ZON CONTRIBUTIONS TO THE REVISED DRAFT RECOMMENDATION OF THE EUROPEAN COMMISSION ON REGULATED ACCESS TO NEXT GENERATION ACCESS NETWORKS (NGA)

ZON Multimédia, Serviços de Telecomunicações e Multimédia, SGPS, S.A. (including its subsidiaries, together "ZON"), the leading cable operator and provider of electronic communications and multimedia services in Portugal, hereby submits additional observations on the revised draft Commission recommendation on regulated access to Next Generation Access Networks (NGA) (hereafter referred as "draft recommendation").

In global terms, the draft recommendation is a positive tool for the development of the European electronic communications market and for the deployment of NGA and so ZON agrees generally with the new proposal. Nevertheless, there are some issues that, in our opinion, still need to be addressed in the draft recommendation. However, since several observations have already been made and we are facing a second consultation process, we would like to focus on three specific issues that, from our experience in the Portuguese market (innovator in some aspects), we consider paramount to the deployment of NGA and to the promotion and sustainability of the competitive environment in Europe.

1. Taking into consideration the specific situation of the Portuguese electronic communications market, we strongly believe that the creation of the necessary conditions for a true level playing field is of the utmost importance. NGA deployment capacity by alternative operators in Portugal depends strongly on access to civil engineering access (ducts, sub-ducts, manholes and poles as well as access to central offices).

   The Portuguese regulated reference offer on ducts (ORAC – "*Oferta de Referência de Acesso a Condutas*") is usually referred as a success story. We acknowledge that this offer did not have parallel in Europe, but it also suffers from several constrains that do not allow an effective access to the existing infrastructure. One of the main problems is, in our view, the lack of the application of the equivalence principle, namely:

   a) Lack of Chinese walls between the wholesale and retail arms of the incumbent operator and asymmetry of information, as the incumbent operator has access to strategic information on other operators' rollout plans 2 years in advance;

b) There is a lack of information about infrastructure location and capacity, allowing not only a more discretionary behaviour from the incumbent and a larger scope for refusal of access, but also turning processes more complex and inefficient;

c) Asymmetric and discriminatory access to the essential infrastructure owned and controlled by the incumbent operator, since PT does not apply internally the ORAC procedures that must be followed by other operators when accessing ducts. The disadvantages created by this situation are twofold: PT benefits from its own preferential treatment in access to ducts and it has no incentive to make the ORAC procedures more efficient for other operators, a situation that would certainly not arise if it was also subject to such procedures (in fact, it suits PT to keep them unchanged).

By declaring the observation of the equivalence principle between the SMP operator and its competitors on access to ducts and manholes – access under the same conditions – in the draft recommendation, the Commission recognizes the need to overcome a situation which deters investment and deployment of NGA by other operators. Therefore, ZON recognizes and welcomes the Commission's efforts in introducing such change.

In addition, there has been a consistent behaviour of refusal of access to spaces in the incumbent's central offices, namely for network upgrading to NGA, which limits the other operators capacity to compete. Moreover, we see huge savings in costs and carbon footprint in sharing central offices for the installation of equipment by all operators in the market – the buildings are there, space is available due to the technological evolution and the existing infrastructures connect all buildings, making it easier to establish a network. These factors lead us to suggest that access to central offices (similar to the co-installation procedures already in place) should also be included in the infrastructure access obligations.

Another aspect that should be considered by the Commission is the approach to be followed in the cases when the historical operator, which holds most of the relevant civil engineering infrastructures, is not found to have SMP in certain areas, after the markets 4 and 5 analysis. We considerer that, in those cases, access obligations to those infrastructures, not replicable, should still be mandated by the NRA. The draft recommendation should reflect these specific cases in order to allow a level playing field between all operators investing in NGA and to promote competition.

2. Another aspect we would like to draw your attention to is the geographic segmentation of the markets. Although the principle is theoretically correct, its practical implementation can have serious consequences in the competitive landscape. In particular, price discrimination may give rise to predatory practices by the SMP operator in competitive areas, as a result of cross-subsidisation with "monopolistic" revenues in areas where competition does not exist or does not exercise enough pressure.

   In the Portuguese case, the NRA did not take into consideration a number of essential facts in its recent decision on the review of markets 4 and 5, namely:

   - Non-homogeneous commercial conditions have solely been offered by the incumbent operator (and no other operator) as a result of the emergence of an alternative operator able to challenge the incumbent's dominance in fixed markets, with no objective grounds such as technical or technological reasons, differentiated costs or differentiated economies of scale and scope;

   - Unlawful discrimination of voice and broadband customers in geographical areas where there is a low competitive pressure or no competition at all, deepening the digital divide between urban and rural areas;

   - Lack of evidence of a decline of the incumbent operator market quotas in the retail and wholesale broadband markets;

   - The level of competition in competitive areas is far from being consolidated, namely due to the overwhelming control over essential facilities (through regulated wholesale offers such as access to ducts, LLU, etc.), which are key for the emergence of alternative operators.

   Therefore, geographical segmentation should be carefully considered, since the competitive environment does not reflect effective conditions for a long term sustainable competition.

3. Given the above mentioned constraints and exploring some of the proposals put forward in the draft recommendation, we would like to suggest some concrete proposals:

   a) Separation of information management systems of the SMP operator, severe limits to the flow of information between the wholesale and retail businesses, together with the use of encryption systems and the strict limitation in the number of workers of the

SMP operator with access to information of third party access seekers' deployment plans. In addition, all wholesale division employees should be under the obligation to adhere and formally commit to observing Chinese wall principles, through a code of conduct, duly approved by the NRA. We consider that the implementation of these measures will avoid the asymmetry of information;

b) Application of the equivalence principle in all access obligations imposed upon the SMP operator;

c) Vertical separation of the historical operator civil engineering infrastructure (e.g. ducts, poles, central offices and all associated infrastructure), with all assets (infrastructures) passing to an independent entity and with the definition of prices, approved by the NRA, that guarantee the return of the cost of capital in order to promote investment. While the vertical separation it is not completed, an independent external entity would be appointed for the management, operation and maintenance of the ducts, with the NRA defining the rent level to be paid for the infrastructure concession to that external entity.

In our opinion, and as already mentioned, the draft recommendation represents a step forward in the creation of a reasonable level playing field by introducing mechanisms to promote non-discriminatory access to basic infrastructures and a higher level of transparency in the market.

Nevertheless, we strongly believe that a close follow-up of markets 4 and 5 by NRAs will be necessary to ensure an adequate and uniform implementation of the recommendation on NGA in the internal market.