

REPORT ON THE PRIOR HEARING OF THE PUBLIC CONSULTATION ON THE DRAFT DECISION ON AMENDMENTS TO THE REFERENCE DUCT ACCESS OFFER (RDAO)

I. BACKGROUND

On 17 November 2009, the Management Board of ICP-ANACOM approved a draft decision on the amendments to the Reference Duct Access Offer (RDAO)¹, determining to conduct the prior hearing of interested parties, pursuant to articles 100 and 101 of the CPA - Código de Procedimento Administrativo (Administrative Proceeding Code) as well as the general consultation procedure provided for in article 8 of Law no. 5/2004 of 10 February (ECL), with a maximum period of 30 working days established for both cases.

It was likewise decided to notify the European Commission and other European regulatory authorities, pursuant to paragraph 1 of article 57 of Law no. 5/2004 of 10 February.

Essentially the DD established a geographically segmented and phased approach in providing information about the occupation of ducts on the Extranet, a reduction of various response times, an increase in the amount of compensation payable for failure to comply with established targets, the extension of the offer's scope to include cable input tunnels and the establishment of technical and economic conditions governing access to masts and other procedural matters to streamline the offer.

In response to public consultation comments were received from APRITEL - Associação dos Operadores de Telecomunicações (Association of Telecommunications Operators)², from Cabovisão - Televisão por Cabo, S.A. (Cabovisão)³, from Colt Telecom - Serviços de Telecomunicações Unipessoal, Lda. (Colt)⁴, from OniTelecom - Infocomunicações, S.A. (Oni)⁵, from PT Comunicações, S.A. (PTC)⁶, from SGC AR Telecom (SGC)⁷, from Sonaecom - SGPS, S.A. (Sonaecom)⁸, from Vodafone Portugal - Comunicações Pessoais, S.A. (Vodafone)⁹ and from ZON TV Cabo S.A. (ZON)¹⁰.

According to APRITEL, the *"position of APRITEL was approved by the majority of its members, which did not include PTC, since it does not concur with key aspects conveyed in this text. This contribution does not replace or invalidate the individual contributions which the members of APRITEL deemed relevant to put forward in respect of this consultation"*.

¹ Hereinafter "DD" (Draft Determination).

² E-mail from APRITEL of 7 January 2010.

³ E-mail from Cabovisão of 7 January 2010.

⁴ E-mail message from Colt of 7 January 2010.

⁵ E-mail message from Oni of 6 January 2010.

⁶ E-mail from PTC of 7 January 2010.

⁷ E-mail message from SGC of 7 January 2010.

⁸ E-mail from Sonaecom of 7 January 2010. It should be noted, that in the meantime, Sonaecom changed its name to Optimus - Comunicações, S.A.

⁹ E-mail from Vodafone of 7 January 2010.

¹⁰ E-mail from ZON of 7 January 2010.

In response to the notification made, the European Commission reported¹¹ that it did not have any comments to make, pursuant to paragraph 3 of article 7 of the Framework Directive.

In the present report, when reference is made to the positions expressed by various participants in the prior hearing and public consultation, the designation of OSP (operators and service providers) is used to designate all the operators who responded to the public consultation, with the exception PTC.

Pursuant to point d) of paragraph 3 of the "Procedimentos de Consulta do ICP-ANACOM" (ICP-ANACOM Consultation Procedures), approved by determination of 12 February 2004, ICP-ANACOM releases responses which it receives on its website, while safeguarding any information which is confidential in nature.

According to point d) of paragraph 3 of these consultation procedures, this present document makes reference to all responses received and provides an overall assessment that reflects the position which this Authority takes in respect thereof. This report provides a summary only, and therefore its analysis does not replace consultation in full of the responses received. The report restricts itself to issues which are the object of consultation, forming an integral part of the decision on amendments to the duct access offer.

II. ANALYSIS OF COMMENTS RECEIVED

1. General comments

APRITEL and the OSP (including Sonaecom, ZON, SGC, Cabovisão, COLT and Oni) welcomed the DD and/or consider that it contains a set of determinations which are viewed very positively overall insofar as they resolve various operational problems and difficulties in the current RDAO. This association and the OSP consider that the measures included in the DD contribute to the improvement of competitive conditions and that many of the issues addressed correspond to concerns which had already been expressed on previous occasions. Despite the positive view of the DD in general, both APRITEL and the OSP consider that, with regard to various issues, there remains room for improvement.

Although OSP agree with most of the amendments proposed by ICP-ANACOM, they are considered meagre by COLT in relation to the preamble set out by the DD, including with respect to the national priority of investment in Next Generation Networks (NGN), whereas APRITEL, ZON and Sonaecom had hoped that the DD would contain amendments providing the conditions required for observance of the principle of equivalence¹² which it deems will not be case, with Cabovisão considering that achieving this principle requires changes that are reflected in practice, with effects on competition and consumers.

ZON and Sonaecom invoked the need for separation between the wholesale and retail units of PTC, since they consider that there is discrimination in access to ducts and associated infrastructure between PTC itself and the other operators (which, according to ZON, gives rise to the complexity of the RDAO with processes that are inefficient and too lengthy). These operators also claim that the obligations imposed pursuant to the RDAO with respect

¹¹ Letter from the European Commission of 21 December 2009.

¹² Given, according to Sonaecom, the structural nature of access to ducts in the development in the electronic communications market over the medium and long term.

to information on network expansion plans, ensure that PTC has access to strategic information about its competitors. ZON and APRITEL take the view that ICP-ANACOM could have been more ambitious by making it mandatory for the retail unit of PTC to comply with the RDAO procedures applicable to use of and access to ducts.

Meanwhile, ZON recognizes the difficulties of separating PTC's wholesale and retail businesses in the short term.

APRITEL and certain OSP, including Oni and ZON, stated that the version of the DD currently available on ICP-ANACOM's website (and sent to them by ICP-ANACOM by post) does not match the version originally posted on the same website on the date on which the public consultation was announced. In this respect, identifying the differences between the two versions, Oni expressed its surprise at the changes "*made during the consultation period*" without any explanation forthcoming from ICP-ANACOM¹³. Additionally, the three operators reported that the DD contains a reference¹⁴ to a paragraph which was deleted, whereas Oni and ZON and APRITEL considered that it should be maintained.

Oni, in relation to matters in respect of which ICP-ANACOM refers to an agreement between the beneficiaries and PTC¹⁵, takes the position that, while an agreement between PTC and the beneficiary is a desired outcome, the experience gained in direct negotiations with PTC does not indicate that it is feasible or easy to reach agreements with this company (whereby, if this is the opted course, Oni suggests the participation of ICP-ANACOM, possibly leading group discussions of these topics).

Sonaecom stated that in the absence of the principle of equivalence of access, the RDAO is today insufficient and ineffective, with these shortcomings resulting from failures which they have detected in light of the experience over the course of the offer's existence. The operator also notes non-compliance by PTC with the decisions of ICP-ANACOM, in particular regarding the provision of record information. It considers that imposition of regulatory measures does not guarantee that PTC will respect and implement them, while effective oversight of compliance is operationally complex and difficult to implement on the ground. As such, Sonaecom argues that the implementation of a model of functional separation of PTC's network infrastructure is essential to ensure the effectiveness of the measures imposed in relation to equivalence of access, significantly reducing the costs and enhancing the effectiveness of regulation.¹⁶

Sonaecom recognizes that the implementation of functional separation has not inconsiderable costs for those involved. However, given the inadequacy of existing mechanisms available to

¹³ Oni adds that the original versions of these determinations, appearing in the final decision, would have a significant impact on the implementation of the offer, whereby it was even stranger that these changes "*missed the consultation procedure*".

¹⁴ Specifically, the following paragraph of page 23 of the DD contains a reference to one aspect (meanwhile deleted) D2: "*As mentioned in section 2.2, while information on occupation of ducts is not available in the database, the beneficiary may, at its own risk, dispense with the feasibility service and advance directly with the installation/intervention, sending advance notification of five calendar days as stated in D2*".

¹⁵ In particular, the definition of the features and implementation of the RDAO IS, acceptable technical specifications applying to the installation of cables and joint interventions for detecting dead cable situations.

¹⁶ Given that, according to Sonaecom, the use of tools which have not been sufficient to impose a weaker principle (i.e., the principle of non-discrimination) points to turbulent and unsuccessful implementation of this new principle (i.e., the principle of equivalence).

the regulator, it considers that maintaining the current paradigm of regulation involves higher costs for the market; therefore, in its view, the level of functional separation necessary is the lowest that is possible to impose and therefore has lower costs. It also considers that the risks associated with functional separation, as invoked by dominant operators, that it would lead to the elimination of investment and innovation incentives are not high, insofar as innovation with respect to ducts is limited and the main activity in this case is related to operation of an existing asset and that, at most, it will see expansion in its coverage rather than replacement. Therefore, Sonaecom argues that ICP-ANACOM should study functional separation with a view to implementation in the short term, because its benefits will exceed its costs, notwithstanding the application, in the meantime, of the stated principles based on the "regulatory tools" presently available to ICP-ANACOM.

Meanwhile, for its part, PTC is disapproving of a large part of the measures set out in the DD, considering them excessive and unreasonable, particularly in four areas:

- (a) The provision of information on occupation of ducts with a degree of detail which it claims is not available to it and therefore is not used for its own purposes, as well as information on the level of occupation at hole level, making reference to the complexity and costs associated with compiling information and maintaining a comprehensive information system on the state of occupation of ducts¹⁷, whereas it proposes to provide additional information, in the short term, on the Extranet, in order to increase the speed and effectiveness of the processes.
- (b) The reduction in response times, which PTC considers is not duly supported in effective efficiency gains resulting from improved operational performance in activities that may be automated¹⁸, arguing in particular for the amendment of the universe of occurrences of response times with respect to service levels from the current 100% to 95% in order to allow room for exceptional cases and taking into account the specificity and complexity of the processes supporting the management of the RDAO.
- (c) The increased and broadened application of compensation for non-compliance with levels of service, without considering that, for the RDAO to function, it is necessary for the offer's beneficiaries to comply with the procedures established therein, whereas PTC takes the view that failure to impose obligations in this respect constitutes an asymmetric obligation on PTC on terms which it considers unreasonable. Meanwhile PTC also notes the fact that while there is no limit to the number of submitted requests, this mechanism is open to improper use in order to obtain compensation.
- (d) The inclusion of the provision of masts in the RDAO, without this decision being in line with the obligations imposed in respect of the analysis of market for supply of wholesale (physical) network infrastructure access at a fixed location (market 4). PTC adds that, in accordance with the principles laid down in Law no. 5/2004, it has

¹⁷ Which it estimates at more than €10m for "areas C" over an extended period.

¹⁸ PTC emphasizes that these changes should only be envisaged after, and not prior to, the effective implementation of these improvements between itself and the beneficiary, which also involve the development and conduct of tests by the beneficiary.

already established a set of agreements with certain operators on the provision of access to masts and is negotiating conditions of such provision with others, whereas, in its view, there is no justification for the transformation of this offer into a reference offer, and less so for including it in another offer of a distinct nature, in terms of technical and security specifications and the specifications of the associated processes.

PTC also notes favourably the reflexes of a segmented approach in some of the proposals set out in the DD (particularly in terms of providing information about the occupation of ducts on the Extranet with a differentiation between "areas C" and "areas NC" and the respective feasibility process), although it considers that there is further to go in this respect.

Vodafone considers that the significant advantages that result from regulated access to PTC's ducts should be complemented by access to other infrastructure supporting the installation of optical fibre or other cables, such as aerial cables using masts and aerial supports required for the installation of the final segment of the optical fibre loop to the customer's home in FTTH topology. This results in Vodafone's view that there is a need to find alternative solutions to respond to situations of high levels of occupation in ducts or in regions of low urban density.

PTC and Vodafone made reference to the provisions of Decree-Law no. 123/2009 of 21 May:

- (a) PTC stresses the need for harmonization of the final decision on amendments to the RDAO with the legal framework introduced by Decree-Law no. 123/2009 concerning the exigency and level of detail in information about ducts.

In this context, PTC does not consider it fitting that obligations are imposed which are substantially more onerous than those imposed on other undertakings - notably through the application of this decree-law - and sight cannot be lost of the need for coordination, with regard to the provision of information on access to ducts, between the RDAO and the CIS in the light of public consultations conducted in both respects and in light of that established in article 97 of the same Decree-Law.

- (b) Vodafone reports that the rules set out in the RDAO with regard to access to masts and other installations in the possession of PTC which are suitable for the housing electronic communications networks should be more demanding than the provisions of Decree-Law no. 123/2009, otherwise the principles of equality and non discrimination would be violated.¹⁹

Also according to Vodafone, any provisions or obligations arising from the RDAO not complying with Decree-Law no. 123/2009 on the provision of information - including response times, and fees for information and its provision (which includes

¹⁹ Whereas, according to Vodafone, the justification for this argument is set out in the preamble to the referenced legislation, under which "the concessionary of the telecommunications public service remains subject to the stricter rules flowing from the Electronic Communications Law, approved by Law no. 5/2004 of 10 February, and from measures adopted by ICP-ANACOM in the context of article 26 thereof, and for this reason the regime herein does not apply to the referred operator as far as the access to ducts, masts, other facilities and locations held or managed by it are concerned. the concessionary of the telecommunications public service must comply, however, with provisions herein concerning the provision of information and records of infrastructures, pursuant to and subject to the requirements of a centralised information system (SIC) provided for in Chapter IV. Pending the actual implementation of the SIC, ICP-ANACOM, being the national regulatory authority, shall adapt the arrangements for provision of information on access to ducts, masts, other facilities and locations by the concessionary of the telecommunications public service, so as to achieve a coordination with the SIC".

information on available capacity) - are made void by the provisions of article 135 of the APC.

Vodafone also notes that the current non-existence of the CIS does not determine exemption from such obligations of ICP-ANACOM, in respect of their implementation, and of PTC, as recipient, given the exception expressed in Decree-Law no. 123/2009 to adapt and coordinate the RDAO with the future CIS; PTC also alludes to this issue, referring to the need for coordination with respect to the provision of information on access to ducts, between the RDAO and CIS.

ICP-ANACOM notes the general tone of agreement with the DD expressed by virtually all entities that responded to the prior hearing, with the exception of PTC.

Regarding the position taken by ZON that the scope of alterations contained in the DD could have been more ambitious in accomplishing the principle of full equivalence, which it considers has not been achieved, and regarding the proposal put forward by Sonaecom that ICP-ANACOM examine the application of a model of functional separation of the incumbent's network infrastructure, it is noted that while such a mechanism is not completely removed from the current regulatory framework, in particular Law no. 5/2004 of 10 February (see article 42, paragraph 3 and article 66, paragraph 4), it only has specific provision in Directive 2009/140/EC of 25.11.2009, which is due to be transposed into Portuguese legislation next year. And, since the completion of functional separation has relatively extensive associated costs and implementation timeframes, it is deemed preferable, at least at the present time, to achieve the objectives targeted by this type of remedy through the implementation of other obligations under the current regulatory framework (e.g., obligations of non-discrimination and transparency and through the specific measures which were defined under these obligations, including the publication of performance levels). This is a question which ICP-ANACOM will closely monitor, with a view to taking a final position on the matter, which decision will also depend on how PTC puts their reference offers into practice.

Furthermore, in ICP-ANACOM determination of 11.03.2009 regarding the publication of quality of service (QoS) performance levels of wholesale offers, provision is made for the possibility of setting out, when opportune, an obligation of equivalent access under the RDAO, in line with any provisions that may be laid down in the future EC recommendation on the regulatory approach to NGA.

Should this implementation not take place - which will be considered and decided separately in the light of this recommendation²⁰ - indicators relating to levels of quality of services performance provided to internal departments of Grupo PT will be directly comparable to the indicators for services provided to the remaining beneficiaries of the RDAO.

Regardless of whether or not there are directly comparable indicators of supply between the beneficiaries of the RDAO and the companies and internal departments of Grupo PT provided services within the scope of this offer wholesale, ICP-ANACOM will continue to develop all necessary measures and efforts in order to bring the conditions of access under

²⁰ See http://ec.europa.eu/information_society/policy/ecomm/library/recomm_guidelines/index_en.htm.

the RDAO into line with the conditions available internally to PTC so as to minimize distortions of competition.

As regards the comments of Vodafone and PTC, it should be made clear that the provision of Decree-Law no. 123/2009 is that: *"the concessionary of the telecommunications public service remains subject to the stricter rules flowing from the Electronic Communications Law, approved by Law no. 5/2004 of 10 February, and from measures adopted by ICP-ANACOM in the context of article 26 thereof, and for this reason the regime herein does not apply to the referred operator as far as the access to ducts, masts, other facilities and locations held or managed by it are concerned. The concessionary of the telecommunications public service must comply, however, with provisions herein concerning the provision of information and records of infrastructures, pursuant to and subject to the requirements of a centralised information system (SIC) provided for in Chapter IV.*

In fact, the regime governing access to the ducts of the concessionaire (PTC) is provided for in article 26 of Law no. 5/2004, whereas the access regime under Decree-Law no. 123/2009 does not apply. Accordingly, ICP-ANACOM under the terms of successive decisions of the RDAO, has already made PTC subject to a regime governing access to ducts (which it owns or manages), which is *per se*, more demanding than the regime provided for in Decree-Law no. 123/2009. And, in this respect, it should be noted that ICP-ANACOM imposes the obligation that PTC make information available online on the occupation of ducts in "areas C", which is more demanding than the regime set out in Decree-Law no. 123/2009. ICP-ANACOM also reduced the time limits applicable to responses to occupation feasibility analysis requests to 10 calendar days which is also more demanding than the 10 (working) days specified in point b) of paragraph 4 of article 24 of Decree-Law no. 123/2009.

Regarding the adaptation and coordination of the RDAO with the CIS, according to paragraph 1 of article 97 of Decree-Law no. 123/2009 *"until the effective implementation of the SIC, ICP-ANACOM, being the national regulatory authority, shall adapt the rules on provision of information on ducts, masts, other facilities and locations provided by the concessionaire of the public telecommunications service (...) so as to coordinate them with the SIC."*

There is therefore no legitimate interpretation which precludes the possibility of imposing obligations on PTC which are stricter than those provided for in Decree-Law No. 123/2009.

In fact, paragraph 2 of article 97 of this Decree Law states that *"the preceding paragraph shall be without prejudice to provisions of the Electronic Communications Law (...) in matters such as market assessment, identification of companies with significant market power and consequent imposition of obligations."*

With respect to the possibility raised by the Oni that ICP-ANACOM might participate in working groups between operators on RDAO-related matters which are essentially technical in nature, this Authority sees no such need at the present time, believing in the commitment of all parties to achieve results, without prejudice to being able to assess this matter in future and to the opportunity to intervene on a case-by-case basis.

Finally, it is clarified that the lack of coincidence between the version of the DD initially made available on ICP-ANACOM's website for a few hours and the version currently

available on this website (and sent to interested parties by post) is due to a lapse in administrative procedure. In fact, the version of the DD which, by mistake, was initially published on the website of ICP-ANACOM on 20.11.2009 did not correspond to the version which had been approved by the Management Boards of the Authority at its meeting of 17.11.2009, for which reason it was removed and republished on the same day (20.11.2009) at 2.10pm. This republication was also explicitly mentioned on the same website of this Authority²¹. This, obviously, cannot be considered as representing "*changes made during the consultation period*".

In this context, it is clarified that the paragraph on page 23 of the DD, which refers to the meanwhile eliminated second item of D2, was included by mistake and will be corrected in the final version of the decision.

The various objections raised about the DD by PTC will be analyzed in the specific points related thereto. It is important to note, however, that since the RDAO is an essential tool for the development of NGA and in a phase in which steps are being made towards the total or partial deregulation of certain retail and even wholesale markets (as already implemented for example in the analyses of markets 5 and 6²²), it is important to ensure that this offer is effective and meets the needs of markets whose competitive development, to a large extent, it supports, particularly in terms of processes and response times with which non-compliance must be strongly discouraged due to the serious harm that it entails.

2. Specific comments

In this section, the summary and interpretation of responses received and the corresponding analysis of ICP-ANACOM will follow the order of the matters addressed in the DD. Each subsection begins with the determination proposed in the DD, followed by the comments of interested parties and ICP-ANACOM's consideration of these comments.

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

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 Grater Porto: 3 months
- All other "areas C" of the analysis of market 5: 6 months
- "Areas NC" of the analysis of market 5: There is no requirement to include occupation information on the Extranet except in the case of new ducts built during 2009 and thereafter²³.

²¹ See <http://www.anacom.pt/render.jsp?contentId=995555>.

²² See <http://www.anacom.pt/render.jsp?contentId=1000059>.

²³ In which case it should be ensured that information is provided "*on-line*", within 30 days of completion.

APRITEL and all the OSP expressed their satisfaction with the inclusion of information on the occupation of ducts on the RDAO Extranet and regard this as positive and a major step forward in the RDAO, because:

- (a) According to Oni, this streamlines the process of analyzing route feasibility.
- (b) It enables, in the view of Vodafone, all projects to be planned, *a priori*, given the knowledge of the feasibility of the intended occupations.
- (c) In addition, according to Vodafone, it also enables time savings by avoiding feasibility assessment from being carried out separately from requests for information.
- (d) Again according to Vodafone, it avoids rejections of routes at a late stage in the process as well as the creation of necessarily longer routes and the consequent increase in occupancy costs.
- (e) In COLT's view, this information is crucial for the formulation of requests, leading to a real improvement over the existing system.
- (f) According to SGC, it makes it possible for operators finally to have a positive experience when using the RDAO.

Nevertheless, certain OSP²⁴ and APRITEL report that they remain expectant in relation to actual availability of information on occupation of ducts on the Extranet, taking the view that provision for such was already made in previous ICP-ANACOM determinations which have been met with a clear failure of compliance on the part of PTC.

Oni and Vodafone consider the phasing proposed with respect to the provision of information as reasonable, giving priority to areas where there is likely more interest from beneficiaries in making use of the RDAO. However, Vodafone takes the view that the segmentation for the purposes of setting priorities should correspond: (1) to the districts of Lisbon and Porto, (2) to the municipalities of the remaining district capitals and (3) to the rest of the country, whereas the availability of information on new ducts within 30 days should apply to proposed areas (2) and (3).

Meanwhile Sonaecom does not understand the differentiation made between the areas of Greater Lisbon and Greater Porto on the one hand and the remaining districts in competitive areas on the other, nor the established time limits, corresponding to those areas in which Grupo PT has been installing its FTTH network, covering 1 million homes (late 2009), which it equates to a fire within the areas of Lisbon and Porto, making the argument that information on these routes must be made available with immediate effect. For the remaining routes, Sonaecom accepts that there might be an additional transition period, but considers that it must not exceed 45 days, taking the view that there is no justification for PTC's lack of action since the decisions which determined it to carry out a record survey, whereby Sonaecom does not consider it acceptable to grant additional periods of several months.

²⁴ In particular, ZON, SGC and COLT.

Oni, Vodafone, ZON, Cabovisão, Sonaecom and APRITEL have reservations, and consider that the logic of geographic segmentation enshrined in the analysis of market 5 cannot be applied to the framework of the RDAO²⁵, disagreeing with the lack of obligation with regard to the inclusion on the Extranet of information on occupancy of ducts already existing in "areas NC"²⁶, considering, with regard to this situation, that:

- (a) It may, according to Oni, contribute to the maintenance of discrimination through longer installation times in these areas, whereby it deems that availability of information on the occupation of existing ducts should also be imposed in "areas NC"²⁷.
- (b) It results in the maintenance of most of the operational difficulties that have beset this offer, since "areas NC" are typically the most disadvantaged in terms of access to electronic communications services and where there is a greater reliance on the part of operators in relation to infrastructure of PTC (in the view of Oni).
- (c) It may lead to a delay in the deployment of NGN in less attractive regions, particularly in respect to the public tenders for the installation, management, operation and maintenance of NGN (according to APRITEL and ZON), regions where information on ducts constructed prior to 2009 is of added relevance in a framework of incentivising NGN development as a means of combating info-exclusion and regional asymmetries.
- (d) According to Cabovisão, it reinforces existing imbalances in "areas NC", considering that a distinction is being made between urban and rural areas for the purposes of information on the occupation of ducts which, apart from discriminating against operators who want to develop networks in less attractive areas in terms of investment, may lead to a disincentive to investment, to the detriment of consumers.
- (e) According to Sonaecom, it jeopardises the review of investment options and their sustainability in areas that, from the outset, present excessive risk, whereby this "sidelining" will hold back development in terms of electronic communications services, whereas the approach of ICP-ANACOM needs to take into consideration the importance of access to ducts in the progression up the investment ladder.
- (f) In the view put forward by Vodafone, it has a negative impact (i) on fast and easy access to full information on all existing ducts, which should be encouraged,

²⁵ According to Oni, APRITEL and ZON, it may be difficult to apply the concept of "areas C" and "areas NC" in the RDAO, and there are doubts concerning the geographical segmentation, with respect to the delimitation and stability of geographic areas as well as regarding the definition of these areas. They add that, given the expected evolution in the delimitation of zones, which is due largely to "remote enabling" of the AP of PTC and the development of the broadband market, the coherence between the areas defined by ICP-ANACOM in the referred to analysis and the areas now proposed will certainly be affected, possibly introducing further distortions to the market's functioning and to the development of competition, harming consumer interests and what is considered a national goal. Vodafone even considers that the geographic segmentation adopted in the analysis of market 4 and 5 is based on a flawed analysis of the fixed broadband market in Portugal and the parallelism between the analysis of these markets and access to ducts is misinterpreted since the fact that the obligation of access to ducts is included in markets 4 and 5 is naturally not to be confused with the verification of "competition" in the infrastructure in question, an analysis that will certainly lead to a different result.

²⁶ With the exception of ducts built during the 2009 and thereafter.

²⁷ Proposing the establishment of an appropriate time limit for the provision of such information.

particularly in areas which are disadvantaged in relation to the provision of offers of fixed broadband access, and (ii) on the network study and deployment process of the interested OSP, whereby the reasoning set out by ICP-ANACOM regarding this issue appears contradictory, insofar as (quoting ICP-ANACOM) there has been an "*effort to extend NGA to rural areas*", even while a decision has not been made leading to availability of information about the state of occupation of ducts in rural areas, which the operator considers lacks justification.

Regarding the difference in the form of implementing the obligations, ZON states that the present procedure of amendments to the RDAO is based on articles 26 and 8 of Law no. 5/2004 and not on the market analysis regime governed by title IV of the same law; as such it does not see now or what criteria it is possible to introduce a distinction in the obligations of PTC according to any geographical segmentation (which is based on the logic of geographic market definition that is inconsistent with the RDAO), in the absence of explicit legal authorization for said purpose, especially on a matter as relevant to the beneficiaries as record information.

ZON adds that, in the context of the analysis of market 5, obligations remained imposed on the incumbent in "areas NC", since it was recognized that the conditions of competition in these areas continued to justify the imposition of *ex-ante regulation* in order to guarantee the existence of alternative offers to Grupo PT. In conclusion, ZON advocates²⁸ that the imposition of increased obligations for PTC with regard to the provision of information on the occupation of ducts on the *Extranet* should take place in "areas NC" to give an incentive, through *ex-ante regulation*, to the development of alternative networks and the mass deployment of broadband in less favoured regions.

Finally, ZON reveals that the scope of the information to be made available on the Extranet was defined by ICP-ANACOM a long time ago, with no geographic differentiation, whereby all that is required now are measures to ensure compliance with that obligation; as such ICP-ANACOM should call on PTC, within a reasonable but short period of time, to comply with the obligation to provide information on the occupation of ducts on the Extranet throughout the country, accepting that the criterion of geographic segmentation can be used to introduce some distinction in terms of performance of that obligation, along the lines laid down in D1, whereas, in such a scenario, a reasonable time must be established, not exceeding 12 months, for the provision of information on the Extranet in relation to "areas NC".

Sonaecom also considers that the draft decision represents a setback in terms of the stipulations of ICP-ANACOM's decisions of 17.07.2004 and 26.05.2006, and that the argument that priority should be given in the provision of record information to areas which are considered more competitive is invalid, given the time elapsed since those decisions, which period has more than sufficient for PTC to conduct the record survey at a national level.

In this sense, Sonaecom claims not to understand the modification of an obligation which was imposed nearly four years ago on the pretext that it cannot be accomplished with an imposed period of 18 months, arguing that the unenforceability of the initial period may justify failure

²⁸ Applying reasoning for ICP-ANACOM's use of the criterion of geographic segmentation in the analysis of markets 4 and 5 to the RDAO framework.

to sanction a delay but cannot justify the elimination of an obligation which is necessary for the development of the electronic communications market.

SGC considers points D1 to D6 to be fundamental in enabling operators to finally have a positive experience in using the RDAO at the same time as it reduces the negative impact caused by the current unavailability of all necessary information on the Extranet.

Vodafone cites, on the one hand, the provisions of paragraphs 1 and 4 of article 24 of Decree-Law no. 123/2009, noting that the information on the occupation of ducts²⁹ applies to both beneficiary operators as well as to PTC and should be available within 10 days and, secondly, the consultation on the CIS³⁰, to give basis to its view that the terms of availability of information on occupation applicable with respect to the RDAO has to be, as legally stipulated, more demanding than for the other operators³¹ while not conceiving of the motive for making an exception of "areas NC".

Cabovisão proposes that in the case of "areas NC", the obligation to include information on occupation is also valid for ducts which are or have at least once been subject to a feasibility request, even where built before 2009, i.e., each duct (or IC) subject to a request, with the resulting compilation of required information, should be made available centrally.

Sonaecom considers it essential that ICP-ANACOM make it obligatory to conduct a record survey of all ducts in "areas NC" and not only those constructed after 2008 (because it implies the irrelevance of the measure for many years), suggesting that such must be completed within 12 months.

PTC considers that the indication in the DD that the plan of duct routes "*contains no information about dimensions, occupied volume and available space in ducts*", is inaccurate because information on the length of ducts is present and, when missing, can be determined, since the plans are the scale representations, allowing the calculation of distances between points, including the lengths of the ducts between adjacent IC.

PTC also considers that the obligation to provide updated information on the occupation of ducts is a demand which has no parallel in Europe, and it does not know of any regulatory measure that imposes this, nor has one been suggested by the European Commission in the draft Recommendation on NGN³². Furthermore, according to PTC, Decree-Law no. 123/2009 does not require information on the occupation of ducts to be made available in the CIS, whereby the operator argues that there are no grounds for asymmetry, especially since the

²⁹ "Available capacity in infrastructures"

³⁰ "Since there is no obligation to provide information about the state of occupation of objects registered by information providers, it is deemed to be of particular interest that in conceiving the CIS provision is made of one (or more) field for the state of occupation of each infrastructure suitable for the housing of electronic communications networks, which can be completed, as seen fit, by the referred to entities."

³¹ According to the position taken by Vodafone, "the exemption" from automatic information on the occupation of ducts in "areas NC" set out in the DD constitutes a parallelism with the regime which will now be applicable to the other communications companies and therefore does not translate into a true regulatory measure designed to correct existing inequalities in this market and to promote competition.

³² Which states that the SMP operator should provide information on available space in ducts, only where it has this information available. PTC argues that, according to a logic of appropriateness and proportionality, the SMP operator should only be required to update this information as it develops its own fibre network, since it will already have had physical access to ducts and obtained information about the state of occupation.

terms by which information on access to ducts with respect to the RDAO is made available should be coordinated with the CIS.

PTC welcomes the proposed phased and segmented approach, but affirms that:

- (a) It does not have a real time feasibility analysis system for its own use, and so takes the view that there is no justification provided by an approximation to the concept of "equivalent access".
- (b) Information with the level of detail sought by ICP-ANACOM is not available in PTC's information systems and it will not be possible to make it available without carrying out a comprehensive compilation on the ground.

In relation to point (b) above, PTC mentions that the comprehensive registry of ducts and associated infrastructure, as well as of all cable installations and equipment belonging to PTC and other OSP is a project of colossal size and requirements in terms of maintenance of information over time and is virtually impossible to perform, since an update of the state of occupation of a duct does not depend exclusively on PTC.

Even with regard to the initial survey (i.e., at a given time), PTC reports that it is not enough simply to open the 235 thousand IC scattered around "areas C" and survey the installed cables, but it is also necessary to follow the routing of the cables from the point of origin to point of destination and all the equipment (connection points, excess cable and entry points) of the installations³³. Furthermore, according to PTC, it would still be necessary to define procedures for the maintenance of information, since any change in the network, such as altering the position of a cable in an IC, would be subject to an adjustment in the records of PTC. It notes that the record survey would be performed by the beneficiaries whereas PTC will be required to trust this information and enter it into their systems. Despite this, PTC says that the DD does not include incentives for the beneficiary to fulfil these obligations, such as any obligation to pay compensation to PTC in the event of delay, inaccuracy or omission in sending the information in question.

PTC considers that the period of 30 calendar days which the beneficiaries have to prepare and submit the registration added to the proposed 10 working days for receipt, validation and registration of the records by PTC, also make it impossible for the information to be made available on the Extranet in a way that is "*close to real time*". That is, given the proposed timings, the information provided on feasibility, which beneficiaries would want to be able to consult directly, might be outdated.

In the current context of global financial and economic crisis, PTC argues that resources must be channelled into structural projects and investments that create added value for both PTC and the electronic communications sector as well as for the national economy as a whole. PTC thereby takes the view that registration surveys of past facilities does not constitute a

³³ PTC identifies a number of difficulties in this survey, such as the fact that the cables do not have unique identification, except in rare situations, which make it possible to follow them efficiently through the IC and duct, there are IC with access blocked by parked cars or pavement, or IC clogged up with mud and stones making it impossible to carry out the record survey.

priority project, compared to, for example, the publicly assumed priority of developing NGA, given its greater potential for creating well-being, development and wealth for society.

PTC argues that there is no economic justification for making an estimated investment of around 10 million euros for the survey in all "areas C", nor for maintaining the records of around 235 thousand IC, ducts and cable installations and equipment, some dozens of years old, containing cables and equipment without identification and wholly or partially buried in the ducts. PTC estimates that the deadline for concluding the record survey with the level of detail sought by ICP-ANACOM in "areas C" is [Start of Confidential Information, hereinafter SCI] [End of Confidential Information, hereinafter ECI].

PTC notes that it has been developing and automating the processes of the RDAO, intending to provide, in the short-term, additional information on the Extranet, in order to increase the speed and efficiency of its processes.

PTC does not consider the time-limit of 3 months for concluding the survey of occupation information for Greater Lisbon and Greater Porto with the desired detail to be achievable, assuming that these correspond to the areas with codes beginning 01 (Lisbon) and 02 (Porto) and belonging to "Area C". The deadline of 6 months for the remainder of the survey of "areas C" is, according to PTC, impossible to accomplish, given the complexity of the project and the quantity of resources that it would require. Strictly speaking, according to PTC, the intention goes beyond the RDAO, since in order that occupation information is kept rigorously up-to-date and allows identification of the area occupied per tube, PTC would have to deploy information systems and processes that make it possible to ensure that any alteration to the network would result in an update to the respective record information; as such, the impact of implementing such a system would be inordinate.

PTC acknowledges the benefits that could result from implementing such a system, since it would enable online responses on feasibility to beneficiaries. However, it reports that all updates on the occupation of the network in the various parts of the country would have to be automatically recorded on the Extranet, which is a disproportionate requirement, given that reports of infeasibility for sections given in the 1st quarter of 2009 represent no more than [SCI] [ECI] of all sections for which responses were given for feasibility of duct occupation.

Therefore, for the areas of Greater Lisbon, Greater Porto and the other "areas C", PTC proposes to make indicative information available on the occupation of ducts, based on integrated information from different systems, including network records, cables records and other sources.

The detail of this proposal, in terms of information to be made available is analyzed in point D5.

According to the proposal submitted by PTC to implement the provision of information, it is envisaged that an experimental stage would commence within three months, for provision on the Extranet of information on the indication of occupation levels in "areas C" of Greater Lisbon and Greater Porto, based on existing record information. During this phase, PTC says that the information provided will be merely indicative in nature and not suitable for the purpose of placing access and installation requests. Within six months, PTC expects that the

conditions will be in place so that the information on levels of occupation for the "areas C" of Greater Lisbon and Greater Porto will be effective and suitable for use. And within a period of 11 months, it envisages making information available on the Extranet on the indication of occupation levels in other "areas C".

Finally, PTC makes clear that the provision of information on occupation levels leads to additional development and operation costs, whereby it reserves the right to upwardly revise the price of access to the Extranet upon provision of these features³⁴.

Note is made of the advantages and the need for provision of information on occupation of ducts (set out by APRITEL and the OSP), which have also been considered important by ICP-ANACOM, since the decision which defined the minimal elements of the RDAO.

However, as stated in the DD, in the existing framework of implementation of NGA and with a view to pragmatism, taking into account also the cost of compiling, processing and updating this information, it is acceptable that priority be given to the provision of information on the occupation of ducts in areas where there is likely greater demand, subject to maintaining mechanisms, although less rapid, for the entire country. It is noted that some OSP share this view.

It is understood that the OSP wish to have immediate access to information on occupation of ducts. However, it is noted once again, that overly complex or comprehensive options may have implementation periods or costs which, rather than promoting use of this offer, would have the opposite effect.

Additionally, with the entry into force of Decree-Law No. 123/2009, the set of infrastructure subject to access obligations has been significantly extended. Without forgetting that the concessionaire of the public telecommunications service is subject to the more demanding regime stemming from Law no. 5/2004 of 10 February and from the measures adopted by ICP-ANACOM pursuant to article 6 thereof, which measures are also identified as obligatory subsequent to the analysis of market 4, it is noted that the entities bound to grant access to their ducts under the terms set forth by Decree-Law no. 123/2009 are under no obligation to make information available on the CIS with respect to occupation of infrastructure, contrary to the provisions set forth in revoked Decree-Law no 68/20055 and contrary to the stipulations of the RDAO.

The changed circumstances resulting from the increased number of entities required to provide access to ducts, accentuates the perception that, in "areas NC" where demand for such infrastructures is not so high, there is no justification, given the lack of proportionality, for PTC remaining subject to the obligation to conduct a survey on the state of occupation of all ducts, since it is recognised that this situation is distinct from the obligation to grant access to these ducts in these areas, to which obligation PTC naturally remains subject.

In this sense, the option of ICP-ANACOM, given its accumulated experience and the need to implement an effective and efficient process, is to prioritize and simplify (as will be

³⁴ The proposed release of information about occupation will, according to PTC, be of an evolving nature over time in terms of accuracy, completeness and currency and as the record systems are populated with more information, both through records of cable installation and through the migration of information stored on other cable systems to the IS records.

examined in greater detail under point D5) the information to be provided "on-line" on the Extranet, taking into account the areas where there is likely to be more interest among beneficiaries in using the RDAO, whereas the obligation is maintained to provide information on the availability of spare capacity when requested.

Therefore, the view is taken that any obligation for the compilation and the "on-line" provision of information on the Extranet with regard to occupation of existing PTC ducts in all "areas NC" would be excessive, making the costs of using ducts in these areas onerous and, as such, may violate the principle of proportionality to which ICP-ANACOM must adhere in its actions. It is noted that, currently, the development of NGA is the main driver of network deployment and occurs mainly in urban areas where demand for access to ducts is greater.

In this context, the proposal put forward by Vodafone is not reasonable since, despite being made a priority (albeit with extremely reduced deadlines), "areas NC" remain included with regard to the provision of information on occupation of ducts on the Extranet.

Also the proposal put forward by Sonaecom with a view in particular to the immediate availability of all the information on occupation of ducts with regard to all the "areas C" is not reasonable, since the demand for access to ducts is most pressing in areas of the Greater Lisbon and Greater Porto, whereby a phased introduction of information on the Extranet with regard to the occupation of ducts is deemed appropriate, giving priority to these areas.

On the geographical segmentation of the obligation to provide information "on-line" on the occupation of ducts on the Extranet, ICP-ANACOM reiterates that the areas corresponding to those which in the analysis of market 5 were designated as "areas C" are the areas where access to ducts may occur more frequently³⁵, and where, therefore, greater speed in gaining access to ducts may be more critical in terms of market access according to comparable conditions.

Once again it is noted that the obligation to provide information on the occupation of PTC ducts on the Extranet involves costs and that in unit terms, the costs will likely be higher in "areas NC" and the resulting benefits lower than in "areas C".

As such the parallel development of several NGA in "areas NC" is unlikely, which is why in fact the government decided to launch specific tenders with public funding for their development with relatively broad implementation periods. It is recognized that the entities winning the tenders for the deployment of NGA in rural areas have a requirement to obtain information about the state of occupation of ducts in these areas, but issues of equal access or competition in terms of infrastructure in these areas are not so pressing as in "areas C" and do not justify the higher costs associated with the "on-line" provision of information on the occupation of ducts.

This is without prejudice to the recognition of the importance of access to ducts in these areas in reducing regional disparities and greater the delay seen in these regions in terms of benefiting from competition and increased investment, whereby a reduction in the time limits

³⁵ According to information submitted by PTC with regard to the 1st half of 2009, less than ¼ of feasibility requests referred to "areas NC".

for responding to occupation feasibility requests in "areas NC" is likewise included by ICP-ANACOM in the DD and in the framework of an overall balance in the obligations applicable in these areas, in light of real market needs. Again, this is a compromise between cost and efficiency, and it is noted that certain obligations have been imposed in the past (e.g. ATM interconnection in the "Rede ADSL PT" offer) which operators deemed important and then ended up not using.

In this respect it is legitimate to consider the logic of geographical segmentation in the context of RDAO because, while the regime governing access to ducts is laid down in article 26 of the ECL, the imposition of the obligation of access to ducts was also defined in accordance with the analysis of markets 4 and 5 (of the EC recommendation) in which geographical segmentation between "areas C" and "areas NC" was advocated in relation to broadband access, whereas access to ducts is particularly relevant in the context of NGN deployment and was one of the obligations set out in the context of these market analyses.

It is noted that, regarding the comment of ZON, ICP-ANACOM's determination explicitly refers to the analysis of markets 4 and 5 with respect to their rules of eligibility, whereas articles 26 and 8 of Law no. 5/2004 make no reference to how the obligations should be implemented, and it is incumbent upon ICP-ANACOM to decide thereon, whether segmenting them geographically or otherwise, paying particular regard to the principle of proportionality. Therefore, the comment of ZON is unfounded since there is no geographic segmentation in market 4, since Grupo PT is considered as having SMP on a national geographic market. Consideration of the segmentation adopted in market 5 does not mean that the referred to Group does not have SMP in market 4, merely that in "areas NC", due to a lesser intensity of competition, there is likely less demand for access to ducts and less urgency in gaining access to ducts quickly for the construction of new networks, where the question of "*first mover*" sometimes assumes critical importance in gaining customers, whereby there is no longer justification for maintaining the obligation of "*on-line*" provision of information on the occupation of ducts as previously imposed.

With regard to Vodafone's allusion to the need for a more demanding regime under the RDAO than provided for in Decree-Law no. 123/2009, ICP-ANACOM considers that this does not mean that any and all conditions in RDAO need to be more demanding than those provided for in this decree-law. It is the overall set of conditions which, as a whole, should be more demanding, to the extent necessary to further the ends desired. Furthermore, as follows from point D2, the time limit applicable to responses to occupation feasibility analysis requests (which includes more than just information about the location of ducts) is reduced in all cases (see also D3) to 10 calendar days and is therefore less than the limit of 10 (working) days stipulated in Decree-Law no. 123/2009.

The comment of PTC that inaccurate reference is made in the DD that the duct route plans "*contain no information about dimensions, occupied volume and available space in ducts*", given that it is possible to ascertain the length of ducts between adjacent IC, is not fitting and should be contextualized. The reference in question is included in the DD in the section concerning the inclusion of information on occupation of ducts on the Extranet. Here the length of the duct is not related to the information on occupation, which can be obtained, for example, through a percentage of occupancy, plus information on the area (size) of the duct

or by including the total area for occupy. As PTC recognizes, none of this information is currently available on the Extranet.

Regarding PTC's reference to the second version of the draft recommendation of the EC on the regulatory approach to NGN, and specifically the lack of provision for the obligation to provide information on occupation of ducts, it is noted that the recommendation, meanwhile published on 20.09.2010, sets out that the SMP operator is obliged to provide, whenever possible, information on the geographical location of ducts, inspection chambers and masts, and also on space available in ducts.

Regarding the asymmetry desired by PTC in the imposition of the obligation to make information available on the occupation of ducts, it is clarified that the fact that Decree-Law no. 123/2009 does not require that information be made available in the CIS on the capacity available in ducts, this does not mean that this imposition on PTC, which has already imposed in the past, is not justified, given this undertaking's significant market power (it is recalled that the obligation imposed on access to PTC ducts under Article 26 of Law no. 5/2004 was also included as an obligation as a result of the analysis of market 4 and given the dominance of PTC on this market) and the fact that it is concessionaire of the basic network. This justifies regulatory asymmetry in this area.

On the proposals of Cabovisão and Sonaecom on information on the occupation of ducts to be made available in "areas NC", ICP-ANACOM, taking into account the more than 20,000 feasibility analyses performed by PTC since the RDAO entry into force, takes the view that the requirement to include information on the Extranet with regard to the occupation of new ducts built in 2009 and thereafter should also be applied to ducts which were built before that date and which have been subject to a feasibility analysis, although information can refer to the dates of the latter. It is noted that the release of this information does not incur any expense insofar as it does not require the conduct of any survey, but only the establishment of procedures which optimize the outcome of the feasibility analyses.

With regard to the claims made by PTC that it lacks a real time feasibility analysis system and that its systems do not have information on the occupation of ducts to the level of detail requested, ICP-ANACOM takes the view that such comments miss an opportunity in light of the simplification that is now being introduced, recalling that PTC has known about the obligations which it faces in this area for a long time.

Access to an Extranet has been available since 11.26.2007 (i.e. within the established period), but it only allows access to beneficiaries of the RDAO to information about the location of infrastructure, and does not contain any indication as to available and/or occupied capacity of infrastructure. From the outset, there is therefore no justification for PTC to now estimate a new extended timetable to carry out the record survey of (occupation) of ducts in "areas C".

In addition, PTC has carried out thousands of duct occupancy feasibility analyses to date and since the entry into force of the RDAO; the company should therefore have taken the opportunity, at the very least, to record the state of occupation in the duct sections involved (even more so when it is required that beneficiaries send them the updated record after installing their cables); however not even this information has yet been made available.

As regards the impossibility of keeping information about the occupation of conduct updated over time, since such information does not depend exclusively on PTC, ICP-ANACOM takes the view that, even while other entities have access to ducts, in the case of infrastructure structures that PTC owns or that is under its management, PTC is responsible for and manages this infrastructure and, for the accomplishment of such objective, should keep current information thereon over time, which information, as noted above, is required by PTC from the beneficiaries. Meanwhile, in the absence of functional separation, that is, with no single entity dedicated exclusively to the management of wholesale infrastructure, this function is incumbent upon PTC. This does not imply, however, that PTC should be held liable for errors or delays of beneficiaries in the submission of this record information, which in any case must be reported to the Authority in systematic form.

ICP-ANACOM further considers that the estimation of 10 million euros of costs submitted by PTC to conduct a survey of information on the occupation of ducts in "areas C" is not adequately justified, given that PTC has already conducted in excess of 20 thousand feasibility analyses, whereby it has (or should have) obtained knowledge as to the state of occupation of a large number of inspection chambers and duct sections. Furthermore, whereas PTC has said that it would be necessary to *"survey the installed cables, since it is necessary to follow the routing of the cables from the point of origin to point of destination and all the equipment (connection points, excess cable and entry points) of the installations"*, ICP-ANACOM takes the view that, initially, such tasks are excessive, given that (considering the analysis performed in point D5 on the detail of information required regarding the occupation of ducts) the aim is a kind of snapshot of the state of occupation of infrastructure, and since it is unnecessary to perform these tasks, the actual costs are lower than those estimated by PTC.

Therefore, taking into account the detail of information about occupation of ducts required (see ICP-ANACOM's position in point D5), and given the proposal advanced by PTC itself to provide indicative information on the occupation of ducts in the areas of Greater Lisbon and Greater Porto and other "areas C", ICP-ANACOM notes that the timetable proposed by PTC is, *grosso modo*, consistent with that put forward by ICP-ANACOM in the DD.

Finally, regarding the possibility that PTC may increase the price of access to the Extranet, in respect of the availability of duct occupancy levels, ICP-ANACOM notes the basic principle of only considering incremental costs resulting from the development of the Extranet in order to provide information on occupation.

In any case, since PTC will use existing databases and information to implement the proposal analyzed in D5, it is not expected that the additional costs of including such information on the Extranet will be significant.

Taking into account the experience gained through the implementation of this measure and information held by PTC for ducts located in areas of Greater Lisbon, Greater Porto and the other "areas C" of the analysis of market 5, ICP-ANACOM will review the extension of this measure to all ducts owned or managed by PTC.

Accordingly, point D1 of the DD is amended as follows in order to include information about ducts in "areas NC" which have already been subject to feasibility analyses:

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 5³⁶: There is no requirement to include occupation information on the Extranet except in the case of new ducts built during 2009 and thereafter³⁷ and in the case of ducts which, regardless of the date of their construction, were the object of feasibility analyses³⁸; 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 **Error! Reference source not found. 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 where the requests for feasibility analysis are triggered by the fact that information about duct occupation is not yet available on the Extranet.

All OSP agree with the reduction in the time limit for responding to feasibility requests and the elimination of the associated cost, notably because:

- (a) According to Vodafone, the availability of information on the occupation of ducts should always be mandatory and, accordingly, where such provision is lacking, it agrees that there should be no charge for the responses given by PTC.
- (b) According to Sonaecom, measures D2 to D5 help minimize the impact of retracement in the obligations to conduct a record survey³⁹.

Cabovisão considers that, as an incentive to also include information on occupation in "areas NC"⁴⁰, the exemption from payment for feasibility analysis requests must be extended to cover "areas NC", given that the occupation of ducts prior to 2009 may not be available.

³⁶ 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.

³⁷ In which case it should be ensured that online information is available within a period of 30 days following the respective conclusion

³⁸ In this case the information on occupation refers to the date on which the feasibility analysis was performed.

³⁹ Provided that there is adherence to the conditions it refers to with respect to D 1.

⁴⁰ In order that, according to this operator, there is no discrimination at national level and so there is no restriction on the expansion of the network offer in "areas NC" (especially those with most need with respect to broadband solutions).

ZON considers that, for as long as information on the occupation of ducts is unavailable, the beneficiary should be able to advance with the installation, which must be, *modus operandi*, adopted in the context of the RDAO, because, since the beneficiaries are liable for any damage caused to the infrastructure used, access to such infrastructure should only be subject to prior notice given to PTC.

Oni also suggests that PTC, as it responds to feasibility analysis requests, should take the opportunity to update the information on the occupation of the duct on the Extranet.

PTC, which suggests that there may be contradictions between points D2 and D4, considers that, according to the provisions of the DD, it will have 10 calendar days (for 100% of cases) to respond to feasibility analysis requests and may not charge for the tasks of processing requests, conducting feasibility analyses or for providing responses to such requests, i.e., as far as it sees the situation, the intention is for PTC to provide services which have costs associated with them, yet is prohibited from obtaining any compensation for the costs which it incurs in this provision (in violation of the obligations laid down by Law no. 5/2004 with regard to the cost orientation of prices).

In parallel, it states that the time limit of 10 calendar days to respond has "disappeared" in section D4 subject to the payment of 50 euros per day of response, that is, 500 euros to comply with the 10 calendar days granted.

Therefore, PTC concluded that the proposed response to feasibility analysis requests in 10 calendar days and the application of 50 euros of compensation corresponds to a penalty on PTC of 500 euros per request for occupation feasibility analysis (10 days × 50 euros) within the time limit of the target it supports. This means, according to PTC, that if it considers an average of [SCI] [ECI] requests per quarter (average of the first three quarters of 2009), PTC would have to pay [SCI] [ECI] per quarter or [SCI] [ECI] per year to beneficiaries, which would be disproportionate. This fact, added to the possible implementation, without limitation, of feasibility analysis requests being submitted with no obligation to follow up with access and installation requests, could result, according to PTC, in an exponential and uncontrolled increase in demand for responses to requests for feasibility analyses in Greater Lisbon and Greater Porto and other "areas C", possibly providing a profitable side-business for the beneficiaries which could reposition themselves to benefit from feasibility analysis requests and the corresponding compensation and may also instigate the creation of new businesses focused on the submission of feasibility analysis requests. In this context, PTC suggests a careful reflection on the coherence and the real consequences of this position.

PTC believes that any reduction in time limits time only has effective results if based on modifications to the support procedures and their automation; otherwise it results in the payment of compensation to beneficiaries for failure to comply with levels of service. PTC notes that at Christmas, Easter and periods with consecutive holidays, the 10 calendar days may correspond to only 5 or 6 working days, with a higher number of employees on vacation, making it harder to comply with indicators set at 100%. Furthermore, the time limits and the establishment of indicators for 100% correspond to the maximum values which cannot be exceeded subject to non-compliance and payment of compensation and that compliance requires an allocation of human and financial resources which is disproportionate and unreasonable. According to PTC, the situation become even more punitive since it is not able

to charge for feasibility and because beneficiaries remain entitled to compensation, which, it reiterates, should be indexed to a specific percentile (95%) and not 100%. As such, PTC proposes that the existing time-limit (15 calendar days) should be maintained and the scope of application cut to 95% of cases.

Firstly it should be noted that reducing the time limit applicable to responses to feasibility analysis requests from 15 days to 10 calendar days would mean, as stated in the DD, that, contrary to the determination of ICP-ANACOM, PTC does not have information on the occupation of ducts available on the Extranet whereas, in fact, it is considered (see previous point) essential to include this information, with reference to "areas C", on the Extranet and therefore that in these areas the beneficiaries have to resort to a feasibility analysis service that has a response time far in excess of the time resulting from access to the Extranet (15 days as the target compared to immediate access).

Furthermore, establishing a time limit of 10 calendar days for PTC to respond to occupation feasibility analysis requests (when such information is not available on the Extranet) does not require an allocation of human and financial resources by PTC which is disproportionate and unreasonable.

According to the position set out in the above point, it results from the non-obligation to include information "online" on the occupation of ducts in "areas NC", whereby the current process is maintained in these areas, reducing the response time limit from 15 to 10 consecutive days. In addition, support cannot be given to the comment made by Cabovisão that it seeks to extend exemption from payment for responses to feasibility requests to "areas NC", since non-payment in "areas C" is a temporary situation and meant to provide an incentive to compliance with the stipulations of D1 in the shortest possible time.

While preparing the DD, ICP-ANACOM set out the *modus operandi* suggested by ZON (that beneficiaries can proceed with installation without any a feasibility analysis request, even if PTC does not make available information on the occupation of the duct available on the Extranet). However, it was considered that the risks involved for both PTC and for the beneficiaries (such as the movement of the beneficiary's materials and resources to the site and the possible physical impossibility of carrying out the installation, with less control by PTC) were substantial and therefore a different solution was chosen.

On the calculations which PTC made with respect to what it will no longer receive for responses to feasibility analysis requests, while not providing the information on the occupation of ducts on the Extranet within the time limits determined by ICP-ANACOM in D1, it must first be emphasized that the imposition results from PTC failure to date to fulfil the obligation to provide information on the occupation of ducts on the Extranet, while not presenting any alternative proposal for accomplishing the intended objective. As a result the beneficiaries have been incurring a cost - associated with responses to feasibility occupation requests - due to the fact that this information is not available.

In this context, it is made clear that to avoid any opportunistic exploitation of this provision, to which PTC refers, the final decision will be amended to limit its application to feasibility analysis requests whose response, where positive, then leads to a request for access and

installation, as well as to requests feasibility analysis requests which receive a negative response.

Whereas it is recognised that the beneficiaries may have an interest in assessing availability of access to determined sections to gauge opportunities open to them in determined areas, whereby feasibility requests might not always give rise to installation requests, it is likely that the majority of feasibility requests will lead to a request for access and installation. In fact, according to data from the first quarter of 2010 and despite a time lag between feasibility and installation requests, it is estimated that over 75% of positive responses to feasibility requests gave rise to installations.

Furthermore, PTC has estimated a total cost per year, which is incorrect since D2 applies in respect of ducts where there is compulsory provision of information "on-line" under the terms referred to in (D1), for as long as the information is not available on the Extranet.

Therefore, considering the number of feasibility requests per quarter mentioned by PTC and the assumption that such requests are divided equally (50% in Lisbon and Porto and 50% in other "areas C"), taking into account the maximum time limits stipulated for fulfilling the obligation to provide information on occupation of ducts in these areas (of 3 months for Lisbon and Porto and six months for the remaining "areas C"), and assuming an average of 10 IC per feasibility analysis, the resulting value that PTC would no longer receive with respect to the feasibility analyses in question would amount to [SCI] [ECI], which value is several times lower than that estimated by PTC.

Finally, by claiming that it will be penalized 500 euros for each response to a feasibility request, it appears that PTC is implicitly admitting that it will not meet the deadlines for providing information on occupation on the Extranet as defined in D1 (i.e., 3 and 6 months, respectively, for areas of Greater Lisbon/Porto and other "areas C"). In fact, in the case that PTC meets the time limits applicable to the provision of information on occupation on the Extranet (which is what should be expected), there will be no payment of any compensation.

Finally, it is deemed beneficial (as noted by Oni) and normal that PTC upon performing the feasibility analysis, take the opportunity to update the information on the occupation of ducts on the Extranet, for which provision was made in D1.

Accordingly, point D 2 of the DD is amended to the following:

D 2. With respect to ducts where the "on-line" provision of information is obligatory as set out in Error! Reference source not found. 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 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.

Oni welcomes the reduction in the time limit applicable to responses to feasibility requests. However, maintaining the position already expressed that the ducts located in "areas NC" should have occupation information available on the Extranet, it considers that the cost associated with the feasibility request should be eliminated⁴¹.

Vodafone believes that if ICP-ANACOM decides to maintain the position expressed in the DD, the time limit applicable to all and any feasibility requests for ducts when provision of information on the *Extranet* is not mandatory, would be better established at 5 calendar days or at most 5 working days, considering that the reduction in the time limit applicable to the availability of this information from 15 to 10 days would always be applicable, pursuant to point b) of paragraph 4 of article 24 of Decree-Law no. 123/2009, whereby it deems that this measure would not result in an original benefit for alternative operators.

SGC expresses its satisfaction and expectation in light of the decisions D1 to D6 and Sonaecom considers that the amendments D2 to D5 will mitigate the impact caused by the retracement in the records obligation (provided that the conditions set out in D1 are safeguarded).

PTC reiterates the need to reconsider this aspect given that reductions in time limits can only generate effective results if coupled with modifications to and automation of the supporting procedures, whereas these reductions have to be compatible with the efficiency gains achieved. According to PTC, the only practical results of such measures will be the compensation potentially paid to beneficiaries for alleged failures to comply with levels of service.

In the case of responses to feasibility analysis requests, PTC believes that this issue takes on other dimensions, since the reduction in the maximum time limit from 15 calendar days to 10 calendar days may result in an increase in incorrect responses to feasibility, which are penalised at a rate of 200 euros per request.

PTC notes that the time limit of 10 days will, in the overwhelming majority of instances, prohibit the technical team from travelling to make on site feasibility checks. According to PTC, the record information is neither complete nor updated, whereby the proposed reduction in the time limit does not serve as an incentive for rigour in responses, and is therefore, unworkable.

The imposition of the reduction in maximum response times is, according to PTC, disconnected from the issues associated with support by information systems. In this respect, PTC notes that in other reference offers, as for example in the RUO, the approach of ICP-

⁴¹ In the event that the position taken by ICP-ANACOM in section D 1 is maintained, Oni believes that point D 3 should be clarified, stating that it applies only to the ducts in the "areas NC".

ANACOM in defining different levels of service for the case of a channel supported by information systems (IS) and for the channel unsupported by this system was more reasonable, whereas the response times for the eligibility process follow this principle (not considered in this DD). According to PTC, this is not in line with the present intention, since putting the IS into operation in order to automate interfaces to exchange information with respect to this offer requires the involvement of both parties - PTC and beneficiary. However, according to PTC, encouraging the implementation of such systems should involve the application of more stringent levels of service only after these electronic interfaces are put into operation and not before without this support.

As such, PTC proposes that the existing time limit (15 calendar days) be maintained with a reduction in the scope of application to 95% of cases.

ICP-ANACOM considers, for reasons already mentioned in D1, that the provision of information on occupation of ducts should occur as a priority in "areas C". However, in order not to impair access to infrastructure in "areas NC", the position is taken that in these areas greater speed should be fostered in the process of occupation feasibility analysis whereby a reduction shall be made to the time limit applicable to responses to feasibility analysis requests in "areas NC" to 10 calendar days for 100% of cases.

The elimination in these areas, of the cost associated with feasibility analysis requests, as suggested by Oni, is not proportional since, as explained under item D1, in these areas the cost of including information on occupation of ducts on the Extranet is likely much greater than the benefits. In other words, if PTC were obliged to include this information on the Extranet, the cost to beneficiaries would likely be higher than the price currently established for feasibility analysis since, from the outset, the beneficiaries would bear the "cost of feasibility" with respect to ducts in all of these areas, even if they wanted to use a very small percentage of such ducts (and even though this cost could be shared by several beneficiaries).

It should be noted additionally that the period of 10 calendar days is in line with the time limit provided for in Decree-Law no. 123/2009, according to which the companies in possession of ducts are bound to provide electronic communications companies with precise details on the location and availability of spare capacity in existing infrastructure, whenever requested, within a maximum period of 10 days; as such the argument of PTC that the period of 10 days would, in the overwhelming majority of instances, make it impossible for its technical team to travel to the site to verify feasibility is incomprehensible (since this is not the place to make value judgments with regard to the appropriateness of a time limit which has been legally established for this purpose as appears to underlie the observation of PTC) and should not be accepted.

Vodafone's proposal to reduce the time limit applicable to responses to feasibility analysis requests to 5 calendar days (a reduction of 66% reduction over the current time limit applicable to 100% of cases) is not justifiable, given the activities and possible travel and movement which this service involves. Moreover the period of 5 working days may, in practice, correspond to seven calendar days which does not represent a drastic difference compared to what now is determined.

Therefore, point D 3 of the DD is amended with the following text:

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 **Error! Reference source not found.**, 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 close to 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.

Oni considers that the introduction of compensation for failures to comply with time limits is always positive, however, it notes that the compensation provided for in section D4 only applies from the moment that non-compliance occurs with respect to the time limits applicable to the provision of information on duct occupation on the Extranet. In this respect, it proposes that payment be made in respect of any feasibility request where there the time taken to respond is not compliant with the time limits established in points D2 and D3, while there is recourse to feasibility requests. Therefore, Oni suggests the amendment of D4 in order to provide for the application of compensation of 50 euros per day for any request for viability, from the date of the request until the date of response to this request by PTC:

- (a) In case of failure to comply with the time established in point D2 and D3 while the time limits established in section D1 are elapsing; and
- (b) In the event that the information on the occupation of ducts remains unavailable on the Extranet, on conclusion of the period established in point D1.

Vodafone agrees with the measure included in the DD, but believes that ICP-ANACOM intended to refer to the periods defined in D2, since it notes that D1 does not cover requests for availability or the time limits for responses thereto.

As noted, SGC expresses its satisfaction and expectation with respect to the decisions provided for in sections D1 to D6 and Sonaecom considers that amendments D2 to D5 will mitigate the impact caused by the retracement in the records obligation (provided that the conditions set out in D1 are safeguarded), and that, given the critical nature of this information, the compensation to be applied for delays in the availability of record information introduced in D4 are appropriate and proportionate whereas, in its view, a reduction would be unacceptable at risk of compromising its effectiveness.

PTC notes the comments made with respect to D2, claiming that it does to understand what is meant by verification of viability "*close to real time*", because this concept would be broad, vague and indeterminate and since however fast a system, there is always a lag between what happens on the ground and the update of records on the Extranet (which includes information relating to 2.8 million holes and their occupations). Therefore, given the proposed 10 calendar days to respond to feasibility analysis requests in "areas C", PTC is surprised that, in the event of non-compliance in the provision of information in the areas of Greater Lisbon and Greater Porto (and 3 months later, in all "areas C"), the 10 calendar days have no

relevance and the days of response are tied to compensation of 50 euros per day. Given its relevance in the conditions and economy of the RDAO, PTC seeks the review of point D4, specifically of the target, whereby it considers that it would be appropriate to establish a percentile (e.g. 95%) and redefining the value and the period of application of any compensation.

In relation to the observations of Oni and Vodafone, it is made clear that in this point ICP-ANACOM intends to make provision to compensate the beneficiaries, not for delays in responding to requests for feasibility analysis⁴² (which already have respective compensation defined in the RDAO), but any failure to comply with the availability of information on occupation of ducts on the Extranet according to the time limits established in D 1.

In fact, by establishing compensation in D4, ICP-ANACOM intended this to refer to the time limits established in D1, in order to compensate the beneficiaries for any breach by PTC of the deadlines for providing information on occupation of ducts on the Extranet, with respect to Greater Lisbon and Greater Porto and the other "areas C" of the analysis of market 5.

There is no reason for PTC's surprise that, in the event of failure to comply with the time limits established in D1, the 10 calendar days will not be relevant and the days of response are tied to compensation of 50 euros per day. Any other position would be to accept that, in the event of non-compliance with the time limits established in D1, there would be no change (that is, PTC would retain 10 calendar days to respond to feasibility analysis requests and no further compensation would be applied other than that already currently provided in the offer in case of failure to comply with this time limit); this is obviously unacceptable given the failings in this regard and given the effectiveness of implementing the present decision, which represents a reasonable compromise between costs and benefits.

As for PTC not understanding the meaning of checking feasibility in real time, which it believes would be a broad, vague and indeterminate concept, ICP-ANACOM notes that in its legal action which PTC instigated in 2004, it affirmed, correctly, that the database with descriptive information on ducts sought by ICP-ANACOM was *"a kind of "national map" with the layout of all ducts in its possession, as well as the updated indication of the occupation of each one"* (Emphasis added by the author).

Furthermore, recognizing that the concept of "close to real time" might be misleading and that when accessing the Extranet the beneficiaries access available information in real time, the phrase "close to" is eliminated and point D4 is amended to read as follows:

D 4. In the event of non-compliance with the time limits established in Error! Reference source not found., 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.

⁴² This case covers the time limits established in D2 and in D3.

D 5. The information to be made available on the Extranet shall include the profile of the duct, indication of the tube(s) with area to be occupied, and identification of the occupiable area by counting the area which is already reserved for future use (provision of concession services).

With regard to information to be included on the Extranet, various OSP have proposed the inclusion of information about:

- (a) The space used in the duct, not only by all the beneficiaries, but also by the retail units of PTC, by PTC within the scope of the concession of the universal service and by the remaining companies of Grupo PT (according to Vodafone, ZON, APRITEL and Sonaecom).
- (b) Occupied and reserved space (which would be helpful, according to Oni, in order to deter attempts to limit the space usable by the beneficiary through the improper-reservation of space).
- (c) The dimensions, the occupied volume and the available space in the duct, which information ZON affirms PTC has acquired over the lifetime of the RDAO.
- (d) Inspection chambers (IC), especially with regard to the space available for occupation with joints and excess cable and the existence of entry points (EP)⁴³, proposed by Vodafone and by Sonaecom⁴⁴.
- (e) The users of occupied space in ducts, the profile of the duct, tube(s) with occupiable area and the occupiable area (counting the area reserved for future use), according to COLT.

According to Vodafone, ICP-ANACOM declares the detail of information sought by operators to be excessive, with reference to the space reserved for the concessionaire and used for companies of Grupo PT, forgetting that PTC has information on the occupation of ducts by its competitors, which it considers may provide a competitive advantage which is out of line with the intended objectives of competition. Given the that it is impossible for PTC not to have such information, according to Vodafone, there is no way to remedy the situation other than by establishing a parallelism in respect of the information that each operator has; that is, since PTC has this information about their competitors, their competitors should also have access to information about PTC. Furthermore, Vodafone considers that access to such information (as well as information on the space reserved for the concession) would allow greater control over the accuracy of the information available on the *Extranet*⁴⁵.

⁴³ whereas Vodafone proposes having a single size (125 mm) and consequently a single price, thereby simplifying the procedures and transparency of prices.

⁴⁴ Sonaecom reiterates the importance of the availability of information concerning the occupation of ducts per selected route and takes the position that the implementation of D5 is positive, responding in part to previously expressed concerns.

⁴⁵ Vodafone concludes that, given:

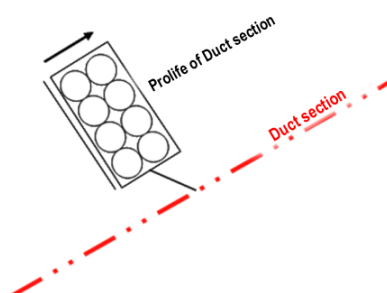
- (a) the extent of intervention made before ICP-ANACOM by alternative operators;
- (b) the recognition of various cases of non-compliance by PTC in respect of the RDAO; and
- (c) the absence of infringement proceedings brought in this regard,

Vodafone also considers that the provision of such information may serve as a deterrent to other "errors" or "delays" occurring in relation to information being provided and in the level of non-compliance currently observed with respect to the time limits associated with the feasibility analysis service, thereby concluding that the automatic availability of information also prevents PTC from being exposed to infringement proceedings to which this undertaking is subject upon failure to comply with the RDAO.

Sonaecom considers that the method (formula) used for calculating the occupation of ducts should be reviewed by ICP-ANACOM, since, in many situations, PTC has given feasibility to requests which according to application of the formula would not be feasible; this shows that this is disproportionate and that in the future, with automatic calculation of information on occupation of ducts, a situation may arise where there is Widespread and undue denial of feasibility requests.

PTC notes that information with the level of detail sought is not available in their IS and could not be made available without comprehensive compilation performed on the ground. PTC also notes that the provision of information which is sought is not demandable from SMP operators pursuant to the draft EC recommendation on NGA, which does not require PTC to share information with other OSP that it does not have or to obtain information which it does not have for the purpose of sharing with other OSP.

Nevertheless, as mentioned in comments on point D1, PTC announces that it plans to make information available shortly on the profiles of ducts with representation of the formation of tubes of the ducts between adjacent IC, which may not be entirely up-to-date. The duct profile may, according to PTC, be used in the process of access and installation, to indicate the hole used for passage of the cable, and in the process of record surveying for the purpose of the indication of tubes (holes) through which cables have been passed (see the figure below for an illustration of PTC's proposal for graphical representation to be used for providing information on the profile of duct sections).



The information provided by this system will, according to PTC, provide an indication of the feasibility of the sections of ducts for the purpose of installing cables, on the following terms:

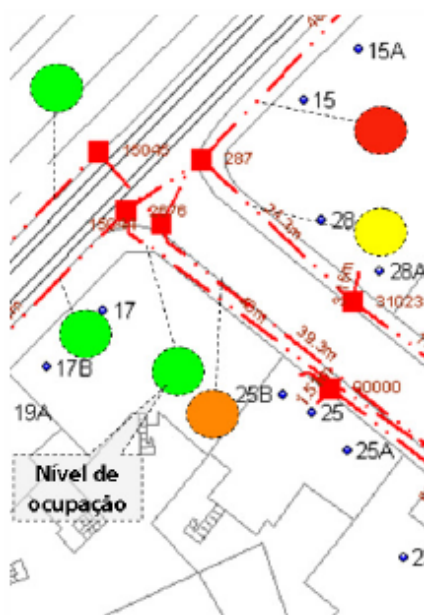
Occupation Rate (%)	Response	Traffic light colour	Feasibility Response (meaning of traffic light)
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there is a failing in the enforcement of the RDAO and that in the future, the harm stemming from such failure and the effort in enforcement may be reduced if knowledge regarding the state and capacity available and used in ducts were extended to beneficiaries.

[100]	No free space	Red	Not feasible
[76 to 99]	High level of occupation	Amber	Restricted feasibility (1)
[51 to 75]	Average level of occupation	Yellow	Restricted feasibility (1)
[0 to 50]	Low level of occupation	Green	Restricted feasibility (1)

- (i) feasibility restricted by the existence of free space to accommodate the space required for the installation of beneficiary cables

The mapping of occupation information would be, according to PTC, performed using maps of ducts and associated infrastructure available on the Extranet, through a graphical representation, as illustrated in the following figure:



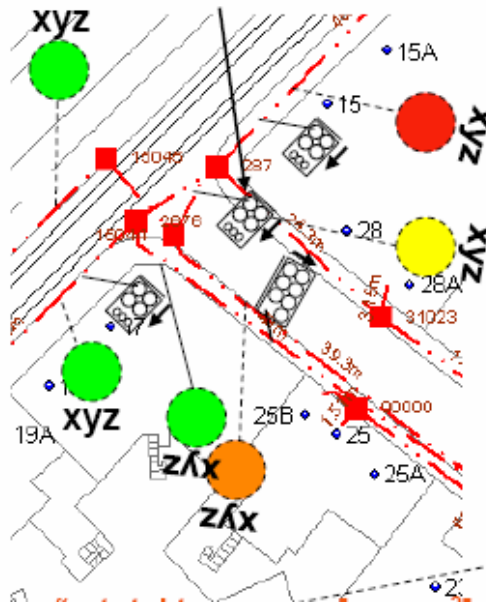
Therefore, PTC noted that:

- For cases where indication of occupation is "green", "yellow" and "amber", the recipient may use the duct sections so classified to immediately submit requests for access and installation.
- The cases indicated as "red" represent a lack of feasibility, and therefore should not be used by beneficiaries to submit requests for access and installation.

Furthermore, PTC reports that when formulating requests for access and installation requests, beneficiaries should be aware that the colours "yellow" and "amber" indicate increasing levels of section occupation, whereby the space available to accommodate the cables of the beneficiary is also increasingly limited⁴⁶. PTC adds that occupation information may be outdated due to delays in receipt of RDAO records from beneficiaries (beneficiaries have 30

⁴⁶ PTC reports that the occupation level of each section of a duct does not take into account the occupation sought by the beneficiary, whereby the feasibility presented has to be necessarily subject to the effective existence of free space to accommodate the space required for the installation of the beneficiary's cables for a given request. In addition, according to PTC, in the event that requests for access and installation are submitted simultaneously for a single feasible section by different beneficiaries, feasibility will also be subject to actual free space in the section to fulfil such needs for occupation.

days to carry out installation, and a further 30 days to deliver the records, a period which, according to PTC is not always fulfilled).



Firstly, note is made of the quantity and diversity of information that the beneficiaries of the RDAO want to be included on the Extranet, without regard to whether the costs of providing such information are in line with its quantity and diversity, and without demonstrating the indispensability of all the information they want for their activity.

For example, in the following justification given by Vodafone as to the need for an indication of the space reserved for the concession and used by the companies of Grupo PT: it will enable "*greater control over the accuracy of information provided on the Extranet*". ICP-ANACOM repeats (as mentioned in the DD), that this is excessive and that the rule governing the reservation of space for future use by PTC to provide concession services is already established in the RDAO, without prejudice to ICP-ANACOM being able to carry out inspections of a random or focused nature on the implementation of this rule. It is also considered disproportionate to establish a parallelism, called for by Vodafone, between information in the possession of PTC and the beneficiaries, noting in addition that it will not contribute to increasing the efficiency of the offer.

been reported by PTC that it plans to provide information soon on profiles of ducts (with representation of the formation of tubes between adjacent IC).

Regarding the indication of the tube(s) with an occupiable area, given that PTC reports that it will provide the representation of the formation of tubes between adjacent IC and that *"the duct profile may be used in the process of access and installation, to indicate the hole used for passage of the cable, and in the process of record surveying for the purpose of the indication of the tubes (holes) through which cables have been passed"*, it is considered that this may allow the indication of tube(s) to be occupied. Accordingly, the final decision is reformulated so that the information to be made available on the Extranet should include the profile of the duct, allowing indication of the tube(s) to be occupied.

In the same point D5, it is also mentioned that the information to be made available on the Extranet should identify, for each duct, the occupiable area by calculating the area already reserved for future use (provision of concession services). PTC reported that information with the level of detail sought is not available in its information systems and it will not be possible to make it available without a comprehensive compilation being carried out on the ground, which would incur significant costs and delays as referenced in D1.

In this context, given the likely level of costs involved in the comprehensive compilation of accurate and detailed information precisely as set out in the DD and that, observing the principle of cost orientation of prices, costs would always be passed on the beneficiaries, ICP-ANACOM considers that indication of the occupation of ducts on the Extranet may be accomplished through a system of levels of occupancy of duct sections in line with the proposal advanced by PTC, together with information on the total segments of the respective sections.

ICP-ANACOM takes the position that for routes which include duct sections with low or medium states of occupancy, the RDAO beneficiary will not, in principle, be required to make use of a feasibility analysis service, since it is likely these duct sections enable the installation of reduced diameter cables (e.g. optical fibre) of the beneficiaries.

In the case of routes which include duct sections with a state of high occupancy (e.g., between 76% and 99%), there may be some uncertainty about whether the needs of the beneficiary can be fulfilled (e.g., at the limit, if the actual level of occupation is 76%, the request may be feasible but not if actual occupancy is 99%). For this reason, PTC should conduct a validation of the request during the execution of the request for access and installation.

ICP-ANACOM will closely monitor situations of duct sections without free space and may, if the percentage of these situations warrants, conduct inspections and audits.

Therefore, summarising, given the arguments mentioned in position D.1, it is considered that PTC's proposal to provide, for the areas of Greater Lisbon and Greater Porto and other "areas C", information indicating the occupancy level of ducts is a reasonable compromise at the present moment, taking into account the costs involved in obtaining more detailed information, the relevance of this information and the need to find a solution expeditiously that is timely for the provision of information concerning the occupation of ducts.

Finally, with respect to Sonaecom's statement that PTC has given feasible responses to requests which through the application of the formula of Annex 2 would be reported as being infeasible, ICP-ANACOM takes note and waits for the transmission of specific data which would allow this claim to be substantiated. Furthermore, the formula used for calculating the available space has been in force since the RDAO entered into operation without comment having been made its beneficiaries.

In any case, this Authority will remain attentive and may take action through enforcement actions or by reviewing the formula as appropriate, particularly if a scenario occurs of "*widespread and undue denial of feasibility requests*".

Therefore, point D5 of the DD is amended to read as follows:

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.

D 6. In the areas where information is available on the occupation of ducts (see **Error! Reference source not found.**), 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 install its cable in any tube, and preferably in a non-occupied tube, provided that there space is available.

Oni agrees with this point, considering it positive that the beneficiary will be able to proceed immediately with the request for installation.

In the case that the feasibility analysis process is maintained in "areas NC" (a solution that it does not support), ZON reiterates the idea that the installation request should be performed simultaneously with the feasibility request.

Vodafone believes that this point is of considerable importance for ensuring greater speed of access to infrastructure, noting that so far, one of the impositions of PTC was that the beneficiary would have to proceed with the installation in occupied tubes, which made this

process very difficult when occupation was near 100%, whereby the use of unoccupied tubes was permitted only in the event that installation in occupied tubes was a practical impossibility. Vodafone points out that, with the possibility of an immediate transition from a request for information (and verification of feasibility on the Extranet) to a request for installation, it should no longer be required to indicate the length of sections between IC (which currently comes from PTC) in installation requests, unless that information is also available on the Extranet (if information is available in vector format, the system will automatically calculate and display this information).

PTC considers that the proposed amendment seeks to supersede the feasibility analysis procedure and transfer this responsibility to the beneficiary; this would only be workable with the alternative method proposed by PTC, and only when the route targeted by the beneficiary was identified in green.

According to PTC, this proposal may not have taken into account the possible harmful consequences of this procedure. PTC gives the following example: *"imagine that the beneficiary accesses the Extranet and identifies the available space; it makes the calculations based on the outer sections of the cables it intends to install, making use of Annex 2 of the RDAO and identifies that there is room for all of the cables, and so proceeds with their installation. What happens if the beneficiary has committed an error in the analysis and/or computations? It is noted that no provision is made for compensation to minimise occurrences of such cases. And what happens if two beneficiaries identify the same space on the same date, and decide to proceed with the installation when there is only space for one cable?"*

Regarding the rule that the beneficiary *"may subsequently install the cable in any tube, and preferably a non-occupied tube"*, PTC takes the view that this goes against all rules and guidelines for cable installation in ducts. This application could, according to PTC, lead to situations where, for example, there were several tubes of 110 mm diameter⁴⁷ with individual occupation of 1 cable with 6 mm diameter in each of the tubes, when necessarily they could all be installed in just one. PTC believes that the apparent ease of the presented procedures clashes with the necessary management of space in ducts, which is difficult to perform in practice on a day-to-day basis, with attention to the following:

- (a) Monitoring and evaluation of available spaces - the difficulties arising in determining available space requires constant and accurate knowledge of the occupation of ducts, which situation, as stated above, does not exist and is not feasible.
- (b) Limitation on the use of available space - indiscriminate occupation could make it impossible to run cables with higher capacity (diameter) due to "underutilized" occupation of the remaining tubes or to the distribution of this occupation.
- (c) Strength of materials - the passage of higher capacity cables (weight) with a corresponding development of traction force may damage other more "sensitive" cables naturally positioned at the bottom of the tube.

⁴⁷ The diameter normally used for this type of infrastructure.

As outlined, PTC argues that preference should be given to the rule of upward occupation of tubes "from bottom to top"; and preferably in occupied tubes, provided that space is available. In addition, according to PTC, this rule best ensures that a tube is kept vacant for manoeuvring and maintenance work.

ICP-ANACOM confirms that this proposal seeks to supersede the feasibility analysis process that contributes to the fact that times taken to access ducts are very extended and may, in addition to other consequences, undermine the conditions for effective competition in the development of new networks, reflecting known problems in the offer of services supported over the network of the incumbent operator. The indication of feasibility given by the traffic light system is always conditional upon the capacity and number of cables to be installed by the beneficiary, which validation is made in cases where information is available on the Extranet, during the execution of the request for access and installation. Such restrictions/uncertainty will arise more often in situations of high occupancy of duct sections (i.e. sections not signalled "green" in the information on the Extranet).

Nevertheless, given the information available on levels of occupation of the duct sections and the total clearance section (xyz) of the sections, the beneficiary will have data which will allow them to assess, with a margin for error according to the occupancy level intervals (variation), whether or not the intended installation of cables is feasible, without the need for a feasibility analysis request.

As to the possibility that beneficiaries might commit errors in calculating the space available (based on the formula provided in Annex 2 to the RDAO and in the outer dimensions of the cables which the beneficiary intends to install, ICP-ANACOM takes the position that these calculations do not depend on the entity making them. Furthermore, in the hypothetical situations identified by PTC, the risk belongs to the beneficiary, which goes to the site and then cannot install the cables it wants, while still incurring the associated costs. As for possible harmful consequences of the procedure whereby the beneficiary may, after checking whether or not there is space available, make the request for installation and then install the cable, ICP-ANACOM makes clear that this does waive the need to schedule with PTC.

Note is made of PTC's comment that the occupation of tubes should preferably be carried out in an occupied tube, as well as of the limitations in the management of cable installation in ducts, which contrasts, for example, with comment from Vodafone according to which this rule makes the installation process very difficult when occupancy levels approach 100%, whereby the use of unoccupied tubes is permitted only in the event that installation in occupied tubes, under prior conditions, was a practical impossibility. In this respect, despite recognizing the ease of installing cables in unoccupied tubes, it is considered that, from the standpoint of the management of the duct network and the improved efficiency of space occupation, it is preferable to install in tubes which are already occupied, provided that space is available.

Accordingly, the principle is accepted that the beneficiary must install cable, following a rule of upward occupation of tubes, giving priority to tubes which are already occupied. However, common sense must prevail, recognizing that there may be occasional situations, particularly when the occupation is close to 100%, where the installation of cables in occupied tubes is very difficult.

Finally, it should be noted that, with respect to space to be reserved for maintenance and repair operations, this should correspond (as determined on 26.05.2006) to the larger diameter cable, whereby it is not necessary to have an empty tube for this purpose. In any case, it is reiterated that for there to be an efficient sharing of ducts, each recipient must clearly identify their cables, and carefully arrange them in the ducts.

Regarding the need, raised by Vodafone, of wanting an indication of the length of the sections between IC, it should be made clear that from the current plans obtained over the Extranet, it is possible to obtain information on the length of ducts between adjacent IC (as indeed is indicated by PTC in its response to the DD).

Therefore, point D6 of the DD is amended to read as follows:

D 6. In the areas where information is available on the occupation of ducts (see Error! Reference source not found.), 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.

2.1.1. Flaws in the results of feasibility analyses and alternative routes

- D 7. In cases where PTC gives a positive response to a feasibility analysis request that proves to be incorrect, 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;
 - (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;
 - (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) in the case of obstruction, make every effort to undertake clearance or indicate a feasible alternative route at no additional cost (either for clearance or for feasibility analysis) to the beneficiary, within the time limit specified in the RDAO.

According to Oni, these measures are very positive, highlighting the compensation imposed on PTC in cases where sections are found to be unusable due to lack of ducts, occupation with cables or obstructions, subsequent to PTC giving confirmation of feasibility, as well as the obligation that PTC offer alternatives or resolve obstructive situations, at no cost to the beneficiary.

ZON welcomes the introduction of compensation for cases in which a feasibility response is obtained which is then found to be erroneous, but, in the event that the beneficiaries have

actioned resources required for the installation, proposes that PTC give indication of an alternative route⁴⁸ within 24 hours of receipt of information from the beneficiary.

APRITEL, SGC, COLT, Sonaecom and Vodafone also view the introduction of compensation in cases where a response of feasibility is obtained which is subsequently found to be erroneous as a positive development, but consider that 200 euros per request is insufficient, given the impact had by such situations on the beneficiaries. They consider that the value of 200 euros should be applied for each day elapsing between the positive response to the feasibility request and the date on which PTC indicates an alternative⁴⁹.

Vodafone believes that ICP-ANACOM could go further in the implementation of mechanisms which deter incorrect responses of non-feasibility and that ICP-ANACOM should:

- (a) Impose the requirement that negative responses be accompanied by detailed justification on why feasibility was denied, including some photographic evidence⁵⁰.
- (b) Define a comprehensive and exhaustive list of grounds for refusal of passage of new cables.
- (c) Provide for compensation in cases where negative responses to requests for feasibility are incorrect or do not comply with the list mentioned above.

With regard to the time limit applicable to the removal of cables, Vodafone believes that the terms of the RDAO (30 days) is too long, suggesting a reduction to 15 calendar days. On the other hand, the position is taken that PTC must, within not more than 48 hours after verification of incorrect confirmation of feasibility, inform the beneficiary of all existing alternatives, in order to minimize and rectify the mistake.

SGC considers that it is essential to identify the cases of a positive response to a request for feasibility analysis where this response is found to be incorrect, which cannot be considered an occurrence for which PTC is responsible and argues that this explicitly covers cases where there is no feasibility request (since information is available for consultation on the Extranet), with no incorrect positive response, or in other words, errors in the record information available on the Extranet, due to lack of space in the ducts or their non-existence, detected only on the ground, regardless of whether or not there was a request for feasibility.

⁴⁸ ZON argues that, in relation to errors in feasibility analysis results, PTC should always indicate an alternative route to the one not deemed feasible (and not only blocked) at no additional cost to the beneficiary, which shall then confirm their intention to use this route (with the request processed) and with no need for a new feasibility request; this would reduce time and administrative costs associated with the procedure for both PTC and the beneficiaries.

⁴⁹ Sonaecom proposes that the applied compensation should be at least 50 euros for each day of delay in the installation of the cables, which should be measured from the date of incorrect feasibility until the date on which notification is given to the beneficiary of the alternative route, from which time the normal time limits applicable to the installation process apply.

⁵⁰ According to Vodafone, the feasibility analysis request presupposes a IC by IC visit along the entire route to verify the availability of the duct, whereby the presentation of photographic proof in case of proved non-feasibility does not represent significant additional work for PTC, while providing a guarantee that feasibility was indeed verified on site and not by checking records (or memory) as has on occasion been demonstrated by the fact of PTC giving feasibility responses for non-existent sections.

In this situation, besides the compensation arrangements, SGC argues that after validating alternative routes "*on-line*", the beneficiary should be able to put forward a new installation request, without needing to again schedule installation (i.e. without having to wait 5 working days for the new PTC scheduling period), with the aim of hastening an alternative solution which does not compromise ongoing work and, since the initial work is covered by PTC supervision, this would also be safeguarded.

COLT considers the indication of an alternative route without additional costs and the removal of cables at PTC's own expense to be insufficient, because although it considers these measures to be good, it takes the view that they do mitigate the time lost as a result of the significant delay caused to works.

With regard to cases where it appears that the sections are not feasible, Sonaecom proposes that provision be made for a procedure which allows the beneficiary to undertake joint visits to assess the reasons for such non-feasibility.

Oni considers elimination of costs of construction clearance and the allocation of responsibility to PTC in respect of the removal of dead cables to be very positive. However, it identifies an apparent contradiction:

- (a) Section 2.12.2 of the DD document, which states that the rules for sharing costs of obstruction clearance are already established in the current version of the RDAO.
- (b) Point D23, which establishes a time limit for PTC to present quotations for the clearance of duct obstructions.
- (c) Point D26, which establishes a compensation for breach of this time limit.

In this context, Oni considers it desirable that ICP-ANACOM clarify the full responsibility of PTC for the works and for the respective duct clearance, without any charge to the beneficiaries.

PTC disagrees with the stipulations set out in D7, since it considers that responses to feasibility analysis requests are determined based on information in its possession and which it uses for other intervention in ducts, whereby any errors that may be committed and which it intends to minimize through its proposal would also occur when the same information is used internally by PTC to identify the feasibility of installing cables and equipment in ducts and associated infrastructure.

There is in this respect, according to PTC, equivalence in the level of information used to determine the feasibility of installing cables and equipment of the beneficiary and of PTC itself. For that reason alone, it believes that compensation of 200 euros per response to feasibility analysis requests is unreasoned, unreasonable and disproportionate. PTC also takes the view that ICP-ANACOM intends to penalise it for a situation where the information available to the beneficiary is one that it provides for its own use.

In addition, according to PTC, it is important to clarify the meaning of erroneous feasibility, since there may be differences between the feasibility indicated in a request and that verified on the ground, some of which might not be attributed to PTC, such as:

- (a) Erroneous feasibility responses for reasons that relate to the inaccuracy or lack of record information provided or to be provided by the beneficiary, as well as instances of improper installation and unauthorised installation, which naturally imply that PTC was unaware and had no record of these resources.
- (b) Sections that do not allow the installation of cables because they are obstructed⁵¹.
- (c) Momentary unavailability of the information on ducts and associated infrastructure that cannot be regarded as non-feasibility of duct sections⁵².
- (d) Existence of simultaneous feasibility analysis requests applying to the same sections that may lead to errors in feasibility⁵³.
- (e) Lack of feasibility determined on the ground of an intermediate IC which cannot be accessed. However, according to PTC, such an occurrence - which could lead to an erroneous feasibility response - could render the passage of cables directly between adjacent IC infeasible, whereby it would have no practical impact on the works performed by the beneficiaries, whereas, in its view, there is no justification for the payment of compensation.

PTC considers that the proposal contained in the DD for an obligation, in case of feasibility errors, to indicate an alternative route at no additional cost to the beneficiary within the time limit specified in the RDAO, is also unreasonable, arguing that the feasibility analysis service with respect to an alternative route should not be provided without charge, since such would be in violation of the principle of cost orientation.

With respect to the requirement to remove cables, PTC notes that the conditions of the RDAO already provide for the mandatory removal of dead cables, whether owned by PTC or by beneficiaries and it is therefore not necessary to establish further conditions in this respect.

Finally, as to clearance of obstructions, PTC clarifies that the existence of obstructions⁵⁴ in a conduct and associated infrastructure can only be detected on site. On the other hand, it argues that the existence of an obstruction cannot be regarded as an error of feasibility, since this situation can never be detected in the feasibility analysis for the simple reason that they are identified during the work carried out by the beneficiary when installing their cables and equipment. Consequently, PTC wholly disagrees with the proposal set out in point d) of the present paragraph and, again argues that the provision of clearance and feasibility analysis services without charge is contrary to the cost orientation principle and contrary to the right of PTC to receive payment for the services it provides.

⁵¹ According to PTC, the obstruction of a section of Conduct cannot be confused with non-feasibility, whereby the RDAO makes provision for a service to resolve duct obstructions wherever possible.

⁵² PTC notes that there are several possibilities why information may not be available. For example, ducts may be of recent construction, which means they can exist on the ground but are not completed or recorded. In general, records of recent duct construction are delivered to PTC one month after the work is concluded.

⁵³ According to PTC, continued limited support by information systems for RDAO PT procedures prevents these potential conflicts from being managed. PTC reports that it may occur that the section is considered feasible for "beneficiary A" and that, during the process of access and of installation of cables in this section, another installation is performed by "beneficiary B", which renders the installation of the "beneficiary A" infeasible.

⁵⁴ Noting that they are not, of course, recorded in PTC's systems.

ICP-ANACOM notes the general positive tone expressed by the beneficiaries of the RDAO as to the imposition of compensation for erroneous feasibility analysis. With regard to the amount of compensation, ICP-ANACOM takes the position that is mainly intended to offset the costs that the beneficiary incurs through the movement of staff and their equipment to the site, when they are unable to perform these works, and for the delay which it imposes in the execution of the works (which is considered to exist, even though it is taken into account that the intended installation of cables will never be possible on the original route, given the lack of feasibility). Accordingly, the position is taken that the value of 200 euros compensation for erroneous feasibility analyses is appropriate and represents a reasonable compromise for PTC and for the beneficiaries, whereas the suggestion put forward by beneficiaries of 200 euros per day of delay is deemed to be excessive.

The proposal of SGC for comprehensive identification of cases in which an erroneous feasibility study is not attributable to PTC may have some usefulness. However no examples were presented and it is difficult to draw up an exhaustive list at present. It can be argued, however, that such situations may occur in the future if, for example, the beneficiaries do not send PTC updated information on the installations which they perform or in situations of very recent duct construction. In any case, according to the available information, it should be noted that the percentage of erroneous feasibility analyses is not significant⁵⁵.

Regarding the proposal for compensation in cases whereby the responses to feasibility requests do not comply with a reason included on a "*comprehensive and exhaustive list of grounds for refusal of passage of new cables*", as proposed by Vodafone, does not seem workable, since these situations can be very diverse and at least in some cases can only be confirmed through inspection measures, which, if incorrect responses are confirmed, would lead to infringement. In any case, it is considered that the proposal submitted by Sonaecom for PTC to implement a service of joint visits may be useful where negative responses are given to feasibility analysis requests while, at this stage, it is left to PTC to consider this situation. The position is taken however, that, in a first phase, the justification of situations by PTC and inspection by ICP-ANACOM constitute the most appropriate measures notwithstanding, given the experience gained, the future imposition of other obligations.

With regard to the removal of dead cables, to the extent that it is work that may involve some complexity and also involves a risk of affecting the integrity of installed networks, ICP-ANACOM considers that the current time limit specified in the RDAO is appropriate.

Vodafone's proposal to require that negative responses are accompanied by detailed justification on why feasibility was denied, including some photographic evidence, although not connected to the issue at hand which is about positive responses (which are found by the beneficiaries on site not to be feasible), this may also be useful for consideration at a later stage, since PTC may have to travel out to the site (occurring essentially in cases of non-feasibility) to carry out the feasibility analysis.

The suggestion of ZON that PTC should be required to indicate an alternative route within a maximum of 24 hours is considered excessive, whereas the alternative feasible route must be presented by PTC respecting the time limit for responses to feasibility request (under the

⁵⁵ That is , the very small number of actual cases reported by the beneficiaries.

terms of D3 of 10 calendar days). The same reasoning applies to the proposal by Vodafone regarding the suggested time limit (48 hours) for informing the beneficiary of all existing alternatives.

The apparent contradiction cited by Oni between the provisions of this section and the provisions of Section 2.12.2 and in points D23 and D26 on the costs of obstruction clearance or compensation for non-compliance with the time limit for clearance of obstructions is also identified by PTC. As PTC also notes, it is not possible from the outset, and in response to a request for feasibility, to know whether a given duct section is obstructed. ICP-ANACOM recognizes that the detection of obstructions on site can only take place when the work is performed by the beneficiary for the installation of its cables in ducts, and should not therefore be considered an error in the feasibility analysis. Nor can it be concluded that an obstruction of a section of conduct arises necessarily from lack of maintenance (an obligation which is binding upon PTC under the Concession according to Decree-Law no. 31/2003 of 17 February) or from the poor state of ducts.

Therefore, with respect to the clearance of obstructions, ICP-ANACOM takes the position that the provision of point (d) of paragraph D7 of the DD should be removed, whereas the rule already established in prior determination is maintained, whereby the costs of clearance should be shared by the users of the route in question; as such pursuant to the RDAO, the beneficiary should request that PTC send a quotation for clearing the ducts, with application of compensation for failure to comply with the time limits applicable to the sending thereof.

ICP-ANACOM does not comprehend the argument made by PTC as to its view that ICP-ANACOM seeks to penalise it for a situation where the information available to the beneficiary is the same that it provides for its own use. The important thing is to discourage the provision of an inefficient service by PTC to the beneficiaries, entailing unnecessary costs to beneficiaries, with the wasted travel of teams to the site, which should of course be properly compensated.

Given the arguments of PTC that *"the responses to feasibility analysis requests are determined based on information in its possession"* or that *"there may be differences between the feasibility indicated in a request and that verified on the ground, some of which might not be attributed to PTC"*, the position is taken that in case of doubt, the feasibility analysis should involve a trip to the site to verify the conditions on site. In these situations, PTC cannot argue, for example, that their response depends on the accuracy or existence of record information provided by the beneficiaries.

In addition, the fact that there could be simultaneous requests for feasibility analyses regarding the same sections or, when information about occupation is on the Extranet, the fact that record information has not been provided by the beneficiaries, of that information has been provided with inaccuracies, are situations that can legitimately justify the lack of responsibility on the part of PTC in light of positive responses to feasibility analysis requests which are found to be erroneous, as stated with reference to the observations of SGC.

The fact that imposition is made on PTC, besides the allocation of compensation, to remedy the situation through the identification of alternatives at no cost to the beneficiary means that it is not legitimate for the beneficiary to incur an additional cost (payment of a new service, in

addition to payment for the initial feasibility analysis service), for an error that is not their responsibility but the responsibility of PTC. In this case, this principle overlaps, naturally, with the principle of cost orientation of prices and with of PTC having the right to be paid for the services which it provides.

Accordingly, in cases where PTC gives a positive response to a occupation feasibility request sent by a beneficiary, and it is subsequently found that the response was incorrect or that the information of the Extranet resulting in incorrect feasibility, except in situations in which absence of responsibility is demonstrated to the beneficiary and to ICP-ANACOM, PTC shall introduce into the RDAO the obligation to pay the beneficiary compensation of 200 euros.

In the above situations, PTC shall indicate a feasible alternative route and, 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; in this respect there is agreement with the proposal put forward by ZON that the beneficiary shall not be required to submit a new request for feasibility;

Additionally, in the event that the ducts are occupied by dead cables of PTC which render occupation infeasible, PTC shall remove the cables, within the period specified in the RDAO and at its own expense, and enable the use (occupation) of the ducts by the beneficiary to which notice of feasibility was given,

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 in 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.

Where, for example, the percentage of non-feasible responses by PTC to requests from beneficiary warrants, ICP-ANACOM may conduct on site inspections to confirm (or not) such infeasibility.

Nevertheless, given the complexity in determining responsibilities with respect to possible inaccuracies in the information available about occupation of ducts through the Extranet, ICP-ANACOM has already recommended to all parties, PTC, and beneficiaries, that they contribute actively and in conjunction, with the aim that the information on duct occupation available through the *Extranet* is as updated and true as possible.

Taking into account the position set out above, paragraph of D7 of the DD is amended as follows:

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;**
- (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.**

The following decisional element is added:

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 in the duct routes in question, whereas ICP-ANACOM may carry out inspections upon request and where deemed appropriate. Where it is shown that the negative response was incorrect, PTC shall pay compensation of 200 euros to the beneficiary.

2.2. Scope of the RDAO

2.2.1. Access to masts

D 8. PTC shall include in the RDAO, within a period of not more than 20 working days, all the technical and economic conditions governing access to masts, specifically for the installation of cables. The detailed respective reasoning must be submitted to ICP-ANACOM within the same period.

Oni agrees with this paragraph of the DD and Sonaecom welcomes the determinations made with respect to access to masts.

APRITEL considers that the inclusion of access to masts in the RDAO (and the transition infrastructure from underground access to aerial access) is an extremely positive measure. APRITEL took this opportunity to raise some concerns on this matter, stating that PTC's commercial offer of masts:

- (a) Has seen a change which, according to the Association, has a substantial economic impact on OSP: Previously, the tariff unit was the mast whereas, in 2008, PTC informed OSP that the tariff unit would be changed to mast support - in practice, PTC would charge for each mast- installed cable.**
- (b) Does not make provision for certain time limits (e.g. time limit for responding to requests for information) or any type of compensation for non-compliance.**

- (c) Is characterized by an asymmetry of obligations between PTC and the beneficiaries where PTC has been relieved of responsibilities and beneficiaries take on disproportionate risk, and also by unsatisfactory procedures and practical rules for its daily operation (installation phase, corrective intervention on the cables, etc.).
- (d) Includes requests for information, which is not reasonable since the infrastructure in question is visible, unlike the case with the ducts.

Vodafone considers that ICP-ANACOM is finally ensuring compliance with the provisions of Law no. 5/2004 wherein masts are included as an infrastructure to which access must be provided, adding also that the draft European Commission recommendation on NGN includes masts as well as ducts and sub-ducts in the set of infrastructure to be accessed. Despite the existence of a commercial offer from PTC, Vodafone reports that to date it has been unable to obtain any agreement with respect to basic aspects of any service such as supply times, time limits for information, quality of service parameters and payment of compensation for non-compliance⁵⁶. For Vodafone, the aerial passage of cables and use of masts⁵⁷ provides a form of deployment of alternative networks, or a complement to passage through underground ducts and used primarily in areas of lower population density.

Vodafone argues that regulated access to masts is a necessary complement and should have been included in the RDAO from the beginning, since it enables alternative and rapid solutions to be found in response to situations where ducts are occupied and it promotes the deployment of alternative networks in locations or regions of lower urban density or where there are no ducts available. As such, Vodafone argues that the whole framework and set of obligations applicable to ducts and laid down in the present DD should apply also, on a mandatory basis, to access to masts.

Therefore, Vodafone believes that access to posts and masts and other facilities and sites (including access to buildings and their internal ducts) owned by PTC or under its management should be included in the RDAO, whereby information should be provided including the hierarchy of the network infrastructure, the technical characteristics of its various elements and, among other information, geographic locations and list of buildings which are connected by masts.

For Vodafone, the inclusion of masts in the RDAO (as infrastructure subject to the obligation of access) should naturally be subject to precisely the same set of obligations which apply to access to ducts, in particular the obligation of cost orientation of prices⁵⁸ and compliance with a set of quality of service parameters.

According to Vodafone, and in general terms, it must be guaranteed that the rules and procedures (including those now defined in the present DD) applying to ducts will be transposed to masts, given the similarity of the two realities.

⁵⁶ Vodafone says that the absence of response deadlines or compensation for non-compliance, disproportionate obligations for PTC and beneficiaries and the entirely unsatisfactory procedures and practical rules governing the day-to-day functioning of the masts access offer (installation phase, corrective intervention on cables, etc.) constitute some of the features of PTC's current commercial offer which ICP-ANACOM and PTC itself must fully address upon its inclusion in the RDAO.

⁵⁷ That, according to Vodafone, access to infrastructure implemented in the facades of houses and buildings is also included, in particular for connecting to the final segment of the access network to the customer.

⁵⁸ Whereas Vodafone hopes that the regulated prices of the future offer will, at the very least, not exceed existing prices.

Finally, Vodafone considers that the DD fails to make provision for beneficiaries to state their views on the offer which PTC will present, whereas it finds no justification for the different treatment of this reality given its parallels with the other reference offers; Vodafone therefore considers it essential that this offer is not only subjected to a prior hearing of interested parties, pursuant to article 100 and 101 of the CPA (Administrative Proceeding Code) but also to the general consultation procedure provided for in article 8 of Law no. 5/2004⁵⁹.

ZON considers that the inclusion of access to masts in the RDAO is a measure which is extremely positive and long overdue, given the existence of an express statutory requirement to publish a masts access offer, according to the stipulations of ICP-ANACOM, and in light of the fact that the current commercial offer of PTC has not been favourably received by operators and in particular not by ZON.

Like APRITEL, ZON identifies several aspects that call for amendment in PTC's commercial masts access offer and, in addition to the absence of time limits, ZON principally cites the alteration of the tariff unit (from mast to mast support), which it claims has had a substantial impact (due to billing according to each mast-installed cable) and suggesting that the maintenance of this alteration can in no way be justified by increased costs; as such it proposes that the previous pricing model should be retained.

Therefore, in order to comply with the provisions of the ECL, ZON considers that point D8 (which determines the inclusion of conditions of access to masts in the RDAO within 20 days) must be rejected, without an opportunity being given to beneficiaries and operators to comment on the terms and without a prior definition thereof by ICP-ANACOM. To that extent, ZON considers that the terms of the technical, economic and procedural conditions applicable to access to masts, which govern the inclusion of this type of access in the RDAO, should be defined by determination of ICP-ANACOM, with the respective DD submitted to the general consultation procedure established in the ECL.

COLT also believes that the inclusion of access to masts⁶⁰ in the RDAO represents a very important step in the evolution of RDAO. However, in order to avoid unclear situations, it suggests that access to masts should be more specific in order to prevent situations or interpretations that may appear ambiguous.

Cabovisão recognizes the importance of access to masts, both for the extension of high-speed networks and for the necessity that use of such essential infrastructure may be called for at any time to support network alterations, particularly in more remote areas where there is a lack of underground infrastructure⁶¹. Cabovisão therefore argues that the inclusion of a masts

⁵⁹ Nevertheless, Vodafone welcomes the possibility of intervention by ICP-ANACOM when it considers that the conditions currently offered are not suitable, stressing that such intervention can and should occur before completion of the process which it now proposes - inclusion in the RDAO of all the technical and economic conditions governing access to masts - upon complaint of any operator in order to avoid delays and/or unnecessary constraints arising from the current procedure.

⁶⁰ And transition infrastructure from underground access to aerial access.

⁶¹ Whereas it has been considered that access to masts constitutes a strong incentive to investment by operators in their own infrastructure and may contribute to the promotion of greater certainty and predictability in the expansion of the high-speed networks.

access offer in the RDAO is fundamental⁶², and therefore welcomes the imposition of this duty while considering that access to passive elements should be governed by the principle of equivalence.

Cabovisão reports that in June 2008, PTC presented it with a procedure for access to masts - "Serviço de Postes - Procedimento de Gestão de Pedidos" ("PGP") (Masts Service - Requests Management Procedure), which made substantial alterations to the technical conditions and pricing that had been in force until that time. Considering that PTC has already prepared a procedure, Cabovisão considers it likely that it will use it to comply with this determination. Based on its experience of requests under this procedure, Cabovisão makes the following comments about the PGP:

- (a) the PGP governing access to masts does not include time limits for responding to requests for information from competitors, which jeopardises, from the outset, the continued progression of high-speed networks to other locations, making investment impossible as a result of delays in response; these delays allow PTC to position itself in first place in the locations targeted by new service offers which, subsequently, may lead to the disabling of the beneficiary in expanding its network to the location in which the available infrastructure depends on routes consisting of the masts of PTC⁶³. Cabovisão argues therefore that time limits should be established in the offer of access to masts which are similar to those applying to ducts.
- (b) It is a rule with a feasibility request in the use of ducts under the RDAO that a request for use of masts be sent within the same locality and with respect to the same project, so that it is economically viable. That is, within the same locality and the same project, a network is expected to be supported using PTC's masts and ducts. It therefore proposes that when requests are made for access to masts and ducts on contiguous routes, in the event that one of the routes requires clearance (ducts) or the other repair (e.g. to replace a broken pole), the waiting period for PTC to proceed with the intervention should be applied equally to both cases. That is, the time limit for installation along a contiguous route, whether masts, ducts, or both, should only apply from the time that feasibility is obtained for the entirety of the route and when there is no impediment due to any need to carry out repairs.⁶⁴.

In summary, Cabovisão believes that the inclusion of the provision of access to masts in the RDAO (i) is essential, but (ii) must be made so that the terms of access to masts, ducts, other

⁶² According to Cabovisão, both by force of the provisions made in the Concession Bases and by the ECL, which imposes a duty on PTC to take specific and precise action in enabling provision of access to such infrastructure.

⁶³ According to Cabovisão, responses to requests for access to masts in excessive, unjustified or unreasonable time, constitute situations of discrimination which impact competition in downstream markets. Cabovisão also notes in this respect that the PGP makes provision for a period of 25 working days for PTC to respond to a feasibility request. Subsequent to the approval of a feasibility analysis request, for which PTC has no time limit, the beneficiary shall send PTC an application for access and installation, which will be decided within 5 working days. Subsequently, the first scheduling of the start of access and installation should occur between the 6th and 15th working day after receipt of the request. Therefore, according to Cabovisão, a period of 40 days (three times the period required by Decree no. 123/2009) can easily be reached, only referring to requests granted by PTC, considering that PTC has attempted to make this request mechanism notoriously slow and lacking in transparency.

⁶⁴ To facilitate the identification of various request forms related to the same route Cabovisão proposes that beneficiaries enter the same reference into the "Referência de Pedido Agregado" (Combined Reference Request). In this way, it considers that PTC will know that the request made using the same reference includes masts and ducts.

infrastructure, and other conditions, are adjusted, interlinked and coordinated in a manner that prevents PTC from engaging in behaviour which has a negative impact on competition in the downstream market.

According to Sonaecom, the absence of rules and procedures associated with access to masts is one of the main weaknesses of the RDAO and it therefore welcomes the present determinations.

Sonaecom considers that the offer of access to masts should:

- (a) Comprise the availability of respective record information on the Extranet at no additional cost, including information on available capacity per route, in a manner in line with those to be adopted with respect to the underground ducts.
- (b) Include QSP and respective compensation on terms which are equivalent to those established for ducts⁶⁵, in so far it does not consider that there any difference can be justified.

According to Sonaecom, the urgency of this intervention is justified by the behaviour in which PTC has been engaging in this respect, in the current context of lack of compensation for delays and lack of regulation regarding quality of service parameters, considering also that the rules to be adopted pursuant to D7 should be extended to access to masts.

To begin with, PTC reports that, in accordance with the ECL it has already established agreements with operators for the provision of the offer of access to masts and is currently negotiating the conditions of this offer with others, whereas there are no grounds for transforming this offer into a reference offer or integrating it into another offer of a distinct nature, in terms of technical and safety characteristics and associated processes.

Moreover, PTC mentions that in the decision concerning the obligations to be imposed with respect to market 4, ICP-ANACOM made no comment as to requiring the inclusion of the terms and conditions of access to PTC's masts in a reference offer (i.e. in a regulated offer). As a result, PTC concluded that it was ICP-ANACOM's view that commercial agreements established in this respect guarantee the obligations of access arising under the applicable legal framework and that it would only intervene when and where required. As such, PTC expresses some surprise finding that ICP-ANACOM now intends a reference masts access offer included in the RDAO, which in any case has different characteristics as referred to above.

Notwithstanding the above, PTC argues that, where a reference offer of access to masts is imposed, such an offer should be separate and independent from the RDAO⁶⁶ for reasons that relate to:

⁶⁵ Currently it takes the view that these are clearly higher than those prescribed in the RDAO, which, it considers, exacerbates the impact of non-compliance of the times achieved by PTC with respect to requests for information and feasibility regarding masts.

⁶⁶ Because, according to PTC, the distinct characteristics associated with each one of the offers would make a joint offer extremely complex and induces potentially ambiguous interpretations.

- (a) The scope - according to PTC, the scope of RDAO was well defined in accordance with the concepts set forth in the offer: i.e., the scope of RDAO is limited to ducts and associated infrastructure, where the concept of infrastructure excludes masts; as such inclusion of the offer of access to masts in the RDAO implies substantive changes to the offer, also causing a profound change in its bases.
- (b) Distinctive conditions - with the inclusion of the offer of access to masts in the RDAO, PTC considers that ICP-ANACOM is discounting the actual conditions of the latter offer and the particularities of the offer of access to masts which distinguishes it from the RDAO in terms of information, feasibility analysis, suitability of infrastructure, access and installation, interventions and records; Additionally, PTC cites the enhanced particularities and demands in terms of access to masts for the purpose of installations and interventions and which may give rise to increased problems of safety and danger of accidents to personnel carrying out tasks in this context. PTC also reports that some municipalities are demanding the removal of routes made up of masts and the transfer of cables and equipments supported over these routes underground (ducts and associated infrastructure), due to urban and environmental situations and for reasons related to the quality of urban spaces.
- (c) Degree of replicability - PTC reports that the construction of a route made up of ducts is very costly compared to an equivalent route of masts, which leads to the conclusion that it is substantially easier for a beneficiary to replicate a route of masts based on its own infrastructure when compared to the construction of routes made up of ducts and associated infrastructure.
- (d) Management of offer complexity - according to PTC, the level of complexity of the RDAO is already high, and has increased over the course of its life, particularly due to the automation of its procedures⁶⁷.
- (e) Flexibility for alterations of the two offers - PTC notes that the inclusion of the offer of masts will create unmanageable complexity and will create constraints with respect to its future evolution, contrary to the objectives of ICP-ANACOM.

In conclusion, and notwithstanding that already mentioned, PTC reports that it is available to undertake the preparation of the offer of masts, separate from any other offer, with a structure which is equivalent to the reference offer, particularly with the inclusion of levels of service.

Note is made of the agreement of the OSP with the inclusion in the RDAO of the technical and economic conditions governing access to masts.

It is noted that the possibility of regulating access to masts has been previously considered by ICP-ANACOM; however, in 2004 it was concluded that given the lack of disputes related to situations of access to posts and masts, this was not warranted.

In this respect, considering the responses of the OSP to the DD, and specifically regarding PTC's current commercial offer of access to masts, there is no reason for surprise that ICP-ANACOM intends "*now to see the RDAO include a reference masts access offer*", as PTC

⁶⁷ And the more complex an offer becomes, so the difficulty of its operational management and its evolution increases.

comments. As is evident from these responses, the agreements which PTC has established with operators for the provision of the offer of access to masts is not to their liking, in a broad range of subjects, whereby there are grounds for ICP-ANACOM's intervention when provision for access is made in legislation, including in Law no. 5/2004⁶⁸ and Decree-Law no. 123/2009⁶⁹.

Although, given their different nature, mast infrastructure is governed by rules which are different to those governing underground infrastructure, ICP-ANACOM takes the view that both are complementary in ensuring the continuity of routes. In this respect, the inclusion of this infrastructure in a regulated reference offer is justified. It should be noted, in any event, the important issue is not whether or not the conditions applicable to access to masts are included in the RDAO. The issue is their inclusion in a reference offer which is public, transparent and regulated. The arguments of PTC that including the provision of access to masts in the RDAO may increase its complexity and instability are accepted.

ICP-ANACOM considers however that the reference masts access offer must have a structure which is appropriate to such an offer, in particular with inclusion of levels of service and compensation for non-compliance with these levels of service; it should also incorporate the same general principles adopted in RDAO, such as the right and responsibility of installation by the beneficiaries, whereas any differences with respect to the RDAO must be due to technical, economic or operational reasons with detailed justification.

The analysis of technical and economic conditions governing access to masts and the respective reasoning will be performed separately by ICP-ANACOM, which will take into account the comments made herein and submitted in the meantime. Indeed, the fact that publication of the offer is being imposed is precisely to provide an opportunity for stakeholders to comment before ICP-ANACOM formulates a draft decision on the specific conditions of the offer. Obviously, if conditions exist in this offer which ICP-ANACOM deem warrant amendment, it will publish a draft determination which shall, pursuant to Law no. 5/2004, be submitted to the general consultation procedure and, pursuant to the CPA, submitted to the prior hearing of interested parties.

Nevertheless, ICP-ANACOM has taken note of the concerns raised by OSP, specifically on infrastructure coverage, record information, procedures, pricing and charging schemes, time limits and compensation for non-compliance and the regime of responsibilities to apply in respect of access to masts.

Taking into account the date of approval of the final decision, the deadline for publication of the offer is extended to 30 working days.

Notwithstanding that pursuant to the decision under analysis, market definition, SMP assessment and imposition of obligations on the market for wholesale supply of wholesale network infrastructure access at a fixed location, no specific obligation has been imposed to publish a reference offer for access to masts, it is highlighted that under paragraph 4 of article 26. Law no. 5/2004 of 10 February, the concessionaire is bound to provide an offer of access

⁶⁸ See article 26

⁶⁹ Masts are infrastructure capable of housing electronic communications networks to which access is provided for pursuant to this legislation.

to masts, which offer shall include the conditions of access and usage, in accordance with terms to be established by ICP-ANACOM.

Taking into account the above view, point D8 of the DD is amended as follows:

D 8. 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.

2.2.2. Access to multi-operator IC

D 9. 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.

Oni agrees with this point.

Vodafone considers that this is a positive measure and reports that it is currently waiting for local authority authorisation with respect to a site within the metropolitan area of Lisbon to circumvent the access of the IC of the cable tunnel of the PTC exchange, which will be superseded by the present measure.

PTC does not agree with this point of the DD, referring to the behaviour of various operators in terms of the installation of cables within the scope of the RUO and the RDAO. In particular, PTC reports that there have been several instances of repeated and improper use of PTC's technical chutes to support cables by operators, even while such works are not permitted by the RUO⁷⁰. PTC notes that these situations denote irresponsible and improper conduct by operators or by their subcontractors which, in breach of all established procedures, improperly pass cables through PTC's chutes without authorisation, which conduct puts both people and property at risk.

With specific regard to the installation of cables by operators in the cable access tunnel of PTC exchanges, the operator highlights the following aspects which are critical for the security of the network and communications services:

- (a) Cable tunnels are very sensitive elements of PTC's network, because they concentrate all cables (copper and fibre) that serve a particular area into one place, including interconnection cables, NGA and the critical services that PTC is bound to provide.
- (b) In older exchanges there are numerous "TPC type" cables in operation, which, due to their characteristics (copper with paper insulation and lead casing), require special

⁷⁰ There are, including, according to PTC, situations where the misuse of chutes has put their stability at risk (as shown in specific examples provided by PTC in response to the DD on the RUO).

protection, given that any improper handling can easily lead to a set of faults that are difficult to repair⁷¹.

- (c) Cable tunnel entry points have watertight plates (lead plates on most holes), to protect against flooding and fire; therefore, when installing a new cable, it is necessary to pierce these plates, passing the cable through and terminating it with a retractable shrink-sleeve and insulation material, which tasks must be properly executed at risk of jeopardising the integrity of the network.

As such, PTC considers it totally unacceptable that operators should be permitted to install cables using their own technicians or technicians under their responsibility, in the cable access tunnels to PTC exchanges, and thereby opposes the inclusion of exchange building access IC and access branches to these buildings in the RDAO⁷².

In short, PTC believes that the cable access tunnels to PTC exchanges should remain as infrastructure which is not eligible under the RDAO, proposing, in addition, to clarify the term "cable tunnel" as follows: *infrastructure providing exclusive access to a PTC exchange housing electronic communication cables which, as a general rule, connect IC or ducts installed on the public highway to the distribution frame inside the exchange. The IC and sections of ducts providing direct and exclusive access to the cable tunnel form an integral part of this*".

In line with the arguments set out in the decision of 17.02.2010 on amendments to the RUO, with respect to the commentary submitted by PTC, it is recognized that the cable tunnels are elements that are of some sensitivity in its network, as are their ducts. Nevertheless, in this decision ICP-ANACOM determined that PTC should eliminate any restrictions on the installation of optical fibre belonging to beneficiaries of the RUO by the technicians of these beneficiaries in the cable access tunnels to PTC exchanges.

In this regard it is noted that there is a need to achieve a reasonable compromise between the security of the incumbent's network and efficiency and cost of access to that network, allowing greater equivalence of competition. In this regard it is noted, for example, that the sensitivity of ducts has not prevented beneficiaries, through their own or subcontracted technicians- which technicians, it should be noted, are duly accredited and in most cases belong to the same companies as contracted by PTC itself - from installing cables in PTC ducts without reported incident (serious or otherwise).

As regards the possible existence of non-accredited personnel using PTC's ducts, ICP-ANACOM will duly monitor such situations, which cause some concern, whereby it is essential that this Authority has full knowledge of all the information related to such cases. Nevertheless, in the event that any problem arises, those responsible will have to reimburse PTC for any damage caused, which fact constitutes a sufficiently strong incentive to carry out interventions with due care and responsibility. It is further noted in this regard that under the

⁷¹ PTC mentions that in exchange tunnels there are often cables of this type of 2400 pairs, whereby a fault in a cable of this capacity has a severely negative impact on PTC and on other operators with services supported by the same infrastructure.

⁷² That is, PTC believes that, given the specificity and associated security issues, any installation of cables in the access tunnels of its exchange buildings should be carried out exclusively by its own technical teams, in line with, for example, the signal transport service established in the RUO.

RDAO, it is stipulated that the beneficiary "*undertakes to contract and maintain constantly updated liability insurance covering damage caused by installed facilities or by its personnel*".

Accordingly, the critical aspects mentioned by PTC in relation to network security in terms of the installation of cables in access cable tunnels to exchanges, can be safeguarded through the suitable certification of installation personnel and proper supervision or monitoring, the latter already having provision pursuant to the RDAO.

Everything noted and considered, the provisions of point D 9 of the DD are maintained:

D 9. 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.

2.2.3. Infrastructure providing transition from underground access to aerial access

D 10. The infrastructure providing transition from underground access to aerial access (masts) using riser tubes shall be included in the offer of access to masts.

Oni, ZON and Vodafone explicitly agree with this point, with ZON also referring to the inclusion of infrastructure providing transition from underground access to aerial access as a very positive step which is long overdue.

Vodafone takes the view, however, that in cases where the beneficiary intends to extend a duct which terminates at a building access branch, it should be established that the transition solution will require the construction of an IC by PTC at their own expense within a period not exceeding one month, at the base of this mast.

SGC noted that the current position of PTC is that the wall riser tubes do not form part of the offer and therefore beneficiaries are required to install their own tubes, completing the interconnection of this tube to PTC underground access using an independent connection; as such beneficiaries are required to construct a trench to connect the new drop tube to PTC's underground access, entailing high costs, a significant environmental impact and a delay in the development of networks, given the need for local authority licensing to deploy these solutions. Therefore, SGC considers that it would be of benefit, in order to minimize civil engineering, to share existing riser tubes wherever possible and, where not possible (due to lack of available in space), at least the underground accesses and the respective interconnection points to the riser tubes, considering that the DD is unclear with regard to the infrastructure in question.

PTC does not agree with the inclusion, in the mast access offer, of riser tubes used in the transition from underground to aerial infrastructure having space available for the installation of beneficiary cables.

However, it agrees with the description of operational procedures and technical rules which beneficiaries will be bound to observe in the construction of riser tubes to PTC masts.

According to PTC, it does not make sense to include such infrastructure in the masts access offer given that riser tubes:

- (a) Are associated, as a rule, with the cables that are installed therein and they are sized purposely to house the cables designed for them; as such there is generally no space available for sharing.
- (b) They do appear to be relevant in economic terms, given the minimal costs associated with the installation of metallic or plastic riser tube by any beneficiary.
- (c) Are not recorded in PTC's registration systems whereby their management in practice would always be impossible.

In the case of the RDAO, PTC supports the classification of access branches, including access branches to mast riser tubes, which terminate at the base of the riser tube. Therefore, whenever a beneficiary requires transition from ducts to masts, PTC proposes that they seek access to the access branch to the mast riser tube, under the RDAO, and indicate an entry point in the mast access offer. Regarding joint RDAO and masts feasibility analysis, PTS reports that it can study procedures for responding simultaneously thereto.

In conclusion, PTC considers that *"infrastructure providing transition from underground access to aerial access (masts) using riser tubes"* should not be shared, whereas its construction remains the responsibility of the beneficiaries which are bound to observe the procedures and technical standards specified in the masts access offer. However, PTC affirms that it understands the importance of enabling the presentation of simultaneous requests and is available for the consideration of procedures to facilitate simultaneous response to feasibility analysis requests submitted under the RDAO and the masts access offer.

ICP-ANACOM does not recognize the reasoning for nor the need/suitability of imposing the obligation on PTC to construct an IC at the base of a mast, at its own expense and within a period not exceeding one month, where a beneficiary intends to extend a duct which terminates at a building access branch, whereby it does not accept Vodafone's proposal.

Notwithstanding the recognition that, as stated in the DD, the capacity of infrastructure providing transition from underground access to aerial access is limited, and given the arguments presented by PTC, especially that the riser tubes are *"associated, as a rule, with the cables that are installed in them and they are sized purposely to house the cables designed for them; as such there is generally no space available for sharing."*, ICP-ANACOM takes the view that a response should be given to the concerns raised by interested parties regarding provision of access to PTC riser tubes where these have available capacity, and ensuring, where possible, the continuity of a given route through access to the access branches of mast riser tubes (both for PTC riser tubes and beneficiary riser tubes to PTC masts). As such, PTC should also make provision in the RDAO and/or in the mast access reference offer for a service of joint feasibility analysis of access to masts and ducts.

In any case, in order to provide for situations where access to PTC's riser tubes is not possible, ICP-ANACOM considers it important that the beneficiary is at least provided with access to transition from duct to aerial access without which there cannot in fact be continuity in their networks; as such PTC shall set out, in the reference masts access offer, the operating

procedures and technical standards with which the beneficiaries are bound to comply in the construction of riser tubes to PTC masts. That is without prejudice to any difficulties (at municipal level, for environmental reasons, etc.) in the installation of network elements (tubes, masts) of the beneficiaries.

Therefore, PTC shall:

- (a) provide access to the riser tubes of PTC, whenever these have capacity available;
- (b) establish, in the reference masts access offer, the operating procedures and technical standards with which the beneficiaries are bound to comply in the construction of riser tubes to PTC masts;
- (c) include in the RDAO, a service of access to the access branches to 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) make provision in the RDAO and/or in the reference masts access offer for a joint feasibility analysis service for access to ducts and masts.

Accordingly, **all noted and considered, the provisions of point D 10 of the DD are amended as follows:**

D 10. 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.**

2.3. Information on ducts and associated infrastructure of PTC

2.3.1. Automatic printing of plans by beneficiaries

D 11. PTC shall introduce into the RDAO daily compensation of 50 euros for each additional day that the generated plans remain unavailable.

Oni, Sonaecom and ZON⁷³ agree with the provisions set out in section D11 of the DD.

⁷³ Whereas ZON that this is in line with the proposal which it submitted to ICP-ANACOM.

Vodafone believes that this measure fulfils, albeit partially, a shortcoming existing since the introduction of the Extranet, seeing that it has repeatedly been faced with the unavailability of the application, both after requesting plans, and before (in access itself to the application). In cases where this occurred, according to one operator, there was no reliable prediction as to resolution of the problem by PTC, nor any compensation for delay.

While it fully agrees with the underlying principle, Vodafone cautions that the measure should be applied whenever the Extranet is inaccessible, before and after the beneficiary's request for plans, and that there should be a differentiation in compensation to be applied for the inaccessibility of the Extranet, since the districts on the Extranet have different annual prices, suggesting that the value of 50 euros per day corresponds to compensation for districts with lower annual pricing⁷⁴.

Vodafone considers (if the proposed compensation offered is intended to prevent, on competition grounds, the misuse of information which the beneficiaries have submitted to PTC) that, as a matter of proportionality, compensation should not be confused with a mere delay which causes difficulties (as was the case in D4) but should additionally reflect a much higher value as a deterrent to such practice. Finally, Vodafone considers that likewise a distinction should be established between information which is given in full through the Extranet (and corresponding price and contractual conditions) and other types of information by beneficiaries, not only in terms of ducts but also in terms of access to masts and other infrastructure.

PTC considers the introduction of provision in the RDAO for compensation of 50 euros per day as excessive, given the fact that this compensation is associated with non-compliance with a time limit of response of one working day.

PTC reiterates in this regard, its position that reductions in time limits should be supported by actual efficiency gains and that, in this case "the double penalty" of 50 euros per day and the reduction from 5 working days to 1 working day, in addition to the fact that the level of service applies to 100% of cases, is not reasonable. Therefore, PTC does not agree with this compensation and proposes that this time limit be established at 5 working days for 95% of cases.

Additionally, referring to the manual of the *Extranet* which forms part of the RDAO - "*The weekly period of availability of the Service is as follows: from 8am on Monday until midnight on Saturday*" while "*maintenance activities will be carried out preferably during Saturday throughout the day for a maximum of 6 hours*" - , it considers that outside the periods of unavailability, any non-compliance with levels of service should not be counted for the purpose of determining indicators, far less for payment of any compensation for non-compliance with levels of service.

In the future, and after the completion of the last phase of automation of the Extranet, PTC claims that alterations to existing levels of service may be put forward based on the gains obtained as a result of such changes. On the other hand, it notes that the Extranet does not limit the number of requests for plans, whereby, in the hypothetical case of an overload of

⁷⁴ And proposing that the amount of compensation for the remaining districts be made in proportion to the applicable annual price.

requests, there may be unavailability, failure or collapse of the system, which situation, in its view, is not attributable to PTC. In this case, it considers that the requests in question should not be counted for assessing levels of service and far less for the payment of any compensation.

In the first place, ICP-ANACOM noted that reducing the period of availability of plans with the layouts of ducts from 5 days to 1 day, stems from the fact that since 01.11.2008, this provision had been performed using an Extranet rather than on paper, thereby achieving the gains in efficiency resulting from the automation of the process.

In addition, it was PTC itself which included in the Extranet user manual the objective of one working day to make the files available in the area of each beneficiary, following confirmation of generation of plans by the user; it is therefore incomprehensible that PTC now seeks to extend the same deadline to 5 working days (for 95% of occurrences). Concerning the percentage of occurrences, ICP-ANACOM set out the reasoning for its establishment at 100% in 2006, whereby it does not see fit to revise this level in this process. Furthermore, PTC, in the Extranet user manual does not make compliance with this target time limit subject to any conditions.

In this context, ICP-ANACOM considers that a delay of more than 1 working day in the provision of plans requested by the beneficiary of RDAO is unjustifiable, whereby it reiterates that there must be compensation for each additional day of unavailability of plans with the routes of ducts.

ICP-ANACOM considers that the compensation value of 50 euros per day for delay in the provision of each plan of duct routes generated in any district is an appropriate value and represents a reasonable compromise for PTC and for the RDAO beneficiaries. Therefore no differentiation in the value of penalties can be justified depending on the district, contrary to the proposal made by Vodafone, also because there is no evidence of non-compliance differentiated by region.

It is obvious that, in line with the reasoning of PTC, outside the periods of availability any non-compliance with levels of service is not counted for the purpose of determining indicators, nor for payment of any compensation for non-compliance with levels of service.

Finally, the hypothesis mentioned by Vodafone of the compensation now proposed being allocated to prevent the misuse of information that has been delivered to PTC by the beneficiary on competition grounds, justifying a much higher level of compensation as a deterrent of such practice is not clear. As appears explicit, such compensation is applied in case of delays by PTC in making plans available.

The Extranet must be scaled to a reasonable number of requests for plans, whereby is unavailability can only be accepted in extraordinary cases where there is an overload of requests and where duly substantiated that any outage, failure or collapse of the system is not attributable to PTC. In this case, the requests in question should not be counted in the assessment of levels of service, nor for the payment of any compensation.

Everything seen and considered, section 11 D of the DD is amended to read as follows:

D 11. PTC shall introduce into the RDAO daily compensation of 50 euros for each additional day that the generated plans remain unavailable.

D 12. With a view to more detailed analysis, PTC is required to notify ICP-ANACOM within 20 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

Oni agrees with this point. However, it considers that a time limit should be established for the provision of the plans, or preferably the possibility of automatic printing of plans by the beneficiaries.

According to APRITEL, given that PTC is able to obtain and consult a printing record, it does not seem reasonable that confidentiality issues should be invoked with respect to the automatic printing of plans by the beneficiaries. According to APRITEL, the automatic printing of plans without the intervention of PTC is a key measure in order that PTC does not use information sought by the beneficiary for its own benefit.

Vodafone, using the same line of reasoning as APRITEL, adds that this issue is particularly sensitive in the current framework in which PTC is simultaneously an actor in the wholesale market and an actor in the retail market. Additionally, Vodafone argues that any reference to the need for confidentiality of the information on the plans is questionable given the authorisation which is given "contractually" pursuant to the RDAO for beneficiaries to use such information. On the other hand, it takes the view that the scenarios of potential misuse of information which, in the context of the relationship between PTC and the beneficiaries, are open to the parties, are not comparable, whereby it can envisage no type of use of this information which would justify the safeguard provided through the delayed printing of plans, in contrast to the potential losses already outlined in the misuse of information provided by the beneficiaries.

According to Cabovisão, the current situation⁷⁵ results in the need to systematically trace the routes into the project mapping bases, which process is almost entirely manual and prone to error, for example, in the numbering of the IC. This working method is, according Cabovisão, inefficient and poorly developed compared to what is enabled by current software, whereby it proposes that information be made available in geo-referenced vector format with all necessary information associated with each object (duct and IC).

ZON, considering that PC is able to obtain and consult a record of printing activity, does not consider it reasonable to invoke issues of confidentiality issues as an impediment to the automatic printing of plans with the location of ducts; it therefore proposes that the interests of beneficiaries should prevail, since the automatic printing of plans without the intervention of PTC is a key measure so that PTC itself does not use information on the direction of the potential expansion of beneficiary networks for its own purposes, particularly at retail level.

⁷⁵ Provision of information in PDF.

In this context, it ask that ICP-ANACOM impose the obligation on PTC to provide automatic printing of plans.

Sonaecom does not understand why the obligation of immediate downloading of plans is not imposed from the outset. According to Sonaecom, the need for *off line* tasks can only be justified by an inefficient process which must be eliminated and is not warranted, whereby it seeks the proposed review.

PTC, as regards the justification of the internal processes associated with the availability of plans, reported that it is developing improvements with a view to enhancing automation of the *Extranet*, envisaging implementation in the near future. Concerns about possible human interventions in the process will, according to PTC, in principle no longer exist.

In this respect there is a convergence of positions between the OSP and PTC with a view to increasing the level of automation of the Extranet and eliminating human intervention in the process. Nevertheless, and given the information provided by PTC that it is engaged in developments to improve the level of automation of the Extranet, envisaging its implementation in the near future, it is deemed that PTC should notify ICP-ANACOM as to the terms and scope associated with these developments.

Taking into account the date of approval of the final decision, the time limit in the DD is extended to 30 working days, whereby **the provisions of point D12 of the DD are amended as follows:**

D 12. 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.

2.3.2. Mapping data in vector format

D 13. With a view to more detailed analysis, PTC is required to notify ICP-ANACOM within 20 working days following notification of the present determination as to the reasons why mapping data is not made available in vector format.

Oni agrees with this point.

APRITEL, Vodafone and ZON consider that the provision of geographic information in vector format is the most efficient way of working with plans and a massive improvement over plans in PDF, given the increased potential for use and handling, reducing the margin of error and increasing the quality of project planning, providing greater speed and precision throughout the process, including record updating through appropriate software; and such they welcome the analysis which ICP-ANACOM proposes to undertake on this matter.

Vodafone added that, since it is possible to adopt a format that brings undeniable advantages over the alternative format, it does not understand how it can be possible to maintain use of the less efficient format, and for the same reason, does not understand why PTC should be granted a new deadline to set out its position on an existing matter governed by the date of this document, considering this to be of no use given the opportunity now granted; as such, with the submission of PTC's position now ensured, the present DD should indicate the obligation to make mapping information available in vector format, avoiding a prolongation of the situation and in line with the principle of procedural economy.

Cabovisão also agrees with the provision of files in vector format and geo-referenced with all necessary information associated with each duct and IC, noting it is only necessary to safeguard that the geo-referencing of infrastructure has a minimum level of precision⁷⁶. Cabovisão proposes that, if accuracy cannot be ensured, the *PDF* file should be sent with reference mapping without prejudice to submission in vector format without mapping. According to this operator, the adoption of this alternative avoids the problem of mapping and associated copyright issues, since the geo-referencing of objects obviates the need to have a reference mapping base. Furthermore, also according to Cabovisão, sending information in vector format and associated with objects would automate feasibility and access requests and the subsequent transmission of records, with advantages for PTC and for the beneficiaries.

Sonaecom does not understand why the provision of information in vector format is not imposed, affirming that the companies sub-contracted by PTC already use this information in the required format, whereas there is no rationale for why this is not available to the beneficiaries. According to Sonaecom, all beneficiaries should have their own geo-referencing systems, so the issue of the appropriation of information of the PTC system does not arise. It also noted that the geo-referenced information of the PTC network is already available on the PDF files and also there are legal mechanisms that allow prevention of situations of misuse of information, whereby it takes the view that the obligation should be imposed from the outset to make record information available in vector format.

PTC has no comments.

ICP-ANACOM recognizes that the use of mapping information in vector format (as for example *shape* file) allows editing, verification and correction of vector objects in a more efficient way, giving this map far greater accuracy and currency compared to maps available only in PDF format, and also facilitates record updating. However, sight should not be lost that the main purpose of the information in plans is to identify the duct sections and inspection chambers and feasibility analysis requests and not to support the information systems of the beneficiaries.

As such, it seems unreasonable, for example, to require PTC to adopt a maximum error of 2 metres in vector information on the positioning of the IC and respective ducts, as proposed by Cabovisão, if such an imposition implied significant changes to its systems.

⁷⁶ Recommending that the maximum error in the positioning of the IC and respective ducts should be 2 meters.

Furthermore, ICP-ANACOM continues to take the view that it is necessary to ascertain the reason which leads PTC not to make mapping information available to beneficiaries in vector format.

Vodafone's comment that did not comprehend the granting PTC a new deadline to state its position on existing issue which is governed by the date of this document, whereby Vodafone considered that the position of PTC was already provided for, is without basis. Indeed, the data giving basis to Vodafone inference that PTC has already commented on the reasons why it will not provide the map data in vector format cannot be identified, nor does ICP-ANACOM presently have the elements that permit the imposition (or not) of this provision.

In any case, it is noted that in France, France Telecom provides alternative operators with files with information on ducts in vector format.

Everything seen and considered, the provisions of D 13 of the DD is amended to increase the deadline for PTC to notify ICP-ANACOM from 20 to 30 working days:

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 reasons why mapping data is not made available in vector format.

2.4. RDAO IS

D 14. ICP-ANACOM recommends that PTC and the beneficiaries of the RDAO cooperate in order to establish, in the short-term, an information system (RDAO IS) that allows automatic processing of requests and responses, speeding up the processes of the RDAO.

Oni agrees with the principle of cooperation envisaged in the DD, warning, however, of the difficulties it has encountered in previous cases of direct negotiation with PTC and that these turned out to be unsuccessful, whereby it suggests that a representative of ICP-ANACOM participate in the working group as a way of ensuring the success of the negotiations. Oni also considers that it would be useful to define common rules to be adopted by the parties in the handling of record information and believes that there should be uniformity in the rules and formats of record information between the RDAO and the Centralized Information System (SCI) which is established by Decree-Law no. 123/2009.

Vodafone supports any measure which facilitates the introduction of speed and robustness in the RDAO process and accordingly argues that the development of an RDAO IS system should be a priority for PTC and beneficiaries. It would help, according to Vodafone, the entire process, from obtaining initial information, through to installation and billing control. Vodafone affirms however, that such a system must involve cooperation between PTC and the interested OSP lest PTC be able to define and implement a system in which the OSP does not figure and at the limit cannot translate, given the specifics of its internal reality and its own information systems. To prevent this, Vodafone suggests the establishment of a Working Group, holding its first meeting 15 days following the publication of the final decision and with the works to be concluded within 2 months following this first meeting.

Vodafone suggests that:

- (a) Any vague and undefined concepts should be withdrawn from the DD to avoid any room for interpretation about what is meant by "short term", proposing that such wording be substituted by 3 months.
- (b) That all deadlines for implementation, updating and modification of any other features of the RDAO IS are put before the development working group and require the majority agreement of its members.
- (c) The number of accesses of each beneficiary and/or of entities contracted by the beneficiaries is not limited since, upon verification of such limitation, the volume of requests is limited and as the result so is the activity of the beneficiary with respect to the RDAO⁷⁷.

Cabovisão considers that there is only a requirement to standardize a consistent format⁷⁸ so that information associated with civil infrastructure objects supporting telecommunications network (ducts, IC, building access branches, masts and facades, etc.) can circulate between PTC and the beneficiary and vice versa. This would, according Cabovisão, open doors to the possibility of automation of the licensing process by the beneficiary and by PTC, automating the bureaucratic components of the processing of licensing procedures.

Sonaecom considers that the evolution of the RDAO IS must involve the expansion of the features of the Extranet, considering that the mere proposal of an agreement between operators is insufficient to the extent that the proposed RDAO IS that PTC has communicated to the beneficiaries lacks the features mentioned by the regulator as being essential for implementation. In this context, it requests that ICP-ANACOM review this proposal with a view to imposing a specific deadline (not exceeding 6 months) for the provision of all the features associated with the use of the RDAO by the beneficiaries through an automatic and integrated interface⁷⁹.

PTC reported that it has made developments in electronic interfaces to exchange information with the beneficiaries, with a view to improving the effectiveness of this service, and is communicating these interfaces to beneficiaries; it also reports that since 05.03.2010 (date of publication of RDAO version 3.0), it has made electronic interfaces available to beneficiaries

⁷⁷ Vodafone explains that the aim of its proposal to increase the number of users per beneficiary is, in its view, self-explanatory, since the possibility of access to information which is relevant to the development of its activity by more users have definite results in efficiency of their work. Vodafone claims to be sensitive to ICP-ANACOM's prioritization of issues and measures. Nevertheless, it believes that the postponement of the proposed measure can only be considered justified if there was found to a lack of proportionality between the costs of implementing the referred measure and their benefits - an issue that, in any form, is not addressed in this DD, nor does it consider such to be the case.

⁷⁸ According to Cabovisão, the format to be defined for this vector information and respective objects should be adopted at least at national level, enabling the creation of *design optimization tools software*. In this respect, this operator considers that ICP-ANACOM's moderation between PTC and the beneficiaries might have very positive effects. Cabovisão believes that the materialization of this format could be, for example, in *Shape File* (.shp) or *AutoCAD Map* (.dwg) or *Spatial Data File* (.sdf). Cabovisão reports that it is available to assist in defining data and file structures, in order to allow processing, in vector format, of the routes of civil infrastructure supporting telecommunications networks, and also to allow automation in the completion of forms.

⁷⁹ In this respect, Sonaecom states that, within the scope of the RUO, the information systems that should have been in place since late 2003 are not yet complete, since processes still remain which require manual processing. This situation shows, in the opinion of this operator, that without an exhaustive identification of the features to be included and without the definition of specific dates, with compensation for non-compliance, this type of obligation is extended over the course of years without any sanction.

(based on structured files, API and ETF) for transferring requests and responses associated with the feasibility analysis, access and installation and record services, with a transitional period provided of four months during which these interfaces will coexist with existing forms and at the end of which, the form based service will be discontinued.

PTC informed ICP-ANACOM on 01.07.2010 that the beneficiaries only began to express their interest in arranging tests of these electronic interfaces in the final phase of the transition period (ending 04.07.2010), and it therefore decided to extend the transition period for a further 4 months and informed the recipient to this effect, making reference to the extension of this transition period in RDAO v3.1 05.07.2010.

This point of the DD does not deal directly with the Extranet, but rather with a system of automatic processing of requests and responses, and therefore the comments made with relation to uniformity in the rules and formats of record information between the RDAO record database and the Centralised Information System (CIS) do not apply.

ICP-ANACOM agrees with Vodafone that the definition of a system that allows automatic processing of requests and responses must involve *"cooperation between PTC and the interested OSP lest PTC be able to define and implement a system in which the OSP does not figure and at the limit cannot translate, given the specifics of its internal reality and its own information systems"*. In this context, APRITEL as the association representing electronic communications companies (including PTC), which generally includes the beneficiaries of RDAO, could provide a useful forum for discussion of matters concerning the implementation of the system outlined above. Therefore, from the outset, the best conditions for the success of the process are achieved in a multilateral forum, while note is made of Oni's comment on the *"difficulties it has encountered in previous cases of direct negotiation with PTC and that these turned out to be unsuccessful"*.

The proposal by Vodafone to withdraw *"any vague and undefined concepts from the DD to avoid any room for interpretation about what is meant by 'short term'"* is considered useful. In relation to Vodafone's other proposals, it appears excessive and inappropriate to define that any modification or update of the features of the RDAO IS should be put before the *"development working group"* and require *"the majority agreement of its members."*

In any case, as mentioned above, PTC has been providing electronic interfaces (based on structured files) since 06.03.2010 to transfer requests and responses associated with the feasibility analysis, access and installation and record services, and made provision for a transition period of 4 months of co-existence with the current forms. Since PTC informed ICP-ANACOM that the beneficiaries only began to express their interest in arranging tests of these electronic interfaces in the final phase of the transition period (ending 04.07.2010), whereby PTC decided to extend the transition period for a further 4 months (see RDAO v3.1 05/07/2010), it is recommended the RDAO beneficiaries cooperate with PTC with a view to testing out these interfaces.

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), making streamlining them and enhancing their efficiency; as cannot be achieved using paper forms.

Even so, it is considered that there might be cooperation at this point in order to improve the system developed by PTC, and so it is recommended that PTC examine any suggestions which it receives from APRITEL or individually from RDAO beneficiaries, within the period of two months following notification of the present determination.

Regarding the increase in the number of requests recommended by Vodafone, it is considered that the arguments do not provide basis for amending this in the DD. It is noted that other intensive beneficiaries of the RDAO have not reported any problems with this limitation on the number of accesses, the expansion of which may have associated costs. Accordingly, in the event that an overall increase is reported in the number of requests for information, feasibility and installation, ICP-ANACOM will consider the need to increase the number of users per beneficiary, based on more concrete information.

Everything seen and considered, **this point is amended as follows:**

D 14. 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.

2.5. Record information to be submitted by the beneficiary

D 15. 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.

Oni agrees with this point.

APRITEL, ZON and Sonaecom⁸⁰ take a positive view of the introduction of a target time limit in the RDAO applicable to the updating of records. However, these three entities together with Vodafone⁸¹ take the view that the proposed 10 working days is an excessive time limit, taking into account the changes that will now be implemented and its increased importance, particularly in relation to information on occupation in "areas C", suggesting that updates should be performed within 5 working days.

Agreeing with the principle of common rules for record information, Oni underlines the need for harmonization with the CIS provided for in Decree-Law no. 123/2009.

APRITEL and ZON argue that the acceptance of record information by PTC should not be subject to the full implementation of this recommendation, which does not form part of the RDAO.

⁸⁰ Although Sonaecom refers to this point as D16, ICP-ANACOM assumes that this was a small mistake, and that Sonaecom meant to refer to D15.

⁸¹ Which considers that the update of records by PTC is of vital importance, as the basis of any RDAO process.

Sonaecom believes that the existence of the "*Recommendation for the formulation of record information*" is important and should be included in the RDAO, but considers that (i) information requirements should not be more stringent than applicable to the information provided by PTC with respect to feasibility, which it refers is not the case in the recommendation⁸² and (ii) shall not have retroactive effect. According to Sonaecom, PTC, by way of recommendation (in its present form), is transferring the onus of formulating detailed records of PTC's own duct network to the beneficiaries (with the added note that the beneficiaries are in practice incurring the associated cost and paying for this work (through the prices they pay for the RDAO)).

Also according to Vodafone, this recommendation could only be binding upon each beneficiary by agreement between the parties, since it is not part of the RDAO. Vodafone therefore rejects any possibility of unilateral change to these rules, which could result in increased difficulties in completing the cycle. Therefore, for Vodafone, it should be explicitly incorporated into the RDAO that any "recommendation" that may be proposed by PTC which does not require the consent of all beneficiaries of RDAO, should not constitute justification for not updating (with the corresponding delay) the information available on the Extranet. Another measure which Vodafone considers to be "extremely simple" in preventing PTC from invoking the non-receipt of information is an obligation on PTC to acknowledge receipt of information (via e-mail, for example) and, at the same time, use this to communicate an assigned sequential and definite number, which will also enable the record to be located.

According to Vodafone, failure to update the Extranet should not be confused with erroneous information on feasibility and therefore proposes that different compensation be provided for each case, accepting that it would only be possible to implement one type of compensation (the highest) where both cases are applicable (e.g. inaccuracies in the information on feasibility resulting from non-updated information on the Extranet).

COLT seeks clarification as to the future inclusion in the RDAO of the recommendation for the formulation of advanced record information by PTC, since it considers that there is a risk that important information might be lost.

PTC, for questions of reciprocity between the survey and record registry and the activity of record validation, argues for a time limit of 30 working days for reception, validation and registration of valid records equivalent to that for the survey and preparation of records.

PTC does not consider it reasonable that it is made subject to requirements which are not imposed on the beneficiaries who are granted a period of 30 calendar days to prepare updated information on duct occupation records and deliver it to PTC, whereas in its view, the tasks of the beneficiaries in the accomplishment of this objective are less complex, given that they may collect information as occupation works progress. Additionally, PTC says that it has to validate the elements received, interpret them, assess their consistency, possibly obtain confirmation of implementation on site or clarify them with the respective beneficiary and this refers to all the records (100%) of all the beneficiaries and, in some cases, it has to deal with simultaneous requests for service and record registration; as such it considers that it would be unacceptable to introduce the time limit proposed in the DD which is lower than the

⁸² It reports, for example, that with regard to feasibility, PTC provides no information about manhole escutcheons, requiring this later in the submission of record information.

time limit applicable to beneficiaries, and it argues for a longer time limit (30 working days), excluding time taken up by any process between PTC and the respective beneficiaries for the clarification of any details or for the rectification or addition of information.

With respect to this point, two sets of comments are presented of a different nature:

- (A) On the one hand, comments in relation to the "*Recommendation for the formulation of record information*".
- (b) On the other hand, comments on the deliberative point in the DD on the introduction of a period of 10 working days in the RDAO for PTC to update the occupation record following receipt (sent by the beneficiary), applicable to 100% of cases.

Regarding the first point, note is made of the different points of view put forward by APRITEL, ZON and Vodafone on the one hand and Sonaecom on the other. While the first group argue that the "*Recommendation for the formulation of record information*" should not form part of the RDAO (although acknowledging its usefulness), the second argue that this recommendation is important and that its inclusion in the RDAO is warranted.

APRITEL and ZON argue that the acceptance of record information by PTC should not be conditional on full compliance with the recommendation. However, the particular aspects of the DD recommendation which they consider excessive are not identified in their responses⁸³.

The view taken by Sonaecom with regard to PTC transferring, through the recommendation in question, the onus of making detailed records of PTC's own duct network to the beneficiaries, does not appear correct, since the recommendation applies to beneficiary infrastructure installed in the ducts and associated infrastructure of PTC. There is no requirement or recommendation that beneficiaries identify the installed cables of PTC.

Vodafone's proposal to make provision for distinct compensation for failure to update the Extranet and for errors in information on feasibility is not clear. The impact of a failure to update the Extranet is had at the level of feasibility information (PTC may respond positively to a feasibility analysis request, which response is incorrect due to a failure to properly update the Extranet). It is therefore not appropriate or justified to impose two types of compensation on PTC and it is sufficient to apply compensation in the case of errors in feasibility information.

On the second point mentioned above, note is made of the position of APRITEL, ZON, Vodafone and Sonaecom proposing to shorten the time limit in question in this point to 5 working days, while PTC maintains that it should be extended to 30 working days.

PTC's arguments to justify the extension of the term are without basis. According to PTC, the activities it engages in are more complex than those undertaken by the beneficiaries, including the need to validate and register requests, interpret the information received, evaluate their consistency, and possibly obtain on site confirmation or seek clarification from

⁸³ Nevertheless, ZON informed ICP-ANACOM as to the recommendation (taking the opportunity to highlight some expressions which it considers to be "ambiguous"), whereas ICP-ANACOM mentioned in the DD that the recommendation does not form part of the RDAO and it not binding upon the beneficiaries.

the beneficiary. As such, if it has to perform all these validations and confirmations, it is deemed more efficient if PTC itself undertook compilation of the cables installed by the beneficiaries⁸⁴. Moreover, PTC may, subject to confirmation and subsequent correction in case of uncertainty - which it is allowed may occur on rare occasions - include information received on the system directly, since it is never held liable for incorrect information which is given with basis in this information.

The fact that the beneficiaries are late in submitting their record information primarily affects the other beneficiaries who make feasibility requests to which PTC, based on available information (which due to the failure of the first beneficiary is outdated) gives a positive answer; as a result the second beneficiary transports resources to the site only to find that installation is not possible. This situation will, as mentioned in section 2,12, be subject to monitoring by ICP-ANACOM.

Furthermore, if PTC fails to meet the deadline of 10 working days, there is only a problem if a beneficiary posts a feasibility analysis request and PTC gives a positive response when there is no space, following the failure to enter information into the database referring to a previous installation of cables made by a beneficiary. That is, there needs to be a string of events, whose probability of occurring simultaneously is very low.

Meanwhile, it is not considered reasonable to reduce the term to only 5 days as sought by APRITEL and some OSP given the work involved in updating the register.

Taking into account the above position and without prejudice to further monitoring of the issue regarding the "Recommendation for the formulation of record information", point D15 of the DD is maintained:

D 15. 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.

2.6. Lists of refusals of the passage of new cables for technical reasons

On this point, the DD encourages the parties to negotiate a specification on the technical characteristics of the cables and a manual of procedures.

APRITEL, ZON and Sonaecom take a positive view of the existence of a list of refusals to the passage of new cables for technical reasons, in that it will (i) facilitate communication between PTC and the beneficiaries, (ii) limit the invocation of unreasonable technical reasons, and (iii) avoid the presentation of unclear motives.

Accordingly:

⁸⁴ which could for example be done proactively by PTC itself when monitoring the beneficiary's work (bringing enhanced efficiency to a service that does not provide much added value and which constitutes a mere supervision of installation work).

- (a) ZON takes the view that to ensure greater clarity and certainty in the relationship between the beneficiaries and PTC, which competes with the beneficiaries at retail level, there are grounds for imposing an obligation on PTC to negotiate a list of refusals with the beneficiaries, as part of the RDAO, without prejudice to the intervention of ICP-ANACOM in case of dispute regarding atypical grounds for refusal.
- (b) APRITEL considers that another mechanism to deter incorrect feasibility responses by PTC may involve a photographic record to accompany each negative response, which it considers should not cause great inconvenience to PTC since the feasibility survey should have been done on site and it is only a matter of documenting it.

PTC believes that the maintenance of the technical information on the cables and equipment of the beneficiaries is essential for the proper operation and validation of access, installation and intervention requests in its ducts and infrastructure. PTC reports that it has agreed a procedure with the beneficiaries for maintaining updated cable information on the operators' portal, which procedure has been implemented. As such, this operator supports the formalization of this service component in the offer, which is nothing more than the receipt, validation and recording of information on cables and equipment of each beneficiary. It is therefore proposed that the beneficiaries submit information to it on all the cables and equipment used, within at least 5 working days notice prior to the posting of requests and the operations which involve them, and to keep this information updated. According to PTC, feasibility analysis, access and installation and removal requests will be subject to cross-checking of the cables and equipment required (cables, excess cable, PL and PE) with the information contained in the catalogue of cables and equipment.

It appears that there are different interpretations on this section of the DD. This deals with the discussion and analysis of the typification, *a priori*, of the cables to be installed by the operators. It is not related to incorrect responses to feasibility requests or to the grounds for negative feasibility responses (comment of APRITEL) nor to the systematic submission by the beneficiaries to PTC of information on all cables and equipment used, with at least 5 working days notice prior to placing orders and operations that include them (as in comment of PTC).

ICP-ANACOM maintains the view that the specification on new cables eligible for use and any restrictions on the passage of new cables (due to their physical characteristics) may be added in Annex 7 of the RDAO, following negotiation between PTC and the beneficiaries. Therefore, the operators would know, in good time, which cables they can install and, if they wanted to install cables not provided for, PTC would have a deadline to report on the suitability or otherwise of including this type of cable in the established catalogue.

It is noted in this context that PTC agreed upon and implemented a procedure with the beneficiaries to keep up-to-date information on cables in the portal, whereas in annex 3 of RDAO v3.0 it is stated that the catalogue of cables and equipment is available in each

beneficiary's restricted access area, enabling the creation/definition of a process for adding new cables to the catalogue or for the refusal of new cables in the catalogue⁸⁵.

In any case, the view is taken that there are no grounds (as set out in version 3.0 of the RDAO) for setting a time limit for the submission by the beneficiary of information on cables prior to the submission of the request, considering that PTC is bound to respond in a fast and reasoned manner (1 or 2 days) following a feasibility, installation or intervention request regarding any unsuitable use of the specific cables indicated therein.

2.7. Extension of reservation period

In the DD, ICP-ANACOM reported that it saw no reason to change the current reservation period of 60 days, subject to further review of this issue in light of concrete data on the response times of local authorities and the comments of beneficiaries.

Oni suggests that the reservation period should be automatically extended for a period equal to any delay in the response from local authorities to civil engineering licensing requests, in cases where the RDAO beneficiary has diligently submitted the licensing request to the municipal council.

SGC states that in cases where occupation information is provided on the Extranet, there is a high risk that any infrastructure reservation mechanism might make the process overly bureaucratic, inefficient and susceptible to abuse. To demonstrate this fact, it mentions that the time taken for local authority licensing is extremely volatile, and that SGC has even encountered times exceeding one year. However, according to SGC, this context makes any control mechanism based on the time taken to issue the licenses impossible, perpetuating reservations which will prevent other operators from rapidly developing their networks. SGC argues that the ideal situation to manage this dichotomy would be a mechanism of reservation moderation, which would clearly penalize abuses. However, it does not envisage a workable model that meets these objectives, whereby it is clearly of the opinion that the risks of a reservation model clearly outweigh its possible benefits.

Distinct positions are reported in the comments received, on the one hand, SGC opposes the reservation period, while on the other hand, Oni suggests that it should be extended. The inclusion of exceptions to a rule greatly increases its complexity and it can be difficult to assess the diligence with which a beneficiary has handled any application for local authority licensing for the purpose of granting an extension of the reservation period for a period equal to the delay in the response of the local authority to civil engineering licensing applications. In this regard it is noted that SGC reports that responses to licensing applications have taken over one year.

⁸⁵ PTC informed ICP-ANACOM on 05.03.2010 that it included conditions in the RDAOv3.0 with respect to the beneficiaries sending information about their cables and equipment (providing the catalogue of cables and equipment in each beneficiary's restricted area) and a set procedure for their validation, whereas a period of 5 working days was stipulated for beneficiaries to send information on all cables and equipment used prior to the posting of requests and the operations involving them.

The response of SGC is not deemed relevant because this entity does not specify the form in which abusive situations with regard to reservations could be penalised, and it even questioned the existence of a model of space reservation.

ICP-ANACOM reiterates that the beneficiaries of the RDAO are responsible for submitting applications for local authority licensing authorization, and are therefore responsible for the speed (or lack thereof) with which it submits the applications and takes the necessary steps, including following up on submitted applications, to obtain a response from the municipal council.

However, if it is found, according to concrete data and objectives, that the time taken by municipal councils to respond to requests is repeatedly incompatible with the "reservation period" of 60 days, ICP-ANACOM may intervene.

2.8. Supervision of interventions (urgent and non-urgent) and of interventions

D 16. 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.

Oni, Vodafone and COLT agree with this measure.

Vodafone also proposes that, even where occurring due to oversight by PTC, in the case of such improper billing the beneficiary should be able to suspend payment of the entire invoice until the item in question is rectified, which action it considers would discourage PTC from adopting such practice or at least ensure the absence of such errors on invoices. It adds that this obligation should be fully applicable to all other infrastructures, in particular, to the offer of access to masts.

Cabovisão⁸⁶ proposes that urgent interventions should be exempt from supervision and, as an alternative, proposes that intervention could be subject to inspection (or verification) by PTC *a posteriori*, whereas beneficiaries shall be committed to rectifying any irregularity compared to the situation prior to intervention⁸⁷. This is because, according Cabovisão, personnel directly involved in performing any intervention are required to have RDAO certification, whereby they are duly authorised and registered for such tasks, considering that such authorisation should dispense with the need for inspection occurring simultaneously with the intervention, rendering the beneficiaries more accountable

Cabovisão also proposes the creation of a form within the RDAO to be initialled by both parties during supervision, considering that this will make it easier to provide proof of presence at supervision, both on the part of PTC and of the beneficiaries.

PTC agrees with the principle that services not provided should not be invoiced.

⁸⁶ Comment referring to point D21 (on the definition of the time limit with respect QSP4), whereas it was deemed that the comment is more pertinent to this point (D16).

⁸⁷ According to Cabovisão, for example, a new cable placed during the resolution of an urgent intervention could be duly rectified with feasibility and access requests, effected *a posteriori* or, failing this, be replaced in a subsequent scheduled intervention.

Note is made of the general positive reaction to ICP-ANACOM's proposal that a service should not be invoiced when in practice it is not provided.

The proposal suggested by Vodafone is not considered appropriate, whereby the beneficiary could suspend full payment of the invoice until rectification of the improper billing of the intervention/installation supervision service, especially given the lack of proportion between the values in question and the correct value of the invoice).

As regards Cabovisão's intention to dispense with PTC's supervision service for urgent interventions, ICP-ANACOM takes the view that it falls to PTC to assess whether such supervision is required, according to the characteristics of the intervention and the resources it has available, since this prerogative is one of the characteristics of the current duct access system.

The existence of a form, as proposed by Cabovisão, may make it easier to ascertain the performance of supervision, since the signature of both parties on this form would provide proof that supervision took place.

Therefore, without prejudice to whether or not there might be supervision by PTC of the interventions of the RDAO beneficiaries, any type of intervention in the ducts of PTC must be notified to PTC in the manner stipulated in the offer.

Therefore, the provision of point D16 of the DD is maintained:

D 16. 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 17. 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).

Oni agrees with this point.

The proposal that the beneficiary may carry out work in cases where the technician(s) of PTC fail to attend earns Vodafone's full support, since the non-attendance of PTC's technician does not prohibit the execution of the work, provided that is executed as previously stipulated. Vodafone highlights cases where execution is dependent on the presence of PTC's technicians and where, in respect of a scheduled supervision:

- (a) PTC's technician fails to attend; or
- (b) The technician attends but is delayed⁸⁸.

⁸⁸ Vodafone deems the technician(s) to be absent, when they are not present on site 30 minutes after the appointed time (even while it informs its staff or contractors that they may decide to wait beyond these 30 minutes). In this respect, Vodafone asks ICP-ANACOM to confirm this position.

In the first case, Vodafone considers that all costs incurred should be fully reimbursed, including but not limited to travel costs. In the second case, the operator considers that the compensation should be applied as envisaged and proposed by Vodafone in response to point D 25 of the DD. In addition to the proposals presented, Vodafone argues that the subsequent re-scheduling requested by the beneficiary, to replace the "missed" scheduling, should not be charged by PTC.

Sonaecom underlines its view that the question of time limits for "*scheduling of the passage of cable on the chosen route*" should not exist, since interventions are performed by personnel who are accredited by PTC itself; as such, it considers that the argument that access to PTC's infrastructure must be safeguarded is inappropriate and disproportionate, proposing the replacement of the practice of scheduling with prior notice of 48 hours.

PTC disagrees with the principle supported in the DD, since the possibility of beneficiaries gaining access to ducts without proper prior authorisation would act as a driver of improper and non-authorised access to ducts by beneficiaries, which is contrary to the conditions of the RDAO. As such, the following principle is proposed as an alternative, whereas prior authorisation from PTC is always required for a beneficiary to access and carry out work in the ducts and associated infrastructure:

- (a) In the case of installations, it is considered that before starting work, the beneficiary shall have contacted PTC to schedule and agree the supervision of access and installation, including the date(s) for commencing construction of the PE and, in event that PTC fails to respond, the beneficiary should request clarification from PTC, that is, access and installation should not be initiated without PTC's express permission⁸⁹.
- (b) In the case of interventions, if PTC fails to attend at the appointed location, it argues that the beneficiary should seek clarification from PTC and should not, in any way, initiate access or intervention without its express permission.

PTC also notes that the beneficiaries, as PTC's clients, are provided with a set of commercial contacts which they can use to obtain an answer in any cases of failure to attend, and it is precisely this procedure which PTC proposes to deal with these cases and not the procedures put forward by ICP-ANACOM.

ICP-ANACOM continues to hold the view that, even taking into account the submitted responses, that if supervision by PTC is scheduled for an intervention and, on site, PTC's technician fails to attend at the scheduled time and place, the beneficiary should not suffer any loss, stressing that such situations are wholly within PTC's control. Therefore, in such cases, the beneficiary can proceed with the work in question, provided that there is no technical or operational impediment caused by absence of PTC.

Regarding this point, ICP-ANACOM is referring to "*the failure by PTC's technician(s) to attend at the appointed time and place*" (Emphasis added by the author). This includes failure

⁸⁹ PTC also argues that to enable the supervision of access and installations and interventions by PTC's technical team, the beneficiary (or the company subcontracted by the beneficiary) should be obliged to keep them informed during the period of installation or intervention as to the locations and dates/times of access to PTC's ducts and associated infrastructure for the purposes of the installation/maintenance of the beneficiary's cables and equipment.

by PTC's technician(s) to attend or their late attendance. If the practice adopted by Vodafone (or other operators) is to wait 30 minutes after the scheduled time, no objection is made in this respect and there is no need for further clarification. It would also be good practice, and is hereby recommended, that before beginning work on the infrastructure of PTC, and once the scheduled time has passed, the beneficiary's technician should contact PTC to report the failure of their technician to attend and to inform PTC that they will initiate the works, whereas no express authorisation from PTC shall be required.

The possibility of reimbursement of the costs incurred, including travel in the case of non-attendance (as opposed to cases of late arrival), raised by Vodafone does not arise, since with respect to this point ICP-ANACOM is clear by stating that the provisions of this point apply *"provided that there is no impediment [to the works to be undertaken by the beneficiary] arising from the non-attendance of PTC's technician"*. That is, when the beneficiary's technician(s) are able to carry out the works despite the absence of PTC's technician(s), there is no cost to Vodafone requiring reimbursement. Situations where work cannot be carried out - and, as such, where travel costs are incurred with no benefit - are covered in point D25 of the DD⁹⁰, which it is clarified is also applicable in the case of installations. In situations where there are impediments to intervention, the view is taken that there is no reason why the new scheduling should not be charged by PTC considering that PTC has already been penalised for its failure to attend through the payment of compensation.

This does not represent, contrary to PTC's claim, improper and unauthorized access by beneficiaries to ducts since, provided that it is undertaken according to the above stipulations, such access results from a scheduling arranged in advance with PTC. The alternative to this procedure would likewise be the application of compensation, in accordance with point D 25 of the DD, with which PTC also disagrees. That is, as far as PTC is concerned the only viable alternative would be for the beneficiary to seek clarification and wait, without PTC being subject to any penalty and with no compensation due to the beneficiary, thereby supporting a maintained lack of compliance which has a negative impact on the activity of the beneficiary and causes them irrecoverable costs. The provision of this point D17 seeks precisely to overcome such non-compliance.

Furthermore, ICP-ANACOM reiterates that the practice of supervision constitutes a logical consequence and necessary safeguard for permitting beneficiaries to carry out installations and interventions in the ducts and associated infrastructure of PTC, and therefore the claim of Sonaecom is not accepted.

In conclusion, **an addition is made to point D17 of the DD in the form of the recommendation that the beneficiary contact PTC in advance:**

D 17. 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

⁹⁰ *"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."*

impediment arising from the non-appearance of PTC's technician), whereas it is recommended that the beneficiary's technician contact PTC in advance.

2.9. Unblocking of ducts

In the DD it was considered fitting to establish an SLA in this area since quotations for the clearance of obstructions are drawn up on a case-by-case basis and with an indicative deadline for the execution of works.

APRITEL, ZON and Sonaecom consider that, even while the quotations for the clearance of obstructions are drawn up on a case-by-case basis and with an indicative deadline for the execution of works, provision should be made for an SLA (and respective compensation) governing the execution of the work with a time limit (counted from the date of acceptance of the quotation by the beneficiary) for its conclusion, which time limit Sonaecom considers should not exceed five days. Alternatively, ZON argues that the beneficiary could be permitted to carry out the clearance work itself (directly or making use of accredited companies), in which cases, according to APRITEL, there should be no payment by PTC (additional to the values of the quotation).

According to Sonaecom, PTC takes the view that that pursuant to Decree-Law no. 123/2009⁹¹ works aimed at clearing obstructions should be notified to the municipality on the working day following their execution. It notes, however, that in certain situations, on the grounds that construction of a new duct is required to replace the loss of functionality of the blocked duct, on several occasions, PTC has refused immediate clearance of obstructions, arguing that local authority authorization is required before installing the new duct.

Sonaecom takes the view that the purpose of the rule laid down in Decree-Law no. 123/2009 is to allow the timely resolution of situations where faults and obstructions impede the provision of service to customers, which resolution involves any type of clearance, even when reinforcement of a duct is required; as such Sonaecom argues that all works which are necessary to repair faults/obstructions, including those which imply the construction of new ducts, should be undertaken with immediate effect, whereas notification may be made to the local authority on the following working day.

Therefore, Sonaecom considers that the behaviour of PTC in the situations referred to above is abusive, whereas there is no justification for additional ducts in these specific cases; as such, it claims that PTC is hiding behind an unacceptable justification in the text of the law whereby the only conceivable outcome is to cause significant delay to the work undertaken by the beneficiary. Sonaecom therefore seeks the intervention of ICP-ANACOM in order to penalise this behaviour of PTC, whereas it essential that this be reflected in the RDAO.

ICP-ANACOM maintains its view that access to the concession infrastructure for the installation of cables requires skills which differ from those required for clearance operations in respect of the same infrastructure, whereby beneficiaries should be prohibited from carrying out clearance operations. Furthermore, the maintenance of ducts is the specific responsibility of the concessionaire.

⁹¹ In point b) of paragraph 1, together with paragraph 2 of article 7.

Furthermore, given that quotations for the clearance of obstructions are prepared on a case-by-case basis and since the time limit for execution is indicative, while providing an important reference, ICP-ANACOM does not see fit to establish an SLA and respective compensation. This situation also occurs, for example in the case of constraint resolutions under the RUO. Moreover, the number of clearances is limited⁹².

Nevertheless, ICP-ANACOM takes the view that the deadline applicable to the submission by PTC to the beneficiary of the quotation for the clearance of ducts should be constituted in an SLA and be subject to compensation for non-compliance, which matter is dealt with in point D26.

Finally, in relation to allegations put by Sonaecom that PTC, in some situations of obstructions, claims that there is a need to install new ducts in order to replace the loss of functionality of the blocked duct, arguing therefore that local authority authorisation is required, it is clarified that, with respect to the requests of the beneficiaries, PTC is bound to follow the same procedures as it follows for itself and that provision is made pursuant to paragraph 1 of article 7 of Decree-Law no. 123/2009 of 21 May, whereby *"works to clear obstructions are exempted from the municipal council prior notification scheme"*. In these cases (under paragraph 2 of this article) *"the undertaking shall notify the municipality with regards to the works on the following working day"*.

2.10. Removal of cables

D 18. 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.

Oni and Vodafone agree with this point of the DD.

PTC agrees with the principle that a beneficiary wishing to remove cables in order to install other smaller diameter cables may use the space freed up for the purposes of said installation. It does not agree, however, with the maximum period of 60 days, proposing instead a period of 30 days and that the recipient might post a feasibility analysis request⁹³ for the installation of cables connected to a request for removal.

For the purposes of the previous procedure, the beneficiary is required to submit an application for removal, obtain the reference from PTC and indicate PTC's reference for the removal request in the observations field of the associated feasibility analysis request. The texts to be included in removal and feasibility analysis requests, respectively, are "remoção dependente de análise de viabilidade referência beneficiária X" (removal dependent on feasibility analysis beneficiary reference X) and "Considerar remoção de cabo com a referência da beneficiária Y e referência PTC Z" (Consider removal of cable with beneficiary

⁹² In 4th quarter 2009, the number of positive responses to requests for clearance represented only 2% of the number of responses to requests for installation.

⁹³ According to PTC, the feasibility analysis will be performed taking into consideration the space freed by the removal, whereas, in these circumstances, the installation of cables may be subject to feasibility and prior execution of their removal.

reference Y and PTC reference Z). In this case, the request for removal is made pending the posting of the associated access and installation request. It is noted, however, that the proposed process must be adapted in cases where beneficiaries access the Extranet and, based on information on occupation levels, directly post the request for access and installation. In this case, the beneficiary must indicate that it intends to install cables by removing existing cables.

Note is made of the agreement among the respondents to this point regarding the principle advocated by ICP-ANACOM, whereby the space occupied by a cable (e.g. copper pair) to be removed a beneficiary should be available to the same beneficiary for the installation of a new cable (e.g. optical fibre).

ICP-ANACOM considers that the establishment of a maximum period of 60 days, for use by the beneficiary of the space that was freed up by the removal of cable(s) is reasonable and appropriate for the purposes mentioned above, and is the same as already applies to installation.

Regarding the procedure advanced by PTC, these are deemed unnecessarily complex and it is considered that a beneficiary's request to remove cables should not depend on a feasibility analysis, nor should it made pending the submission of an access and installation request, whereas it should be processed along the lines already established in the RDAO (see removal request form in Annex 4 of the offer), with the addition of a new field indicating the beneficiary's intention to use the space occupied for later installation. If the operation concerns dead cable, the time limits established in the RDAO for its removal are maintained.

Accordingly, **the provisions of point D 18 of the DD are maintained:**

D 18. 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.

2.11. Quality of service indicators

As a general comment to quality of service indicators, PTC considers that the applicability of time limits for 100% of cases is excessive, not allowing any margin for situations that deviate from the target and not reflecting the response times achieved in most instances; as such PTC claims that there needs to be only one occurrence with an abnormal response time which exceeds the value, discounting all other shorter response times.

Therefore, according to PTC, compliance with time limits in 100% of cases requires total predictability with regard to the systems and processes that eliminate any variance in its response, which requirement is incompatible with the complexity of the processes of RDAO, since these processes are characterised by manual intervention in the exchange and processing of information. PTC therefore argues that the time limits specified in the RDAO should not apply to 100% of occurrence, but rather to 95% of occurrences.

PTC reports that, based on the QSP applying to feasibility analysis requests for the first nine months of 2009, the responses given in 95% of cases fall within a time interval between [SCI] [ECI] days, which it considers reasonable for a maximum period of 15 days for 95% of best occurrences. To the contrary, it notes that the maximum period for 100% of cases⁹⁴ reflects only the worst case, where, with external considerations (values in calendar days) and manual intervention in processes, as is the present case, this corresponds, in general, to lapses or abnormality in the processing of applications.

PTC believes that the proposed reduction in the maximum time limits should be based on efficiency gains achieved through automation and optimization of processes, whereby it argues that any changes to the time limits should only be discussed after, and in no case before, the effective implementation and operation of the systems and the optimization of processes. In this way, the reduction in time limits should be consistent with efficiency gains and should not be imposed without necessary basis, as appears to be the case in the DD⁹⁵. With the exception of the Extranet once the last phase of automating the information access component is concluded, it is not, according to PTC, likely that the efficiencies proposed by ICP-ANACOM will be accomplished given the human activities involved in the processes that simply cannot be automated⁹⁶.

In summary, PTC supports, firstly, changing the total number of occurrences considered with regard to service level response times from the current 100% to 95% and, secondly, the maintenance of existing time limits until the accomplishment, in a properly sustained manner, of effective gains in efficiency through improved operational performance in activities that may be automated. This operator emphasizes that these changes should only be considered after and, in no case before, these improvements are put into effective operation between PTC and the beneficiary, which will also involve development and testing by the beneficiary.

It is reiterated that the establishment of target time limits in the RDAO for 100% of occurrences was decided and reasoned by ICP-ANACOM in 2006, and ICP-ANACOM does not see fit to review them in the present decision.

The fact that the indicator is set to 100% of events ensures that there no situations of prolonged time and without control, which in the current context of the RDAO is more acute. It is further noted that the cases which cause PTC concern will surely be very few, whereby any resulting compensation will certainly not be disproportionate. With regard to the reduction in the time limit in the case responses to requests for information on ducts (80%

⁹⁴ That, for the period in question was between 21 and 67 days.

⁹⁵ PTC notes that in the DD it is accepted (see page 17 of the DD) that "*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*" and on page 27 of the DD "*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*", indicating a relationship of cause-effect between the implementation of the IS and the increasing speed of the processes, which can be considered logical, but not the proposed reduction in response time limits and imposition of others, without the implementation of information systems and the optimization of processes.

⁹⁶ According to PTC, the entry into operation of any system of automatic information transfer of requests and of responses to requests involve, in addition to efforts for its design and development, internal and external testing with the beneficiary, evolving maintenance to be undertaken by PTC, an equivalent effort by the beneficiaries in terms of development and testing with PTC, if such a project can succeed.

reduction), the view set out above is reiterated that: this reduction formalises the indicative time limit stipulated by PTC in the Extranet manual and corresponds to the transformation of a service based on the availability of plans on paper into a service based on the provision of information (electronically) through an Extranet. That is, it arises from efficiency gains.

Regarding the occupation feasibility analysis service, since 2004, ICP-ANACOM has been advocating the existence of a database with information on the occupation of ducts which until now has not been made available, given the need for a response by PTC (to a feasibility request submitted by the beneficiary) in a reasonable period (and superior, for example, to that existing in the similar offer in Spain).

D 19. 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.

Oni, APRITEL, ZON, COLT and Vodafone agree and welcome the requirement that SLA be established for any services provided and controlled by PTC.

According to Vodafone, the necessary and fairness in the processes can only be promoted through target time limits and established non-compliance compensation, provided that such constitutes a sufficient disincentive⁹⁷.

PTC does not agree with this point, whereby it notes that there will be "*future effects on service components that do not exist (nor are expected to exist)*" and due to the ambiguity of this point of DD, questions the significance of a process totally controlled by PTC, when in the RDAO the beneficiaries have a high level of participation and some of the work requires that PTC fuse administrative procedures subject to licensing; as such PTC proposes the deletion of this point.

The proper definition of SLA with regard to processes of the RDAO is a principle advocated by ICP-ANACOM, which, contrary to PTC, does not see how the principle could result in ambiguity, which claim by PTC is not in the least part explained.

In this context, a process completely controlled by PTC is, for example, a response to a request which does not involve PTC having to apply for local authority licensing/authorisation. It is a process whose response depends solely on PTC.

Since no issue has been raised which would call for the revision of this point, **the provisions of point D19 of the DD are maintained**, establishing a broad principle applicable to the entire offer.

D 19. 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.

⁹⁷ Vodafone suggests throughout its response to the present DD the review of a number of time limits terms and compensation values so that they are given a primary characteristic of being a disincentive to behaviours and practices by PTC.

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

D 20. PTC shall amend the RDAO to establish the time taken to respond to requests for information at 1 working day, for 100% of cases.

Oni agrees with this measure. It considers, however, that this time limit only makes sense if the position of this Authority as stated in Point D1 is maintained, thereby applying only to the ducts in "areas NC", considering that this aspect should be clarified in the final decision.

APRITEL, ZON and Vodafone consider the printing of plans by the beneficiary must be made a reality and therefore the information should be automatically and instantly available from the Extranet, i.e. the automatic printing of plans (PDF files containing infrastructure plans) should be performed at the time of consultation, whereby the response time of 1 working day is excessive and unjustified.

COLT considers that the time limit of 1 working day to respond to requests for information on ducts could be reduced to a period measured in hours.

Sonaecom also considers that the provision of information about the routes of ducts should be available immediately, arguing that the level of service to be established should refer to the degree of the system's availability (which should follow industry standards in this regard) and not to the delivery of information.

PTC, besides disagreeing with the application of response time limits to 100% of cases, takes the view that the reduction from 5 to 1 working day is only achievable with the full automation of the process, whereas the service component of the Extranet is not yet fully automated. In this respect, it disagrees with the implementation of this amendment prior to this development, which it expects will be implemented during the first half of 2010. Therefore, PTC believes that the proposed reduction is excessive with regard to the maximum level and to the universe of occurrences, arguing that the time limit should be established at 6 working days and be applicable to 95% of cases.

The time limit for responding to requests for information on ducts through the Extranet of 1 working day has been provided for since the release of the Extranet (which replaced the provision of plans on paper) in the RDAO Extranet manual; however, this time limit has not yet been reflected as a QSP in the offer.

Contrary to the reference made by Oni, this time limit applies to all information on ducts and not only to those in "areas NC", and is unconnected to whether the information on occupation of ducts is found on the Extranet, since it refers to information concerning the routes of ducts which are found on the Extranet throughout the national territory.

Any further reduction in this time limit or its eventual elimination, is subject to the receipt and analysis by ICP-ANACOM of the information requested in D12 on the developments that PTC is undertaking with a view to improving the level of automation of the Extranet and the date indicated for its implementation, so that the impact that such developments will have can be assessed with respect to the possibility of automatic printing and/or provision of plants upon consultation/generation.

Therefore, ICP-ANACOM deems that it is now necessary to establish this QSP, regardless of the claimed intention of PTC to develop the Extranet, with a view to a "*total automation of the process*". Meanwhile, the target time limit for this QSP is established for 100% of occurrences in line with the other target time limits established in the RDAO.

Finally it is noted that alongside the RDAO v3.0 of 05.03.2010, PTC published a new version of the RDAO Extranet manual, modifying therein the time taken for the provision of plans from 1 working day to 5 working days without any justification.

As such, the provisions of section D20 of the DD are maintained:

D 20. PTC shall amend the RDAO to establish the time taken to respond to requests for information at 1 working day, for 100% of cases.

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

In the DD, ICP-ANACOM made no provision for any variance in the target time limit for responding to occupation feasibility requests according to the volume of such requests.

According to APRITEL and ZON, "areas NC" assume a dynamic character, whereby, with the deployment of NGN in these zones, the feasibility analysis service will be more relevant, and as such the time taken to respond to feasibility requests should vary according to the number of requests made. In contrast, they suggest the alternative of providing equal conditions of access to information, including information on available space in ducts, as in "areas C".

In time, with information about the occupation of ducts provided over the Extranet, the feasibility analysis request response service, as it exists, will apply only in "areas NC", and hence have a smaller scope. In this context, the proposal to establish time limits for responding to feasibility analysis requests which vary according to the number of requests made does not appear reasonable. With regard to revising the time limit for responding to occupation feasibility analysis request and the reasons therefor, see section 2.2.

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

D 21. PTC shall amend the RDAO, reducing the deadline for scheduling supervision of urgent intervention (QSP4) from 8 to 4 (consecutive) hours.

Oni agrees with this point of the DD.

Regarding the 24 hour target time limit associated with non-urgent intervention (QSP3), which was not subject to modification in the DD:

- (a) It is considered excessive by APRITEL and ZON which consider that the principle of equivalence is not objectively fulfilled, given that the time limit presupposes that the

retail unit of PTC does not follow the same procedures as the beneficiary in relation to supervisions.

- (b) According to ZON, although the rationale underlying ICP-ANACOM's maintenance of the target time limit associated with non-urgent interventions stems from the fact that such interventions are planned, the operator's experience would suggest that in certain situations access to a duct is required which is not urgent (e.g. performance of audits and inspections), considering that a period of 24 hours appears excessive for the intended purpose. As an example, ZON notes that confirmation of the passage of a cable in a particular duct might prove to be an urgent issue, even if not considered a fault, whereby it considers that it would be appropriate to reduce the target time limit from 24 to 12 hours.
- (c) Vodafone supports the review⁹⁸ of the time limit applicable to the scheduling of non-urgent intervention supervision, noting that intervention of this type is often necessary to solve problems in a section of the network which, at that moment, is being compensated by a redundant section, but whose repair is nevertheless urgent given the exposure (risk) of the network; the operator therefore likewise believes that there is justification for reducing QSP4 from 24 to 12 consecutive hours.
- (d) Sonaecom considers that in order to ensure equivalence of service in the context of non-urgent operations, this time limit should be reduced to 12 hours, affirming that the supervision of the operation is performed at the choice of PTC and that beneficiaries should not therefore be penalised for this fact.

With respect to the time limit associated with urgent interventions (QSP4):

- (a) Referring in the most part to faults, APRITEL and ZON⁹⁹ consider it unreasonable that beneficiaries would propose scheduling to PTC with notice exceeding 4 hours, arguing that a reduction to a maxim time limit of 1 hour was extremely important¹⁰⁰.
- (b) COLT also considers that a reduction from 8 to 4 hours with respect to urgent interventions would be positive, but takes the view that this type of scheduling often requires scheduling with less notice, whereby it proposes a reduction in the number of hours.
- (c) Sonaecom and Vodafone consider that, at this stage, the period of 4 consecutive hours is appropriate¹⁰¹.

⁹⁸ Equivalent to QSP4.

⁹⁹ ZON, in particular, alerts ICP-ANACOM as to the unreasonableness of beneficiaries proposing scheduling to PTC with a notice period exceeding 8 hours (affirming that it has never done so), and considers that ICP-ANACOM should request PTC to provide it with the information which would allow the regulator to ascertain the veracity of the information provided; for its part ZON affirms its availability to provide information on cases where, it is claimed, it will be agreed that there was no compliance with QSP4.

¹⁰⁰ ZON considers that the imposition of stricter target time limits should not be made subject to whether non-compliance with the applicable time limits is due to a failure by PTC, which in its view requires verification, but stems from the need to amend the conditions of the offer, thereby determining the introduction of improvements, for which reason it puts forward the proposal to reduce QSP4 in the hope that it is accepted.

PTC disagrees with the reduction in the time limit for scheduling urgent intervention (QSP4) from 8 to 4 (consecutive) hours, given the extent of the reduction and the impossibility of achieving compliance in the majority of cases.

PTC maintains its position given that:

- (a) It distributes activities among its technical teams on a daily basis, taking into account the scheduling agreed with its customers and
- (b) To alter this plan on the same day leads to inevitable failures to make scheduled appointments, whereas it considers that it would not be feasible to keep inactive teams waiting on standby for potential scheduling arranged with less than 8 hours notice.

Furthermore, according to PTC, this amendment would force it to supervise a smaller number of interventions scheduled by the beneficiaries, for the reasons stated above, which in their view, will lead to increased lack of compliance with the rules of the RDAO by the beneficiaries.

PTC also reports that there is a considerable history of non-compliance with the rules of the RDAO by its beneficiaries, as well as of situations where work has been carried out by non-accredited suppliers, contracted by the beneficiaries, who fail to observe the procedures set in annex to the offer, putting PTC and beneficiary infrastructure at risk; it reports two cases that illustrate lack of compliance with the rules of RDAO by beneficiaries.

As shown, PTC considers that the current time limit - 8 consecutive hours - should be maintained for urgent interventions.

Regarding QSP3, it is clarified that it is neither reasonable nor proportionate to reduce a time limit, which is applied in all situations, merely to address occasional occurrences. It is noted that in this case the maximum time limit is 24 consecutive hours (1 day), and as such it is not seen how this time limit is incompatible with the need to confirm a cable in a specific duct or to resolve problems in a duct which is being compensated by another redundant duct.

Accordingly, in light of the contributions received, ICP-ANACOM considers with respect to QSP3 that, since the interventions in question are non-urgent in nature and thereby require a degree of planning by beneficiaries, the time limit of 24 consecutive hours, as currently established, elapsing between the submission of the non-urgent intervention and the scheduling of this intervention is not excessive; as such ICP-ANACOM sees no justification for reducing it.

With respect to QSP4, note is made of the disparity of comments, even among the beneficiaries, where ZON suggest a reduction from 8 hours to 1 hour and Sonaecom and Vodafone agree with retaining the provision made in the DD (reduction from 8 to 4 hours).

Since the interventions in question are urgent in nature, ICP-ANACOM considers that a reduction in the current time limit is more compelling. PTC must allocate the resources

¹⁰¹ They argue, however, that the impact of this reduction in terms of customer experience should be monitored in order to assess the need for a further reduction in the future.

necessary to achieve compliance with this time limit, since it is considered that in cases of urgent interventions on its own behalf, PTC does not apply a period which exceeds that elapsing between the submission of the urgent intervention request and the scheduling of this intervention. Moreover, it is reiterated, as stated in the DD, that in the LLRO, there are services in which PTC guarantees re-establishment in 4 hours, so that although these time limits do not refer, typically, to 100% of occurrences, it is unreasonable to stipulate a minimum advance notice for scheduling and intervention which exceeds the repair time. In this context, the current procedure of PTC distributing the daily activities may for example be restructured as a morning (or evening) distribution. The fact that this change may force PTC to provide supervision to a smaller number of interventions cannot override the fact that this change brings far greater benefits to end-users who suffer as a result of protracted intervention times in cases of service interruption (urgent interventions) which could affect hundreds or thousands of customers.

Nevertheless, ICP-ANACOM will naturally monitor trends in compliance with this indicator and assess any future need for additional reductions.

Finally, in relation to failures by beneficiaries (or their suppliers) to comply with the rules of the RDAO, it is stressed that these claims must be properly documented and identified in order that ICP-ANACOM may conduct an analysis as to the best way to proceed.

Accordingly, **the provisions of point D 21 of the DD are maintained:**

D 21. PTC shall amend the RDAO, reducing the deadline for scheduling supervision of urgent intervention (QSP4) from 8 to 4 (consecutive) hours.

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

D 22. 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.

Oni agrees with this point of the DD.

APRITEL and ZON consider that the inclusion of a time limit applicable to installation requests (SQP6) is a positive development. Nevertheless, they consider that the period of 5 working days is excessive given that feasibility has been confirmed (by the beneficiary in the case of "areas C", and by PTC in the "areas NC"); as such ZON proposed the adoption of a period of 2 working days.

Vodafone believes that once verification of feasibility has been concluded, since no other actions are necessary which might justify an extension to the time taken to respond requests for installation, this time limit should be established at 3 working days.

COLT considers that the target time limit is appropriate, compliance, or otherwise, therewith by PTC should be monitored and that any reduction from 7 to 5 working days would be beneficial with regard to installation.

Sonaecom considers that the existence of an interval for the scheduling of installation, without clearly specifying the situations in which PTC may reject this request, is detrimental to the development of the offer. It therefore argues that the intervention request should be changed to a notification of the date of installation made to the owner of the ducts, proposing for this purpose a limit of 24 working hours which it considers would see consensus. Given that the beneficiary's technicians must be accredited in accordance with the technical rules established in the RDAO, Sonaecom considers that it makes no sense to impose supervision by PTC staff, arguing that supervision should occur in cases where the owner sees fit and at the owner's expense, whereas the date of installation should not be made subject to the availability of PTC technicians to provide supervision to the work.

Sonaecom also reports that there are situations where the beneficiaries are prevented from proceeding with installation work in the duct due to delays caused by obstructions, pending condominium and/or local authority authorisation or required reinforcement of ducts, whereby the period allowed in the RDAO for the conclusion of works following initial scheduling is exhausted; in such cases the OSP are required to begin the whole process again (including the submission to PTC of a new request for information), causing serious delays in the works and significant costs. Sonaecom therefore proposes that in such cases the application of the installation time limit should be suspended.

PTC states that the requirement of 5 days for 100% of cases with the application of automatic compensation for failure is manifestly excessive and unsustainable. According to PTC, the procedure for the reception, service, validation and technical verification of requests, as well as the provision of a response to the beneficiary, involves a high level of human intervention which is incompatible with the demands of ICP-ANACOM's determination.

As the service component of the Extranet is not yet fully automated, PTC disagrees with the application of this determination prior to this development, which, however, it expects in the 1st half of 2010.

Therefore, PTC considers that the proposal is excessive and, as an alternative proposal, argues that the time limit should be established at 5 working days for 95% of cases, with application subsequent to the entry into operation of RDAO IS with the OSP.

PTC argues that, in the event that PTC does not respond within the prescribed period, the beneficiary should contact PTC using the established channels from the sixth working day following the request to clarify the situation.

Finally, PTC mentions that ICP-ANACOM noted on page 27 of the DD¹⁰² that the SLA changes proposed in the DD should be sustainable (and notes that for this to be possible, they must be supported in real efficiency gains through the improvement and automation of RDAO procedures and not by "decree").

ICP-ANACOM takes the view that, while a request for the installation of cables should be a normal consequence of a positive result of an occupation feasibility analysis, this may not
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¹⁰² "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."

always be the case. In fact, ICP-ANACOM is aware that in some situations the beneficiaries have sent installation requests which did not correspond to a previously granted feasibility on a given route.

Therefore, ICP-ANACOM maintains the view that 5 working days is reasonable for PTC to examine an installation requests and give a response thereto; this time limit shall therefore be established as a new quality of service parameter in the RDAO (QSP6), applicable to 100% of cases.

Furthermore, the increased importance that the RDAO has assumed in the development of NGN is justification enough for the establishment of this new indicator of timely response to requests for installation in ducts. In addition, the beneficiaries have brought no new data regarding this matter¹⁰³, whereby the analysis performed in the DD is maintained.

With respect to the considerations put forward by PTC, it is noted that the value of 5 working days is already established in the RDAO for this time limit and that this is not presently related to the RDAO IS. Nevertheless, ICP-ANACOM notes that PTC had the intention of putting this system into operation during the first six months of 2010, whereby this Authority is monitoring the development of this tool with a view to a possible redefinition of this QSP.

With respect to the time limit for making a duct installation request (of cables), as established in the RDAO (as 30 calendar days), while not subject to review under the present decision, ICP-ANACOM takes the view that in relation to pending condominium and/or local authority permits, it remains incumbent on the beneficiary to perform any steps/follow up in order to obtain resolution.

If there is a significant number of refusals to schedule installation, the beneficiaries should report this information to ICP-ANACOM, which could impose a system similar to that of number portability, with the indication of windows for installation, whereas, in such a case, PTC would be bound to chose one of the suggested windows.

Finally, it is noted that the suggestion put forward by PTC that the beneficiaries should follow up on the request after the time limit for response has expired (in this case for the installation of cables) has already been examined in Section 2.11 and, generally with respect to all indicators.

Having regard to the above position, point D 22 of the DD is maintained:

D 22. 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.

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

D 23. 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

¹⁰³ Previous suggestions had included the replacement of the scheduling with a notification of the installation date.

cases.

Oni affirms that it does not understand how the existence of a time limit for sending clearance quotations is coordinated with paragraph (d) of point D7 of the DD.

APRITEL and ZON and refer to the comments made in section 2.12.1 (DD)

For Vodafone this measure is extremely positive given that, according to this operator, the beneficiaries have no reliable prospect of a time limit for responses to requests for quotations from PTC to clear obstructions. It takes the view, however, that it is necessary to go further, whereby upon responding to the quotation request, PTC should specify a deadline for the execution of the work and subsequently, in the event that it fails to comply with this deadline, be made liable to the payment of compensation. In this case, Vodafone claims that the beneficiary could, in the meantime and at its own discretion, proceed itself (or making use of subcontractors) with the clearance intervention, in which case the sum quoted by PC shall not be payable.

SGC supports the existence of SLA for the clearance of obstructions in ducts, since it reports that it has encountered numerous situations of this kind in its construction activity and that resolution of such situations by PTC has no forecast completion date but is subject only to the delivery, according to established time limits, of a quotation without any perspective as to the execution of the works (according to this company, there have been cases where the actual clearance work was not carried until months after sending the quotation). According to SGC, all situations where PTC has concluded that it is not feasible to clear the obstruction should be labelled in the records as unavailable sections, which has not been the practice to date; as the operator notes there have been cases of clearance requests made by various operators with respect to the same section.

COLT also considers that an SLA is essential in situations of ducts clearance, lest the deadlines which are presented, by being merely indicative, continually slip. According to COLT, the deadline for sending quotations for the clearance of duct obstructions is satisfactory, since in certain situations it is necessary to wait, according to COLT's experience, for more than two weeks before receiving them.

Cabovisão proposes a model in which the costs of clearance are assumed entirely by the beneficiary requesting the installation, but the amount is credited in respect of the subsequent monthly payments payable for use of the infrastructure¹⁰⁴. According to Cabovisão, its proposal decreases the challenges made with respect to the amounts charged with respect to this kind of installation, since they can be recovered over the subsequent monthly fees.

Sonaecom considers that, beyond the need for a time limit to apply to the presentation by PTC of a quotation for clearance of obstructions, there should also be provision made for an SLA with respect to the conclusion of the work, with respective compensation for non-compliance, for which it proposes a time limit of no more than 5 days. Despite the infrequent

¹⁰⁴ According to Cabovisão, this practice simplifies the management of cost allocation since currently it is required that costs are divided equally between the operators sharing the same section of duct; the operators may be, simultaneously with PTC, the beneficiary and another operator which already had cable in the duct (in which this other operator shall also take a share in costs, with respect to a site where it already had a stable network and where this cost was not anticipated).

nature of the occurrences of clearances, Sonaecom states that the impact of their existence on the plans of the beneficiaries is very high and that the lack of an SLA in this context introduces unpredictability with severe implications on network provisioning plans. Sonaecom reiterates in this context, the need to ensure that the text of the RDAO eliminates any ambiguity that promotes the current behaviour of PTC.

PTC does not agree with the target time limit of 5 working days for 100% of cases, because it considers that this is excessively demanding and applicable to all of the occurrences. As an alternative proposal it advocates the establishment of 10 working days for 95% of cases to present, where clearance is possible, a quotation for clearance to the beneficiary. In addition, it proposes an improvement in the clearances component as follows:

- (a) Creating a separate service component for clearances, bearing in mind that it may be requested in connection with different service components (access and installation, interventions removals and diversion of routes).
- (b) Disassociating the request for an alternative route from clearance requests, in order to, firstly, simplify the service component and, secondly, to give flexibility to the simultaneous request, or otherwise, of this possibility.
- (c) Typifying single and multiple clearances, depending on the length of obstruction, respectively, equal to or less than 1.5 m and over 1.5 m (in PTC's proposal, the beneficiaries are responsible for identifying the type of obstruction and for information surveys necessary for its description)¹⁰⁵.
- (d) In the case of a single request for clearance and provided that it is feasible and confirmed on site, this is not subject to a quotation, whereas a *standard price is applied*, in accordance with the rules of cost allocation provided in the offer.
- (e) In the case of a multiple clearance request, PTC will send the quotation and the planned completion date of the works to the beneficiary in question within a time limit of 10 working days, together with the deadline for achieving the clearances, but will not be liable for any delays attributable external to entities, such as in cases of delays in obtaining licenses/authorisations required to perform clearance¹⁰⁶.
- (f) The beneficiary must accept the quotation and proceed with the respective clearance request, using the form provided in Annex, within a period of not more than 5 working days from the date of the quotation's submission¹⁰⁷.
- (g) As an alternative or supplement to the clearance request, the beneficiary may request a feasibility analysis of alternative routes to bypass the obstruction.

¹⁰⁵ In addition the beneficiaries may also request the clearance of obstructions to gain access to an IC.

¹⁰⁶ PTC's response will present the details regarding the number of beneficiaries with cables in the duct and the total price of clearance.

¹⁰⁷ After accepting the work, any intervention to be performed with respect to installed cables is covered by the offer's intervention services. If the beneficiary does not accept the quotation, PTC will not perform the clearance.

- (h) If it is found that the clearance is not practical, there is no obligation on the part of PTC to build ducts and associated infrastructure to overcome the impracticality of such clearance.

The observation of Oni is not understood, insofar as in point D7 provision is made that PTC remains bound to make every effort to undertake the clearance¹⁰⁸, in cases where PTC gives a positive response to an occupation feasibility, and it is subsequently found that the response was incorrect, whereas QSP7 sets out a time limit for PTC's response to a request sent by the beneficiary for a quotation for clearance.

ICP-ANACOM recognizes that obstructions can only be detected on site and that their resolution depends on the case, so it is not workable to establish a single target time limit for the conclusion of clearance operations, which is short (as suggested for example by Sonaecom) and applicable to all situations, nor to establish compensation for respective non-compliance. Nevertheless, when sending the clearance quotation to the beneficiary, PTC should not omit to indicate an estimate date for the conclusion of the clearance work.

The reference made by SGC to the many situations of duct clearance which they have encountered, is not supported by data available to ICP-ANACOM. According to information submitted by PTC under the RDAO with regard to the 1st and 2nd quarters of 2010, this entity made no requests for obstruction clearances.

Nevertheless, the proposal made by SGC to identify in the records those sections whose clearance was deemed to be infeasible (such as to avoid further clearance requests with respect to such sections) is positive, making the processes of the RDAO more efficient.

The proposal from Cabovisão for a model in which the costs of clearance are assumed entirely by the beneficiary requesting the clearance is not entirely clear. Nevertheless, to the extent that there may be various beneficiaries sharing a blocked duct section, who will consequently all benefit from the clearance, ICP-ANACOM considers that an equitable division of the costs of clearance among these beneficiaries is proportional, and should therefore be maintained.

Regarding the comments and proposals of PTC and notwithstanding that these may be presented to the beneficiaries by PTC and discussed with them, the position is taken, at a first analysis, that:

- (a) It is unclear to ICP-ANACOM how PTC requires 10 working days to make a decision with regard to bypassing a given obstruction, whereby, in order to promote a better balance between PTC and the beneficiaries, the view is taken that it is appropriate to maintain a period of 5 working days for PTC to send the quotation to perform the clearance work.
- (b) The usefulness of characterising the clearances into single and multiple obstructions, depending on the length of the obstruction, does not appear evident, considering that this would introduce further complexity, particularly with regard to inspections.

¹⁰⁸ Or indicate a viable alternative route without additional costs within the period specified in the RDAO.

- (c) Under the terms of the RDAO, provision is already made that the beneficiary must accept the clearance quotation within 5 working days from the date it is sent.

Finally, regarding the possibility that the beneficiaries might undertake clearance works, it is considered that such works have greater impact and are more demanding than, for example, works for installing cables, and it remains incumbent upon PTC, pursuant to the concession contract, to undertake the maintenance of infrastructure (including ducts); ICP-ANACOM therefore rejects this possibility.

Accordingly, point D 23 of the DD is maintained as follows:

D 23. 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.

2.12. Compensation for non-compliance

PTC highlights the growing severity of compensation through its free application without it being associated with forecasts, and also the widening scope of its application.

According to PTC, the DD does not contain the criteria which govern the proposed values of compensation presented, whereas there is also a lack of consistency in the application of these values¹⁰⁹.

PTC states that the beneficiaries have a high level of involvement in the RDAO¹¹⁰, whereby there are obligations which are necessary for putting the RDAO into effective operation and which are binding upon the beneficiaries (with which there is often non-compliance, for example in the submission of record information).

Therefore, noting that the DD makes no provision for compensation incurred by the beneficiaries in cases where they provide inaccurate or incorrect information, or provide information late, noting also that it is precisely this information which ICP-ANACOM intends to see published on the *Extranet*, PTC supports the inclusion in the RDAO of a set of compensation payable by the beneficiaries in the event of their non-compliance with the conditions and rules set forth in the RDAO, with a view to establishing incentives for compliance therewith, which non-compliance, according to PTC, gives rise to inefficiencies and causes it to incur added costs. Such is the case in respect of:

- (a) Invalid requests for feasibility analysis, access and installation, registration, clearance and removal at a value of 50 euros per occurrence¹¹¹.
- (b) Unauthorized access to IC, at a value of 200 euros per occurrence.

¹⁰⁹ For example, PTC notes that the value of 50 euro is used for most compensation, but sometimes with respect to days and otherwise applied to hours, which it considers as demonstrating a lack of consistency, whereas, in the case of an incorrect feasibility response, it is penalized 200 euros, which value PTC deems disproportionate.

¹¹⁰ Since it is the beneficiaries who carry out the installation of cables and interventions, as well as the record surveys when concluding installations, interventions with alterations and route deviations.

¹¹¹ Referring to the cost incurred by PTC in servicing and validating the request

- (c) Installation of cables and equipment without authorization from PTC, at a value of 200 euros per occurrence, plus 50 euros per day and per section of unauthorized installation.
- (d) Detection of non-accredited beneficiary technicians, at a value of 200 euros per occurrence of non-accredited technician.
- (e) Delay in the submission of valid records beyond 30 calendar days, at a value of 50 euros per record request.

PTC also considers that "over penalisation" can have a perverse and extremely punitive effect on PTC, insofar as the compensation structure proposed in the DD could, if it were adopted and due to the value that it may represent to the beneficiaries, constitute a reduced incentive for beneficiaries to participate, together with PTC, in the development of electronic interfaces and in putting them into operation. As such, PTC proposes that ICP-ANACOM consider this aspect in light of the distortions which could result in the evolution of the RDAO, which, for a long time, has had no provision for limit on the requests for various components, whereas the human resources and processes available to handle and satisfy these requests are limited. In this respect, PTC considers that it is unacceptable that, as a result of any abusive occurrence in the submission of requests, it would be liable for the payment of compensation to the beneficiaries.

ICP-ANACOM notes the proposals of PTC regarding the establishment of compensation to be imposed on beneficiaries of the RDAO. Nevertheless, ICP-ANACOM considers that it is premature to adopt such proposals, given that if one looks at the compensation imposed on PTC since the RDAO's beginning, these have so far only encompassed QSP1 and QSP2, whereas no compensation has been established (payable by PTC) for non-compliance with QSP3, QSP4 and QSP5.

In this context and taking into account that this offer has been in effect for only four years, it is recalled that in 2006¹¹², it was stated that "*given the initial state of the offer, ICP-ANACOM decided, for the time being, not to establish values for these indicators. Nevertheless, ICP-ANACOM will monitor the development of the offer, which will enable access to more detailed information, and may establish values for compensation for non-compliance with the specified quality indicators in a separate process*". This position with respect to PTC likewise applies to the beneficiaries.

It is noted that the values of the compensation now imposed by ICP-ANACOM are in line with the values already provided for in the RDAO since its entry into force (specifically with regard to non-compliance with QSP1 and QSP2). Accordingly the value of 50 euros per day is maintained with respect to QSP6 and QSP7.

In relation to compensation for failure to comply with time limits for scheduling interventions or delays in the attendance of PTC at the appointed time and place, whereas these situations relate to the provision of service with targets established in hours, being the most urgent or with fastest response, compensation should also be measured in this same unit. For this reason, the value of 50 euros/hour is applied to urgent situations and the value of 25

¹¹² See prior hearing report, approved by decision of 26.05.2006.

euros/hour is applied in non-urgent situations. Furthermore, these values are comparable to what it costs per hour for PTC to have a technician to supervise the work (under the RDAO, the price payable by RDAO beneficiaries for PTC's first hour of supervision is 39.40 euros during normal hours and 61.40 euros in remaining periods). In this context, given the resources transported by the beneficiary to the intervention site (certainly higher than the number involved in the supervision of works by PTC), it is deemed that the values of 25 euros in compensation for each hour of delay in PTC's attendance at the non-urgent intervention, and 50 euros in compensation for each hour that PTC is delayed in the case of urgent intervention, are in no way disproportionate.

Naturally, compensation shall only be payable by PTC as the result of non-compliance which is attributable to the company, whereas the values established for compensation depend on the impact of PTC's non-compliance. It should be noted however that the purpose of compensation under the RDAO is to encourage PTC to provide a service to all operators within the established targets and standards of quality (it is noted that PTC itself in 2009 almost reached the target of cabling one million homes with optical fibre), with the possibility of nullifying such compensation.

In the event that PTC presents a significant number of specific and documented situations, such as, the installation of cables in ducts without authorization, detection of beneficiary technicians intervening in ducts without proper accreditation or delays in sending records, ICP-ANACOM will examine and consider implementing other appropriate measures to remedy such situations. Furthermore, situations where an exorbitant number of requests are submitted simultaneously will likewise be examined, although it should be noted that the submission of such requests also involves costs which, from the outset, deter such practices.

In any case, it is not considered that the present proposal could result in reduced incentives for beneficiaries to participate, together with PTC, in the development of electronic interfaces and their entry into operation, since all parties will benefit from their use.

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

Based on graph 3 of the DD, ZON and APRITEL consider that PTC has been non-compliant over the course of several quarters with the target time limit established, whereas APRITEL argues for an increase in the levels of compensation, while ZON states that full payment of compensation should not be dependent upon the submission of forecasts.

SGC considers that even while section 2.15.1 of the DD relates to "*compensation for failures to comply with time limits for responding to requests for information about ducts and to feasibility analysis requests*", feasibility requests were not addressed therein. Taking into account the definition of the SLA for 100% of cases (10 calendar days), SGC considers that compensation must be established on a daily basis for respective non-compliance, above all with respect to situations where these requests remain mandatory. Therefore, according to SGC, in the event of failure to comply with the time limits established in D1, the compensation to be established must be in addition to that provided for in D4.

COLT believes that monitoring is essential, as is a substantial increase in the levels of compensation due for failure to comply with time limits for responding to information and feasibility analysis requests.

Sonaecom, based on information which it compiled between January 2008 and May 2009¹¹³ reported persistent non-compliance with QSP1¹¹⁴ and the QSP2¹¹⁵, whereby it takes a generally favourable view towards the review of compensation, although it disagrees with the use of forecasts to ascertain applicability, or otherwise, of the compensatory mechanism.

PTC considers, regarding "*compensation for non-compliance with time limits applicable to responses to requests for information on ducts*" that it is important to take into account that the price of access to the Extranet is annual and is not dependent on the number of requests for plans posted by the beneficiaries. However, PTC affirms its hope that the beneficiaries will make rational use of the Extranet and request only the plans which correspond to their actual need, stating that the Extranet is not prepared to respond to excessive volumes of requests from beneficiaries. In this context, PTC considers that it cannot be penalised with compensation for non-compliance with levels of service if such stems from unreasonable use of the Extranet and argues that a provision should be established in the conditions of the RDAO to safeguard against this possibility.

It is clarified that the compensation provided for in D4 (50 euros per day applicable to each feasibility request) is intended to compensate the beneficiary for non-compliance with the time limits (established in D1) applicable to the provision of information on occupation of ducts on the Extranet, whereas in cases where feasibility requests are "mandatory" (as SGC refers), compensation is applied as currently established for non-compliance with QSP2.

ICP-ANACOM recognizes that because the quality of service parameters of the RDAO were established for 100% of cases, failure in one situation becomes very visible, and that in most of the situations the established time limit could have been achieved.

As such, ICP-ANACOM considers that the present values of compensation applicable to non-compliance with respect to QSP1 and QSP2 of the RDAO provide sufficient incentive to the accomplishment of high quality standards. ICP-ANACOM also reiterates its position, as conveyed in the DD, that the review of the conditions in respect of subjecting the applicability of compensation payments to the submission of forecasts is a more important incentive for achieving compliance with time limits than any increase in the value of such compensation.

The specific situations related to various decision elements proposed in the DD are examined below.

¹¹³ Corresponding to 17 months referring to the period during which the RDAO received most intensive use.

¹¹⁴ According to Sonaecom, PTC was reported in non-compliance in 7 months during the period, whereas 4 of these months came after the entry into force of the Extranet.

¹¹⁵ Sonaecom states that PTC was not in non-compliance only for 2 months and in the majority of the months in which non-compliance was reported, the average of response times which were not within the time limit exceeded 20 consecutive days.

2.12.2. Compensation associated with failure to schedule supervision of interventions within the established period (urgent and non-urgent)

D 24 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.

Oni agrees with this point of the DD.

Supported by Graph 3 in the DD, APRITEL states that PTC has been non-compliant over the course of several quarters, and considers that the increase of such compensation has some relevance.

Vodafone agrees with the proposed values, provided that they are not made subject to limitation, that is, provided that no ceiling is applied to the presented values (the greater the degree of PTC's non-compliance, so should the penalty which it incurs likewise increase). Vodafone adds that the unit of measurement to apply with regard to such compensation should be per full hour, rounded up to the nearest whole hour (1.5 hours would be considered as 2 hours for the purposes of applying the established compensation).

COLT disagrees with the value of 25 euros (scheduling non-urgent interventions) and of 50 euros (scheduling urgent interventions) for each hour of delay and considers it imperative to substantially increase compensation for non-compliance with the time limit applicable to the scheduling of supervision of planned interventions and to the non-attendance of PTC staff at the appointed place and time. In this regard, COLT recalls that such interventions involve transporting teams of more than one person who are prevented from carrying out their work in a timely manner, in addition to the unavailability of service that can result.

PTC disagrees with the proposed determination on non-compliance with the time limit applicable to scheduling, as presented by ICP-ANACOM, since, in its view:

- (a) The IS does not support registration of the date/time proposed by the beneficiaries when reporting a fault or for recording PTC's response to the date/time indicated by the beneficiary - according to PTC, this limitation makes it impossible to calculate the indicators associated with the processing of any compensation for non-compliance.
- (b) The DD does not explain in detail how the value of compensation is calculated, whereby it presents the following example: in the case of urgent interventions, the beneficiary has up to 8 hours to request intervention counted from the moment it contacts OTEL, whereby it may request a date/time a maximum of 8 hours ahead, i.e. "date/time of the request plus 8 hours" or for "date/time of the request plus X hours" where X is less than 8 hours. Regarding this latter case, if PTC does not have the resources available to supervise a request for "date/time of the request plus X hours" it can always, while remaining compliant, respond with "date/time of the request plus 8 hours"; this means implies that any non-compliance occurs when, choosing to provide supervision, PTC is unable to agree with "date/time of the request plus 8 hours". As such, for PTC, the basis of the problem is to decide, when requested by the beneficiary, whether or not to supervise the intervention.

In addition, PTC says that it does not understand the basis for the value of 50 euros per hour of delay and 25 euros per hour of delay, respectively, for non-compliance with the time limit applicable to non-compliance with the time limit for scheduling supervision of urgent and non-urgent interventions. According to PTC, compensation under the RDAO is currently applied per day of delay and not per hour of delay; as such it affirms that for compensation of 50 euros per hour of delay and 25 euros per hour of delay to be consistent with other levels of compensation established in the RDAO, these values would need to be divided by 24¹¹⁶. Unless these values are divided by 24, PTC would consider that ICP-ANACOM is ordering the payment of compensation at a level which is 24 times more punitive than those established in the offer, which it claims is manifestly disproportionate

Alternatively, PTC proposes to replace the system of compensation with the following alterations to the procedure of submitting intervention requests:

- (a) The beneficiary should contact the Operators Centre (OTEL), indicating a target date/time for the intervention, within the maximum number of hours established, 8 and 24 hours respectively;
- (b) PTC analyzes this request, confirming their availability to attend on that date/time and where it is unable to attend, it informs the beneficiary that it may perform the intervention, without prejudice to PTC being able to carry out assessments of the interventions and works performed.

According to PTC, this proposed amendment eliminates possible non-compliance with respect to scheduling of interventions, and therefore also eliminates the need to apply compensation thereto.

PTC also notes that, contrary to the current reference in the RDAO, the proposed compensation is not subject to any limits.

Finally, PTC reports that various cases of non-compliance by beneficiaries have been identified as a result of unauthorised access to ducts; it therefore proposes the immediate establishment of compensation applied to beneficiaries, which compensation must be "dissuasive and proportional" in order to incentivise compliance with the offer's conditions on the part of the beneficiaries. On this subject of improper and unauthorized access, which PTC considers critical, it argues that the principle of reciprocity should reign with regard to non-compliance with the conditions of the offer, and, for this reason, compensation should be established which deters non-compliance.

Contrary to the statement of APRITEL, in the DD, ICP-ANACOM has not proposed an increase in the levels of compensation associated with failure to schedule supervision of (non-urgent and urgent) interventions within the established period, since, to date, no penalties have been applied for non-compliance with QSP3 and QSP4 of the RDAO.

COLT's comment is not applicable here, since the response time to scheduling elapses prior to teams being sent to the site. The issue of delays with respect to the scheduled time is addressed in the following point (D25).

¹¹⁶ Since there are 24 hours in a day.

With respect to the reference made by PTC to the fact that current compensation under the RDAO is applied per day of delay and not per hour of delay, ICP-ANACOM makes it clear that compensation is established according to the same unit as used to measure the relevant QSP. Therefore, since the target time limits of QSP3 and QSP4 are both established in (consecutive) hours, it is deemed that the value of compensation for non-compliance with QSP3 and QSP4 should be measured in the same unit.

Furthermore, there is no comparison between the value of compensation for non-compliance with the time limit applicable to a request for information of feasibility with the non-compliance with the time limit for scheduling (supervision) of an urgent (or non-urgent) intervention, since the impact of non-compliance in the latter case (considering that there are customers without service) is far more severe than the impact in the former case (which corresponds to the provision of service to potential customers). In this context, ICP-ANACOM takes the view that the values of 25 euros and 50 euros for each hour of delay, for compensation for non-compliance with time limits applicable to the scheduling of supervision, respectively, of non-urgent and urgent interventions are fully justified and appropriate and this represents a reasonable compromise for PTC and for the beneficiaries.

On the other hand, PTC can in no way cite unavailability of resources as a reason for non-compliance with this time limit. It is noted that the time limit for scheduling the supervision of interventions corresponds to the time in consecutive hours elapsing between the time that PTC receives an intervention request by the beneficiary and the time when PTC schedules the necessary supervision.

As for PTC's cited lack of support in its information systems to record the date/time proposed by the beneficiary for the intervention (and PTC's response), ICP-ANACOM does not comprehend the point made, insofar as, since the RDAO's entry into force (except for access to the Extranet, which enables information to be obtained on the location of infrastructure) paper forms have been used, which are not the most efficient method of managing procedures between PTC and the beneficiaries.

Nevertheless, form 7 of annex 4 to the RDAO - intervention request - contains fields which allow PTC to record the date/time that it receives the intervention request from the beneficiary and the date/time scheduled for the necessary supervision.

It is further noted that PTC has submitted quarterly reports to ICP-ANACOM regarding the accomplished values of the QSP in the RDAO, so that, except for situations where alternative operators request interventions with a period of advance notice which exceeds the established time limits (which do not count for indicators on scheduling the supervision service), it is concluded that PTC has some way of calculating this indicator.

The proposal by PTC that the beneficiary should indicate the time of intervention and that PTC would subsequently confirm its availability (or otherwise) is likely to lead to higher levels of non-compliance, seeing that PTC itself envisages the possibility of non-attendance ("*where it is unable to attend*"), which in situations where the presence of PTC is essential, might prevent the work from being carried out by the beneficiary, which outcome is to be avoided.

Regarding the lack of limits applied in the DD to compensation, ICP-ANACOM understands that there may be exceptional cases where a specific request for action from a beneficiary can be lost, and that subsequently, in the absence of notification by the beneficiary to PTC, this might lead to massive compensation (payable by PTC to the beneficiary). ICP-ANACOM considers that this situation is more likely to occur with respect to non-urgent interventions, since with respect to urgent interventions, given that time is pressing, it is not deemed plausible that the delay to scheduling of such an intervention would extend to such an extent as to make the lack of a limit to the respective compensation a critical factor. However, if applications are made through an autonomous request management system (e.g., RDAO IS), such instances of mislaying or losing track of requests are minimized.

Finally, with respect to the possible application of compensation for non-compliance of the beneficiaries in respect of the RDAO, ICP-ANACOM reiterates that if PTC is able to report a significant number of specific situations such as, the installation of cables in ducts without authorization, detection of the beneficiary technicians intervening in ducts without proper accreditation or delays in sending records, ICP-ANACOM will, in view of the situations presented, conduct a review and consider appropriate measures.

Accordingly, **the provisions of section D 24 of the DD are maintained:**

D 24. 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 25. 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

Oni agrees with this point of the DD.

Vodafone agrees with the proposed values, recalling its arguments with respect to point D 17, i.e. in the event that PTC does not appear within 30 minutes, the costs incurred by the beneficiary should be fully reimbursed, including but not limited to costs associated with travel (effected by means of a debit note issued by the beneficiary). Additionally, Vodafone argues that a subsequent scheduling requested by the beneficiary, in lieu of the scheduling that was not attended, should not be charged by PTC. Also according to Vodafone, in the event that PTC appears after 30 minutes and the beneficiary is still on site in order to undertake the intervention, the proposed compensation should still be applied.

PTC disagrees with this point because, in its view, there is no support in the IS to record the moment at which the technicians arrive on site, neither its technicians nor the beneficiary's. For this to take place, PTC indicates that it would have to contract a third party to arbitrate on the problem, which it considers to be clearly unrealistic and inefficient.

PTC also reports that there may be delays on both sides and argues that, following the logic of the DD, compensation should also be applied in these cases¹¹⁷.

As in the previous section, PTC suggests, as an alternative, the elimination of compensation and in its place, application of the following procedural rule: in the event that PTC fails to attend at the appointed date/time, the beneficiary should contact PTC's DWH commercial management, for which it already has contacts, requesting authorization of access.

PTC also repeats the comments which it made in the previous point regarding the absence of limits on the amount of compensation and cases of unauthorized access by the beneficiaries to its ducts and infrastructure which, in PTC's view, justifies the application of compensation due from the beneficiary to PTC, in accordance with the principle of reciprocity.

Given the contributions received, ICP-ANACOM retains the position that, in the event that the failure of PTC's staff to attend at the appointed date/time in some way prevents the beneficiary from proceeding with the previously scheduled intervention, compensation should be applied, since this situation entails a more important loss to the beneficiary, which transported its resources to the intervention site, incurring the costs thereof, than the loss caused to PTC as a result of any delay by the beneficiary; this is besides the fact that the intervention arose from need of the beneficiary and not of PTC. Nevertheless, as mentioned in the previous paragraph, ICP-ANACOM will consider and analyze any concrete situations reported by PTC with regard to delays or failure of beneficiaries to attend resulting in significant loss to PTC.

Furthermore, under the terms of the RDAO, the price payable by RDAO beneficiaries RDAO for PTC's first hour of supervision is 39.40 euros during normal hours and 61.40 euros in remaining periods. In this context, given the resources transported by the beneficiary to the intervention site (certainly a larger number than the number involved in the supervision of work by PTC), the view is taken that the values of 25 euros compensation for each hour of delay in the attendance of PTC at a non-urgent intervention, and 50 euros in compensation for each hour of PTC's delay with regard to urgent intervention are not at all out of proportion, representing a reasonable compromise for PTC and for the beneficiaries.

With regard to there being no support in the IS to record the attendance of PTC (or beneficiary) technicians on site, ICP-ANACOM considers that at present these could be recorded on the intervention request form itself and 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 (no later than two hours, and preferably also on-site) which can also be an important factor for the verification of non-compliance.

Cases where the delays do not prevent or hinder the work of the beneficiary were already addressed in D 17, and therefore the comment of PTC in this respect does not apply.

¹¹⁷ PTC questions whether, if there is a lack of reciprocity in compensation, compensation applied to PTC remains valid. And the operator also questions how delays should be measured in such cases (if any delay in arrival by PTC's technician with reference to the appoint date/time should be deducted from the delay in the arrival of the beneficiary's technician). Without a system to record all these occurrences PTC argues that it is not possible to put this process into operation.

Accordingly, the provisions of section D 25 of the DD are maintained, with the inclusion of a reference to the need for additional contact by the beneficiary:

D 25. 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.

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

D 26. In the event of failure to comply with QSP6 or QSP7, compensation will be applied, amounting to 50 euros per day.

Oni agrees with the principle of compensation for non-compliance with the time limit, not comprehending however how the existence of a time limit for sending quotations of clearance can be coordinated with paragraph (d) of point D7.

In the opinion of Vodafone, the value provided as compensation for non-compliance with QSP6 or QSP7 does not appropriately reflect the damage caused by delay in the deployment of a particular section of the network. According to this operator, ICP-ANACOM should take into account that:

- (a) A delay in an access section will have always far less impact than a delay on a vector or trunk section.
- (b) Such delay in entry into or coverage of a given geographical area may determine that customers who have made advance subscriptions to offers of services cancel these, given the delay in their provision.

Vodafone takes the view that, accordingly, a formula should be created which reflects this entire reality or, alternatively, that the value of 50 euros per day should be substantially increased to a value which is three to four times higher.

COLT considers that an SLA is indispensable for situations of duct clearance, lest the time limits which are presented, as indicative, become subject to continual slippage. In COLT's view, the existence of compensation associated with non-compliance with the time limits would encourage compliance with the indicated time limits. According to this operator, monitoring of non-compliance with the time limits applicable to responses to installation requests and clearance requests is imperative, as is a substantial increase in associated compensation.

Sonaecom, based on information which it compiled between January 2008 and May 2009¹¹⁸ noted the persistent non-compliance with QSP6¹¹⁹ and QSP7¹²⁰, whereby a review of compensation would be generally favourable.

PTC considers the compensation established for non-compliance with the time limits of QSP6 and QSP7 to be disproportionate and unjustifiably asymmetric. Noting that compensation under the RDAO is limited at 60 working days and 90 calendar days, respectively for QSP1 and QSP, PTC considers that, in the case of compensation for non-compliance with QSP6 and QSP7, ICP-ANACOM has taken a different position, contradicting its statement that (*"In this context, it is considered that the value of 50 euros a day (as provided for in the RDAO) fulfils [..]"*), since no limit to the value of its application is specified.

With regard to Oni's statement, it is reiterated that the principle is maintained that there has to be compensation for non-compliance with the time limits applicable to PTC's response (with clearance quotation); it is also reiterated, as is now made clear by ICP-ANACOM in point D7, that obstructions can only be detected on site upon execution of installation works by the beneficiary, and cannot therefore be considered as feasibility analysis errors.

The ducts sections covered by the RDAO (see Annex 1 to the offer) are primary, secondary and distribution sections, whereas the time limits applicable to responses to feasibility analysis requests and installation are not dependant on the type of section. Therefore, subject to further analysis, the view is taken that delays with respect to responses to requests for installation and clearance should not be penalised more severely when they refer to specific types of section (vector and trunk, as Vodafone mentions) over another type (access, as Vodafone also mentions).

ICP-ANACOM takes the view that the daily rate of compensation for non-compliance with the time limits applicable to responses to installation and clearance requests is in line with the compensation values already provided for in the RDAO for non-compliance with time limits, which are also measured in number of days.

Therefore, ICP-ANACOM reiterates that, with the introduction of the new indicators (PQS6 and PQS7) and to encourage 100% compliance, it is necessary to establish compensation for non-compliance, considering that a value of 50 euros per day (as already provided for in the RDAO) is sufficiently dissuasive and proportionate.

Regarding the comments of PTC regarding limits to compensation for non-compliance regarding QSP6 and QSP7 of the RDAO, in light of the established time limit of 5 working days with respect to each one, the view is taken that the same limit should now be adopted with respect to QSP1 (which also had a target time limit of 5 working days) and, therefore, the limit is 60 working days. This approach is subject to review in the event that a relevant number of occurrences are reported involving higher values.

¹¹⁸ Corresponding to the 17 months during which the RDAO received most intensive use.

¹¹⁹ According to Sonaecom, the only month in which no non-compliance was found on the part of PTC was February 2009.

¹²⁰ Sonaecom notes that in all the months in which there were requests for clearances, there was reported non-compliance with the established limits.

In light of the above, **the provisions of point D 26 of DD are maintained with addition of a limit of 60 working days.**

D 26. 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.

2.13. Pricing

APRITEL and ZON consider that they should not be penalized for problems in PTC's IS, while ZON argues that in situations where the database is not accessible, the beneficiaries should not be subject to any payment for responses to information requests.

According to Oni, ICP-ANACOM considers that feasibility requests should be charged separately from access to database records, because this database still lacks information about the occupation of ducts and this service requires manual labour. However, Oni takes the view that this statement is in contradiction with the point D2, with respect to the ducts of "areas C". According to Oni, the principle in question should apply only to ducts of "areas NC", where the Extranet does not have information on occupation of these ducts, as established in point D1.

Vodafone agrees with the payment of a charge per response to request for information on ducts when the database is inaccessible and responses to requests have to be given in the "old manner", provided that the price to pay for requested plans does not exceed the compensation due as a result of the application's unavailability, otherwise the beneficiaries are paying twice for the same service while having to resort to an old procedure which is more manual and more bureaucratic.

COLT reveals that in the DD, it is stated that, in situations where the database on the ducts is unavailable through the Extranet, requests will be answered using paper plans and therefore are there are grounds for the payment of a price per response to request on information on ducts. According to COLT, the fact that the database is inaccessible should not cause disruption (since it involves an additional fee) to the normal functioning of requests and because inaccessibility of a database affects beneficiaries and an annual payment has already been made to access it, this situation represents a double payment for the same service. Therefore, COLT advocates eliminating the additional payment for requests with responses provided using the old system.

PTC reported that it has already implemented a process of removing plan files from the Extranet which have been available for over nine months, since because of limitations to the space available for storing plan files, these records cannot be maintained indefinitely on the system. PTC notes that the beneficiaries can acquire as many plants as they want, since the price (annual price of the Extranet) is not affected by quantity. Accordingly, PTC announced that it intends to include in the RDAO that plans used in the procedures of the RDAO have a maximum validity of 6 months from their date of provision on the Extranet, and that requests containing plans whose validity has expired will be rejected.

It should be made clear to Oni that ICP-ANACOM has actually considered that access to the database should be charged separately from feasibility requests. This is because the database on ducts so far only allows access to information on the location of infrastructure (ducts, inspection chambers, etc.) and not access to information on their occupation, which information is taken into account with regard to feasibility requests, according to an independent process.

In future it will be considered in what situations it will necessary to charge for responses to feasibility requests, since there may be a need for this service in "areas NC" and in some situations in "areas C" (e.g., average or high occupation levels in ducts, where it would be necessary or advisable to submit a feasibility request) as stems from the position stated with respect to D5).

Regarding any occasional situations of temporary inaccessibility of the database on PTC's ducts which prevent the beneficiary from generating/obtaining the plans it requires, ICP-ANACOM agrees that, since there is no compensation (payable to the beneficiary) in such situations, and since they already pay an annual price to PTC for access to the Extranet, in such cases, the beneficiary should not have to pay for access to information (on paper). As such, in the text of the final decision, ICP-ANACOM will formulate the reference in the DD on this issue.

2.14. Forecast plans

D 27. 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.

Oni maintains its position that there is no justification for the submission of forecasts, since this offer is used on a case-by-case basis and is therefore unpredictable; as such, the lack of these forecasts should have no bearing on the payment of compensation for non-compliance with SLA. However, it considers that the ICP-ANACOM's proposal represents an acceptable compromise.

APRITEL considers that the change proposed by ICP-ANACOM regarding the submission of forecast plans and the payment of compensation on the basis of that submission might be considered reasonable, while ZON recognizes that it represents a substantial improvement over the current system. However, they continue to advocate the elimination of any connection between the two issues, since, given the experience that PTC has acquired with regard to the RDAO, having the payment of 100% of compensations dependant on the submission of forecast plans is disproportionate and inappropriate to the regular functioning of the market.

ZON stresses that it is not justifiable, given the principle of full equivalence, for the maintenance in the RDAO of the obligation to submit forecast plans to PTC; considering that

this no longer makes sense several years after the RDAO's introduction, when PTC will have already acquired a wealth of experience that easily allows it to allocate its resources in accordance with demand for access by the beneficiaries. Meanwhile, ZON believes that this requirement introduces a factor of extreme asymmetry into the relationship between the beneficiaries and PTC, since, and as ICP-ANACOM clearly recognizes, it allows "*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*". As such, it considers that it is important to eliminate chapter 9.4 of the RDAO, entitled "Planning and Forecasts".

Vodafone considers that, besides the difficulties involved in properly preparing forecast plans with the level of detail and specification currently stipulated, this detail enables PTC to access a quantity of privileged information regarding the activity of Vodafone and other operators. If the maintenance of forecast plans is accepted - which it would consider disproportionate - Vodafone takes the view that the terms thereof (such as geographic segmentation and monthly data) need to be modified, since they are too detailed and grant PTC a singular strategic and competitive advantage over its competitors.

According to Vodafone, these situations become even more adverse because such data must be provided with a very significant degree of advance notice.¹²¹ According to Vodafone, the advance knowledge of the objectives of the OSP enables PTC to target potential customers of the OSP with marketing activities.

In conclusion, Vodafone welcomes this proposal, since it makes provision for the OSP to benefit from the compensation established in the RDAO even when they have not provided PTC with demand forecasts with regard to ducts (and, it assumes, masts, although point D 27 only makes mention of "ducts") or if they such forecasts have not been sent in accordance with the terms and with the level of reliability specified in the RDAO. However, it questions the applicability of the first paragraph of the proposed D27 whereby all the compensation shall be paid only where demand forecasts for ducts are presented " (...) *in accordance with and with the reliability stipulated in the Offer*".

COLT believes that the proposal put forward by ICP-ANACOM is unlikely to work, since, taking into account current market factors, the forecasts submitted may not match actual results. Accordingly, it considers that the condition *sine qua non* of payment of compensation by PTC based on presented forecasts is not workable and may also give rise to possible "bad feeling" between the various parties.

Sonaecom reports that ICP-ANACOM has not challenged the aspects which the operator has already presented as grounds for the removal of the condition that the payment of compensation be made subject to the prior submission of demand forecasts, noting with respect to each service:

- (a) Information service: to the extent that the service involves the provision of plans from the Extranet, Sonaecom finds it incomprehensible that forecasts are required, since

¹²¹ Which, in its view, besides making it more difficult to arrive at the estimates required, provides PTC with access to information and allows it to prepare possible measures to retain and acquire customers well in advance.

there is no forecast which could be provided with respect to this service and it is only because of the inefficiency of processes that this service is not provided on an immediate basis - via download; and therefore, since there are also no situations where compensation for delay, if due, should not be paid in full, it considers that it should be made clear that, in this case, compensation due should always be paid in full and the rule defined in point 27 should not be applied.

- (b) Scheduling of supervision: it is not acceptable to Sonaecom, that payment of compensation for non-compliance is made subject to forecasts since, while some installations may result from the deployment of optical fibre, many others result from situations involving faults which are not the subject of forecasts; as such, the application of the rule proposed would imply, according to the operator, that the beneficiary would never receive compensation, for reasons not attributable to it, whereby the application of the rule is unreasonable.
- (c) Submission of quotations for clearance of obstructions: Sonaecom states that obstructions are due to poor maintenance of the ducts, which are the property of PTC or, possibly due to situations of force majeure, i.e., an occurrence can never be forecast by the OSP. According to Sonaecom, it could be argued that there is a relation with the number of requests for installation. However, it believes that such reasoning does not take into consideration that the obstruction is not caused by the installation, but is only detected when technicians come to execute works. In short, the operator states that there is no relationship with the number of installation which an operator performs, but rather with the degree of rigour that PTC applies to the maintenance of its own duct network; as such it argues that the application of the proposed condition is unreasonable.
- (d) Feasibility analysis requests: this is the only situation where, according to Sonaecom, and while record information is not available on the Extranet, it could accept the process defined by ICP-ANACOM. However, given the persistent non-compliance of PTC with regard to updating the Extranet with the record information of their ducts, it argues that compensation for non-compliance with regard to this service should be paid in full, since with timeliness in the transfer of information to the Extranet, there is no situation where, in its view, there are legitimate grounds for not penalising the non-availability of the platform.

In summary, Sonaecom reports that it fails to understand the rationale of limiting the payment of compensation to the satisfaction of certain criteria such as the submission of forecasts when there is a no direct relationship between the majority of situations in which compensation is due and the forecasts provided by beneficiaries, and the only situation in which this relationship can be established (feasibility requests), these requests only remain in practice due to a lack compliance by PTC with the determinations of ICP-ANACOM; it therefore does not accept any deductions of compensation for as long as the provisions set forth in the determinations of 17.07.2004 and 26.05.2006 are not met. In addition, given that five years have elapsed since the first release of the offer, and in light of the problems arising as a result of the forecasts with respect to competition (a particularly sensitive issue in the case of FTTH), it fails to see the proportionality of applying this rule. Therefore, Sonaecom

reiterates the need for the total elimination of the condition of the payment of compensation being subject to any aspect associated with forecasts (or any other factor).

PTC considers that the proposals relating to compensation are summarized as the obligation of PTC to pay compensation in advance and the award a benefit of 75% of the value of the compensation to beneficiaries without these beneficiaries being required to submit demand forecasts.

According to PTC, these proposals release the beneficiaries from the obligation to present forecasts which enable PTC to plan and manage its activities and resources required to meet the needs of the beneficiaries and, therefore, accomplish the level of service that is required; it considers this to be unacceptable, because the performance of the RDAO involves the management of human resources on a nationwide basis, with respect to various service components: feasibility analysis, access and installation, removal and interventions.

To ensure the efficient management of these resources, PTC considers that it must have access, *a priori*, to accurate forecasts for requests broken down by geographical areas, as defined in the forecast procedure. This need is, according to PTC, yet more critical, with respect to the DD under analysis, if provision is made for a scenario where time limits are substantially reduced and compensation for non-compliance more punitive for PTC.

PTC affirms that forecasts relating to access to information are unnecessary because this service is provided over the Extranet, which has a high level of automation. It therefore proposes that the information on this service is removed from the RDAO's forecast form.

In summary, PTC disagrees with these proposals and it appears imperative to PTC that they are revised and that the current framework regarding compensation is maintained; as such, PTC proposes only the elimination of forecasts related to the service of information on ducts.

ICP-ANACOM considers, as stated by APRITEL and ZON, that the submission of demand forecast plans by the beneficiary with respect to (access to) ducts has meant that PTC is granted knowledge of the plans of these operators to develop optical fibre networks well in advance of the actual deployment of access, placing these operators at a potential disadvantage.

It is further noted that one consequence of the current system related to the submission of forecasts has been to avoid or impede the payment of compensation for non-compliance with established levels of quality of service, given the amounts actually paid by PTC in respect of non-compliance with targets, compared to the amounts that would have been incurred if such compensation had not been subject to the forecasts. On the other hand, the role of such forecasts in the planning and efficiency of the offer is increasingly diminished, given the economies of learning and experience accumulated over the nearly four years that the offer has been in operation.

Nevertheless, given the lack of experience and the need to adapt the offer to demand, it is considered that the submission of forecast plans by the beneficiaries of RDAO was more important during the introduction and development of the offer, whereby it is recognised that the submission of such plans still has some benefit in terms of the scaling of the resources,

justifying the maintenance of the incentive established (25%) with respect to the payment of compensation, contrary to what the comments made by PTC might suggest.

Vodafone's commentary is unfounded, because a failure to impose any terms or reliability with respect to forecast information would be paramount to not requiring any demand forecasts.

Regarding the comments of COLT, it is noted that to date, PTC is only bound to pay compensation under the RDAO for non-compliance where the beneficiary has provided proper forecasts plans and where such plans are deemed reliable (i.e. if the actual monthly volumes by area are within 20% of the value forecast by the beneficiary). With the amendment now proposed by ICP-ANACOM, the beneficiary is no longer obliged to submit forecasts, in which case 75% of compensation will be paid.

Regarding the comments made by Sonaecom:

- (a) It is noted, in line with the argument put forward by Sonaecom, that PTC intends to eliminate the need for estimates relating to requests for information on ducts, which is justified given the existence of an Extranet, whereby there is no need to submit forecasts with respect to requests for information about ducts.
- (b) It is considered that it is important for PTC, as a supplier of wholesale access to ducts, to know the level of demand required by the beneficiary with respect to the quantity of feasibility requests (whereas with the discontinuation of these requests in "areas C" and the resulting automatic responses through the Extranet, the need for feasibility forecasts will cease to make sense in those areas), so that PTC is better able to adjust its resources in order to evaluate the feasibility of sections listed in each request.
- (c) Likewise, as with the number of feasibility requests, it is considered that it is also important for PTC to be given forecasts regarding the number of installations.
- (d) ICP-ANACOM takes the view that the quantities of non-urgent and urgent interventions are not subject to forecasting, whereas PTC can glean an estimate of the number of interventions from the forecast number of installations and thereby estimate the number of resource required to undertake any supervision, since the higher the number of installations, the greater the number of duct sections used and the greater, in probabilistic terms, the absolute number of faults.
- (e) The RDAO forecasts form does not include estimates on the number of requests for obstruction clearances, given their sporadic nature. However, in statistical terms the probability of detecting an obstruction, and therefore the expected number of obstructions depends on the number of installation requests.

As such, the payment of full compensation remains subject to the submission of forecast plans broken down by geographic areas, as set forth in the RDAO. In any case, the forecast plans to be submitted by RDAO beneficiaries should not include quantities of requests for information on ducts, quantities of requests for urgent and non-urgent intervention and quantities for requests for duct clearances.

In conclusion, the provisions of point D 27 D of the DD are maintained, with the addition of the clarification as to the content of the forecast plans:

D 27. 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.

2.15. Method of compensation allocation

D 28. 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, notwithstanding subsequent review and adjustment, taking into account the figures established by the OSP.

Oni agrees with this point of the DD.

Vodafone considers that the determination to be issued by ICP-ANACOM concerning the method of allocating compensation for non-compliance with obligations under the RDAO should be detailed, clear and unambiguous as to the precise functioning of said allocation. While agreeing with point D28 of the DD, in particular, Vodafone takes the view that ICP-ANACOM should establish:

- (a) The maximum period in which PTC shall make payment of the compensation provided for therein;
- (b) A mechanism and time frame for reassessment/reconciliation of the values of compensation in case of disagreement¹²²; and
- (c) An arbitration mechanism provided by ICP-ANACOM in the event of discrepancies between the amounts of compensation paid by PTC and those calculated by the beneficiary.

¹²² Vodafone notes that, in an attempt to reconcile the indicators, it has been met "*systematically with PTC's intransigence in its rejection of any information other than its own, or, in cases where the same entity attempts to find explanations for the differences, such goodwill is not reciprocated with the provision of a response in good time, nor has it led to any real plans for improvement*". In this regard, Vodafone believes that the possibility that PTC itself will send information that will allow such compensation, while refusing any reconciliation or discussion about it, cannot but be regarded as abusive conduct, alien to normal business practice and only tolerated by its counterparts in the absence of alternative wholesale offers i.e., due to PTC's dominance on this market.

According to COLT, the introduction of this measure appears to be an improvement over the current situation since it is not always possible to make an application for compensation; as such, it considers that focusing on the initiative of PTC to pay compensation for non-compliance with established quality of service targets could constitute an incentive to more rigorous compliance with the established objectives.

PTC does not agree with, nor does it consider justifiable or proportionate, the obligation to undertake, on its own initiative, the payment of compensation for non-compliance with the established quality of service targets, taking the view that the OSP should have a maximum period (of 90 days) in which to seek any compensation for non-compliance. PTC considers that compensation for non-compliance is by its nature a penalty clause that the contracting parties agree before the events giving rise to liability thereunder occur, remaining subject to the actual existence of a fact giving rise to liability which may be associated with a right to compensation. Since it is the exercise of a right by the creditor in question, PTC understands that payment should naturally occur following notice by the creditor for said purpose.

PTC claims that ICP-ANACOM's intention is incomprehensible in making provision for an obligation in the RDAO that PTC proceed, on its own initiative, with the payment of compensation for non-compliance with established quality of service targets and, at the same time, and also that PTC allow OSP the opportunity of later conducting a reassessment of the non-compliance and claiming from PTC the payment of additional sums resulting from any non-compliance with quality objectives. In this regard, it notes that it will have to start monitoring its performance and conduct the necessary analyses to determine cases in which there were occurrences of non-compliance that may give rise to the payment of corresponding compensation. And despite this, it states that it might be faced with a reassessment and request for the reconciliation of accounts from the OSP, requiring a new analysis of the facts and their verification in the light of the OSP's request, resulting in a duplication of processes and additional costs associated with the monitoring of compliance with the quality of service targets.

Insisting that it considers the proposed amendment to be unreasonable and disproportionate, PTC also takes the view that it violates basic principles of civil law with regard to the verification of the occurrence giving rise to liability. As a result, ICP-ANACOM is unilaterally interfering in the contractual relations between operators to an extent that is wholly beyond its powers and remit; as such it advocates the retention of the current provision of the RDAO based on the principle that it falls to the claimant to apply for damages.

Additionally, PTC mentions that, even while it accepts that the proposal may be viable, such an obligation would require developments in the IS¹²³.

As in the position set out in the report of prior hearing on the amendments to the RUO, it is stressed that all that is being changed is the time from which PTC has liability for payment of the compensation for non-compliance, whereas a fixed period is established for this purpose which is not dependent on notice by the claimant. This solution is perfectly permissible under the Código Civil (Civil Code), contrary to the claims of PTC. Furthermore, since the

¹²³ With likely significant impact in terms of costs.

RDAO (Annex 5 to which contains a standard contract to be signed between PTC and the beneficiary) is a regulated offer, it is natural that the intervention of ICP-ANACOM also focuses on contractual relations, within the limits of legality, proportionality and reasonableness that are considered assured in the present case. The approach contained in the DD is indeed similar to that established by another NRA, as detailed therein.

With regard to the existence of a mechanism allowing any reconciliation of data, the position is taken that provision must be made in this respect, similar to that in place for reconciliation in respect of billing data. Unless the system is audited periodically, information on compensation cannot only be dependent on information provided by the operator in non-compliance, which, naturally, has an incentive to pay the lowest possible value.

The reference of PTC is not wholly understandable, where it states that *"it will have to start monitoring its performance and conduct the necessary analyses to determine cases in which there were occurrences of non-compliance that may give rise to the payment of corresponding compensation"*. Currently, in light of a formal notice of the beneficiaries - which should happen frequently, in all likelihood in every six-month period and by the offer's most active beneficiaries - PTC already has to monitor its performance and conduct the necessary analyses to determine the value of the corresponding compensation. Furthermore, the monitoring of its performance was also imposed in determination of 11 March 2009 on the publication of performance levels in the quality of service of the RUO, LLRO, RDAO, "Rede ADSL PT" and WLRO wholesale offers¹²⁴ and should be standard practice by any efficient operator.

On the alleged development of the IS required for the implementation of this measure, from the outset, no reason can be identified which would give rise to these developments. PTC already monitors the levels of performance with respect to different indicators and already makes payment of compensation. The fact that such payments are made prior to a notice of claim by the beneficiary does not appear to have a significant impact, either in terms of information systems or in terms of associated costs. Therefore, PTC must give detailed and comprehensive basis to any additional costs that it may incur with the implementation of this measure.

Regarding the comment from Vodafone about the definition of the maximum period for payment of compensation, the answer is found in the DD itself - *"PTC shall pay compensation no later than the end of the second month following the end of the six month period in question"*, which could be clarified in the deliberative part.

Regarding Vodafone's view that ICP-ANACOM should define a mechanism and timetable for the review/reconciliation of the amounts of compensation in case of disagreement, it is noted that it first falls to PTC to define this mechanism in the RDAO, which may, subsequently and where this is appropriate, be amended by this Authority.

Regarding the definition of an arbitration mechanism, it is clarified that this mechanism is provided for under Law no. 5/2004 of 10 February.

¹²⁴ See <http://www.anacom.pt/render.jsp?contentId=885299>.

Everything seen and considered, the provisions of point D 28 of the DD are maintained, including the clarification that PTC shall pay compensation no later than the end of the second month following the end of the six month period in question.

D 28. 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.

2.16. Reciprocity of liability for damages

D 29. PTC shall amend the RDAO and the standard contract in order to lay down the right of the beneficiary to obtain compensation for losses incurred in their networks, provided such losses are caused by PTC through the installation, intervention or removal of cables in the ducts.

Oni agrees with this point of the DD.

APRITEL and ZON consider that the establishment of reciprocal liability for damage is a key factor in the accomplishment of the principle of non discrimination (and also the principle of equivalence, according to the ZON), and therefore consider the proposed change to be a positive step.

Vodafone considers that one of the most pressing issues for resolution was the establishment of reciprocal liability for damages, since this is assumed as a key factor in accomplishing the principle of non discrimination; it therefore actively welcomes this measure.

COLT believes that, given the principles of non-discrimination and equivalence, enacting the reciprocity of liability for damages in the RDAO accomplishes equal treatment for all beneficiaries of this offer.

According to Cabovisão there is an imbalance between the liabilities of PTC and the beneficiaries, whereby it supports the measure contained in Section D29 of the DD with a view to reflecting the reciprocity of liability for damages under the RDAO, both with regard to PTC and the beneficiaries, including the right of the beneficiaries to compensation for any damages caused to their networks, provided that such be caused by PTC during the installation, operation or removal of cables in ducts.

PTC makes no objection to the content of the proposal, provided it is assured of full reciprocity in the conditions.

PTC noted that in the current clause 18. of the RDAO standard contract, provision is in fact made that *"beneficiaries are responsible for all damages that 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 has been caused or exacerbated by the resources of the beneficiary installed in ducts during the installation, operation or removal of cables"*.

According to PTC, as drafted, this condition is limited to the consequences of resources installed in ducts, during installation, operation or removal of cables, whereas in fact there may be occurrences of *"interruption, suspension or any failure in the provision of services to end customers, in cables and equipment of PTC installed in ducts, caused by access to ducts and by work executed by the technical teams of the Beneficiary"*.

PTC therefore considers that this clause should be amended in its final part in order to reflect that *"the interruption, suspension or any failure in the provision of services to its customers"* may be caused by said access and by the works of beneficiaries and not solely by the installed resources as currently specified.

Note is made of the acceptance of all the entities as to the proposal conveyed in the DD, under which reciprocity for damages must be given provision in the RDAO (and also in the text of the standard contract), i.e. it must lay down that PTC is also liable for any damages which the beneficiaries may incur on their networks, provided that such is caused by PTC.

Furthermore, given that in paragraph 2 of clause 18 of the text of the standard contract of the RDAO provision is made that *"the interruption, suspension or any failure in the provision of services to its customers"* arising only from the *"resources installed in ducts during installation, intervention or removal of cables"* it is agreed, as stated by PTC, that it shall be laid down that such damage may be caused by said access or by works and not solely by the installed resources as currently specified. Naturally, this provision should apply in a reciprocal manner as to PTC as to the beneficiaries.

The comment from PTC about the need to ensure full reciprocity of conditions, including compensation, is not accepted for the reasons outlined above.

Everything seen and considered, the provisions of point D 29 D of the DD are maintained, with the addition that interruption, suspension or any failure in the provision of services to its customers may be caused by said access and by the works and not solely by the resources installed as currently specified.

D 29. 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).

2.17. Other matters: Alteration of routes

Cabovisão considers that provision should be made in the RDAO, with regard to ducts and masts, for prior notification to the beneficiaries whenever there is need to change or decommission routes on which its network is supported.

Since these changes of cables often require on-site visits to establish alternative routes, or scheduling with other operators affected by the cut in services, preparation of all necessary forms and the respective installation of the network on alternative routes, Cabovisão recommends that prior notice be given of not less than two months. According to Cabovisão, this notification should be accompanied by standard RDAO forms listing the sections (masts

or ducts) to be decommissioned, the list of alternative routes and the respective maps with numbers identical to those presented in the listings. In addition, Cabovisão argues that it makes no sense to apply costs to beneficiaries with respect to the information, feasibility and installation requests that will be required to make these changes to routes.

Under the terms of RDAO (see section 4.5 of the body of the offer), where a deviation in a route occurs, PTC shall send prior notice to the beneficiary of not less than 60 days, with the reasons therefor, which provision coincides with the proposal for advance notification put forward by Cabovisao.

However, given that the diversion of routes currently provided in the RDAO only applies to underground routes (i.e. ducts and associated infrastructure), it is clarified that the matter pertaining to diversion of aerial route (masts) should be addressed in the future (regulated) offer of access to masts.

Finally, if the deviation of routes is not substantiated, the position is taken that the beneficiaries should not incur costs with respect to the respective feasibility or installation requests which they come to submit in order to carry out the alteration/removal of their resources.