letters mentioned earlier on the confidential nature of information provided in Additions annexed thereto, including the pricing information, and to provide details, in a substantiated manner, on any confidential issue, attaching, where appropriate, a non-confidential copy thereof.

On the same date, ANACOM sent also letters to RTP<sup>11</sup> and TVI<sup>12</sup>, as holders of the information concerned, to obtain their comments, within 5 working days, on whether there were any confidential elements in the mentioned Additions. SIC was also notified<sup>13</sup> of steps taken in this scope, including the request sent to MEO itself.

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<sup>6</sup> Letter with reference ANACOM-S012054/2017.

<sup>7</sup> SIC was heard in the scope of the prior hearing on the draft decision regarding the amendment of the right of use for DD frequencies (MUX A) (available at: <https://www.anacom.pt/render.jsp?contentId=1395898>). As such, ANACOM cannot fail to acknowledge the company as an interested party. Without prejudice, even if this was not the case, it is deemed that the Regulatory Authority would always be required to acknowledge that company's extension of its information rights, operated by article 85 of the APC, in view of its specific status as beneficiary of "must carry" obligations to which MEO is subject under the Right of Use for Frequencies ICP-ANACOM No. 06/2008 it holds.

<sup>8</sup> Within 5 working days.

<sup>9</sup> On the basis of a preliminary analysis of the information provided, ANACOM immediately conveyed to MEO that it found the classification of such information as confidential to be hard to support, as the Regulatory Authority failed to identify any business or trade secrets.

<sup>10</sup> Law No. 5/2004, of 10 February, as amended and republished by Law No. 51/2011, of 13 September, and subject to subsequent amendments (available at:

<https://www.anacom.pt/render.jsp?categoryId=333113&tab=&a=333114&b=&c=>)

<sup>11</sup> Letter with reference ANACOM-S012057/2017.

<sup>12</sup> Letter with reference ANACOM-S012058/2017.

<sup>13</sup> Letter with reference ANACOM-S012060/2017.

### ***MEO's response***

In response to ANACOM's request, MEO, by letter of 02.06.2017<sup>14</sup>, informed that it had reassessed the classification as confidential of the information in the referred Additions to contracts with RTP, TVI and SIC, further to the publication of Law No. 33/2016, of 24 August.

In this context, MEO, "*taking into consideration the information that involves trade and industrial secrecy included in additions, namely data based on technical issues, trade and business strategies, (...) consider[ed] that the content of Additions, just like the respective Contracts, should remain confidential, reason for which MEO restates the classification made in (...) communication of 26 January 2017*".

Notwithstanding, MEO submitted information on the price per Mbps agreed in those Additions, already in force, making their disclosure to SIC dependant on the corresponding authorizations of RTP and TVI, as counterparts in the Additions, and given the specific interest claimed by SIC on this element, "*given that this will allow that company to assess whether its right to enjoy non-discriminatory conditions in the provision of the service is respected*".

### ***RTP and TVI's responses***

In response to letters received from ANACOM:

(i) **RTP**, by letter of 09.06.2017, declared that "*there seem not to be any competition grounds that would require the withholding of contractual information based on the probable existence of 'trade, industrial and internal life secrets of a company' and that (...) it is not aware of any intention to withhold information conveyed by MEO in the scope of the contractual negotiation and conclusion (...) it does not identify any issue the confidentiality of which must be safeguarded, in the light of the general interest of access to documents held by administrative bodies*". The company thus attached a full copy of the Addition without any condition of confidentiality.

Moreover, RTP requested ANACOM to submit a full copy of Additions to contracts concluded between MEO and SIC and between MEO and TVI, claiming that "*...only in this way (...) will*

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<sup>14</sup> MEO letter with reference S0223.

*there be an absence of discrimination in the price charged by MEO to television operators”;*  
and

- (ii) **TVI**, by letter of 26.06.2017<sup>15</sup>, informed that it considered essential that, in case ANACOM takes the view that access must be given to information in Additions between MEO and television operators, SIC, TVI and RTP, respectively, such access must only take place where it is simultaneous, full and reciprocal, under the same conditions for all television operators operating over the DTT network.

As such, the company formally requested ANACOM to submit a full copy of Additions to contracts concluded between MEO and SIC and between MEO and RTP. The company also informed that “[the] *Addition of 29 December 2016 forces TVI to maintain absolute confidentiality, except in situations where orders from authorities (in this case, ANACOM) exist, acting in the exercise of their powers. (...) As stated above, TVI has nothing to object where ANACOM considers, in the exercise of its powers, that TVI, together and simultaneously with other DTT television operators, is required to make available full information of the Addition, in order to fulfil transparency and non-d[i]scrimination obligations, set out, among others, in Law No. 33/2016, of 24 August*”.

### ***ANACOM’s draft decision***

Having analysed the positions of holders of information and taking into consideration the authorization granted by SIC, RTP and TVI, and the fact that MEO, in its letter of 02.06.2017, failed to detail, in a duly substantiated manner, the alleged confidentiality, namely elements of Additions that specifically were considered to involve trade and business secrets, as well as grounds for the invoked secrecy, this Authority concluded that it did not identify any obstacle to the provision of a full copy of Additions to television operators that had applied for it. In this context,

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<sup>15</sup> Following a fax sent on 20.06.2017 to TVI, in which ANACOM, having expired the legal deadline to respond and in the absence of a response from the company, restated its request for the mentioned information, within 3 days, as such information was relevant to reply to SIC’s application, without prejudice to ANACOM’s powers in this issue. The Regulatory Authority took the opportunity to inform also that RTP, in response to a similar request, had not identified, on the one hand, any issue the confidentiality of which should be safeguarded, in the light of the general interest of access to documents, and, on the other hand, requested of ANACOM a full copy of Additions, claiming that “...*only in this way (...) will there be an absence of d[i]scrimination in the price charged by MEO to television operators.*”

it notified the company<sup>16</sup> to assess the view taken in writing, within 10 working days, bearing in mind the legal framework applicable to the right to information, namely the right to procedural information<sup>17</sup>, under articles 121 and 122 of the APC.

Letters were sent also to RTP<sup>18</sup>, SIC<sup>19</sup> and TVI<sup>20</sup>, having ANACOM notified steps taken and the view submitted to the prior hearing of MEO, in the light of the applications for access submitted by the three television operators.

### **Comments from MEO**

By letter of 25.07.2017<sup>21</sup>, MEO informed that it had *“reassessed the matter, taking into account the responses from television operators on the confidentiality of Additions concluded”*. Moreover, and bearing in mind that *“excerpts of responses of television operators, submitted by ANACOM, seem[ed] to suggest that interested parties themselves s[aw] no inconvenience in lifting the confidentiality of Additions”*, the company requested ANACOM to *“send a full copy of the respective statements/authorizations from operators, reserving the right, after a due analysis, to undertake a new [reassessment] of the matter”*.

In its comments, the company declares that *“specifically as regards the Addition concluded with RTP, it includes detailed technical information the confidentiality of which deserves to be safeguarded, as it involves trade and industrial secrets, namely the information set out in Annex IV”*. It further claims that *“the safeguard of this information as confidential does not affect the knowledge and assessment of prices practised between MEO and television operators, an aim which SIC wishes to achieve under paragraph 3 of article 4 of Law No. 33/2016.”*

*“... in the light of the purpose to be achieved, the relevance and legitimacy of which (...) is acknowledged”*, the company submitted also a new table (more detailed than the one sent previously) with prices currently in force per Mbps, Mbps occupied by the different channels and monthly/annual prices, which, in its opinion *“after information has been validated and cer[t]ified*

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<sup>16</sup> Letter with reference ANACOM-S015718/2017, of 07.07.2017, in accordance with which MEO was notified to submit its comments in the scope of the prior hearing.

<sup>17</sup> Cfr. article 268, paragraph 1 of the Constitution of the Portuguese Republic and articles 82 to 85 of APC.

<sup>18</sup> Letter with reference ANACOM-S016240/2017.

<sup>19</sup> Letter with reference ANACOM-S016238/2017.

<sup>20</sup> Letter with reference ANACOM-S016239/2017.

<sup>21</sup> MEO letter with reference S0270.

*for conformity purposes by ANACOM, may be presented to television operators, so that they may check the intended information”.*

### ***Subsequent developments***

By letter of 13.07.2017, SIC notified that:

- (i)* It noted that ANACOM had notified MEO, on 7 July, to provide comments in the scope of the prior hearing;
- (ii)* It does not object to the provision of a full copy of Additions to television operators that apply for it, as this is what it intends;
- (iii)* This provision must be carried out jointly and simultaneously by ANACOM.

In response to MEO’s request, included in its comments, ANACOM submitted to this company, by letter<sup>22</sup> of 31.07.2017, a copy of the following communications:

- (i)* SIC’s letter of 10.03.2017, and given the relevance to the matter, the subsequent communication from this company, of 13.07.2017;
- (ii)* RTP’s letter of 09.06.2017; and
- (iii)* TVI’s letter of 26.06.2017.

After reception of these communications, MEO did not pursue the matter any further.

## **II. Analysis**

The right to information has been laid down in the Constitution of the Portuguese Republic (CPR), under article 268 thereof, and is governed, at procedural level, by articles 82 to 85 of APC, and at non-procedural level, by article 17 of APC and other relevant legislation (Law No. 26/2016, of 22 August - Law of Access to Documents and Administrative Information - LADA). In general, the first strand requires the existence of a pending procedure and a direct and legitimate interest of

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<sup>22</sup> Letter with reference ANACOM S-018938/2017.

the recipient of information<sup>23</sup>, while in the second strand the right to information is granted to everyone<sup>24</sup>.

In both strands, and also in general, it must be ensured that administrative documents to be reproduced and transmitted are not of a confidential nature, namely that documents:

- (i) Have not been classified;
- (ii) Are not under state secret;
- (iii) Do not involve third party trade, industrial, copyright or professional secrecy; and
- (iv) Do not include verbal elements.

Pursuant to sector legislation, article 108, paragraph 3, of ECL, lays down that bodies are required to identify, in a substantiated manner, any information deemed to be confidential, attaching, where appropriate, a non-confidential copy of documents comprising such information.

Accordingly, the determination of the Management Board of 17.11.2011, on the indication of confidentiality in information submitted ANACOM, sets out that such indication “*shall be substantiated, taking into account legal rules on access to documents held by the administration, namely the principles of publicity and transparency, and the fact that administrative documents should be accessed by whoever has a legitimate interest in the issue, unless documents concerned are named or include other matters which under the law must be deemed as reserved - namely due to trade and industrial secrecy, or secrets related to the internal affairs of a company - in which case, if the person applying for the access proves its personal, direct and legitimate interest on the matter, the conflicting interests at stake must be weighted*”.

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<sup>23</sup> Article 268, paragraph 1, of CPR: *Citizens have the right to be informed by the Administration, whenever they so request, as to the progress of the procedures and cases in which they are directly interested, together with the right to be made aware of the definitive decisions that are taken in relation to them.*

Article 82, paragraph 1: *Interested parties have the right to be informed by whoever is responsible for directing the procedure, whenever they so request, as to the progress of the procedures and cases in which they are directly interested, together with the right to be made aware of the definitive decisions that are taken in relation to them.*

<sup>24</sup> Article 268, paragraph 2, of CPR: *Citizens also have the right of access to administrative files and records, without prejudice to the law governing matters concerning internal and external security, criminal investigation and personal privacy.*

Article 17, paragraph 1, of APC: *Everyone has the right of access to administrative files and records, even where procedures which directly concern them are not underway, without prejudice to the law governing matters concerning internal and external security, criminal investigation, tax secrecy and personal privacy.*

Article 5, paragraph 1, of LADA: *Everyone has the right of access to administrative documents, which involves the right to consultation, reproduction and information on existence and content, the need to declare any level of interest not being required.*



As specifically regards MEO's responses, the company claims that the three Additions submitted to ANACOM are confidential, without presenting any additional justification, merely referring that such additions include trade and business secrets. In fact, it was found that:

- (i) In letters of 09.01.2017 and 26.01.2017, MEO substantiates the invoked confidentiality in a general way, failing to justify in detail the assigned classification, by reference to specific aspects or elements of the information submitted, and failing also to submit a non-confidential version of the information;
- (ii) In the letter of 02.07.2017, MEO informed that it had reassessed the confidentiality classification of information set out in the Additions, and that *"taking into consideration the information that involves trade and industrial secrecy included in additions, namely data based on technical issues, trade and business strategies, the (company) considers that the content of Additions, just like the respective Contracts, should remain confidential, reason for which MEO restates the classification";* and
- (iii) In its letter of 25.07.2017, MEO informed that it had reassessed the matter, taking into account the responses of television operators on the confidentiality of Additions and that *"specifically as regards the Addition concluded with RTP, it includes detailed technical information the confidentiality of which deserves to be safeguarded, as it involves trade and industrial secrets, namely the information set out in Annex IV".*

In the present case, as referred earlier, instead of explaining the alleged confidentiality in detail and on duly justified grounds, specifying each element included in the Additions considered to have information that reveals trade or industrial secrecy, indicating the reason that justifies the type of invoked secret, MEO merely refers that the information concerned includes commercial and business secrets. In fact, the company only indicates, in its letter of 25.07.2017, that the Addition concluded with RTP involves *"detailed technical information the confidentiality of which deserves to be safeguarded, as it involves trade and industrial secrets"*, indicating as an example, the contents of Annex IV to the Addition. However, this mere allegation is not sufficient to consider the confidentiality of the information to be justified. On the contrary, MEO should have identified, in a substantiated manner, the information it regarded as confidential, attaching where appropriate a non-confidential version of the document, which however the company failed to do.

In addition, it is stressed that, in the case under consideration, the procedure for amendment of the Right of Use for DTT Frequencies (MUX A) has now been completed, given that the corresponding final decision was approved on 22.06.2017. For this reason, according to the principle of open administration, an application for access to documents included in the respective file is subject to the regime provided for in the above-mentioned LADA<sup>25</sup>, being analysed on a case-by-case basis.

In this context, the positions taken by holders of information - SIC, TVI and RTP -, who authorize a full access to concluded Additions where such access is granted in a simultaneous and reciprocal way and under the same conditions for all DTT television operators that apply for it, must be highlighted.

Accordingly, ANACOM can only conclude, from the analysis of the views expressed in MEO's letters and, specifically, from MEO's comments to its prior hearing, that the company fails to present arguments that justify any change to the draft decision notified by this Authority, notwithstanding the opportunity given to do so.

As such, taking into consideration that:

- (i) It is incumbent on ANACOM to take a final substantiated decision on the application(s) for access to information, MEO having failed to present any elements that justified the alleged confidentiality of elements it indicated vis-a-vis SIC's right of access (as well as that of other DTT television operators);
- (ii) Holders of information - SIC, TVI and RTP -, authorized a full and reciprocal access to concluded Additions;
- (iii) MEO merely claims the confidentiality of information in a general way, instead of justifying in detail the assigned classification, by reference to specific aspects or elements of the information submitted, and failing also to submit a non-confidential version of the

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<sup>25</sup> Under article 6, paragraph 6, of LADA, *A third party shall only be entitled to access administrative documents that include trade, industrial or internal affair secrets of a company where it holds a written authorization from such company or is able to prove that it holds a direct, personal, legitimate interest protected under the Constitution that is sufficiently relevant after all fundamental rights concerned and the principle of open administration have been weighed, in the framework of the principle of proportionality, so as to justify access to information.*

information, notwithstanding the fact that is required to do so under ECL and determination of 17 November 2011, having been notified for the purpose; and

- (iv) ANACOM does not find in MEO's comments any grounds that go against its views, nor does the Authority identify any obstacle to the provision of a full copy of Additions to television operators that applied for it;

this Authority maintains the position set out in its draft decision.

### **III. Determination**

Therefore, for the above-mentioned reasons, in the light of developments that have taken place and acknowledging the right of access enjoyed by SIC, RTP and TVI, bearing in mind the legal framework that applies to the right to information - cfr. article 268 of CRP, articles 17 and 82 to 85 of APC, the LADA regime, as well as article 108, paragraph 3, of ECL - **ANACOM's Management Board**, in the scope of powers provided for in article 26, paragraph 1 q) of its Statutes, approved by Decree-Law No. 39/2015, of 16 March, hereby determines to provide the full copy of Additions to contracts for the provision of the signal encoding, multiplexing, carrying and broadcasting services over the digital terrestrial network and complementary coverage concluded with MEO, jointly and simultaneously for television operators that applied for access thereto, namely RTP, SIC and TVI.

Lisbon, 21 September 2017.