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Autoridade Nacional de
Comunicações (ANACOM)
Avenida José Malhoa No. 12
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Portugal

For the attention of
Mr João Cadete de Matos
Chairperson

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Dear Mr Cadete de Matos,

Subject: Commission Decision concerning Case PT/2018/2104: Call origination on the public telephone network provided at a fixed location in Portugal

Comments pursuant to Article 7(3) of Directive 2002/21/EC

1. PROCEDURE

On 9 August 2018, the Commission registered a notification from the Portuguese national regulatory authority, (ANACOM)¹, concerning call origination on the public telephone network provided at a fixed location² in Portugal.

The national consultation³ ran from 13 April 2018 to 15 June 2018.

¹ Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

² Corresponding to market 2 in Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2007 Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

³ In accordance with Article 6 of the Framework Directive.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

The third review of the market for call origination on the public telephone network provided at a fixed location was previously notified to and assessed by the Commission under case PT/2017/2023⁴.

Unlike in the second market review in which call origination was considered as one single market, ANACOM defined two separate markets for call origination on the public telephone network at a fixed location: (i) for geographical numbers and (ii) for non-geographical numbers relating to the provision of specific services.

ANACOM carried out a three criteria test in order to ascertain whether to continue imposing regulation on the markets for call origination for geographical and non-geographical numbers. ANACOM considered that for non-geographical numbers the three criteria test was not met and proposed to lift the regulatory obligations in place. As regards the market for geographical numbers, ANACOM found that the three criteria were met and proposed to designate MEO with SMP and to impose on it a full set of regulatory obligations, including: (i) the obligation to respond to reasonable requests for access, including CS, CPS and WLR, (ii) non-discrimination, (iii) transparency, including the publication of an interconnection reference offer, (iv) price control and cost accounting, and (v) accounting separation.

The Commission issued a serious doubts letter questioning the continued regulation of the market for call origination for geographical numbers, in particular pointing to a lack of sufficient evidence supporting the SMP finding. ANACOM withdrew its notified draft measure.

2.2. Market definition

The market for fixed voice call origination services to geographical numbers for residential and non-residential customers includes local networks and simple transit, regardless of the transport technology and the interconnection interface used (TDM, IP interfaces, both for PSTN and VoIP calls with fixed or nomadic numbers). The market includes calls made by mobile network operators at fixed locations (homezone) as well as self-supply.

The relevant geographic market is national.

2.3. Three criteria test

The Recommendation on Relevant Markets⁵ no longer includes the wholesale market for call origination in the list of markets susceptible to *ex ante* regulation.

⁴ C(2018)7846.

⁵ Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service

Therefore, ANACOM carried out a three criteria test in order to ascertain whether continuing regulation on the markets for call origination on geographical numbers for residential and non-residential customers is justified.

ANACOM considers that the barriers to entry are no longer high and non-transitory within the time horizon of the present analysis. In particular, ANACOM refers to the Commission's serious doubts letter stating that alternative operators have carried out major investments in the past and/or entered the market based on LLU or bitstream products and were providing package deals including fixed telephony at no extra charge to around 90% of customers in late 2016. Furthermore, ANACOM refers to the fact that since MEO continues applying national pricing, it would be constrained in its PSTN services pricing policy by the presence of alternative operators in the market. In addition, ANACOM notes that the significance of wholesale line rental (WLR) is negligible, since it is used to make less than 1% of calls in the residential and non-residential segments, with a declining trend.

ANACOM also notes that the market for call origination on geographical numbers for residential and non-residential customers tends towards effective competition. MEO's market share continues to decrease. In 2017 it stood at 42.6%, down from 44.5% in 2016 and 48.6% in 2015, while the market shares of the two biggest alternative operators continue to increase. NOS' market share increased from 33.3% to 34.3% from 2015 to 2017 and Vodafone's market share increased from 11.1% to 14.4% in the same period.

ANACOM further analysed the wholesale tariff trends, existence of infrastructure difficult to replicate, economies of scale and scope and significance of the potential competition in line with the Commission's suggestions in its serious doubts letter. In particular, ANACOM considers that two major alternative operators have similar economies of scale and scope. ANACOM also points towards the fact that since FTTH/B coverage was 70.1% of all households and DOCSIS 3.0 coverage amounted to 70.8% of households in 2015 and is progressively increasing, call origination services offered via self-supply have the potential of constraining MEO's ability to charge excessive prices at the retail level. In fact, ANACOM consider that this is the case even without a presence of a MEO commercial offer or agreements at the wholesale level.

Since the three criteria test is not cumulative, ANACOM does not consider it necessary to analyse the third criterion in order to lift the regulatory obligations currently imposed on the SMP operator.

Based on the three criteria test, ANACOM also finds that no operator enjoys SMP in the defined relevant market.

2.4. Withdrawal of regulatory remedies

ANACOM proposes to withdraw all the regulatory obligations as from the day of the adoption of the final measure with the exception of the price control obligation that will be applicable for an additional 18 months to access agreements already in

markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 295, 11.10.2014, p. 79.

place. ANACOM argues in this regards that an immediate withdrawal could, *inter alia*, (i) cause a disruption of supply under medium-term contractual commitments of access seekers with non-residential and public authorities and, (ii) cause a possible dissatisfaction of final customers.

ANACOM further notes that such a transitory period is also necessary to implement alternative solutions (including individual technical and economic feasibility studies) and ensure a sustainable transition.

3. COMMENTS

The Commission has examined the notification and has the following comment:⁶

Transitional period for the deregulation of the call origination market

The Commission recalls that according to Article 16(3) of the Framework Directive, where a national regulatory authority concludes that a market is effectively competitive it shall not impose or maintain any specific regulatory obligations and where sector specific regulatory obligations exist, it shall withdraw such obligations. In addition, any period of notice given to the parties affected by such a withdrawal of regulatory obligations in place must be appropriate.

In light of the above, the Commission takes note that the price control remedies for existing access agreements imposed on MEO are set to expire eighteen months after the adoption of the final measure. The Commission notes that ANACOM only provided very general reasons to justify the proposed duration of the transitional period. The Commission also notes that the notification does not contain more specific elements showing how an eventual faster lifting of SMP obligations on MEO could cause harm to consumers in a market that is considered effectively competitive.

The Commission therefore calls on ANACOM to reconsider the length of the transitional period and to provide further and more specific justifications in its final measure as to why the chosen length can be considered appropriate under Article 16(3) of the Framework Directive.

Pursuant to Article 7(7) of the Framework Directive, ANACOM shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC⁷ the Commission will publish this document on its website. The Commission does not consider the

⁶ In accordance with Article 7(3) of the Framework Directive.

⁷ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

information contained herein to be confidential. You are invited to inform the Commission⁸ within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.⁹ You should give reasons for any such request.

Yours sincerely,

For the Commission,
Roberto Viola
Director-General

⁸ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

⁹ The Commission may inform the public of the result of its assessment before the end of this three-day period.