
Determination of 2.9.2005

ALTERATIONS IN THE REFERENCE OFFER FOR ACCESS TO DUCTS OF PTC

Preamble

Pursuant to paragraph 1 of article 26 of Law no. 5/2004, of 10 February, it is incumbent upon PT Comunicações, S.A. (PTC) to provide, through an agreement, the access to ducts, poles and other premises and locations it owns or the management of which falls under its responsibility. Within this context, the same statutory instrument (article 26, paragraph 4) establishes upon the concessionaire the obligation to provide an offer for access to ducts, containing access and use conditions, under such terms as defined by ICP-ANACOM.

In this sense and taking due account of a variety of factors, among which the following may be stressed:

- (i) difficulties of remaining operators in doing further investments in ducts in certain geographic areas, in an economically efficient manner;
- (ii) the need to avoid inefficient infrastructure duplication and to reduce the global amount of investment borne by each company, thereby reducing costs;
- (iii) claims made by operators, related to the use of the concessionaire's infrastructures, as regards the imposition of restrictions, by the concessionaire, in the infrastructure assignment conditions, namely sub-ducts, pipe space and visit chamber space, and also as regards discriminatory conditions and pricing of too high fees;
- (iv) the need to promote transparency in the access conditions to ducts and associated infrastructures,

ICP-ANACOM, by decision of 17/07/04¹, following the consultation of interested parties², established the principles and general conditions which the access and use of ducts and associated infrastructure of the concessionaire must comply with, as well as

¹ See decision of 17/07/04 at95
<http://www.anacom.pt/template12.jsp?categoryId=126439>.

² See consultation report at
http://www.anacom.pt/streaming/rel_condutas.pdf?categoryId=109639&contentId=211362&field=ATTACHED_FILE

the minimum elements to be comprised in the reference offer of access to ducts and associated infrastructure (ORAC).

This decision likewise determined that PTC should submit an ORAC to ICP-ANACOM, which should comply with the principles of transparency, non-discrimination and cost orientation, in order to assess the compliance with the determined minimum elements, within 90 days from the final determination of ICP-ANACOM (17/07/04).

Due account should be taken of Decree-Law no. 68/2005, of 15 March, which specifically established the legal regime for construction, management and access (acknowledging particularly the relevance of access to ducts), taking due regard to infrastructures installed in the public domain of the State for the storage of communications networks.

PTC requested, on 29/10/04, the suspension of the validity of two determinations comprised in Determination of 17/07/04, namely:

- (i) Description of the space available in the ducts and associated infrastructure, considered necessary for the development of the own infrastructures and that will probably be used during the period when the reference offer is valid;
- (ii) The creation, maintenance and update of a database with descriptive information on ducts and associated infrastructure and respective availability for beneficiary entities.

On 15/11/04, PTC brought special administrative proceedings³ in respect of acts of administration against ICP-ANACOM, wherein the annulment of the determination of 17/07/04 was requested.

NOVIS Telecom, S.A. (NOVIS), on 16/11/04, also brought special administrative proceedings in respect of acts of administration against ICP-ANACOM, challenging the same determination of 17/07/04, and likewise presented a protective measure, requesting the issue of a new Determination from ICP-ANACOM.

On 09/08/05, ICP-ANACOM was notified of the judgment given on 05/08/05 by the 2nd Office of the Administrative Court of Lisbon concerning the protective measure (suspension of validity) requested by PTC, that rejected that plea.

ICP-ANACOM thus ceased to be restricted from enforcing the two determinations the suspension of validity of which had been requested by PTC, the latter being once more subject to comply therewith.

Considering that the time limit established for the compliance with the two above-mentioned obligations was suspended during the period between the summon of ICP-ANACOM to challenge the protective measure presented by PTC (4 November 2004) and the moment of the notification of the judgment passed on these proceedings (11 August 2005), such time limit ends on 20 September 2005.

Following the referred judgement, PTC informed ICP-ANACOM, on 01/09/05, that:

³ See link at <http://www.anacom.pt/template20.jsp?categoryId=774&contentId=241585>.

- i) as regards the construction of a database with descriptive information on ducts and associated infrastructure, while this is allegedly a long term process, PTC is taking all the necessary steps relating both to the record preparation and to the subsequent database construction;
- ii) As regards the description of the space available in the ducts and associated infrastructure, considered necessary for the development of PTC's own infrastructures and that will probably be used during the period when the reference offer is valid, notwithstanding the limitations resulting from the lack of detailed, up-to-date and processed information on its duct network, PTC is preparing Annex 3 of the ORAC proposal to be submitted to ICP-ANACOM.

In order to fully comply with the provisions of the determination of ICP-ANACOM of 17/07/04, PTC must create, maintain and update a database with descriptive information on ducts and associated infrastructure, based on the respective infrastructure records and kept permanently up-to-date in the course of the different access requests, the disclosure of which to beneficiary entities in general and to ICP-ANACOM, according to effectiveness criteria, must take due regard to the effective needs of beneficiary entities.

Aiming at the implementation, as swiftly as possible, of conditions of transparency and effective availability of information, ICP-ANACOM deems in special that PTC should implement the referred database [which is, as referred by PTC in its judicial pleadings, a sort of "national map" with the route of all ducts it is the owner of, as well as with the up-to-date indication as to the occupation of each one of them (that is, with the reference of the number of installed cables and respective dimensions, at a given time, in each duct).

As far as the time limit for the provision of the database proposed by PTC is concerned, ICP-ANACOM deems it not to be reasonable, as it is inappropriate as regards the interest of beneficiary entities, namely taking into account the need to promote the optimisation of the ORAC through the provision of the referred database.

With reference to the description of the space available in the ducts and associated infrastructure, considered necessary for the development of PTC's own infrastructures and that will probably be used during period when the ORAC is valid, in compliance with the determination of ICP-ANACOM of 17/07/04, and taking into account the suspension of the calculation of the time limit during the period between the summon of ICP-ANACOM to challenge the protective measure submitted by PTC and the notification of the judgment passed on these proceedings (11.08.2005), PTC must present to ICP-ANACOM the referred description up to 20 September 2005.

Considering the grounds attached hereto, in compliance with paragraph 3 of article 68 of Law no. 5/2004, of 10 February and with point g) of article 9 of the Statutes approved under Decree-Law no. 309/2001, of 7 December, the Board of Directors of ANACOM hereby determines:

1°. To reinforce that PTC, in compliance with the determination of ICP-ANACOM of 17/07/04, shall create, maintain and update a database with descriptive information of ducts and associated infrastructure, as provided for therein. In this context, up to 20 September, PTC shall submit to ICP-ANACOM a description of the database design

and a detailed and phased time-tabling of the database operation process (namely including the technical specifications thereof) and of the comprehensive catalogue of records of ducts and associated infrastructures, per geographical area, throughout the national territory.

2°. To reinforce likewise that PTC shall submit to ICP-ANACOM the description of the space available in the ducts and associated infrastructure, considered necessary for the development of its own infrastructures and that will probably be used during the period when the reference offer is valid, up to 20 September 2005, in compliance with the provisions of the determination of ICP-ANACOM of 17/07/04.

3°. To promote the prior hearing of interested parties, under articles 100 and 101 of the Code of Administrative Procedure, setting a time limit of thirty working days so that such entities, if they so wish, may assess in writing the determination that intends to adopt the following contents:

PT Comunicações, S.A. shall amend, within 10 days, the Reference Offer for Access to the Ducts of the concessionaire PTC (PTC ORAC), in compliance with the below-mentioned alterations:

I. Entry into force of the offer

1. The ORAC shall enter into force thirty days after the final decision of ICP-ANACOM on the “Alterations to be introduced in the PTC ORAC” has been issued.

II. Expressions and definitions

2. Where the ORAC refers the expression “underground infrastructures”, this shall be replaced by “ducts and associated infrastructure”, according to the wording adopted in the determination of ICP-ANACOM of 17/07/04.
3. The following definition of associated infrastructure shall be considered: “manholes and other infrastructures deemed indispensable for the installation, withdrawal, maintenance or repair of electronic communications cables in ducts and sub-ducts”, according to the definition comprised in the above-mentioned determination.
4. As regards the definition of “manholes”, the reference to the underground manholes shall be removed, thus making the definition consistent with the determination of 17/07/04, that is, “boxes for access to the cables installed along the ducts, which are integral part of the electronic communications network”.

III. General conditions

5. PTC shall provide for the physical access of beneficiary entities to its own ducts and associated infrastructure, to be carried out by workers of the beneficiary entity, duly escorted by representatives of PTC.
6. Without prejudice, any dispute arising between PTC and the beneficiary entity shall be resolved through agreement, and where this is not possible, through an appeal made to ICP-ANACOM.
7. The rule provided for in pg. 6/29 of the offer, regarding the space to be reserved, by PTC, for maintenance and repair work, shall be amended so as to reserve only the space that corresponds to the larger diameter cable.
8. The ORAC shall establish, in any case, that the concessionaire may not install in ducts, pipes, sub-ducts and associated infrastructure, cables or any other equipment that do not correspond to the current or expected needs in terms of service provision and that, as a result of the undue excessive space occupation, prevent or limit the access to infrastructures by beneficiary entities.
9. Following a request by beneficiary entities to occupy space in ducts and associated infrastructures, where no space is found and the existence of one or more “dead” cables (that is, with no possibility of usage for reasons of technical disability) is identified, PTC shall remove such cables. Where such cables are under the responsibility of the beneficiary, the latter shall bear the costs of the respective removal.

IV. Information on ducts and associated infrastructure

10. PTC shall make available information on ducts and associated infrastructure at an Extranet page to which each beneficiary shall have access by means of the respective access code.
11. Any local survey deemed necessary for the provision of information on ducts and associated infrastructure of PTC shall not be charged to the beneficiary entities of the ORAC.
12. The maximum monthly capacity for processing drafts shall take due account of the expected requests of beneficiary entities, rather than the limits proposed by PTC.

V. Access to ducts and associated infrastructure

13. Insurance against civil liability beneficiary entities are forced to engage and to update permanently shall cover potential damage caused by installed facilities or people at their service.
14. The ORAC shall provide for an *ex ante* assessment of potential deterioration of the network and equipment operation and/or potential harm of the network integrity, in order to avoid discretion capable of giving rise to conflicts.

15. The exceptions to the provision of access and use of ducts and associated infrastructure of PTC, referred to in section 5, points c) and d) of ORAC, shall be removed.

VI. Requests for occupation feasibility

16. The limitation concerning a maximum of fifteen duct sections constituting each request for occupation feasibility shall be removed from the offer.
17. Where a request made by a beneficiary entity for feasibility of occupation of certain ducts and associated infrastructure is not deemed feasible by PTC, as no space is found for the installation of cables of the beneficiary entity, PTC shall demonstrate that the cables/equipment occupying such ducts and associated infrastructure correspond to its current or expected needs as far as the service provision is concerned, and thus that the access of beneficiary entities to such infrastructures is not prevented or limited as a result of an undue excessive occupation of space.
18. The limitation concerning a maximum of 10 sections for an alternative route with regard to the original route shall be removed from the ORAC.
19. Beneficiary entities shall not be charged any amounts for costs with are not, by their very nature, incremental costs allocated to such entities, such as keeping in order and cleaning PTC's own infrastructures.
20. The limits in table 3 of the offer, regarding the maximum monthly capacity to assess requests for occupation feasibility per geographic area shall be removed from the ORAC.

VII. Installation of cables in ducts and associated infrastructure

21. The 3rd paragraph of page 10/29 of the offer refers that PTC provides sub-ducts, exclusive per beneficiary entity, for cable installation purposes. This shall be amended to read: "PTC provides access to ducts and associated infrastructure to beneficiary entities for cable installation purposes".
22. The exclusivity provided for in paragraph 5 of the offer, concerning the fact that the installation of cables and sub-ducts, connection of cables and replacement of cable sections, in ducts and associated infrastructure of PTC, should only be carried out by PTC itself, shall be removed, without prejudice to the beneficiary entities submitting on every occasion to PTC the respective standard forms. As referred to in Section III, the ORAC shall provide for the physical access of beneficiary entities to PTC's own ducts and associated infrastructure, to be carried out by workers of beneficiary entities, duly escorted by representatives of PTC.
23. The condition included in the last paragraph of page 10/29 of ORAC, according to which PTC shall not start installation work in case beneficiary entities do not deliver the respective material or this material is not in proper conditions for

instalment, shall be removed. Having regard to the fact that the cable installation work of beneficiary entities in ducts and associated infrastructure is not carried out in exclusive by PTC, the beneficiary entities shall not be bound to deliver material to PTC.

24. The beneficiary entities shall submit to PTC a request for access and installation in underground infrastructures, so that PTC may monitor and supervise the cable installation work of beneficiary entities in its own ducts and associated infrastructure.
25. Beneficiary entities shall not be penalised for the existence of obstacles in a section of PTC's own duct, as the unblocking of the section of PTC's duct is not solely in the interest of the beneficiary entities.
26. In this sense, the following unblocking cost sharing formula shall be considered: on the basis of the number of beneficiary entities ($i > 1$), each one shall pay PTC for a percentage of the unblocking cost of $(1/i) * 100\%$, while each beneficiary entity shall receive from PTC the equivalent to $(1/i - 1/(i+1)) * 100\%$ per each new beneficiary entity that subsequently shares the same section.
27. Thus, per example, in case a section is occupied by a beneficiary entity, it shall pay $(1/2)$ of the possible unblocking cost. In case the same section is subsequently occupied by another beneficiary entity, it shall pay $(1/3)$ of the unblocking amount, and PTC shall pay back to the first beneficiary entity the difference $(1/2) - (1/3)$ and so forth.
28. After the cable installation works of the beneficiary entity in the ducts and associated infrastructure of PTC have reached an end, the latter shall submit to the former the occupation record, without prejudice to the information update in the Extranet page to which each beneficiary shall have access by means of the respective access code.
29. The limits in table 4 of ORAC, regarding the maximum monthly capacity of installation in ducts and associated infrastructure shall be removed from the ORAC, and PTC shall adjust its resources to the expected demand.

VIII. Intervention in cables installed in ducts and associated infrastructure

30. The ORAC refers that it is incumbent upon the beneficiary entity to supervise the appropriate functioning of proprietary cables which are installed in ducts and associated infrastructure of PTC. In order to ensure that such supervision on the part of the beneficiary entity is effective, it is necessary to provide in the ORAC for the physical access of the beneficiary entities to ducts and associated infrastructure of PTC.

IX. Route deflection and alteration of occupation

31. PTC shall state the reasons which may lead to the need to eliminate or to deflate a certain route by imposition of third parties, presenting concrete examples thereto.

32. The provision for cases in which, after PTC has deemed a request as feasible and granted the access to the beneficiary entity for the installation and or maintenance of the respective systems, equipments and other resources, this company invokes the restructuring of the network to impose on the beneficiary entity the need to remove the means and to release space in ducts and associated infrastructure, shall be removed.

X. Removal of means of beneficiary entities installed in ducts and associated infrastructure

33. Where PTC pursues the removal of cables of beneficiary entities, it shall ensure the physical conditions of removed cables. In case damage occurs in the course of the removal process (which may be accompanied by the beneficiary entity), PTC shall compensate the beneficiary entity.
34. The limits regarding the maximum monthly capacity of cable removal in ducts and associated infrastructure of PTC shall be removed from the ORAC.

XI. Project and construction of new ducts and associated infrastructure

35. The way beneficiary entities gain access to information on plans for the construction of new ducts and associated infrastructure, namely how beneficiary entities are notified of the existence of such information, shall be made clear.
36. The bank guarantee shall cover a three-year period (not a five-year period as provided for in the current offer), its existence being justified only where PTC bears costs resulting from the physical access of beneficiary entities to its ducts and associated infrastructure.

XII. Indicators and levels of quality of service

37. Indicators of quality of service shall be defined according to the provisions of the determination of 17/07/04 and, in particular, the start and end of the time counting shall be specified, namely:
- i) Time limit to reply to a request for access and use of ducts and manholes - time duration, in calendar days, from the moment the concessionaire receives from the beneficiary entity a request for access and use of ducts and manholes, to the instant the beneficiary entity receives a reply regarding the feasibility of the request.
 - ii) Time limit to install infrastructures - time duration, in calendar days, from the moment the feasibility of the desired instalment is confirmed up to the date solicited for the beginning of the necessary physical works;
 - iii) Time limit to remove infrastructures – time duration, in calendar days, from the date the feasibility of the desired removal is confirmed up to the date solicited for the beginning of the necessary physical works;
 - iv) Time limit for maintenance and repair operations - time duration, in calendar days, from the date the feasibility of the desired maintenance and repair

operations are confirmed up to the date solicited for the beginning of the necessary physical works;

v) Time limit to reply to a request for information on underground infrastructures - time duration, in calendar days, from the moment the concessionaire receives the request up to the instant the beneficiary entity receives a comprehensive reply to the information request.

38. The above-mentioned time limits are maximum periods to be complied with for 100% of observations, penalties being provided for in case of non-compliance. Thus, for 100% of the cases:

- The maximum time limit to reply to an information request is of 5 working days;
- The maximum time limit to reply to an access request (that is, feasibility assessment) is of 15 days where there is no alternative route, and of 30 days with an alternative route.
- The maximum time limit to install route cable is of 30 days.
- The maximum time limit to remove route cable is of 30 days (cable no longer usable) and of 45 days (cable usable where possible).
- The maximum time limit for starting cable intervention is of 5 days for programmed intervention and of 8 working hours for non-programmed intervention.

39. Periods of time not be considered for the above time counting shall be exclusively the following: (i) reasons of *force majeure*; (ii) reasons for which the beneficiary entity is responsible. All other periods of time shall be removed, as they correspond to exceptional events and therefore should be comprised in the percentage of facts not included in indicators.

XIII. Compensation for non-compliance with time limits to reply

40. The daily compensation penalty value due to the beneficiary entity for non-compliance of PTC, regarding delays in replies to information requests or feasibility requests shall be at the least 50€, in order to encourage compliance therewith.

41. The limit to compensation for non-compliance with time limits shall not be less than 60 working days.

XIV. Pricing of services provided in the ORAC

42. Maximum applicable prices (in euros, no VAT included) for services broken down below shall be as follows:

Services		Prices proposed by PTC	Maximum prices defined by ICP-ANACOM	
Provision of information on ducts and associated infrastructure		45	37,0	
Assessment of occupation feasibility	base with no alternative route	70	61,6	
	base with alternative route	80	71,3	
	(per permanent manhole)	75	43,2	
Access to points of entry		120	103,0	
Cable installation in ducts and associated infrastructure (base price)		5	2,9	
Monthly occupation of space in sub-duct per Km	(Lisbon and Oporto)	315	To be defined following presentation of grounds by PTC	
	(other municipalities)	245		
Monthly occupation of space in sub-duct per Km, per cm ² of the surface	(Lisbon and Oporto)	25		
	(other municipalities)	20		
Monthly occupation of space per holder provider		3,2	3,1	
Intervention in cables installed in ducts	Programmed	Peak hours	155	136,6
		Remaining period	270	243,6
	Not programmed	Peak hours	200	176,8
		Remaining period	355	318,7
Removal of cables in ducts and associated infrastructure (base price)		5	2,9	
Communication of project for the construction of new infrastructures		50	42,4	
Sending of project for the construction of ducts and associated infrastructure		75	64,3	

43. Without prejudice to the provision of information on ducts and associated infrastructure in paper, such information shall be also provided at an Extranet page, the respective price being cost-orientated.

XV. Service management, planning and billing

44. In order to prevent situations where beneficiary entities are billed for services requested which were not in fact provided, such as information on ducts and associated infrastructure which possibly may not yet be identified and/or located, the sentence comprised in the first paragraph of pg. 24/29 of the offer shall be completed with the following indication: “and duly provided”.
45. As regards the payment of bills issued by PTC, the respective time limit shall correspond, as in the case of other offers, such as the RIO, to the provision in the respective agreement to be signed by both PTC and the beneficiary entity, and not to an *ad-hoc* time limit indicated in the bill.
46. The removal of means of the beneficiary entity (provided for in the first paragraph of pg. 25/29 of the ORAC) shall only be billed following the conclusion of the work.

XVI. Settlement of disputes and interruption/suspension of service provision

47. The information exchanged between PTC and the beneficiary entity intended for the amicable settlement of any disputes shall be treated as confidential, except where such information is conveyed to a public authority under applicable law.
48. The repeated delay in paying due amounts, and not a simple default in payment, shall be deemed as cause for interruption or suspension of services provided in the scope of the ORAC. Beneficiary entities shall thus lose their right to the ORAC only where they fail to comply three times per year with the time limit to pay bills to PTC.
49. PTC’s need to carry out control operations, adjustments or routine maintenance (provided for in the second paragraph of pg. 28/29 of the ORAC), aiming to ensure the proper functioning of its network, shall be notified ten days in advance to the beneficiary entity, and not just “in a timely fashion”.

XVII. Standard contract

50. Annexes (i) and (v) to the standard contract referred to in clause 2 thereof shall be included in the ORAC, and the inclusion of annexes (ii), (iii) and (iv) is recommended, for transparency and coherence purposes.
51. The object of the contract and all other references made thereto shall adopt the designation “ducts and associated infrastructure”, according to the body of the offer.
52. The contract shall be duly adapted to the body of the offer, namely, the possibility of the physical access to ducts and associated infrastructure by workers of the beneficiary entity, where they are escorted by representatives of PTC.
53. The concessionaire shall dimension, where technically and physically feasible, the new ducts and associated infrastructure having regard to the fulfilment of

expressions of interest received by beneficiary entities, and thus paragraph 4 of clause 6 of the standard contract shall be removed.

54. Point 2 of clause 6 shall be reworded so as to make beneficiary entities responsible for the supervision of the respective cables solely where they may physically access ducts and associated infrastructure where cables are installed.
55. Clause 12 of the contract shall be reworded so as to provide that intervention works in cables of the beneficiary entity shall be carried out by its own workers, where they are escorted by representatives of PTC.
56. Clause 16 shall specify a time limit of one month for the assessment on the part of PTC of billing complaints submitted by beneficiary entities.
57. The provision of paragraph 1 of clause 19 shall also apply to beneficiary entities.

XVIII. Effects of alterations to the ORAC

58. Any alteration to the ORAC shall have immediate effects on the relationships with beneficiary entities, unless specifically provided otherwise by ICP-ANACOM.