

The Portuguese 5G Auction Rules

November 2020



MACEDO VITORINO & ASSOCIADOS
Sociedade de Advogados, RL

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Foreword

A long process

In March 2018, ANACOM published its first consultation on the process for awarding spectrum licenses for 5G.

Through the following months, this issue would become the fighting ground of an unusually bitter dispute between the Regulator and key market players, with the latter accusing the first of failing to create adequate regulatory conditions for its roll out and ANACOM claiming that it was on par with the EU agreed schedule.

These disputes eventually subsided when, in February 2020, ANACOM published the consultation on the draft rules for a 5G spectrum auction ⁽¹⁾.

As detailed below, the rules are designed as a triggering event, i.e., once the final decision on the regulation is published, a series of successive events would follow ensuring that roll out of 5G would happen until the 4Q2020.

However, only a few weeks after the consultation phase was opened, the COVID-19 pandemic peaked in Portugal, forcing ANACOM to suspend the proceedings.

Following the end of the emergency measures related to the pandemic, on June 1st, ANACOM decided to relaunch the consultation, which ended on July 3rd, 2020.

It may be said that this auction is the latest of a three-decade long string of spectrum licensing procedures in which the Regulator attempted to reshape the market by bringing new players.

In the early 2000's, with the market still expanding, ANACOM attempted to use the 3G tender to bring in a new player and it awarded a fourth license to Oni Way (an EDP, BCP and Telenor joint venture) which failed to thrive.

Unlike the 4G spectrum auction held in the early 2010's, this time there is again a clear intention of the Regulator to use 5G auction proceedings to force the entering of new operators, a move that has not been seen in the Portuguese market for nearly 20 years.

At the time, the Portuguese 3G award procedure had been preceded by record breaking spectrum auctions in Germany and in the UK, thus ANACOM and the Government were feeling confident of a successful reshape of the market.

However, months after the award procedure, not only the markets took a sharp fall with the burst of the “telecom bubble”, but also the technology was not available ⁽²⁾. Recession and technological deficiencies created a belligerent market, which, in turn, highlighted the frailties of both the Regulator and the regulatory framework used. As a result, the Portuguese new entrant suffered the same fate as most its 3G European new entrants: it shut down without a single customer.

The aftermath of this process virtually dictated the end of ANACOM’s attempts to reshape the market via the award of spectrum for nearly two decades.

In 2011, this time with the country in the middle of the sovereign debt crisis a 4G auction was held. This time, it was meant to serve as little more than a way for an income starved Portuguese State to increase fiscal revenues and alleviate the enormous financial burden it was facing: the auction ended without virtually any bids made above the reserve price.

One would have to wait for the second half of the decade for the Portuguese market to settle and show signs of vitality.

The Portuguese mobile markets share most of the characteristics of its European counterparts: there are decreasing growth rates as they reach near saturation in most segments, there is erosion of the traditional revenue streams caused by OTT providers. Nevertheless, there are particularities that should be noted, particularly for newcomers.

In the second half of the 2010 decade, two key events reshaped the market, the first was the takeover by Altice of the former incumbent PT Group, who, after the collapse of its major shareholders, virtually imploded, and the second, the Optimus/ZON merger ⁽³⁾, creating the NOS group, an integrated operator with market shares that in time matched those of the former incumbent.

While battling a long recession throughout most of the decade, operators were forced to look for innovative ways to counter the erosion of their traditional revenue base and the saturation of the market. In order to do so, they used a particular feature of the Portuguese market: the fact that all key players ⁽⁴⁾ are both vertically and horizontally integrated, i.e., they all own fixed and mobile networks, thus allowing them to bundle services and capturing revenue by diversifying their offer across market segments.

This strategy proved successful as, according to ANACOM, in 4Q2019, virtually all households (98,8%) subscribed to a multiple play bundles (double play or higher), more significant still is the fact that quadruple or quintuple play (i.e. an integrated offer of fixed telephony, fixed internet, television, mobile telephony and mobile internet services) account for nearly half of these bundles (48,8%).

In such a scenario, there aren't many incentives for new entrants, which explains why MVNO's account for only 1,8% of mobile voice traffic, and why, of the two major MVNO's, only one is a stand-alone operation while the other is essential mobile arm of a triple play fixed operator.

Current 4G (and 4G+, or LTE) networks represented a considerable upgrade from 3G, after all, it is roughly 500 times faster than the latter, and is able to support high-definition mobile video streaming, video conferencing and much more. When a device is moving, as when one is walking with one's phone or is in a car, the top speed can be 10s of mbps, and when the device is stationary, it can be 100s of mbps.

In Portugal, given both the market characteristics and the economic context mentioned above, 4G rollout became virtually unnoticed and ended up having only a marginal impact in the whole market structure.

Over the last two years, however, in an unprecedented change of mood, ANACOM not only voiced its displeasure with the status quo but also signaled its intention of actively intervening in the market in order to change its structure by opening it.

As expected, these considerations were fiercely rebutted by operators and was followed by an unprecedented vocal dispute with the Regulator.

Considering that the technical features of 5G make it much more than a simple evolution of existing standards, it is not surprising that ANACOM is once again trying to use the spectrum award procedure for the new technology as a catalyst to foster a change in the market structure.

To attract new players, the proposed auction regulation offers incentives ranging from (i) deferred spectrum payments, to (ii) creating for incumbents the obligation to negotiate fair MVNO and national roaming and, (iii) in an attempt to prevent incumbents from buying off new competitors, a two-year waiting period for spectrum resale.

The changes to the draft regulation considered the context of the current pandemic, the results from the auction consultation procedure, that involved 505 inputs as well as the objectives and purposes stated in the Resolution that approved the strategy and timing of 5G in Portugal.

In the following pages we provide a brief description of the 5G final auction rules.

The Auction Rules

The public consultation

Following a series of public consultations on spectrum designation and allocation rules, on November 5th, 2020, ANACOM published the *regulation of the auction for the allocation of right of use of frequencies in the 700 MHz, 900 MHz, 1800 MHz, 2.1 MHz, 2.6 GHz and 3.6 GHz bands* - Regulation no. 987-A/2020 ("Regulation"), the full version may be retrieved from the [Official Journal webpage](#).

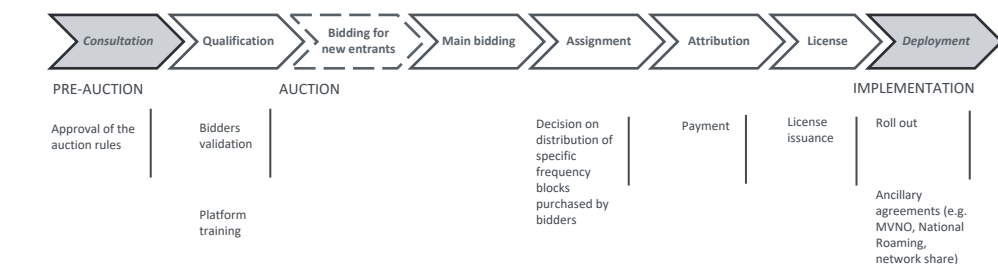
ANACOM's intention was to issue 5G licenses by September 2020, which meant the public consultation on the auction rules should have ended in March. However, the process was suspended due to the COVID-19 pandemic the consultation phase resumed on June 1st with the final version being approved only at beginning of November.

The final version of the auction Regulation, as expected, followed the bulk of current version under consultation.

The auction management

The auction is to be directly managed through the ANACOM electronic platform, but its Board of Directors, along with its general supervision powers, will be required to intervene at certain key moments of the proceedings.

The auction comprises the following sequential phases:



PROPOSED TIMETABLE

- (1) ✓ APPROVAL OF THE AUCTION RULES: 5TH NOVEMBER 2020;
- (2) AUCTION DECEMBER 2020 - JANUARY 2021;
- (3) ROLLOUT 1Q2021.

Following a simultaneous, ascending, open and multiple round model, the auction will be supported by an electronic platform: a computer system which supports the auction execution, namely the bids submission and other communications, while ensuring the application of the auction rules.

Qualification stage ⁽⁵⁾

The first phase is meant to determine who may be admitted entering the auction as bidders. Both companies and individuals are eligible to propose themselves as bidder in the auction.

Applicants must prove to have proper financial standing. This is confirmed by providing a “tender security”, by means of a bank guarantee or insurance bond (a draft for each is provided by ANACOM).

Each block of spectrum corresponds to a number of eligibility points identified by ANACOM, in the following table.

| Categories | Bands | Blocks of spectrum amount | Eligibility points per block of spectrum |
|------------|----------|---------------------------|--|
| A | 700 MHz | 6 blocks of 2x5 MHz | 5 |
| B | 900 MHz | 1 block of 2x5 MHz | 5 |
| C | 900 MHz | 4 blocks of 2x1 MHz | 1 |
| D | 1800 MHz | 3 blocks of 2x5 MHz | 2 |
| E | 2,1 GHz | 1 block of 2x5 MHz | 1 |
| F | 2,6 GHz | 2 blocks of 2x5 MHz | 1 |
| G | 2,6 GHz | 1 block of 25 MHz | 1 |
| H | 3,6 GHz | 6 blocks of 10 MHz | 1 |
| I | 3,6 GHz | 4 blocks of 10 MHz | 1 |
| J | 3,6 GHz | 30 blocks of 10 MHz | 1 |

The ceiling on admission is therefore defined by the amount of the provided deposit. Thus, a minimum deposit of 800 000 euro guarantees one eligibility point, and a deposit of 15 million euro ensures the maximum points that may be used in both bidding phases.

In general, the deposit may only be released under the following circumstances:

1. If the application is not admitted;
2. When the bidder is not declared the winner of the main bidding phase;
or
3. Once the successful bidder has made the final deposit.

Applications must be formally submitted, until 15 days after the entry into force of the auction rules, a deadline that may be extended on ANACOM's own motion or upon reasoned request from the applicants.

Within six days ANACOM's Management Board concludes with the bidders' admission or exclusion, which depends on the fulfilment of the submission form requirements as well as the application documents and elements.

ANACOM notifies applicants of both admission and exclusion. The exclusion decision must be justified and may be subject to prior hearing.

Bidding phase for new entrants ⁽⁶⁾

As the name itself suggests, only new mobile operators will be allowed participate.

By new entrant ANACOM means *"an entity which on the date of entry into force of this Regulation does not hold rights to use frequencies in bands designated for terrestrial electronic communications services and does not have direct or indirect, dominant or significant influence relationships with entities that hold rights to use frequencies in bands designated for such services"*.

Although the intention behind the definition is discernible, i.e., to limit the concept to mobile network operators (MNO), the wording is not particularly clear. As it stands, it is arguable that fixed operators with usage rights to frequencies for terrestrial services would be excluded.

In this phase B and D bands are made available at the same time and at the reserve prices. New entrants may decide not to participate in this bidding phase, by notifying ANACOM of such (*"Licitação para novos entrantes"* in the Portuguese version).

The objective is clear: to allocate every block in those bands, which means the bidding phase may have multiple rounds.

In each round, the bidder submits a bid specifying the number of blocks per band he intends to acquire bearing in mind his eligibility in that round. The rounds will have a maximum duration of 30 minutes. In the event of all bids being submitted before, the Management Board concludes the round. Also, the same body may decide to increase the duration of each round.

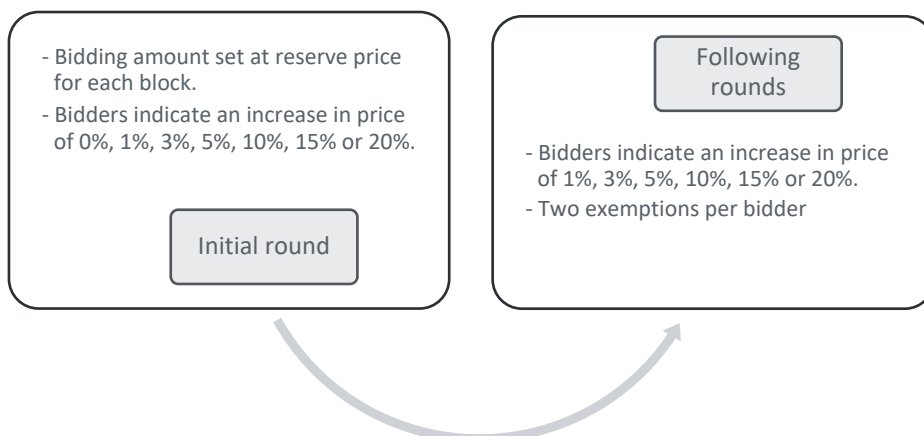
In each round the blocks price is increased between one and 20% of the bands in which excess demand was found, maintaining the prices of the blocks of spectrum of the bands where there was no overdemand. The last round occurs when there is no excess demand in any band. As usual in an auction procedure, bidders who have submitted a bid in the last round are deemed as winners. The final amount to be paid is the total sum of final prices of the blocks won by the winning bidder.

Main bidding stage ⁽⁷⁾

At this stage bidders can submit simultaneous bids for the blocks of all the categories, except for those already acquired in the previous phase.

The main bidding may have one or multiple rounds. The rules are identical to those of the previous phase. The bidder must at least have 70% eligibility in the first round, whereas in the following ones ANACOM decides to change to 85% or 100% thus restricting the number of participants.

Each bidder benefits from only two exemptions, which may only be used after the initial round, and are deemed used whenever a bidder does not submit any bid in a round (after the initial naturally). The bidding plan is as follows:



In the event of a tie between the highest bids for the same block, the winner is randomly determined by the auction platform.

Winning bidders are the ones with the best offers in the last round. The final amount to be paid by each winning bidder equals the sum of the final prices for each block purchased.

Assignment stage⁽⁸⁾

At this stage, winning bidders in the 700 MHz, 1800 MHz, 2,6 GHz and 3,6 GHz bands are entitled to select the exact location of their blocks within the respective frequency band, ranked according to successive criteria:

- a) The highest final amount in the relevant category;
- b) The highest number of blocks acquired in that category; and
- c) The highest number of blocks acquired in all categories.

In the event of a tie, bidders are randomly ranked by the auction platform.

In order to determine the exact location of the frequency blocks, according to the above-mentioned criteria, after the sorting, a meeting among the winning bidders and ANACOM is held.

Each individual assignment of blocks must be validated by ANACOM's Management Board in order to maximize spectrum contiguity.

It should be noted that the rules are slightly different with regard to the 900 MHz band. In this band, new entrants as well as incumbents that may have acquired additional frequencies, are granted a period of 30 days to agree among themselves the exact location of the spectrum in this frequency band. ANACOM approves the result of the agreement or, in case no agreement is reached, the regulator shall decide on the reallocation of spectrum in these frequencies.

In deciding the exact location of the spectrum in any category, the following principles shall be taken into account:

- a) The number of blocks already allocated in categories B and C;
- b) The spectrum already consigned in this band under previously existing rights; and
- c) Miscellaneous principles such as:
 - i. Optimizing the efficient use of spectrum in the 900 MHz band; and
 - ii. Pursuing public interest in spectrum management;
 - iii. Maximizing the contiguity of the assigned spectrum and the spectrum held by each entity as well as the one unassigned.

Award phase⁽⁹⁾

In this final phase of the auction, ANACOM approves the draft auction report and sends it to the successful bidders. The report includes the results and the decision on the allocation of individual rights to each bidder, the final price to be paid by each of them, among other relevant information.

All payments must occur within ten days of the notification to the successful bidders of the decision on the rights allocation, to transfer the final amount to a bank account to be indicated by ANACOM.

Bidders may choose to transfer half the acquired spectrum while the remainder may be deferred by for a maximum period of seven years from the date of the attributive act but must provide a further deposit, valid for that period. That other half will be paid in annual installments of $\frac{1}{7}$ of the remainder.

The release of the initial deposits is proportional to the amounts effectively paid.

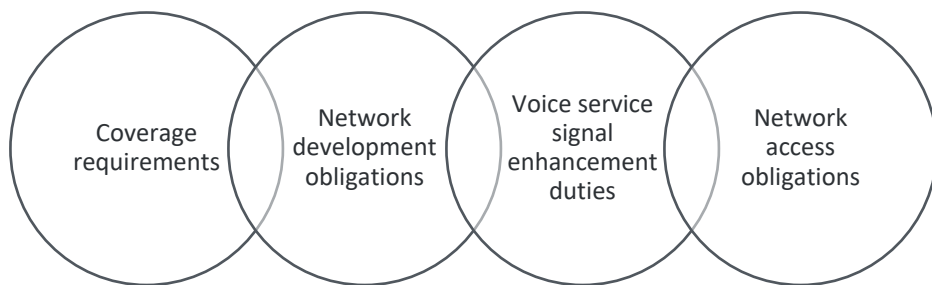
Issuance of licenses

Once spectrum is allocated and all fees paid, ANACOM shall issue forthwith the respective authorizations for the frequency usage rights. These new titles will also include all conditions imposed to the new 5G operators.

Incumbent operators shall have new titles issued merging existing conditions with those applicable under the auction regulation.

Conditions associated with frequency rights of use

Adding to the conditions laid down in the Electronic Communications Act, the conditions imposed on frequency rights holders are broadly divided into four large groups.



Coverage requirements

Coverage obligations vary whether the holder is a new entrant or an incumbent, with objectives divided into three timeframes: until the end of 2023, 2024 and the end of 2025.

As part of the incentives for new entrants, ANACOM defined much less demanding coverage conditions when compared to those of the incumbents, it is expected that new entrants' coverage requirements be met via national roaming arrangements.

If operators are able to negotiate balanced and fair agreements it may be a win-win solution for all, (i) for the new entrant, it will lower the burden of investment, (ii) for the host operator (the incumbent) it will bring a new revenue that may be important to fund the network expansion, and (iii) for the market as a whole it will avoid inefficiencies arising of duplicated networks.

In the table below, we summarize the main coverage milestones.

| | |
|--|---|
| Incumbents (holders of frequency rights prior to the auction) | <p>By the end of 2023:</p> <ul style="list-style-type: none"> - Coverage of 75% of the total population in each of the parishes considered low-density, and in all parishes in the Autonomous regions of Madeira and Azores. <p>By the end of 2024:</p> <ul style="list-style-type: none"> - Coverage of 70% of the population in each of the parishes not considered low-density, but integrate municipalities with low-density parishes. <p>By the end of 2025:</p> <ul style="list-style-type: none"> - Coverage of 95% of the total population of the country; - Coverage of 95% of each of the country's highways; - Coverage of 85% of each of the country's main road routes; - Coverage of 85% of National Road 1 and National Road 2; - Coverage of 95% of the routes included in the "Atlantic Corridor" (a part of the national road network running parallel to the coast) in the part relating to continental territory, on the Braga-Lisbon and Lisbon-Faro railway line; and on the urban and suburban connections of Lisbon and Porto; - Coverage of 85% of each of the railway routes in the country; - Coverage of 95% of the metro of Lisbon, Porto and Sul do Tejo; and - Coverage of 90% of the population in each of the parishes considered low-density, and in all parishes in the Autonomous Regions of Madeira and the Azores. |
| New entrants | <p>By the end of 2025:</p> <ul style="list-style-type: none"> - Coverage of 25% of each of the country's highways; - Coverage of 25% of each of the main road routes in the country; - Coverage of 25% of each of the rail routes included in the Atlantic Corridor, in the part relating to national territory, on the Braga-Lisbon and Lisbon-Faro railway line, and on the urban and suburban connections of Lisbon and Porto. |

These obligations are deemed to be fulfilled with the provision of a mobile broadband service with a minimum speed of 100 Mbps, in case of holders of rights who, at the end of the auction, will hold 2x10MHz and 50Mbps, in case of holders of rights who, at the end of the auction, will hold 2x5MHz.

Network rollout obligations

Holders of rights in the 3,6 GHz band are subject to some network development obligations within a maximum period of three years from the date of issue of the enabling licenses.

Naturally, there is an exception for those whose rights are subject to restrictions ⁽¹⁰⁾. In that case the time limit shall be counted from the date of expiry of such constraints.

The obligation of installing a number of macro or outdoor small cell base stations depends on the amount of spectrum acquired. Therefore, those who acquire:

50 MHz

Must install:

- 917 macro base stations;
- 9170 outdoor small cell base stations; or
- A combination of both, ensuring the relation between them stands at one in 10, and should be installed in each municipality with more than 50 thousand inhabitants and in all the municipalities in the Autonomous Regions of Azores and Madeira.

Between 60 and 100 MHz

Must install:

- 183 macro base stations; or
- 1830 outdoor small cell base stations;

For every 10 MHz above 50 MHz they have purchased, of which at least one macro or 10 small cell outdoor base stations, or a combination of both, ensuring the relation between them stands at one in 10, and should be installed in each municipality with more than 50 thousand inhabitants and in all the municipalities in the Autonomous Regions of Azores and Madeira.

In any event, when requested to install either one or other type of station by, e.g., small and medium-sized enterprises, universities, hospitals, ports and airports, network operators must submit a proposal in response to such requests.

These stations allow the provision of 5G-compatible services, such as ultra-fast bandwidth (eMBB) services for Gigabit connectivity, low-latency (URLLC) or massive machine-to-machine communications (mMTC) services.

Voice service signal enhancement duties

There is also an obligation for MNO's to strengthen their voice service signal quality in order to reach a "Good" level of coverage (a notion defined by ANACOM in the annex 2 of the "Methodology for Assessing the Performance of Mobile Services and GSM, UMTS and LTE Coverage" , which can be read [here](#)) across 95% of national territory until 2025.

This obligation, however, may be fulfilled using any frequency range and any technology (e.g., 2G or 3G coverage is acceptable for this purpose).

Network access obligations

To foster competition, both new and incumbent MNO's shall be required to provide third parties access to their networks under non-discriminatory and fair conditions. In particular, they must accept to negotiate agreements (and inform ANACOM of all the requests they receive) in the following:

- a) Mobile Virtual Network Operations (MVNO). This obligation applies for the duration of the spectrum licenses acquired; and
- b) Specifically in the case of incumbent MNO's, National roaming with new entrants that, at the end of the auction will individually or jointly hold up rights. These obligations shall remain in force for at least 10 years, during the last two ANACOM will assess the need to maintain the obligation beyond the original deadline and its terms, such decision shall be subject to prior consultation.

These agreements shall have a minimum duration of five years, and the actual period of availability of the access shall not exceed 6 months from the date of the concluded contracts or availability of the relevant retail services, unless otherwise agreed by the parties.

If parties fail to reach an agreement within 45 days of receiving such a request, either party may request ANACOM's intervention, which will then submit the dispute to the Administrative Settlement Mechanism and in a maximum period of four months a decision must be provided. Failure to fulfil these obligations is subject to severe penalties ⁽¹¹⁾.

Licensing conditions and spectrum resale

The holders of the rights allocated within the scope of this auction must start offering electronic communications services accessible to the public within a maximum of three years from the date of issue of the respective enabling titles.

As the 3,6 GHz band is subject to restrictions due to the transition of TDT, this period shall be one year from the date of expiry of those limitations.

The rights may only be transferred or leased after the first two years, unless duly justified and recognized as such by ANACOM. The rights of use frequencies are granted for a period of 20 years and may be renewed.

Endnotes


- (1) The public consultation documents can be found [here](#).
- (2) By the time, most 3G licences were awarded, most network elements were available for deployment. However, the fact remains that there were no available handsets. With 3G licences awarded in early 2000, only in the second half of the decade smartphones would appear and only in the 2010's they became ubiquitous.
- (3) The ZON/Optimus merger joined the third mobile operator (Optimus) and the largest cable operator (ZON), who also had a small MVNO operation.
- (4) Along with Altice and NOS, there also Vodafone and Nowo/ONI (using an MVNO agreement).
- (5) "*Qualificação*" in the Portuguese version.
- (6) "*Licitação para novos entrantes*" in the Portuguese version.
- (7) "*Licitação Principal*" in the Portuguese version.
- (8) "*Consignação*" in the Portuguese version.
- (9) "*Atribuição*" in the Portuguese version
- (10) Parallel to the 5G Auction and later its roll out, there is a process for *refarming* spectrum previously awarded for TDT (terrestrial digital television), the process was suspended on March 13th due to the COVID-19 crisis but has already been resumed and is expected to be completed on December 18th (for further information see [here](#)).
- (11) As mentioned, in 2000, none of these remedies was in place, thus leaving ANACOM no recourse other and the courts, thus rendering them virtually useless, as the new entrant had already disappeared. It is a clear example of ANACOM's willingness to reshape the market by protecting new entrants

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“Very efficient, detailed and thorough when presenting solutions and addressing the issues; we were impressed. ”

Chambers and Partners

The background of the page is a complex abstract composition. It features several large, overlapping geometric shapes in various shades of gray, creating a sense of depth and movement. On the right side, there is a vertical strip with a textured, almost crystalline or stone-like appearance, which is partially covered by the geometric shapes. The overall effect is modern and architectural.

Rua do Alecrim 26E - 1200-018 Lisboa - Portugal
Tel.: (351)21 324 19 00 - Fax: (351)21 324 19 29
www.macedovitorino.com