REPORT ON THE PRIOR HEARING AND ON THE GENERAL CONSULTATION ON DRAFT DECISIONS CONCERNING THE DEFINITION OF UNFAIR BURDEN AND THE METHODOLOGY FOR CALCULATING THE NET COSTS OF THE UNIVERSAL SERVICE OF ELECTRONIC COMMUNICATIONS

Contents

1. Framework

By determination of 27.01.2011, ANACOM decided to submit the Draft Decisions (DD) on the "*Definition of unfair burden*" and on the "*Methodology for calculating the net costs of universal service of telecommunications*"[1] to prior hearings of interested parties, and also to the general consultation procedure (referred to hereinafter as public consultation), pursuant to articles 100 and 101 of the Administrative Procedure Code (APC) and to article 8 of Law number 5/2004 of 10 February (Electronic Communications Law - ECL) respectively, timely comments having been received from the following bodies:

- AR Telecom – Acessos e Rede de Telecomunicações, S. A. (AR TELECOM);
- Cabovisão - Sociedade de Televisão por Cabo, S. A (CABOVISÃO);
- OniTelecom – Infocomunicações, S. A. (ONITELECOM);
- Optimus – Comunicações, S. A. (OPTIMUS);
- PT Comunicações, S. A. (PTC);
- Rádio e Televisão de Portugal, S.A. (RTP);
- Vodafone Portugal – Comunicações Pessoais, S. A. (VODAFONE); and
- ZON TV Cabo Portugal, S. A. and companies in which it has shareholdings (ZON).

Pursuant to paragraph 3d) of "*ICP - ANACOM consultation procedures*", approved by its determination of 12.02.2004, ICP - ANACOM makes available in its website all responses received, safeguarding any information of a confidential nature and duly substantiated as such. According to the same paragraph of the referred consultation procedures, this report considers and comments the responses received, presenting an overall assessment which sets out the Authority's position with regard to such responses.

The structure of this report generally corresponds to the structure of the DD submitted to the prior hearing and public consultation procedures. Each of the chapters herein lays down a summary of responses received. At the end of each chapter, ICP - ANACOM's views on the matter at issue is presented. At the end of the report, a set of amendments to DD are presented, in the light of the referred views taken by this Authority.

This report is deemed to be an integral part of the decisions on the "*Definition of unfair burden*" and on the "*Methodology for calculating the net costs of universal service of electronic communications*".

[1] Hereinafter referred to as DD.

2. General comments

A. Responses received

AR TELECOM

AR TELECOM, stating that it is broadly in agreement with the approach proposed by ICP - ANACOM, considers it essential for a reasonable time-frame to be established for the designation of the next universal service provider (USP), given that the DD refers that the methodology for calculating CLSU - *custos líquidos do serviço universal* (net costs of the universal service) is to be applied until the USP designated following a tendering procedure starts the service provision.

As regards the CLSU financing issue, AR TELECOM supports the option of compensation through public funding; nevertheless, it believes that, where this is not possible, in the light of the ongoing crisis in the country, a possible distribution of costs among the remaining operators should mainly take into account the activity's operational revenues or results, and not only the mere turnover.

CABOVISÃO

CABOVISÃO raised doubts on the reason why ICP - ANACOM failed to draw immediate conclusions from the Judgment of the Court of Justice of the European Union (CJEU), of 7.10.2010, which declared that the Portuguese Republic infringed the European Union (EU) Law on the matter of USP designation, for the purposes of these DD.

CABOVISÃO considers that, as in its opinion the USP designation in Portugal is not valid under EU Law, before moving on to an analysis of possible net costs of the provision of the universal service (US), the procedure laid down in article 95 of the ECL should be launched, so as to enable other operators to show their ability to provide the service in a more efficient/less expensive manner, in compliance with the process imposed by law.

In this context, an alternative to US financing could be considered, such as, for example, the provision of direct support to citizens who use this service, instead of imposing obligations on companies that operate in the market.

CABOVISÃO refers that it is legitimate to hear PTC only within the scope of a public consultation, as a result of the conviction of the Portuguese State as regards the designation of PTC as US provider.

The company is also of the opinion that ICP - ANACOM should first make sure that the USP complies with its obligations in an economically-efficient manner, deeming that the technological evolution should render that operator subject to lower costs. Should this situation not occur, other operators, which in this operator's opinion were illegally excluded from the possibility of providing the US, should not be unduly burdened with this fact.

CABOVISÃO refers that even after the tender for USP designation has been carried out, it would be unthinkable for other operators to compensate the value of costs without questioning and verifying such value. In this context, it would be necessary even then to debate whether criteria for calculating costs are reasonable.

The company refers that it does not accept the amount of information which is deemed to be confidential in the process, fact which in its opinion says much about what it deems to be a lack of transparency, forcing operators to comment, approve and bear costs they are not aware of nor control. It thus requests of ICP - ANACOM that it makes available all appropriate costs/benefits data at its disposal, so as to enable operators to assess the matter in a full and informed manner.

ONITELECOM

ONITELECOM finds that, overall, the DD show the regulator's concern with fairness in the sector and with accuracy in the calculation of CLSU. However, ONITELECOM believes that some subjects remain to be clarified which must be safeguarded, in order to ensure an effective probity in the calculation and financial allocation of costs related to the US provision.

ONITELECOM hopes that the regulator distributes CLSU among the major operators, whose total market share reaches 80% to 90%, thus maintaining the rationale of the notion of non-existence of unfair burden.

ONITELECOM considers also that several sectors of economy, namely the financial sector, should contribute to CLSU, from a minimum base of the respective EBITDA[2].

Lastly, the company refers that it is essential for the regulator to hold a consultation on the various options on US financing modalities.

OPTIMUS

OPTIMUS welcomes ICP - ANACOM's decision to allow the market to discuss the methodology for calculating CLSU and the definition of unfair burden, as this will contribute to increase the legal certainty related to the legal and regulatory framework of the provision of electronic communications networks and services in Portugal, in general, and specifically of the US provision.

Without prejudice to agreeing with some of the proposals put forward by ICP - ANACOM, OPTIMUS states upfront that the company does not accept others, namely with some aspects in the scope of the definition of unfair burden, which will considered in the assessment of specific comments.

As regards the assessment of unfair burden after a tendering procedure, OPTIMUS disagrees with the approach proposed by ICP - ANACOM. It is of the opinion, in this matter, that the mentioned article 95 lists a set of alternatives, and does not impose the value indicated in the tender to be the automatic value to be compensated. It also refers that this situation has not occurred in any Member State where a USP designation tender has been held, referring the example of the designation of France Telecom.

Thus, invoking paragraph 4 of article 99 of ECL, OPTIMUS considers that the value indicated in the tender should be regarded as the maximum ceiling for the value to be compensated, the assessment of unfair burden, and where appropriate, the calculation of the effective CLSU, being also required. According to OPTIMUS, it should not be ruled out that some entities may present values that exceed the respective costs but which are nonetheless lower than those presented by other bodies, owners of networks which are less comprehensive in geographical terms, especially in the more remote areas.

In this context where the range of operators contributing to the CLSU financing largely exceeds that of possible tenderers, OPTIMUS suggests that the designated USP is made subject to the obligation to prove regularly that it has incurred in unfair burdens that could be compensated, and that the regulator imposes audits to verify and accept the nature of such burdens.

[2] EBITDA stands for earnings before interests, depreciations and amortizations.

PTC

PTC, recalling its condition of USP under a concession contract, the historical background, and the fact that it never received any compensation, to which it deems to be entitled for services provided since 1995, welcomes the fact that ICP - ANACOM has given some steps towards the adoption of decisions on CLSU. Notwithstanding, it considers that the DD propose concept and methodology approaches which must be reviewed, referring that there is a lack of preliminary enquiries which taint, or may taint, some of the conclusions reached by ICP - ANACOM.

PTC refers, however, that many of the methodological options put forward, especially those which are amendments to prior positions, do not comply with legal requirements, nor do they take into consideration the national reality. They also have the pernicious effect of decreasing considerably the amount of compensation to which PTC considers to be entitled for the CLSU incurred so far.

PTC believes also that the regulator's role should not be to ascertain that the CLSU do not exceed a given threshold, or that such costs fall within the ranges in line with per capita values of other countries, but to establish a methodology and a definition of unfair burden which take into consideration the relevant aspects of the national reality.

PTC feels that it should not suffer loss due to the difficulties arising from the fact that the issue is many years overdue, on account of obligations laid down in the ECL and of time-limits self-imposed by the regulator. It is also of the opinion that such difficulties should not be used as an excuse not to compensate the company for the years for which that compensation is due, or to decrease the amount of compensation.

Likewise, it takes the view that, although it wishes the CLSU financing process to reach an end, the urgency related to proceedings against the Portuguese State should not adversely affect the transparency and grounds for the CLSU process, which requires, in some matters, a more in-depth analysis.

PTC describes the various steps in the scope of the access to the administrative process, declaring that it does not accept the regulator's explanations on the elements kept as confidential, which are deemed to be relevant for the assessment of the matter, and that the failure to being given access to such elements is a violation of its procedural rights which shall be discussed in the appropriate occasion.

PTC considers that the DD represent the culmination of a long process during which it put a great deal of effort and adopted several initiatives to determine the methodology for calculating CLSU. For the purpose, the company presents an extensive historic reference, namely on the various determinations adopted by ICP - ANACOM, as well as on letters submitted by the company, to highlight the delays of the regulator. It also stresses the positions taken by some members of the Management Board (MB) of ICP - ANACOM on the need to finalize positions on CLSU, at the time of the 2007 decision on "Retired People and Pensioners" which significantly increased its costs.

PTC specifically mentions the regulator's internal memos (submitted to the MB between April and August 2009), which, following guidelines of the MB of ICP - ANACOM, were in its view subject to deep or even radical changes, further stating that it fails to understand what it refers to be "vague minutes", requesting of this Authority that these issues are clarified.

PTC concludes by referring that these DD were only submitted for public consultation 9 months after it supplied the information requested, 2 and a half years after the expiry of the deadline to which ICP - ANACOM committed in the determination of 30.02.2008, almost 4 years after the

regulator's Chairman acknowledged ICP - ANACOM's added responsibilities to quickly settle the question of universal service financing and around 7 years after the entry into force of ECL, which imposes on ICP - ANACOM the obligation to define the notion of unfair burden and the calculation of CLSU.

Relatively to the definition of unfair burden, PTC stresses the need, in its opinion, to differentiate between the regime prior to the ECL (Decree-Law number 458/99) and the one which came into force with this law, as otherwise a retroactive and illegal application of this law would be at stake. It highlights also its view on the judgement of the CJEU and contests the DD approach in terms which are described in more detail in the specific comments.

As far as the calculation methodology is concerned, the company disagrees specifically with the use of historic costs, of successive iterations, of the so-called "*plausibility criteria*", of the classification of avoidable costs and of the exclusion of unprofitable customers for insufficiency of revenues. It also expresses certain misgivings about the elasticity factor in the case of costs associated to "*Retired People and Pensioners*" and about some aspects related to the assessment of indirect benefits, namely those related to reputation and brand, ubiquity, life-circle and regulation fees.

As regards the time-limit for sending the information, PTC does not agree with the 60-day deadline for submitting data on the preliminary calculation of CLSU, referring that it is not a proportional or reasonable deadline, given the level of detail and the extent of required information, and proposes as an alternative a 120-day period.

Relatively to audits, it refers that given the existing delays, specific launch and conclusion deadlines should be defined immediately, so as to avoid dragging out ICP - ANACOM's final decision on CLSU. It further refers the need to establish a deadline also for audits to be carried out after CLSU information for the period from 2001 to 2003 is submitted.

RTP

RTP refers that it does not provide these services, and as such it has nothing to declare on the documents under consultation.

VODAFONE

VODAFONE welcomes the approval of the DD, considering that they contribute towards greater predictability and legal certainty, enabling an easier planning of the commercial and strategic planning of several market agents.

Notwithstanding, it refers that both what it deems to be an illegal designation of USP and an incorrect implementation of the legal framework on the nature and evolution of US, render any decision-making process on a possible CLSU financing by other companies impossible. According to VODAFONE, CLSU compensation, if any, should only by financed through public funds.

VODAFONE highlights what it deems to be essential facts to be considered in the scope of the ongoing procedures, as well as the main conclusions to be drawn.

It focuses first on what it considers to be an illegal USP designation which, according to VODAFONE, should influence the application of the methodology for calculating CLSU, in the scope of the determination of what may be considered an unfair burden and the steps taken to promote CLSU compensation.

VODAFONE refers that an appropriate USP designation is essential for numerous reasons that affect the results of the decisions under consideration, among which it stresses that it is not guaranteed that US obligations have been or are being complied with in an economically-efficient manner, and that it has not been demonstrated that, in Portugal, the US should be provided by a single company and that the USP designation should concern all services and all the areas of the country. In this respect, referring to some examples of other countries, it states that the option for several USP has the potential for increased and better competition, raising concerns about whether the "*choice*" of the incumbent for the sole Portuguese USP does not create distortions in the market and hinders the desired liberalization and evolution of the sector.

In the light of the above, VODAFONE expresses a deep worry, as it declares that it remains to be demonstrated that there would still be any CLSU to be considered if the USP had been chosen according to the legally established procedure. It refers also in this respect that in several countries with competitive market conditions, the designation of an USP is not required, and moreover, such designation does not imply any compensation for obligations relating to that provision.

The company highlights also what it considers to be an absence of procedures for reviewing US obligations, which should guarantee that obligations are provided while using the most efficient technology (which, if ignored, would lead to a failure to comply with the principle of technological neutrality), that they are of a current nature/scope and are applied to the different/new needs of the population, by reference to the evolution of the market and competition.

In this context, VODAFONE considers that the obligations on the provision of the fixed telephone service (FTS) should be removed from the US scope, given the development of mobile services, both in terms of the number of users and in terms of prices, which are lower that US charges.

The US scope should also exclude the provision of directories and of directory enquiry services, which are widely made available to the public and which are provided by most providers, as well as public pay-phones, as the need for this services is met via the universal access to the land mobile service (LMS).

After the referred obligations have terminated, persisting market failures should be identified, namely the provision of the service to customers in extremely remote areas, customers with disabilities or special needs and users with a low income, and specific measures should be considered, including the allocation of selective support, namely in the framework of social policies, to users with low income (for example through the granting of vouchers).

As regards US provisions, VODAFONE also refers that the concept of affordable price should only be used to avoid the exclusion of specific users for social or economic reasons, not in a general and indiscriminate manner.

VODAFONE considers that designating an USP and determining US obligations should only be required where there are obligations that are not naturally provided by the various operators in a competitive market framework.

In this scope, it is of the opinion that only net costs which do not exceed those which would result from the proper compliance with the law, as regards the use of the most efficient means, of the most appropriate services and the most current needs of potential US beneficiaries, should be considered. It adds that the determination of CLSU which exceed those which ideally would be incurred in case all legal preconditions on the matter were met, would not only benefit the USP unfairly, but it would also seriously harm the remaining operators and imply distortions in markets directly or indirectly connected.

A third fact referred by VODAFONE concerns US financing obligations. In this respect, the extremely significant weight which electronic communications service providers have been burdened with in the scope of their Information Society obligations should be mentioned, in the scope of fees for the activity performed and indirect contributions to the US (regulation fee), which are considered public for nature and scope purposes. ICP - ANACOM' revenue arising from electronic communications are also highlighted.

It also refers the challenges faced today by providers, given the situation of economic crisis and the need to ensure the country's technological evolution, with the long term evolution (LTE)[3] and next generation networks, the adoption and implementation of which entail high investments.

Lastly, in refers that the US has a public nature which, in the Portuguese case, is more paradigmatic, given the steps given so far, namely the option to "choose" the USP, this body's shareholding structure, its competitive situation and its economic and financial position, which is deemed to be healthy, allowing it to make investments which would be too high for most of the remaining operators.

In this context, VODAFONE feels sure that, in the light of grounds laid down, its concerns will certainly be legally met, in case CLSU are compensated by distributing costs among other companies, all the more so when considering that these companies have not been given the opportunity to provide the US. In this respect, it highlights that US obligations are a source of legal disputes and infringement proceedings in the European Community, referring further that the CSU financing situation is the exception and not the rule at Community level.

Therefore, according to VODAFONE, CLSU financing should be borne by public funding, not only due to the US political nature, but also to avoid the potential creation of distortions at the level of market competition, which is demonstrated by a study by Plum Consulting attached to its response, and by public burdens (information society contributions and regulation fees) which already fall on operators.

The study submitted by VODAFONE is intended to identify the measures which are required to ensure that telecommunications services are affordable to all homes in Europe.

The study considers that a tariff is affordable where it allows families with lower incomes (last decile) to make the socially required use (up to 60 minutes and 1 GB of downloads per month) through a sustainable expense (up to 4% and 6% of the family budget, respectively for the telephone service and for that service plus the broadband service), and where it helps the family to control its expenditure in telecommunications services.

The study concludes that in Portugal there are prepaid tariffs provided by mobile operators which fit the referred description of affordable tariff and which entail lower costs and a better control of expenses given the fixed tariffs. The study ends by presenting several recommendations to ensure that telecommunications services remain affordable during the next five years, stressing the termination of the traditional US obligation and its replacement for the adoption of measures that ensure the geographical availability of prepaid mobile services, especially for mobile broadband.

ZON

[3] A new broadband wireless system resulting from the evolution of 2G and 3G systems, whose technical specifications were developed within 3GPP (3rd Generation Partnership Project).

ZON is of the opinion that the DD under consideration are positive initiatives of ICP - ANACOM which aim to clarify a set of matters before the launch of the tendering procedure for USP designation, which in its opinion are likely to occur in 2011.

In this context it considers that tenderers will be able to know a priori the framework on the unfair burden definition and methodology for calculating CLSU, allowing a thorough evaluation of conditions associated to their potential designation as USP.

ZON stresses also that the provision of US without a tender does not guarantee that such service is provided in the most efficient manner for the market, recalling in this regard the Judgement of the CJEU on the conviction of the Portuguese State. In this context, ZON takes the view that, pending the launch of the tendering procedure and subsequent US designation, any CLSU should not be borne by other electronic communications operators, but by ICP - ANACOM's net budget results, and limited thereto.

B. ICP-ANACOM's view

Most bodies that responded to the public consultations welcome ICP - ANACOM's initiative, given the need to implement the methodology for calculating CLSU and the definition of unfair burden. However, various complaints have been raised and some alterations to the presented conceptual approaches have been suggested, which shall be dealt with in the specific comments chapter.

Several issues have also been referred related to the process of USP designation and the Judgement of the CJEU which declared the infringement by the Portuguese State of provisions laid down in Directive 2002/22/EC on USP designation, as well as to the CLSU financing mechanism, on which ICP - ANACOM makes the following considerations:

- Issues in question - USP designation, promotion of CLSU compensation via a financing mechanisms and respective distribution of costs - are within the sphere of responsibilities of the Government, under respectively articles 99 and 97 of the ECL, thus ICP - ANACOM is not entitled to take decisions on such matters;
- Under the current legal framework, it is incumbent upon ICP - ANACOM, in this matter, to define the notion of unfair burden and to calculate CLSU, where the Authority takes the view that they may constitute an unfair burden (article 95 of ECL) and, under Decree-Law number 458/99, of 5 November, to promote the audit and approval of negative margins presented by the USP and their possible compensation, if any, and where justified, for the period before 2004. With the DD under discussion, ICP - ANACOM thus intends to comply with responsibilities assigned to it by law, and legally there is no framework to be considered, nor to draw conclusions from, as regards how the USP was designated or the respective consequences;
- In ICP - ANACOM's view, the referred matters are beyond its powers, and respondents that raised these issues, if they so wish, are certainly entitled to find answers in a different and appropriate fora;
- In this occasion it is clarified that ICP - ANACOM submitted the DD on the definition of unfair burden and methodology for calculating CLSU to the prior hearing of all providers of electronic communications networks and services, including PTC;
- As far as lateral issues are concerned, it is also important to stress that obligations referred by VODAFONE to be borne with the Information Society, regulation fees and

several investments, namely next generation networks, are of no relevance to the determination of CLSU nor to the definition of unfair burden, having that company failed to give a valid causal link between such obligations and the matter under discussion.

As regards the concerns and suggestions put forward by CABOVISÃO, OPTIMUS, VODAFONE and ZON, on CLSU financing within the scope of the designation of a new USP, ICP - ANACOM clarifies that the CLSU calculation to be performed following the approval of the decision on the respective methodology will not necessarily have any implications in the identification of the financing proposed by the new USP(s), nor a similar methodology will have to be followed, in the light of paragraph 1b) of article 95.

Note that the provision under consideration provides for two different procedures for CLSU calculation, in which the first approaches CLSU calculation taking into account any additional market advantages for providers, and the second resorts to CLSU identified in the scope of a USP designation mechanism.

As soon as new USP(s) are designated, ICP - ANACOM intends to use the possibility conferred by article 95 of ECL, which corresponds to the second procedure referred to in the preceding paragraph, to consider the value proposed by entities designated as USP in the scope of the tender as the relevant instrument for determining CLSU. In any case, this is a question which will only be decided in the scope of the procedure for designation of the new USP(s).

Note in this respect the document of the Body of European Regulators for Electronic Communications (BEREC) on US[4], which underlines the rationale of using the value presented in the scope of a USP designation procedure as an unfair burden, without requiring that value to be validated:

"*The issue is highly debatable, as it appears that the USD imposes verification requirements (i.e. concerning the accounts and/or other information serving as the basis for the calculation of the net cost) only in connection with the use of the net cost calculation method provided under Article 12(1) (a) and not in relation to the use of the method under Article 12(1) (b). Indeed, the second method, when it is based on a public tender procedure, inherently contains important guarantees of cost-effectiveness and objectivity by its competitive character. An ex post verification mechanism would introduce a degree of uncertainty for the candidates that risks undermining the attractiveness of the public tender with the effect of reduced participation of market players in such procedures.*

Also, it would completely eliminate the benefit of reduced administrative costs, which is an important advantage of the method under Article 12(1) (b) over the method under Article 12(1) (a).

The downside of no ex post verification could be that when for other reasons there is limited competition in a public tender procedure, the net cost resulted from the tender entails a certain amount of risk of being inefficient. A definite solution to this dilemma would require a clarification of the USD provisions which should strike a balance between the identified risks, in an attempt to maximise the cost-effectiveness of the USO".

On the alleged failure to review US obligations referred by VODAFONE, although article 86 of ECL provides that "*the scope of the universal service shall evolve in line with advances in technology, market developments and changes in user demand, which scope shall be modified where justified by such evolution*", it is important to stress that the same ECL explicitly defines the minimum set

[4] Available at http://www.erg.eu.int/doc/berec/bor_10_35_US.pdf

of provisions which must integrate the US scope, namely including an explicit reference to the fixed nature of the service.

Notwithstanding the fact that its scope remained unchanged over the years during which the ECL has been in force, and previously under Decree-Law number 458/99 of 5 November, US obligations have been subject to several adjustments/reviews, namely as regards aspects related to price affordability, several US provisions, and provision of options or tariff packages different from those provided under normal commercial conditions, as far as FTS is concerned.

Moreover, in February 2008 a public consultation was launched on the procedure for USP designation[5], in the scope of which interested parties had the opportunity to provide their views, among other issues, on whether there were grounds for an USP designation and on minimum provisions which should integrate the US. It should be noted that, except for VODAFONE, all other respondents considered at the time that an USP should continue to exist for the minimum set of provisions which currently integrate the US.

Meanwhile, on 23.03.2011, a public consultation procedure was also launched on the public pay-phones component of the universal service provision[6], the respective response deadline having expired on 20.04.2011.

In this respect also it should be stated that in most EU countries, the US scope is basically the same, and its review, just as in Portugal, has only recently become more acute, further to the publication of the new regulatory package.

Without prejudice to the above, it must be underlined that the procedure now under consideration does not focus on the US scope, or on the designation of a provider to guarantee it, which are issues which should be dealt with elsewhere.

ICP - ANACOM entirely rejects PTC's allegations according to which underlying the methodology for calculating CLSU and the definition of unfair burden is a concern to reduce the amount of compensation to which PTC believes it is entitled.

ICP - ANACOM wishes to define a methodology and a notion of unfair burden according to criteria considered to be objective, transparent, proportional and reasonable, followed broadly by other regulators, and which are duly justified for reasons which do not relate at all with any indiscriminate reductions of CLSU values.

Relatively to the considerations of CLSU value per capita and possible range positions, as well as other considerations in internal memos, it should be referred that the analysis carried out by ICP - ANACOM's services was subject to several approaches, which evolved over time, and which not only reflect the complexity of this matter, but also the degree of internal discussion and maturity which this issue deserved.

Accordingly, documents submitted to public consultation reflect the approach which was deemed to be the most appropriate in the scope of a DD, having been privileged the adoption of an objective notion of unfair burden and a concrete methodology for calculating CLSU.

At no time was ICP - ANACOM willing to impair the transparency and justification of the process, as stated by PTC, on account of its urgency. In fact, if this Authority had been mainly driven by the worry about urgency, a decision would already have been taken on the subject, to the detriment, if so, of its reasoning.

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[5] Available at http://www.anacom.pt/render.jsp?contentId=661839

[6] Available at http://www.anacom.pt/render.jsp?contentId=1079932

PTC's statements on not accepting the regulator's explanations on elements deemed to be confidential are quite surprising, given that a full copy of the whole process was delivered, with around 6600 pages, of which only two paragraphs and a footnote remained confidential, which are part of an internal memo of ICP - ANACOM related to the provision of advice to the Government, and a proposal for collaboration handed by a consultancy company to ICP - ANACOM which failed to be selected, which considered the matter to be confidential. Anyway, this subject has been replied to and dealt with in the appropriate fora.

As to CABOVISÃO's statements on information considered to be confidential, ICP - ANACOM clarifies that in this process such data refers mainly to cost/benefit estimates presented by PTC which were not accepted by ICP - ANACOM, which do not affect in any way the discussion of the methodology for calculating CLSU and the discussion of the notion of unfair burden, therefore the Authority is of the opinion that it has no bearing on the assessment of the matter by interested parties.

As regards the 60-day time-limit for submitting data for CLSU preliminary calculation, deemed by PTC not to be proportional nor reasonable, given the detail and extent of requested information, ICP - ANACOM, in view of the arguments put forward, accepts an extension up to 90 days, which may extended by a maximum of 180 days, in case due justifications are presented and accepted. ICP - ANACOM agrees that there are advantages if this time limit coincides with the deadline for selecting the bodies which will carry out the audit of accounts and information provided by PTC for the purpose of CLSU calculation, and this will be taken into due account within the award process. Further to this award, the field work will take place, and ICP - ANACOM is not able to anticipate its date of conclusion, given the specificity of the work under consideration, which depends on the interaction to be established with the USP and the provision of information. In any case, after the work reaches an end, ICP - ANACOM expects to conclude the auditing process of accounts and information provided by PTC within 180 days.

ICP - ANACOM will in due time consider the procedures, namely as far as schedule is concerned, for any audits deemed to be required, if and when PTC presents information on the application of the methodology for 2001 to 2003.

3. Specific comments – Definition of unfair burden

3.1. Definition of unfair burden

A. Responses received

CABOVISÃO

CABOVISÃO recalls the view taken by the British regulator - Office of Communications (OFCOM) - on the notion of unfair burden, in which the latter concludes that, at least until 2006, no unfair burden occurred, taking only into account the criterion of the economic and financial capacity of the USP.

In this respect, it asks whether ICP - ANACOM would not reach a similar conclusion if it used the same method, that is, if the Authority only assessed PTC's economic and financial situation, without weighing market shares.

As regards the value of the market share, CABOVISÃO considers that the threshold used should be 75%, as suggested by the Directorate General for Competition of the European

Commission (EC) and by the CJEU, for a start because it is impossible to definitely forecast the evolution of market shares, and taking this value into account, one may reach the automatic conclusion that no unfair burden exists.

CABOVISÃO considers also that shares below 75% should not lead to the assumption that the market is competitive in a way that prevents the USP from being able to bear CLSU. In this respect, it refers that the decision-making practice of the EC and EU courts shows that concerns are raised as regards a dominant position in the case of companies with market shares above 40% to 50%. In this context, the company believes that in case PTC's shares rank above the referred values, it should incumbent on the USP to demonstrate that the market is effectively competitive so as to prevent it from internalising CLSU.

CABOVISÃO disagrees with ICP - ANACOM as regards the basis for calculating market shares. It refers that PTC is not a company in a Competition Law perspective, which considers the concept of "economic unit". Therefore, not only does it consider ICP - ANACOM's analysis to be legally incorrect, but also artificial, as it fails to consider the market shares of other companies of the Grupo Portugal Telecom (Grupo PT) which also provide FTS and which do not compete with PT.

CABOVISÃO also refers that ICP - ANACOM should not ignore the wholesale business developed by the Grupo PT. According to CABOVISÃO, market power assessment should also consider factors such as vertical integration, among others. Given that the vertical integration of Grupo PT is acknowledged to be a factor which reinforces its market power, ICP - ANACOM should also take into consideration the wholesale revenues earned by Grupo PT.

Moreover, CABOVISÃO considers that all revenues of services provided on unprofitable accesses should also be considered.

As regards the analysis of PTC's economic and financial situation, CABOVISÃO restates that this analysis is restrictive, and should be extended to the whole Grupo PT, or at least to all companies of the Grupo PT fixed business.

Relatively to the minimum financing amount, CABOVISÃO agrees with the regulator that the value in question may be increased, as proposed by ICP - ANACOM, to EUR 4 million.

ONITELECOM

ONITELECOM believes that the market share should be taken into account, as it is an indicator of the capacity to contribute towards covering US costs, given that companies with a lower market share do not earn sufficient revenues to contribute to US financing.

OPTIMUS

Without prejudice to agreeing with some of ICP - ANACOM's options, OPTIMUS strongly disagrees with others. It thus deems the following to be unacceptable: i) relegating to second place the analysis of the USP's economic and financial situation, which in certain circumstances would be enough to determine the absence of an unfair burden; ii) the market share being based exclusively on FTS retail revenues and PTC's reality; iii) the 80% threshold and; iv) the idea that in a context of USP designation by public tender, the CLSU that is identified in that scope constitutes an unfair burden.

OPTIMUS thus considers that the methodology proposed by ICP - ANACOM to assess the competitive situation, based on an 80%market share threshold, is not correct, and even reaches the conclusion that such an evaluation of the competitive situation should not, in any circumstance, determine the decision on the existence of unfair burden.

OPTIMUS starts by considering that the USP's economic and financial situation should be examined, analysing the evolution of indicators such as net results, EBITDA margin[7], ROI[8] and ROCE[9], indicated by ICP - ANACOM and with which the company agrees, deeming the second one to be the most relevant, as it is ruled by international standards. In this context, it takes the view that the analysis of these indicators should not be restricted to PTC, but the whole Grupo PT should be taken into consideration, as the concept of relevant company in the scope of competition rules points towards the whole of the respective economic group. It invokes in this scope the analysis made in the scope of the application of the Competition Law and a judgement of the CJEU[10], and intends to assess the capacity to internalise CLSU at this level.

In case the whole of the Grupo PT is not considered (recalling in this respect that PTC, PT Prime - Soluções Empresariais de Telecomunicações e Sistemas, S. A. (PT Prime) and TMN – Telecomunicações Móveis Nacionais, S. A. (TMN) are held 100% by PT, SGPS, SA) OPTIMUS takes the view that at least all activities related to FTS - both retail and wholesale - developed by the Grupo PT should be considered. In this regards, the vertical integration effect of the Grupo PT cannot be disregarded, nor the fact that the market share increase of new operators is mostly based on wholesale offers made available by PTC, thus any loss of revenue registered by PTC is compensated by the corresponding wholesale revenue received by its competitors.

OPTIMUS refers that this approach which covers the whole Grupo PT does not collide with the approach of the methodology for calculating CLSU, restricted to US provisions, as the assessment of the definition of unfair burden is a different and autonomous task which aims to evaluate the USP's full situation and the existence of competitive pressure, that is, concludes OPTIMUS, this task is about assessing the framework - financial and competitive - of the US provision.

OPTIMUS believes that in the opinion of WIK-Consult GmbH (WIK), the assessment of the economic and financial situation must also be carried out at the level of the group to which the USP belongs, and that the Grupo PT itself has a similar approach, as the quarterly disclosure of their results shows the fixed business analysis in an integrated manner at the level of the group. OPTIMUS refers further that ultimately, and for mere reorganization operation purposes, an extreme situation could be reached in which the USP only provided US components, thus artificially influencing its economic and financial situation.

OPTIMUS present an analysis of the USP economic and financial situation for 2004 to 2009 (according to tables 1 and 2), comparing its indicators to those of foreign operators, and also

[7] The EBITDA margin corresponds to the ratio of EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization) to operating revenues (sales, provision of services and additional revenues).

[8] ROI – return on investment, which may be calculated according to the following ratio: (net results) / (capital + provisions for retirement benefits + medium- and long-term debts).

[9] ROCE – return on capital employed, which may be calculated according to the following ratio: (operating revenues) / (net assets – short-term debts – accruals and deferrals).

[10] Judgement Viho/Comissão in case C-73/95 (of 24.10.1996).

with national operators, concluding that the obligation to provide the US did not affect the Grupo PT's capacity to operate and compete in the market.

Table 1 – Comparative analysis of the EBITDA margin of PTC's fixed business

	2004	2005	2006	2007	2008	2009
PTC (FTS)	38,4%	43,6%	40,7%	42,3%	32,4%	19,7%
Grupo PT (fixed business)	42,0%	51,0%	51,8%	51,4%	45,9%	41,1%
Belgacom	39,3%	32,2%	30,7%	29,6%	-	-
BT Group	-	30,0%	28,3%	27,9%	27,9%	25,0%
Deutsche Telekom	37,6%	37,9%	35,5%	34,2%	34,8%	33,3%
Telefonica	40,7%	40,7%	38,2%	42,3%	48,1%	47,8%
Eircom	-	36,6%	35,8%	36,1%	37,2%	40,3%

Table 2 – Comparative analysis of the EBITDA margin of Grupo PT

	2004	2005	2006	2007	2008	2009
Grupo PT	38,9%	39,1%	38,2%	38,2%	36,9%	36,9%
Telefonica	40,4%	39,7%	35,7%	40,6%	39,6%	39,8%
France Telecom	38,8%	37,6%	35,9%	36,0%	31,5%	31,8%
Deutsche Telekom	34,2%	33,6%	30,2%	29,2%	31,6%	32,0%
Belgacom	43,0%	37,5%	35,2%	34,2%	33,3%	32,7%
BT	29,7%	28,3%	27,9%	28,0%	16,8%	27,0%
KPN	40,9%	39,6%	40,1%	38,8%	34,5%	38,4%
Telecom Italia	45,5%	41,8%	40,5%	39,6%	37,8%	42,0%
Vodafone	37,3%	40,1%	38,5%	37,1%	35,3%	33,1%
Eircom	38,0%	35,0%	33,0%	34,0%	35,0%	37,0%
TDC	33,2%	32,5%	32,9%	32,0%	34,3%	36,3%

OPTIMUS specifically compares PTC's EBITDA margin for the FTS with that of Deutsche Telecom and the Belgacom Group, on operations in this fixed market, stressing that PTC presents values which considerably exceed those verified for those operators at European level. As regards the decrease of the EBITDA margin in 2008 and 2009, it refers this is due to the "Meo" investment, and that the US provision was not negatively impacted. OPTIMUS refers also that the EBITDA margins of the Grupo PT are more significant than those of other European communications groups. Lastly, it compares the EBITDA margins of several European operators at the level of fixed business to conclude that this US obligation did not affect PTC's capacity to operate in the market and that all the group influenced its conditions up to 2009.

OPTIMUS thus declares that the conclusion it reached should be enough to conclude that an unfair burden did not occur for any of the years under consideration, in which several operators abandoned the market, stressing that a similar approach was followed by the British regulator (OFCOM). It is of the opinion, also, that this approach is suggested by the Irish regulator - Commission for Communications Regulation (COMREG) – and by WIK.

In this context, OPTIMUS believes that restricting the analysis of the competitive situation to the market share criterion could be simplistic, and disagrees also with the 80% threshold, suggesting alternative approaches.

In the scope of the market share analysis, and quoting ICP - ANACOM and the DD, it suggests that wholesale revenues resulting from the use of accesses to the FTS provision are included, including revenues from interconnection services, the reference unbundling offer (RUO), the asymmetric digital subscriber line reference offer (PT ADSL Network), and the subscriber line resale offer (SLRO), given that the loss of revenue associated to the loss of a customer to an alternative operator is compensated, at least partially, by wholesale revenue generated by the access of that ex-customer. OPTIMUS considers also in this regard that the shares of the Grupo PT should be taken into account, although the results would be the same if only PTC's share was considered; anyway, the wholesale revenues under consideration reached EUR 495 million in 2009. It stress that, at the very least, it should be ensured that revenues of PTC's wholesale offers to other companies of the Grupo PT were taken into account.

As regards the 80% threshold, OPTIMUS considers this is an arbitrary figure, which is not significant at the level of the identification of the dominant position of the USP. In this context, it refers that Member States which adopted it are a minority, having ICP - ANACOM failed to explain how the market analysis and circumstances of each of those countries are valid also in the case of PTC.

The company does not understand why ICP - ANACOM opted for an 80% threshold instead of a 75% threshold, which is considered by the EC in the competition area. It quotes also European case law and EC documents which refer to situations of dominance where market shares range between 40% and 50%.

OPTIMUS thus suggests that where the USP presents a market share (considering the retail and wholesale revenues of the Grupo PT) equal to or above 75%, the non-existence of an unfair burden should be immediately concluded. Where the share value is lower than that threshold, it believes it is not proper to conclude automatically that an unfair burden does not exist, stating that the decision on unfair burden should then consider additional factors, such as the existence to barriers to entry, the level of vertical integration of the USP, the degree of dependence of alternative operators of the USP's wholesale offers and the economic and financial situation of the various market operators.

Moreover, OPTIMUS declares it agrees with the analysis of the practise of prices close to the maximum price cap to conclude that it strongly suggests PTC's capacity to internalise CLSU over time without them constituting an unfair burden.

As regards the EUR 4 million indicated as a minimum threshold as from which it is justified to consider the US provision to be an unfair burden, OPTIMUS believes that the referred threshold should be based on Portugal's specific situation, namely on the estimate of the annual cost of establishing and operating the compensation fund and the net compensation to be received by PTC from other bodies, but always and only under the assumption that the option for the compensation fund is substantiated and acceptable.

PTC

PTC criticizes the analysis of its economic and financial situation, which is deemed to be short, superficial and useless, as it is based on few indicators, and comparisons are made only at the level of EBITDA. In this respect, it criticizes comparisons with operators starting their business, and with a business portfolio which is less comprehensive than PTC's, as well as comparisons with mobile operators, especially when the mobile market is not considered for the determination of PTC's competitive capacity. PTC is also of the opinion that, relative to these last operators, had the comparison been made at the level of RIO and ROCE, higher rationales would have been established for those operators than for PTC.

It also criticizes the benchmark used, as only 4 in 14 countries refer using the criterion of market shares above 80%, and ICP - ANACOM fails to substantiate how realities of those countries compare to the Portuguese one.

PTC refers that, although it does not argue with ICP - ANACOM's approach on considering the level of competition in the market and PTC's capacity to bear the cost of financing CLSU, the market share criterion (above 80%) says very little about the company's capacity to internalize CLSU, which is deemed to be a clearly insufficient, poor and unreliable indicator. A different set of indicators which globally affect that capacity should also be considered, namely the level of fixed-mobile substitution, the market evolution, the number of operators and the intensity of competition, which failed to be minimally considered in the approach referred in the DD.

It is invoked that small market share reductions, but which concern very profitable customers, may have an important impact on PTC's capacity to internalise CLSU, suggesting in this context the resort to the profit share, or as proxy of that indicator, the company's share of profitable customers. Additionally, it considers that the analysis should not be restricted to the fixed telephone service, given that the capacity to drive profits also depends on other services, namely premium services for companies.

PTC stresses that ICP - ANACOM failed to assess market shares in profitable areas and segments, in which alternative operators aggressively attack, reducing the USP's capacity to internalise CLSU, and it declares there are no reasons for assuming that PTC was able to retain always the best customers during the first six years after the liberalization.

On ICP - ANACOM's considerations on the differences between shares measured in terms of customers or access and in terms of revenues, in which the latter show that PTC's position in the market is more important than what the simple analysis of access shares suggested, PTC stresses the fact that the decrease in the access share exceeds the decrease in the revenue share as a result of higher average prices practised by PTC relatively to those of its competitors, or of a different allocation of revenues between voice services and other services by other operators in bundling situations.

In case access or traffic shares were considered, as the company supports, PTC feels that the conclusion on its capacity to internalise CLSU would be different, as results from information from ICP - ANACOM, although they would have to be put into context, given the market evolution.

In this context, PTC criticizes the definition of market share as the basic criterion of the definition of unfair burden, showing doubts based on the analysis of the administrative process as to the certainty and accurateness of the exercise performed by ICP - ANACOM,

namely as regards the choice of revenues as reference for the calculation of the market share and the determination of its value.

In this respect, PTC invokes the internal memos submitted to ICP - ANACOM's MB in 2009, highlighting that it would like to understand why ICP - ANACOM's position shifted - including the issues referred to in the statement of reasons of the internal memo -, penalising PTC. In fact, according to PTC, the mere application of shares measured in terms of traffic would anticipate in at least two years the consideration of CLSU incurred as unfair burden.

Additionally, PTC refers that is cannot accept the lack of accuracy with which ICP - ANACOM handles the market share assessment, invoking differences in the values of market shares in the various versions of the internal memo, stressing the year 2006, in which this divergence exceeds 4%, a fact which is deemed not to be yet explained.

PTC invokes the APC to request additional measures of inquiry, and one of the aspects for which the referred measures are requested concern the calculation of revenue shares. In this respect, PTC refers to the corrections in FTS revenues of other operators, with a significant impact on the value of their market shares, requesting ICP - ANACOM to carry out audits to data on revenue volume for 2006 provided by all operators or directly estimated by the regulator, so as to determine their accuracy and reliability. It is of the opinion that ICP - ANACOM, where necessary, should request all operators to show their volume of FTS revenue for 2006.

PTC declares also that, even if criteria used by ICP - ANACOM were used, which it begrudges, the analysis of the price cap table in the internal memo shows that in 2006 there was a high level of competitive intensity, given that the variation of FTS prices was much higher than that which would result from the imposed price cap. In this respect, it refers that ICP - ANACOM aimed to underestimate the price reduction occurred in 2006, having focused on the fact that the basket prices was not subject in that year to an occasional change, as in average those prices decreased in -1,51% relatively to the preceding year, which indicates the competitive pressure to which is was subject. It refers also that the evolution of FTS overall average prices, which includes the business market, was subject to reductions which were more significant than those established by the price cap.

It also considers that other indicators, such as the number of unbundled loops, show that the company was subject in 2006 to a significant degree of competition.

Another aspect concerns what PTC deems to be the failure to consider relevant aspects for the assessment of the degree of market competition and the unfair nature of CLSU. In this context, it refers that ICP - ANACOM was aware of the need to analyse all indicators which were relevant for the assessment of the definition of unfair burden, not only market share, namely listing those which ICP - ANACOM explicitly referred in the CLSU internal memo, in the versions of 23.03.2009 and 07.07.2009, requesting additional measures intended to calculate and analyse the referred indicators.

Although it declares that it does not challenge the perspective that, as from 2004, the definition of unfair burden should be integrated and consolidated in the light of the degree of competition in the market, PTC believes that it is possible to establish a simple and direct relation between the loss of revenue share and the decrease of the company's capacity to subsidize CLSU internally, vehemently opposing to ICP - ANACOM's position on this point.

PTC thus feels that the determination of the notion of unfair burden should be based on the moment as from which the company was subject to competitive pressures able to hinder or

decrease its capacity to internalise CLSU, and that other factors should be analysed, in addition to the market share, such as the low level of FTS penetration and the high level of fixed-mobile substitution, with the resulting competitive pressure on FTS, and the drop in prices in traffic which generated the largest margins in the FTS scope, all of which impacted the profitability of investments in this service. PTC feels that the DD fail to deal with these issues, which is deemed to be unacceptable as these elements should integrate the analysis.

As regards the fixed-mobile substitution, PTC recalls ICP - ANACOM's statements in its 2005 Communications Situation Report, as well as statements of the Spanish regulator (Comisión del Mercado de las Telecomunicaciones – CMT) in the scope of resolutions on CLSU calculations.

PTC mentions also the issue of the benchmark of CLSU *per capita*, which it refers to be missing from the DD, although the issue was brought up in the memos sent to ICP - ANACOM's MB. PTC considers that this comparison should not be used to determine or to assess the level of CLSU, not to define or constrain the results in Portugal, otherwise unfair conclusions away from the national reality could be reached. According to PTC, the distribution of costs and revenues in a given country could cause substantial differences in the final values of CLSU, and national specificities could also be taken into account, namely the low telephone density (FTS), the higher weight of the mobile sector, the relatively low level of urbanization, the level of demand and the degree of operations in Portugal.

PTC refers that ICP - ANACOM substantially fails to consider the elements consolidating the definition of unfair burden which result Directive 2002/22/EC, as well as from CJEU case-law, although it acknowledges at first that the concept is not consolidated nor defined in the Directive itself (not in the ECL). In this respect, it believes that the CJEU concluded that the determination of unfair burden requires the analysis of the specific characteristics of the USP situation, in the light of a set of factors, not only its market share.

PTC considers that, based on CJEU case-law, it may be concluded that, to assess the existence of unfair burden, the capacity of the USP to bear it must be taken into account, given the degree of competition faced by the company at any one time, and several indicators should be weighted, such as those referred by CJEU, namely the level of equipment, the economic and financial situation and the market share, which in its opinion have been referred to for the purposes of mere illustration. In this scope, the determination of the existence of unfair burden should take the elements referred under consideration, and consider each of the obligations integrating the US, and therefore cannot constitute an abstract assessment.

PTC also refers that BEREC acknowledges that although there is a reasonable level of discretion in the consolidation of the notion of unfair burden, most National Regulatory Authorities (NRA) analyse a reasonable number of factors for the purpose, which in PTC's opinion failed for no reason to be considered by ICP - ANACOM.

Lastly, it considers that only based on CLSU calculations are NRA authorized to definitively declare whether an USP is in fact subject to an "unfair burden", stressing that this assessment must not ignore the value under consideration.

PTC thus definitively criticizes what it considers to be a methodological and serious mistake, as regards the determination of what unfair burden is in abstract, if the total amount of CLSU fails to be calculated.

To support its opinion, it quoted the Judgement of the Commission against Belgium and a Judgement of the CJEU (Base NV v.s. Ministerraad) which refer that it is only on the basis of

the calculation of CLSU that national regulatory authorities may find that an undertaking designated to provide US is in fact subject to an unfair burden.

The company quotes also article 13 of the US Directive, which lays down that "Where, on the basis of the net cost calculation referred to in Article 12, national regulatory authorities find that an undertaking is subject to an unfair burden (...)", arguing also, based on recital 18, that a judgement on whether a given cost falls outside normal commercial standards should only be made after the respective value has been quantified in concrete.

In this regards, PTC mentions also the approaches followed by the Spanish regulator (CMT) and his French counterpart (Autorité de Régulations des Communications Électroniques et des Postes – ARCEP). The Spanish regulator refers in its determinations that after CLSU have been estimated, an assessment of whether those net costs should be deemed as an unfair burden is made. On the other hand, the French regulator refers that it analyses the unfair nature of the burden based on several elements, one of which is CLSU calculation.

PTC further refers that the regulator itself also acknowledged that only on the basis of CLSU calculation could a definitive conclusion be reached on the existence of an unfair burden, as the Regulator included in its internal memo on CLSU, in the versions of 23.03.2009 and 07.07.2009, the relation between audited CLSU and the profit earned by the US provider as one of the indicators to be analysed in the scope of the notion of unfair burden.

PTC considers that its position does not conflict with article 95 of ECL, as it also follows from this provision that the decision on the unfair nature of the burden - determined beforehand - can only be deemed to be concluded after the absolute amount of CLSU has been calculated, as the referred provision lays down that "*Where the NRA considers that the provision of universal service may represent an unfair burden, it shall calculate the net costs of the universal service*", instead of "*Where the NRA considers that the provision of universal service represents an unfair burden on the respective providers, it shall calculate the net costs of the universal service*".

VODAFONE

VODAFONE agrees with the definition of unfair burden, although the company expresses huge doubts about the merits and reasons on the "boundary" chosen by ICP - ANACOM.

Notwithstanding, it is also of the opinion that, for the purpose of a reinforced and substantiated definition of unfair burden, the referred concept should take into account, in addition to the assessment of the degree of market competition, the level of equipment and the USP's economic and financial situation, as has been held in the recent case law of the CJEU.

Specifically as regards market shares, VODAFONE states that it is clear that an 80% market share is sufficient to consider that the market is not competitive and that the USP is able to endogenize CLSU, which are deemed not to constitute an unfair burden. However, it supports that with a market share exceeding 50%, it is doubtful that CLSU may constitute an unfair burden.

According to VODAFONE, market shares exceeding 50%, according to guidelines from the EC and case law, are by themselves evidence of a dominant position, save in exceptional circumstances. Moreover, it refers that EC's concerns on an individual dominant position arise in the case of companies with market shares above 40%.

However, VODAFONE acknowledges that a dominant position does not exclude the possibility of a certain degree of market competition, nor does it entail per se the inability of the USP to endogenize CLSU, thus the analysis must also include additional criteria such as the above mentioned USP's economic and financial situation and the level of equipment.

As regards the market share value for 2007, VODAFONE stresses that this value, which is a reduction relatively to 2006, occurred only due to the spin-off of PT Multimedia, which took place at the end of that year (November). It thus considers that the USP was able, in 2007, to endogenize any CLSU for that year, which should not, in this case, be deemed to be an unfair burden.

VODAFONE agrees with ICP - ANACOM as regards the level of equipment of the USP and highlights the USP's network quality.

As regards the analysis of the USP's economic and financial situation, VODAFONE agrees with the approach put forward, namely in Ireland, which supports that the unfair burden assessment must take into consideration the analysis of criteria such as changes in profitability, financial indicators and prices, adding however that the effect of measures not directly related to the US provision should be removed.

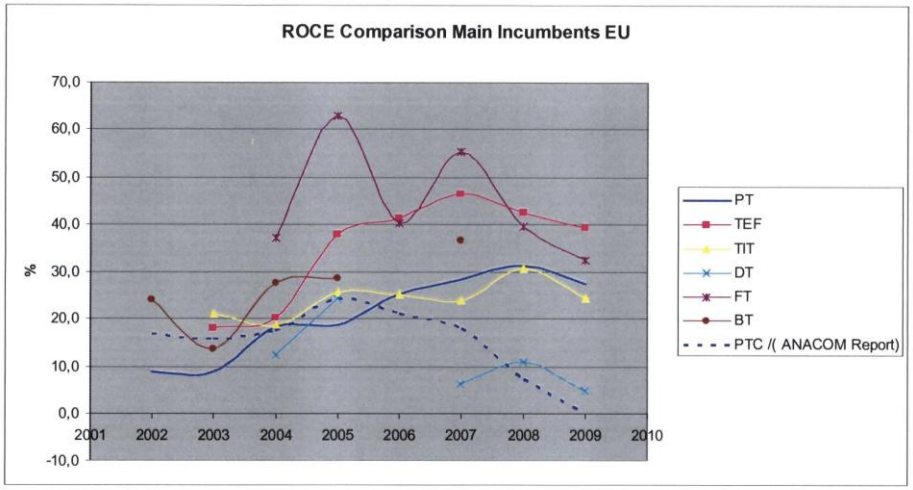
For this purpose, VODAFONE presents a set of indicators on the accounts of PTC for the period between 2005 and 2008, stressing what it deems to be a significant increase of assets, which would have contributed for a ROCE decrease in 2007 and in 2008 (in 2007, the increases of intangible fixed assets stemming mainly from the goodwill concerning PT.COM, PT Prime and PT Corporate, and of financial assets, stemming mainly from the purchase from PT SGPS of ancillary provisions of PT.COM and PT Corporate and supplies of PT Prime; and in 2008, the significant increase of net fixed assets that results from the increase in the value of properties and pipeline network.)

VODAFONE highlights also the impact of the restructure programme and the reduction of human assets in ROI, which are also deemed to have high costs.

VODAFONE considers also that the indicators of PTC's economic and financial situation should be carefully examined within the scope of the accounts of Grupo PT and potential transfers of results and balance between companies, as the overall results of the Grupo PT do not clearly show, in terms of magnitude, that economic and financial indicators, namely ROI and ROCE, fell sharply in 2008 and 2009, as one would expect, given the relevance of PTC in PT's business.

VODAFONE compares also the ROCE of Grupo PT with that of other European groups, as shown below, concluding that the profitability of Grupo PT ranks above some of its counterparts, including operators who are not subject to US obligations, and has registered an evolution which is mainly positive.

Figure 1 – ROCE comparison for EU main incumbents



Source: Bloomberg (Jan 2011)

VODAFONE concludes from this analysis that the reduction of financial indicators, in 2007 and 2008, was due to management factors that do not directly relate to the US provision nor do they result, in any way, from the increase of competition in the provision of services within the US scope, thus it takes the view that these factors should be excluded from the assessment of USP profitability and of the impact of the US provision on the overall results of the company.

VODAFONE thus considers that the USP, in 2007 and 2008 (it holds no information for 2009), enjoyed a healthy economic and financial capacity which enabled it to influence market conditions and to endogenize US burdens, thus there are no grounds for calculating CLSU.

VODAFONE stresses further that only an operator in an excellent economic and financial situation would be able to make extraordinarily expensive investments, namely in fibre optic networks.

ZON

ZON opposes the approach followed by the regulator on the market share value, of 80%, given the absence, in its view, of a supporting reasoning as to the use of the referred value. ZON is of the opinion that the definition of a percentage should be the result of an additional approach to the data obtained via a benchmark. In this respect, it namely refers the need to demonstrate that a market share lower than 80% could entail the generation of net costs.

According to ZON, the blind adoption of a market share percentage seems to be contrary to the CJEU Judgement, quoted in the DD itself, given the reference to an effective analysis of a set of elements characterizing the USP, which, according to ZON, is not consistent with the automaticity of whether a given threshold is reached so as to determine the existence of an unfair burden.

In case ICP - ANACOM intends to maintain the market share as a dominant criterion, ZON proposes an alternative approach which is deemed to reflect, on the one hand, the real possibility of such a burden being endogenized, and, on the other, the characteristics of a

competitive market. ZON's proposal consists in the adoption of a criterion that no unfair burden exists while the USP stays far from the market share of the second operator in 100% or more.

ZON considers that in truly competitive markets, such as the LMS, IAS (Internet access service) or event the Pay-TV Service (PTVS), the described situation, in which the leader's share doubles the market share of the second operator, does not exist. As this situation does occur as regards the FTS, this shows that a competitive maturity does not yet exist, and therefore, the leader should be able to endogenize any CLSU.

Relatively to the period after 2004, ZON stresses the following: i) the increase of competition, as from 2007, is for the most part a result of a spin-off process which led to the Grupo ZON, while the degradation of some of PTC's indicators may be a result of the aggressive commercial launch of "Meo"; in this scope, ZON expresses many doubts on the evolution of PTC's EBITDA margin for 2008 and 2009, as a reduction such as the one presented could be the result of several adjustments, namely the resource to intra-group costs, a situation which deserves a careful analysis; ii) CLSU for 2007-2011 should only be determined after the definition of unfair burden and the methodology for calculating CLSU have stabilized; iii) the retroactive distribution of any CLSU is not very reasonable, as it should be taken into account the fact that business plans of FTS operators did not foresee this cost, nor does the law provide for it.

ZON stresses further, on the issue of retroactivity, that the USP had the opportunity to consider the possible costs of its business plan, thus their distribution would be an extraordinary income in its accounts and an increased cost for other competitors in the market, who would no longer have the possibility to reflect it in their products and commercial offers or to take it into consideration in their commercial and market strategies.

ZON thus considers that any distribution of CLSU should only take place in the year following the one in which the calculation methodology stabilizes, as its retroactive application, in addition to being of doubtful legality, is grossly unfair.

B. ICP-ANACOM's view

First of all, ICP - ANACOM takes note with satisfaction that, in the various responses received, no reservations were expressed as far as the basic concept in its definition of unfair burden is concerned: further to the liberalizing process, it is necessary to identify when did the USP effectively cease to have conditions to endogenize CLSU in its own tariff system.

Opinions are divided - naturally, as some are potential payers and the other a potential receiver - only on the question of how to determine the moment as from which this happens, that is, the approach to be used to determine when did the competitive pressure on the USP prevent it from maintaining a cross-subsidization between profitable customers and unprofitable customers.

However, even in this scope it is possible to establish two aspects common to all answers. It is unanimous that the market share should be deemed as a necessary element to be included in that analysis and all refer that this indicator is not sufficient, and should be completed, according to most respondents, by indicators of a financial nature.

It is precisely on this detail of the approach - which is relevant - that responses vary, namely as to the perimeter of the share calculation (80%, 75%, 40% - 50%), as well as indicators to

use and their interpretation, and it should be stressed that while respondents start from coinciding indicators, they reach opposite conclusions.

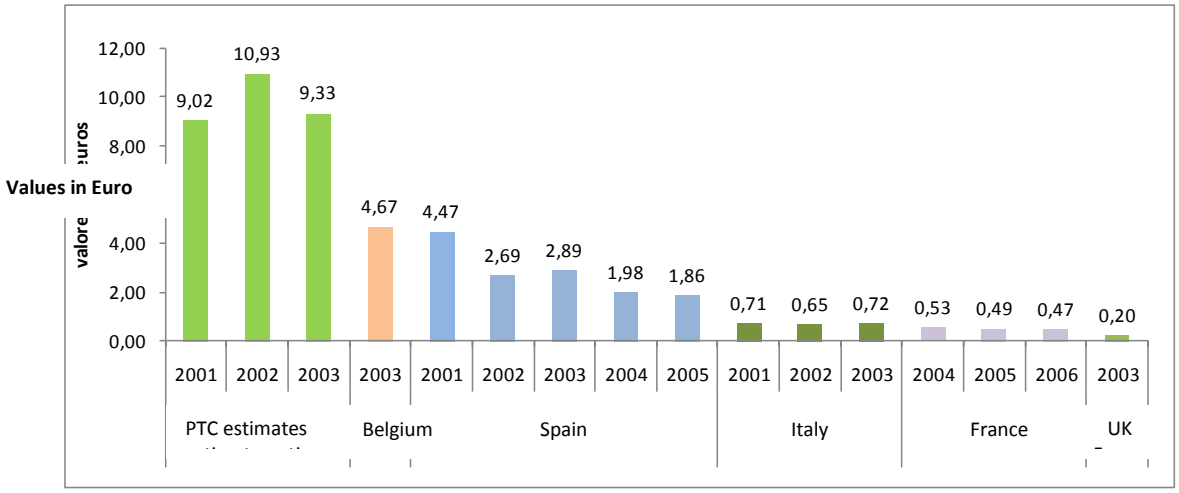
Without prejudice to a detailed analysis which is presented below - in which ICP - ANACOM aims to respond to all suggestions and criticisms - is it relevant at this point to refer some aspects which are deemed to be essential for the decision-making process by this Authority:

- ICP - ANACOM did not ignore, in its DD, the need for a financial analysis of the USP, to which the Authority resorted in order to confirm the latter's capacity to endogenize CLSU, mainly in the period in which market indicators pointed toward slight competitive pressures, through the US tariff system, having been confirmed that the USP had accommodated CLSU. It is not the same, however, to consider that a high level of profitability of the USP, regardless of the level of competition in the market, would justify defining the unfair dimension of CLSU. To do so would imply making a prior judgement on the PSU's maximum level of profitability, and this was never accepted, even in the scope of the US price regulation, as this approach is likely to render inefficiencies. It is easy to understand that the wider the perimeter of the analysis, the more inappropriate would this type of approach be;
- The adoption of a market share as an element required for the identification of the level of competition faced by the USP is common practise in international benchmarking, both as regards general competition issues, and specific sector issues. However, as detailed below, there is a relevant difference between the analysis performed to assess the existence of market power (SMP) - which very often places the relevant market share around 40% - 50% - and the identification of market conditions under which the USP ceases to be able to internalise CLSU via the tariff system. These conditions do not imply, in ICP - ANACOM view, the existence of SMP, and are usually associated to higher market shares, which this Authority identified between the 75% - 80% range;
- Nonetheless, it is important to stress that ICP - ANACOM is of the opinion that the analysis of the market evolution and characteristics for the period under consideration is relevant, in order to assess the consistency of the final decision on the definition of unfair burden, and for this reason the document includes data conducive to this target.

With regard to PTC's references to international comparisons of CLSU per inhabitant, presented by ICP - ANACOM in an internal memo, it should be highlighted that these comparisons, as shown in the graphic below, were included to demonstrate that in the 2001-2003[11] financial years the CLSU values per inhabitant estimated by PTC do not compare at all with equivalent values of other countries, and arguments now presented do not clarify or justify the high differentials identified.

[11] Considering the highest indirect benefit values presented by PTC.

Graphic 1 – Annual CLSU value per inhabitant



Source: Cullen International of 2009.03.18 and data provided by National Regulatory Authorities; population data from Eurostat.

Finally, before presenting a detailed analysis of received contributions, it is important to clarify an issue raised by PTC, related to internal memos of ICP - ANACOM, provided in the course of the administrative process, which contain positions which do not coincide with the position adopted in the DD now under discussion. ICP - ANACOM thus clarifies that the position which binds it is the one adopted and approved by its MB, either directly or through a delegation of powers, and duly published in the Official Gazette. The existence in the administrative process of documents produced by collaborators of ICP - ANACOM or advising bodies - which sometimes are not mentioned in the documents substantiating the decision - do not in any way limit the MB's decision-making process.

B.1 Market shares

As regards the comments to the reference market share provided for in the DD, it should be noted that the assessment of significant market power has a purpose and framework which are different from the evaluation of the definition of unfair burden in the scope of the US. While at SMP level the aim is to identify dominant companies, to prevent and correct abuses of dominant position and market failures in non-competitive markets, the design of US obligations aims for the compliance with social goals.

Accordingly, although both types of analysis may use the same instruments and mechanisms, such as market shares, it is important to bear in mind the different nature of the market and US analysis.

Thus, the specific market share value as from which the USP is considered not to be able to endogenize CLSU, does not necessarily have to coincide with the value as from which that USP is considered to have SMP. In fact, it is considered that the USP may remain as dominant company, in the light of its market share together with other indicators considered in the scope of competition, although it is no longer is able to endogenize CLSU. The opposite, however, does not seem to be plausible.

Moreover, it is not guaranteed, even at the level of competition analysis, and contrary to what some respondents have suggested, that a market share above 50% automatically entails that the company holding it has a dominant position. On this situation, for example,

attention should be drawn to the notification of Denmark's regulator[12] on markets 3 and 4 of the former Commission Recommendation on Relevant Markets[13], which were deemed to be competitive, notwithstanding the fact that the market share of the largest operator was 61%.

It should also be stressed that the existence of SMP does not imply a total absence of competition in the market, but the presence of some market failures which should be corrected. The existence of this level of competition may precisely be the factor which at US level may be preventing the USP from being able to cross-subsidize profitable customers and unprofitable customers (and profitable areas and unprofitable areas), so as to prevent it from being affected overall by the costs of US provision, which would then be internalised.

In the case under consideration, it is considered that the level as from which the USP has a reduced capacity to endogenize CLSU corresponds to a market share of 80%, although a value of 75% was also weighted, on the basis of the practise followed in competition matters. The market share criterion was used in some countries (Austria, Belgium, Croatia, Lithuania), and in none of them a value other than 80% is taken into consideration. It should also be recalled that other values suggested relate exclusively to case law in the scope of the application of competition laws.

According to the document "*BEREC Report on Universal Service – reflections for the future*", of the 27 EU countries, 15 lack any guidelines on the definition of unfair burden. As regards the countries with a defined policy, the document refers as follows, stressing in the case of market shares, the use of the 80% reference value:

- *"costs and revenues, as well as ratio between net cost and revenues;*
- *traffic volumes;*
- *number of subscribers;*
- *financial position of operators;*
- *market shares – in a number of countries, if the USP has over 80% market share, according to revenues, in the market for access provided at a fixed location, the provision of USO is not deemed to entail an unfair burden;*
- *analysis of the retail and wholesale (interconnection) market, with reference to both fixed and mobile services, including the degree of fixed-to-mobile substitution in the universal service context, etc."*

After reassessing issues connected with the market share criterion, ICP - ANACOM considers that the DD must be adjusted so that this criterion is also applied in the situation where the USP is designated following a tendering procedure, as provided for in the ECL, as the grounds for the analysis now carried out, on the capacity to internalise the CLSU in an environment of low competition, remain in the case of that form of designation.

As regards ZON' proposal to consider a market share value of at least double the share of the second operator, which seems justified in very generic terms on account of issues of a competitive nature, it is deemed that its implementation could lead to a paradoxical

[12] Available at http://circa.europa.eu/Public/irc/infso/ecctf/library?l=/danmark/registeredsnotifications/dk20101163-1164&vm=detailed&sb=Title

[13] Available at http://ec.europa.eu/information_society/policy/ecomm/doc/library/recomm_guidelines/relevant_markets/pt1_2003_497.pdf.

situation, in which he USP could have the capacity to endogenize CLSU although it could no longer have SMP. The USP would then have a relatively low market share (for example, below 50%) and its more direct competitors would have shares lower than 20% or 15%. This result is not considered to be acceptable, as under these conditions the USP's inability to endogenize CLSU would be widely acknowledged.

Additionally, ICP - ANACOM restates that the most appropriate basis for the calculation of market shares is the level of revenues associated to the US retail provision. Revenues of a service provision are the indicator which best reflect the global position of a company in a given market. The use of shares based on customers, accesses or traffic, that is, on amounts, fails to grasp the element which is intended to be evaluated, the capacity of the USP to ensure, via the tariffs system, that CLSU are internalized. It is the use of revenues, by assembling information on prices and amounts, which enables this assessment; obviously, the use of amounts - through any of the above-mentioned indicators - would only grasp one of the FTS components included in the US.

In any case, it must be stressed that even if the number of accesses (set up at the request of customers) was considered, conclusions would remain unchanged.

PTC's proposal to calculate market shares on the basis of the company's profits, or as proxy, of profitable customers, is subject to serious limitations. Such a calculation would require a detailed definition of "profitable customer" as well as obtaining from PTC and other market operators information on profitable customers for each of the years considered, the reliability verification of which would be very complex.

Naturally, not all customers of other providers could be considered as profitable, and their level of profitability could vary. Moreover, to consider market shares in terms of margins or profits would imply adopting approaches which are not efficiency-inducing and which have not been considered in USP regulation, namely as regards the respective tariff setting. In fact, since the liberalization of FTS, several situations of negative net results have occurred, as well as exit from the market by some agents, which could imply a larger market share of the USP, measured in terms of margins or profits, and thus overestimate its position in the market. Accordingly, obtaining the referred data is not only complex, but it also involves several incentives for creating distortions without, conversely, any advantages arising from that adoption.

As far as the references to the "economic unit" presented by CABOVISÃO are concerned, as well as other references put forward by OPTIMUS and VODAFONE according to which the USP should be considered as integrated within the respective economic group, it is highlighted that the US provision falls on PTC and not on the Grupo PT. It is thus on the company that the analysis must focus, and it is not clear how can other companies integrating the Grupo PT be held responsible for contributing for CLSU financing limited to the group. These companies are potential funders of these CLSU, however only the scope of any implementation of the fund mentioned in paragraph 2 of article 7 of ECL.

Nevertheless, the consideration of the referred companies and of the respective market shares in this analysis do not alter the conclusions reached, according to which 2007 is the year as from which PTC (or the Grupo PT) no longer presents conditions for internalising any CLSU incurred with the US provision.

In addition, ICP - ANACOM disagrees also with the opinion that services other than FTS should be taken into consideration, as once more, the aim is to assess PTC's capacity to

internalise the costs of US provision, and for this purpose other provisions are not relevant. In fact, the reasons for restricting the analysis to the US provision are the same as those that lead ICP - ANACOM to consider that only the analysis of PTC's economic, financial and competitive situation is appropriate, to the detriment of the situation faced by the Grupo PT.

As regards the type of revenues to be included, it is deemed that only revenues from the retail service provision should be included, and not wholesale revenues generated by PTC. Wholesale revenues, *per se*, do not constitute an indicator of the level of competition at retail level, thus they are not considered to be relevant for the purpose of assessing the USP capacity to endogenize their costs with the US provision.

In any case, it is noted that wholesale revenues, in spite of not being considered in the calculation of market shares for the purpose of determining when should CLSU be deemed to be an unfair burden, are relevant for the purpose of CLSU calculation, as referred to in the respective DD.

It should be stressed, that contrary to what several respondents referred, ICP - ANACOM did more than analyse the USP's market share and discard other analyses, as the Authority took also account of the evolution of indicators on its economic and financial situation and issues related to competition (evaluation not only of the market share, but also evolution in terms of barriers to entry, for example at the level of the evolution of the local loop provision, and of US prices, as well as the effect of the spin-off of PT Multimedia from the Grupo PT), level of equipment and level of prices practised by the USP. This analysis was also useful to prevent situations in which PTC's market share was eroded solely by the loss of profitable customers - as the company argues - as, had this been the case, the company's financial indictors would have been subject to a significant degradation, hindering CLSU from being internalized.

This approach has been laid down in the DD and cannot be ignored, thus it is not correct to state that these criteria have not been taken into account, without prejudice to considering that there could be merits in terms of objectivity, predictability and regulatory certainty in establishing an objective and stable criteria for the definition of the concept of unfair burden.

In these conditions, ICP - ANACOM does not consider appropriate the proposed solutions in which the market share threshold is a necessary but not sufficient condition for declaring CLSU burden to be unfair, or solutions based in mere evaluations of the USP economic and financial capacity, namely as BEREC and the CJEU itself specifically refer to market shares.

It should be noted that, notwithstanding the comments on how the criterion of market shares could be inappropriate and on the need for considering alternative criteria for assessing the definition of unfair burden, all responses received in this context generally point to the maintenance of the market share criterion, although not necessarily with the same values established by ICP - ANACOM, and to the analysis of the USP economic and financial situation, and do not suggest any concrete and objective alternative method of analysis.

It is restated that all referred criteria were analysed by ICP - ANACOM and broadly show that 2007 was the transition year as from which the levels of competition in the market started to be reflected more clearly in the economic and financial indicators of the USP, which would later be reinforced with the spin of PT Multimedia from the Grupo PT, which is referred in the 2007 Annual Report of the Grupo PT as the "*major liberalising act of the telecommunications sector in Portugal*".

This position is consistent with the way the 2008 Annual Report[14] of the Grupo PT refers to the market evolution:

"The 2006-08 triennium was marked by a structural change in the telecommunications market, which was underpinned by the voluntary spin-off of PT Multimedia on 7 November 2007. This was, in fact, the major liberalising act of the telecommunications sector. As such, PT proactively contributed in a structural and decisive manner to the most important measure to increase competition in the sector" (pg. 11).

"Telecommunications context in Portugal

Increasing competitive pressure. The telecommunications sector went through a major transformation in Portugal, with the consolidation of a new operator – Zon Multimedia – and increased commercial aggressiveness from Sonaecom and Vodafone." (pg. 30)

Still on the subject of market share, especially its evolution between 2006 and 2007, VODAFONE's allegation that the reduction verified was due to the spin-off of PT Multimedia, which only occurred at the end of 2007, is rejected, as the impact of this situation in PTC's market share is completely insignificant, being estimated as lower than 0,1%.

As regards PTC's arguments on the changes of market shares assessed in terms of revenues, it is important to present the following clarifications.

All statistic information published by ICP - ANACOM is collected from electronic communications service providers, and it is admitted that it may subsequently be adjusted, as usually safeguarded in all information disclosures made by the regulator.

In this context, any alteration or correction, occurred as a result either of the initiative of the provider or of ICP - ANACOM, is considered under the assumption that providers are acting in good-faith and conveying the most recent and reliable data available to them. It should be referred that this situation, although not an ideal one, as it is acknowledged that it would be preferable if information submitted was correct from the start, allows more accurate data to be obtained.

As regards the situation identified by PTC on the variation of market shares, the alteration of revenue values for 2006 are at issue. These values, for the whole year, were naturally conveyed to ICP - ANACOM in 2007. When ICP - ANACOM analysed the evolution of the indicator on revenues of several providers, for the period between 2004-2007, it considered than in a specific case - Sonaecom - the referred indicator did not show a consistent evolution, and requested clarification on the subject to the provider concerned. These clarifications were requested in 2008, and the reply was received in 2009.

After having received the reply to the clarification request made by ICP - ANACOM, and bearing in mind that the clarifications provided confirmed to need to correct certain values of revenues, which had been wrongly transmitted, ICP - ANACOM altered such values.

As far as this alteration is concerned, it should be mentioned that this situation is perfectly justified, as it was launched on the basis of a request by ICP - ANACOM, further to the verification of inconsistencies in the evolution of an indicator on revenues, thus ICP - ANACOM does not consider it necessary to promote any additional means of evidence, especially audits to information conveyed by the several FTS providers for 2006.

[14] Available at http://www.telecom.pt/InternetResource/PTSite/PT/Canais/Investidores/infofinanceira/Relatorios/relcon1.htm

Moreover, this is not an isolated case, as several providers have in several occasions made alterations to information previously reported. Highlight should be given to the case of companies within the Grupo PT, which have often altered information conveyed to ICP - ANACOM, namely in the following situations:

- FTS revenues for the period 2000-2005

  Further to a clarification request by ICP - ANACOM to PTC in July 2006, on the differential between total FTS revenues submitted by that company in response to the questionnaire of the Statistical Yearbook 2005, and total revenues reported in the scope of quarterly FTS statistics, and an exchange of correspondence, PTC submitted to ICP - ANACOM, in August 2006, the correction of values of revenues for the period at stake.

- Discrepancy between total and partial FTS revenues for 2000-2007

  Further to a clarification request by ICP - ANACOM to PTC in August 2006, on the discrepancy between the sum of quarterly and annual revenues of parts of FTS traffic (2000-2005) and total revenues of calls from the fixed network for all the periods considered, PTC responded in March 2008, having submitted a corrected version of FTS revenues, for the period between 2000 and 2007, in June 2008.

- Incompatibility of FTS revenues defined for 2000-2007 and current definitions

  In April 2008, ICP - ANACOM requested of PTC clarifications on the differential between the values of FTS revenues submitted in March 2008 and values in PT's 2007 Annual Report. Further to several interactions between PTC and this Authority, the former submitted to the latter in June 2008 a new quarterly historic series of FTS revenues, for the period between 2000 and 2007.

- Statistics for ADSL customers in 2007
  Further to a clarification request made by ICP - ANACOM in March 2008, on the differential between the number of ADSL accesses (at retail level) comprised in PT's annual results for 2007, and quarterly statistic information submitted to ICP - ANACOM, PTC submitted in April 2008 an update of statistical information for the 4th quarter of 2007.

B.2 Economic, financial and competitive analysis

As regards comments by OPTIMUS according to which an economic and financial analysis is sufficient to determine the definition of unfair burden, it is hereby clarified that the British regulator (OFCOM) did not follow this approach.

As results from the decision of this regulator[15], the determination on the absence of an unfair burden resulted from the fact that values of US costs and indirect benefits were very close: *"Overall Ofcom's indicative estimates for 2003/4 range between £52-74M for the universal costs and between £59-64M for the benefits. (…) Given the available evidence on costs and benefits, Ofcom's view was that it was unlikely that there was currently an undue financial burden on BT (…)".*

[15] Available at http://stakeholders.ofcom.org.uk/consultations/uso/uso_statement/

Likewise, it is hereby clarified that it seems to follow from the draft decision of the Irish regulator (COMREG)[16], published further to a public consultation, that it does not intend to assess what an unfair burden represents exclusively on the basis of the economic and financial analysis of the USP. As provided for in that document, other factors will also be taken into account, including market shares:

> "*In relation to determining the existence or not of an unfair burden, ComReg will carry out, at a minimum, the following analysis:*
>
> - *If the positive net cost is not relatively small, ComReg will assess whether or not this net cost materially undermines a USP's profitability and/or ability to earn a fair rate of return on its capital employed;*
> - *and If the positive net cost undermines a USP's profitability, assess whether or not such a net cost materially impacts a USP's ability to compete on equal terms with competitors going forward. (…)*
>
> *ComReg will use the following criteria, statically and dynamically, to determine whether or not a net cost burden is actually unfair:*
>
> - *Changes in profitability, including an understanding of where a USP generates most of its profits over time.*
> - *Changes in accounting profits and related financial measures e.g. earnings before interest, tax, depreciation and amortisation ("EBITDA") analysis.*
> - *Changes in direct USO net cost, if any, over time.*
> - *Estimates of average level of cross-subsidy between classes of more or less separately accounted for services, and changes in these over time.*
> - *Changes in prices over time.*
> - *Changes in market share and/or changes in related markets.*
> - *Market entry barriers.*"

Still on the issue of the analysis of the economic and financial situation, ICP - ANACOM is of the opinion that some of the comparisons with foreign operators are not relevant, as they include economic groups with very different business dealings, some of which without mobile operations and other with international operators of a size which does not compare to the USP. It is acknowledged, however, that cases presented in which comparisons are limited to fixed service operations confirm that PTC, without considering any exogenous CLSU compensation, presents equivalent margins to its European counterparts, which supports the argument in the DD. For example, 2006 margins for Belgacom, Deutsche Telekom, Telefonica and Eircom were between 30% and 40%, while PTC's margin was 40.7%, according to information submitted by OPTIMUS.

Relatively to PTC comments on comparisons made in the DD, it is clarified that they were used only to evidence that PTC compares favourably with its most direct competitors and also with mobile operators, which while not integrating the same relevant market, integrate a sector which is deemed to be very competitive.

[16] Available at http://www.comreg.ie/_fileupload/publications/ComReg1115.pdf

On VODAFONE's reference according to which the decrease of PTC's ROCE and ROI was due to an increase of assets, it is the Authority's opinion that while this information is relevant to assess the indicator (namely for the purpose of comparison with mobile operators), it is not decisive for the purpose of making a change in the overall assessment of the matter by ICP - ANACOM, as these indicators have a subsidiary character in the scope of the final decision-making process.

On PTC's comments that the decrease of FTS prices was higher than the one which results from the analysis made to assess the compliance with the price cap, ICP - ANACOM recalls that this decrease was an isolated incident, within the scope of a tariff restructure, and was not consolidated in the subsequent year, thus the analysis made on the subject remains correct, to conclude that the decrease of FTS prices did not exceed that which would result from the imposed price cap.

Specifically on comments on the decrease of traffic prices which PTC refers to be the major generators of margins in the FTS (assuming that PTC refers to regional and national traffic, as illustrated in the graphic in page 13 of its response), it must be clarified that PTC carried out such a tariff rebalancing because previously a cross-subsidization existed between the various communication services (local, national, regional and international), and between the latter and the set-up service and the monthly charge. Some of the services under consideration had prices which largely exceeded costs, thus subsidizing remaining services which were charged below costs or whose margins were very low, which failed to comply with the cost-orientation of prices which PTC was bound to observe, pursuant to the FTS Operation Regulation, approved by Decree-Law number 474/99, of 8 of November[17], as company with SMP in the market of fixed telephone networks and/or FTS. In this context, the tariff rebalancing, which started long before there were any effective competitive pressures, should be regarded in the context of the need to correct the referred situation.

Regarding the justification presented by PTC that the level of unbundled loops verified in 2006 showed that the company was by then subject already to a significant degree of competition, it is clarified that although in that year an increase did occur, it was only in 2007 and in subsequent years that this evolution was consolidated, reaching values around 10% relatively to the total of USP loops, 2007 being the year in which the highest increase occurred.

On the references on a possible fixed-mobile substitution, ICP - ANACOM refers to the market analysis the Authority has carried out, namely to the non-integration of the LMS in the relevant FTS market.

Given that this Authority made an analysis of PTC's economic and financial situation, ICP - ANACOM deems it unnecessary to carry out additional means of inquiry to calculate and analyse indicators listed in the internal memo on CLSU, in the versions of 23.03.2009 and 07.07.2009. For the most part, these indicators can be subsumed under the analysis already carried out; anyway, the memo under consideration, in its various versions, shows the internal discussion within the Authority, and was not subject to any decision, thus considerations/analysis which integrate it do not have any mandatory value.

B.3 Minimum CLSU value that justifies financing

[17] Available at http://www.anacom.pt/render.jsp?contentId=983504

Bearing in mind the comment made by OPTIMUS on the need to substantiate the minimum threshold as from which the financing of CLSU is justified, namely on the basis of the specific situation of Portugal, ICP - ANACOM made a comparison, based on purchasing power parities[18], with the value which was estimated in France for this purpose, of EUR 4 million. As a result, it is estimated that the equivalent value for Portugal ranges EUR 2.5 million.

Accordingly, the minimum amount for activating the CLSU financing fund provided for in paragraph 2 of article 97 of ECL (2.5 million Euro) was determined based on a reasonable balance between the costs of establishing and implementing a compensation fund on the basis of the experience of other countries, and the potential impact of their compensation in PTC's economy. In the light of the above, it is deemed that there are no grounds for developing studies on this issue and to consequently delay the current decision process.

In this respect, it should be stressed that no alternative values for the proposed threshold were put forward in this consultation, nor alternative methodologies for calculating it were suggested.

Having reassessed issues related to the minimum value as from which financing is deemed to be justified, ICP - ANACOM takes the view that the DD should be corrected, so that the criterion is also applied in situations where the USP is designated following a tendering procedure, as provided for in the ECL, as grounds for this analysis, which justify that it would be inappropriate to activate the funding in case CLSU were very low, remain valid in the scope of that method of designation.

B.4. Definition of unfair burden prior to the calculation of CLSU

ICP - ANACOM disagrees with PTC's position according to which it would be a methodological mistake to abstractly define the notion of unfair burden without calculating CLSU beforehand.

In this respect, and first of all, ICP - ANACOM stresses that the sequential approach adopted in the DD has always been taken by PTC itself, thus the position now taken by the company comes as a surprise to this Authority. In fact, this approach was even supported by PTC, as an element structuring the process tending to the determination of CLSU. In this respect, vide PTC's letter submitted to ICP - ANACOM on 05.07.2007 (included in this process in pages 849 to 851), in which that company refers that "*the entry into force of Law number 5/2004, of 10 February (REGICOM) transferred the burden of boosting the universal service financing to ICP - ANACOM, on whom, under article 95, it is incumbent to define the notion of "unfair burden", to establish the terms which rule its determination and, finally, to calculate the net costs of the universal service obligations*" (emphasis added).

In the same letter, PTC goes on to criticise ICP - ANACOM for not having defined yet the notion of "*unfair burden*", referring that this situation inflicts great harm on PTC, "*as on it depends both the calculation of net costs of the universal service and the establishment of a possible mechanism for financing those costs, pursuant to articles 96 and 97 of REGICOM, respectively*". PTC concludes urging ICP - ANACOM to define the concept "*so that subsequently the net costs borne by PTC with the universal service provision for the period 2004-2006 can be calculated*" (emphasis added).

[18] For the purpose, the value was adjusted based on the gross domestic product per capita in purchasing power parities for both countries (estimated by IMF for 2010).

In the letter submitted on 21.12.2007 (pages 1097 to 1126 of the process) PTC insists again on this approach, invoking the need to define the notion of unfair burden so that subsequently CLSU are calculated - "*PTC requested ICP - ANACOM to provide information on measures taken to comply with determinations laid down in article 95 of ECL, bearing in mind that the entry into force of ECL transferred the burden of boosting the universal service financing to ICP - ANACOM, on whom it is incumbent to define the notion of "unfair burden", to establish the terms which rule its determination and, finally, to calculate the net costs of the universal service obligations (for the period as from 2004)*".

Moreover, PTC brought in 15.05.2008 a special administrative action before the Lisbon Administrative Court, referring that ICP - ANACOM must comply with obligations arising from ECL and define the notion of unfair burden.

In this scope, the following quote from the referred action brought by PTC must be highlighted: "*It is thus a fact that the ECL has operated a very relevant modification at the level of the US financing procedure, especially (but not only) at the level of the initiative for starting this procedure, as until the entry into force of ECL, it was incumbent on the US provider - PTC - to calculate the costs resulting from the US, and to submit them subsequently to ICP - ANACOM, who was responsible for auditing and approving them. However, after the entry into force of the ECL, it is necessary, first of all, that ICP - ANACOM defines the notion of "unfair burden", and later, if the US provision is deemed to be an unfair burden, the Authority must calculate the net costs of the US obligations, so that PTC may request compensation from the Government, as provided for in the law*."

In the light of the above, it is highly unusual that PTC, after learning about the definition of unfair burden laid down in the DD, has altered the position it has always conveyed to ICP - ANACOM in this scope, as well as the one invoked in the special administrative action mentioned above.

PTC's reasoning in this scope cannot be accepted.

The reference to the Judgement of the CJEU in the process European Commission v.s. Kingdom of Belgium is taken out of context and leads to a conclusion which is not necessarily the one which the Court intended.

The judgement given by the CJEU considers contrary to the US Directive the provision laid down in the Belgium Law which determines *a priori* that net costs arising from the obligation to apply social tariffs represent an unfair burden which must entail compensation (vd. recital number 23 of the Judgement of the European Commission v.s. Kingdom of Belgium).

However, it cannot be inferred from this that NRA must calculate CLSU in all circumstances.

In fact, in this Judgement the CJEU acknowledges that it is important to determine what "unfair burden" means, clarifying in recital number 50, that "*In the absence of any specific provision in this regard in Directive 2002/22, it falls to the national regulatory authority to lay down general and objective criteria which make it possible to determine the thresholds beyond which – taking account of the characteristics mentioned in the preceding paragraph –* [characteristics of the company on which this burden falls] *a burden may be regarded as unfair. However, the fact remains that the authority cannot find that the burden of providing universal service is unfair, for the purpose of Article 13 of the directive, unless it carries out an individual assessment of the situation of each undertaking concerned in the light of those criteria*" (emphasis added).

It follows from the quoted Judgement that the criterion defined for assessing the existence of an unfair burden affects the analysis to be made by the NRA to reach a conclusion on whether the US provision is an unfair burden for the designated USP. In the case of the DD submitted to consultation, the criterion established - FTS market share - does not require the second step of verification of burdens effectively incurred with the US provision.

In the light of this statement, it is clear that NRA are not necessarily bound to calculate CLSU to declare that, for a given company, that provision represents an unfair burden. What in fact, under the Judgement of the CJEU, NRA must do, after defining - in a general and abstract manner - what unfair burden means, is to verify whether the provision constitutes an unfair burden, analysing the actual situation of each company designated to provide the US in the light of criteria defined.

As such, and as results from that Judgement, a burden may be deemed not to be unfair even if the absolute amount of CLSU has not been calculated.

The Judgement given in the Base NV v.s. Ministerraad proceedings points in the same direction. The CJEU refers in recital 42 of that Judgement that "...*the unfair burden which must be found to exist by the national regulatory authority before any compensation is paid is a burden which, for each undertaking concerned, is excessive in view of the undertaking's ability to bear it, account being taken of all the undertaking's own characteristics, in particular the quality of its equipment, its economic and financial situation and its market share*" (emphasis added).

Recital 43 of that Judgement (just like recital 50 of the Judgement mentioned above) adds that "...*In the absence of any specific provision in this regard in Directive 2002/22, it falls to the national regulatory authority to lay down general and objective criteria which make it possible to determine the thresholds beyond which – taking account of the characteristics mentioned in the preceding paragraph – a burden may be regarded as unfair. However, the fact remains that the authority cannot find that the burden of providing universal service is unfair, for the purpose of Article 13 of the directive, unless it carries out an individual assessment of the situation of each undertaking concerned in the light of those criteria*" (emphasis added).

The actual quantification of CLSU is thus not required. This quantification must be carried out, as provided for in recital number 44 of that Judgement "...*If the national regulatory authority finds that one or more undertakings designated as providers of universal service are subject to an unfair burden or if one or more of them requests compensation, it then falls to the Member State to establish the necessary mechanisms to that end, in accordance with Article 13(1)(a) of Directive 2002/22, from which it is also clear that that compensation must coincide with the net costs, as calculated under Article 12 of the directive*".

This is the order, in fact, which follows from article 95 of ECL. First, the NRA defines what unfair burden means (paragraph 2 of article 95), and only where it deems the US to constitute an unfair burden, should the Authority then calculate CLSU (paragraph 1 of article 95).

In the actual case under consideration, ICP - ANACOM concluded in its DD, based on all data referred therein, covering market information and data on economic and financial performance of the USP without any exogenous CLSU financing, that for the years up to 2006, inclusive, the US did not constitute an unfair burden. And to reach this conclusion, it was not necessary to be provided with information on the dimension of possible CLSU, as the

information collected was enough to demonstrate that PTC, as USP, benefited until that year of market conditions to internalize any CLSU, without any excessive harm for its economic and financial performance.

It is admitted, for the sake of argument, that, in a different situation, another type of approached could have been adopted, of a circular nature, determining the notion of unfair burden on the basis of the comparison of CLSU with the volume of the company's sales or margins, which would imply that such a definition could only be concluded after CLSU were calculated. However, in the current case, ICP - ANACOM took the view, based on the information available at the time and the one which was now been brought to its attention, that the market characteristics in Portugal and the economic and financial performance of the USP for the period under consideration constitutes a situation in which the US provision, in absolute terms, is not an unfair burden.

Consequently, the approach suggested by PTC, to somewhat establish a temporary definition of unfair burden, which could be re-examined or redefined after the determination of CLSU, is not deemed to be necessary not appropriate.

B.5 Retroactivity and schedule

ICP - ANACOM does not accept the argument that the definition of the notion of unfair burden and CLSU calculation in a moment subsequent to its application (in this case to previous years, up to 2007 inclusive) are grounds for not applying it, as supported by ZON. In fact, the application of the notion of unfair burden and a possible CLSU financing are explicitly provided for in the ECL, in articles 95 to 97, and their applicability is widely acknowledged, thus providers of publicly available electronic communications networks and services should have taken them in due account when establishing the respective business plans.

ICP - ANACOM does not find also any legal grounds for postponing for future years the determination of CLSU and the respective financing. Therefore, as assumptions for applying a methodology have been laid down in the law, the fact that it can only now be defined does not imply its retroactivity. Whatever the methodology approved by ICP - ANACOM, it must comply with those rules under penalty of infringing the law.

3.2. Specific reference to net costs for 2001-2003

A. Responses received

PTC

PTC states it strongly disagrees with the position taken by ICP - ANACOM on this subject, especially with point 3 of the DD on the application of the notion of unfair burden, which according to PTC is contrary to the letter and to the "*ratio*" of the law. The company refers, notwithstanding, that it will submit to ICP - ANACOM's approval the demonstration of negative margins of the US operation for the period 2001-2003, calculated according to the methodology to be approved by the regulator, taking the view that such margins cannot fail to be compensated, in the light of legal and contractual rules in force in that period.

PTC refers that any conclusion on US financing matters must take into consideration that the company is the USP under the concession contract approved by Decree-Law number 40/95,

of 15 February and by Decree-Law number 31/2003, of 17 February, and finds it odd that the DD fails to refer this issue. The current concession contract, is adds, refers to the law - Decree-Law number 458/99, up to February 2004, and ECL after that date - only as regards the regulation of the way to compensate negative operating margins resulting from the US provision.

According to PTC, Decree-Law number 458/99 does not make CLSU financing dependent on the existence of unfair burden, and thus does not require the regulator to define it or to verify it, as according to that statutory instrument the notion of "unfair burden" used in Directive 97/33/EC corresponds to the existence of negative margins resulting from the US provision, seeking to harmonise the new legal regime with the agreement established between the State and PTC, consolidating this notion in the framework of the room for manoeuvre which PTC feels the Directive confers to Member States.

According to PTC, it thus follows, for the period under consideration, that where any negative margins result from the US provision, the USP must be compensated pursuant to article 12, paragraph 1, of Decree-Law 458/99, and no consideration on the "fairness" or "unfairness" of the burden entailed by those margins is required.

PTC is thus of the opinion that ICP - ANACOM is wrong in both arguments invoked in the DD in this respect, which fail, in its view, to be supported on the letter of the law. For PTC, the reference in the law (article 14 of Decree-Law number 458/99) to the term "where justified" does not refer to the existence of an "unfair burden", but to the existence of negative margins, as it is obvious that if such margins are absent, the establishment of a compensation fund is not justified.

PTC also considers that ICP - ANACOM is wrong to invoke the principle of conforming interpretation, applicable in the scope of the transposition of Directives, according to which national provisions must be interpreted according to the Community provision intended to be transposed. According to PTC, such a principle should only be invoked in case of an interpretative doubt or legislative gap which should be solved through an interpretation which most "conforms" to the Directive. PTC is of the opinion that no doubt is at issue here, this being a situation in which the legislator has decided to integrate the notion of unfair burden in the scope of the existence of negative margins of the US provision.

PTC refers that it is unaware of the difficulties invoked by the regulator (in an internal memo approved in 2009[19]) on the complexity of a possible distribution of CLSU from 2001 to 2003, in case the compensation requested by PTC was accepted; however, the company stresses that it should not be penalized on that account, as these difficulties are a result of the regulator's delay to decide on this matter.

PTC also considers that, while Decree-Law number 458/99 was in force, the existence of an "unfair burden" was not a requirement for granting the USP an appropriate compensation for CLSU, thus the regime in ECL should not be applied to the years that preceded the entry in force of that statutory instrument, as this would imply a retroactive application of ECL, thus illegal, for violation of article 12 of the Civil Code.

[19] This concerns an internal memo of ICP - ANACOM, to which PTC had access in the scope of the consultation it made to the administrative process, however this document was not subject to any decision on the part of ICP - ANACOM's MB.

VODAFONE

VODAFONE considers that subsequently to 2001-2003, the USP showed a healthy economic and financial capacity, which allowed it to influence market conditions in order to endogenize US burdens. Consequently, also as far as the 2001-2003 period is concerned, the company considers that any negative margins resulting from the US operation do not constitute an unfair burden for the USP.

ZON

ZON decided not to deliver an opinion on CLSU for the 2001-2003 period as it lacks the proper elements to assess the results.

B. ICP-ANACOM's view

The regulatory framework evolution presented by PTC tries to suggest that a right to compensation exists, in the scope of the US, which exceeds the provisions in the national law and in the European regulatory framework, and that such right arises from the Concession Contract.

ICP - ANACOM does not share this point of view and deems it not to be acceptable in the light of the legal framework.

In fact, as PTC itself acknowledges, "*the current Concession Contract simply refers to the law - that is, to Decree-Law number 458/ 99, up to February 2004, and ECL after that date - only as regards the regulation of the way to compensate negative operating margins resulting from the US provision*".

Consequently, it is in the interpretation of Decree-Law number 458/99 that the regime applicable to the financing must be sought, not in a provision of a concession contract which "*simply refers to the law*".

In the scope of the interpretation of this statutory instrument, attention should be drawn to PTC's own statements as regards the regulation of this issue by Decree-Law number 458/99: in fact, the company refers that its provisions did not diverge from the agreement concluded between PTC and the State, "*except as strictly required by the above-mentioned Directive* [97/33]".

However, in ICP - ANACOM's opinion, the referred Directive required compensation only for the unfair burden, as results plainly from its article 5. A contrary position would imply the acknowledgement of an a priori right to compensation, without any judgement on the fairness or unfairness of the burden, which not only is a solution clearly in contradiction with Community law, but it also fails to be supported in any provision of the concession contract, which "*simply refers to the law and the latter discarded the concession contract regime as strictly required by the above-mentioned Directive* [97/33]".

Accordingly, and opposite to what PTC has supported, nor the concession contract includes a solution which is contrary to the Directive, nor Decree-Law number 458/99 could have laid down a right to compensation of negative margins independent from the notion of unfair burden, as that margin of discretion was not conferred by the directive on the legislator, and in the present case that discretion fails also to exist for whoever interprets and applies the provision.

As that company refers on pages 49 and 50 of its response, with the publication of Decree-Law number 458/99, articles 25 and 32 of the bases of concession/concession contract were repealed «... *given that in the light of the Directive almost all forms of compensation of US costs provided for in that contractual provision* [article 25] *were no longer permissible (except for the compensation fund). Article 32 of that contract was repealed as forms of compensation of US costs started to be regulated by Decree-Law number 458/99*...». As legislative amendments arose from the need to make the regime in force in Portugal consistent with the requirements set out in Directive 97/33/EC, it is wrong to interpret the provisions of the statutory instrument transposing the Directive by contradicting the letter and spirit intended by the Community legislator as regards the US financing regime. It is under this basic assumption that article 14 of Decree-Law number 458/99 must be read and interpreted, and its wording, contrary to arguments alleged by PTC, justifies an interpretation according to Community law, otherwise it would not be possible to understand the meaning of the condition resulting from the expression "where appropriate" included in paragraph 1 of article 14.

In fact, that reference cannot be deemed to have the meaning intended by PTC - «"*where justified" does not refer (...) to the existence of an "unfair burden" (...) but to the existence of negative margins...*». Based on this interpretation that requirements would be useless as the solution provided for in this article applies only in case negative margins exist, as results from the restriction made at the beginning of the provision, according to which what is laid down therein is "*For the purposes of paragraph 1 of article 12....*», that is, for the purpose of compensation of negative margins resulting from the US provision, which naturally means they exist. In other words, article 14 of Decree-Law number 458/99 applies only where there are negative margins in the US provision - this is the meaning which may be inferred from the beginning of this provision, which only applies «f*or the purposes of paragraph 1 of article 12*», that is, where there are negative margins which determine the US compensation.

It follows from the above that it is necessary to clarify what this expression means, which can only be achieved by using an interpretation consistent with the provision at its origin.

The condition in paragraph 1 of article 14 of Decree-Law number 458/99 becomes useful in case account is taken of paragraph 4 of article 5 of Directive 97/33/EC, which clearly in parallel with the national provision, lays down that «*where justified on the basis of the net cost calculation referred to in paragraph 3 (...) national regulatory authorities shall determine whether a mechanism for sharing the net cost of universal service obligations is justified*». The net cost calculation referred to in paragraph 3 of that article of the Directive aims for the determination of the burden, if any, which the US provision represents for the bodies bound to ensure it. In case this burden is unfair, CLSU must be shared with other organizations operating public telecommunications networks and/or publicly available voice telephony services, as provided for in paragraph 1 of article 5 of this Directive.

This is the only meaning which can be rendered to the expression "where justified" and the sole reading which paragraph 1 of article 14 of Decree-Law number 458/99 can have - CLSU may only be borne by the compensation fund where they represent an unfair burden for the USP. The interpretation according to which the compensation fund should be activated for the payment of any negative margins resulting from the US provision is totally inconsistent with the regime laid down in Directive 97/33/EC, transposed by Decree-Law number 458/99. The imposition of a US financing obligation which does not constitute an unfair burden will very legitimately be challenged by bodies requested to participate in that fund, as it is incompatible with Community law. The text of the Directive leaves no room for discretion to

the legislator of Members States to define *a priori* whether the US provision represents an unfair burden for the body charged with ensuring it. The procedure provided for in article 5 of the Directive clearly requires the verification of whether that unfair burden exists, which can only be assessed based on a specific analysis of each company and the context in which the service was provided. Failure to carry out this assessment will render it impossible to conclude whether the burden arising from the US provision is unfair and justifies compensation (the need for this exam considering the actual situation is in fact evidenced in the Judgements of the CJEU which were later given in the cases European Commission v.s. Kingdom of Belgium and Base NV v.s. Ministerraad).

It clearly follows from the foregoing that it is necessary to reach a conclusion on the terms on which the compliance with US obligations may constitute an unfair burden for the organizations responsible for providing them, as this is a condition for its financing. As such, and as the verification of a condition on which the financing of costs arising from the US provision is at issue, the regulator cannot fail to give a concrete meaning to the notion of unfair burden. Consequently, the conclusion that the solution supported by ICP - ANACOM entails a retroactive application of ECL cannot be accepted as well. The condition for US financing had been clearly laid down in Directive 97/33/EC, and according to the above-mentioned clarifications, it is the only proviso which can be inferred, via a consistent interpretation, from Decree-Law number 458/99. The notified DD and the final decision to be taken are thus not illegal.

Moreover, it should be stressed that even if it was understood that the burden with the US provision could be compensated by mechanisms other that the compensation fund, a hypothesis which PTC concludes to be inapplicable as results from all the arguments put forward by that company, the compensation of such costs where they do not represent an unfair burden for PTC or companies ensuring the US provision would always be disputed. Admitting this hypothesis, which the Authority begrudges, would imply acknowledging the possibility of an additional financing entailing the transfer from tax payers to PTC, the legality of which is clearly doubtful.

As regards the issue of the difficulties referred to in the 2009 memo on the complexity of a possible distribution of CLSU, it is a fact which did not guide the action or the objectives of ICP - ANACOM.

4. Specific comments – Methodology for calculating CLSU

4.1. General principles

A. Responses received

CABOVISÃO

CABOVISÃO takes the view that the methodology proposed by ICP - ANACOM is generally quite clear, although it could be criticised for being vague and not sufficiently characterized, which could lead to an abusive use.

It considers it appropriate to evaluate costs and assets of the USP at historical costs, which effectively reflect the actual cost of US provision, thus the approach used by the ICP - ANACOM has the full support of CABOVISÃO.

ONITELECOM

ONITELECOM agrees in abstract with the methodology for calculating costs and benefits associated to the US provision.

It further is of the opinion that, like costs, benefits should also be added up, even as regards components in which they exceed costs.

OPTIMUS

OPTIMUS is also of the opinion that costs and assets of the USP should be valued at historical costs.

This approach minimizes uncertainties as regards their determination, as they correspond to costs effectively registered and which support information conveyed to the market, and it is facilitated by information already existent in PTC's cost accounting system (CAS). Without prejudice, OPTIMUS stresses that these costs could include potential inefficiencies resulting from past decisions, thus they should be adjusted to remove such inefficiencies where the latter clearly occur.

It is also stressed that costs arising from the voice service provision should be isolated, as PTC may have invested in accesses intended for the US provision which enable the provision of other services, and it is necessary to avoid that, in case of cross-subsidization, the USP is compensated for the provision of services other that those included in the US scope.

OPTIMUS further refers that the use of running costs would also be a plausible alternative, but in this case, they would have to be based on an efficient operator, and not in the effective cost structure of the USP. It would thus be necessary to define and estimate what an efficient operator is within the scope of the US provision. This approach, according to OPTIMUS, would however compromise the principles of transparency and of reasonableness which must guide CLSU calculation, thus the running costs option should be abandoned in favour of an approach based on historical costs, adjusted according to the evidenced inefficiencies, if any.

PTC

At the level of general principles, PTC refers that the methodology for calculating CLSU must clearly reflect a hypothetical scenario in which the operator would find itself had it never taken up the burden of providing the US, a different reality from the one in which the operator ceases to provide the US, on account of network investments which entail sunk costs.

The referred hypothetical scenario would comprise, according to PTC, a long-term analysis, where most costs incurred would be avoidable, this being the perspective which in its opinion should be applied when calculating CLSU. Moreover, PTC refers that in this scenario it would be provided with a set of strategic options which would grant it higher profits than those earned in the real scenario, selecting and progressing in profitable areas, segregating customers in the light of criteria of economic rationality and promoting more flexible tariffs, which do not require equalisation.

According to PTC, CLSU calculation should reflect the difference between both these scenarios, which fails to be duly addressed in the DD under consideration.

PTC considers that the financial costs associated to the delay in the payment of compensation cannot but be taken into consideration as regards the whole CLSU to be calculated, and for the various years of delay in the payment of compensation for the US provision.

PTC agrees with the geographical division proposed by ICP - ANACOM, based on the Main Distribution Frame (MDF) as unit reference, welcoming the fact that the regulator seems to have abandoned the reservations it once had on this matter.

PTC strongly disagrees with evaluating costs and assets at historical costs, which is deemed not to be sufficiently supported in terms of economic theory, criticizing the alleged alteration of position by ICP - ANACOM in this respect. It thus invokes the Public Consultation on Costing Models, carried out in 2005, in which ICP - ANACOM opted for using running costs instead of historical costs, stressing, among others, the following passages of the public consultation document: "*the use of this* [historical] *cost base does not create incentives for economic efficiency, nor does it anticipate future investments (...). In fact, historical costs, by not embodying factors such as technological evolution or perspectives of change in demand and prices, are able to distort regulation decisions*".

PTC also invokes an internal document of ICP - ANACOM on estimates presented by PTC in 2006, concerning 2001, 2002 and 2003[20], the Decision on the Obligation to Control Prices in the Wholesale Markets for Voice Call Termination on Individual Mobile Networks, of May 2010, and reservations in this respect stated by WIK in its report entitled "Methodology for calculating the net cost of PTC's universal service obligation (USO) and the definition of an «excessive burden»", which is comprised in the administrative file.

To further support its position, PTC invokes the following sentence from the prior hearing report of 30.01.2008: "*although the available accounting system is based on historical costs, it could make sense to complement the analysis taking into consideration criteria of efficiency, as it may be considered that other market agents should not have to bear any inefficiency on the part of PTC. This matter should be further reflected in the scope of the definition of the methodology for calculating CLSU referred to in the DD*".

Based on these considerations, as well as on criticisms made by ICP - ANACOM on CLSU estimates for the period 2001-2003, PTC adds that it decided to radically adjust, at great cost, the methodology for calculating CLSU according to a running cost pattern, expecting this methodology to be considered appropriate and accepted by the Regulatory Authority. It refers also that at a meeting with ICP - ANACOM, in September 2009, the methodology it was working on was presented, and at no time did ICP - ANACOM cast doubt upon this perspective, having inclusively requested some clarifications by fax (02.10.2009), and only in December that year did the Authority question that perspective.

PTC considers that the alleged change of opinion of ICP - ANACOM is incomprehensible and fails to comply with the principle of regulatory predictability.

PTC believes, in an economic perspective, and in the context of the exercise of regulatory powers, that the right method for valuing assets is based on running costs. It also refers that the economic value of assets is the basis generally used in commercial operations, allowing investors to be remunerated on the basis of the current value of assets, determined by its

[20] This regards internal information of ICP - ANACOM, comprised in the administrative file, however this document was not subject to any decision on the part of ICP - ANACOM's MB.

use and resulting benefits, taking into account that prices based on running costs guarantee the operator the capacity to reinvest. In this respect, it stresses that as a private company, it manages its activity aiming to maximize profit and not merely to recover investments it could have been forced to do for being the USP.

In this context, it maintains that the State, by charging a private company to ensure a basic obligation for which it is responsible, should respect the rights and interests of the respective shareholders. In its opinion, this would only be ensured by valuing assets and resources at running costs, so as to reflect the respective market value. A different approach would mean, in its view, that ICP - ANACOM admitted PTC's management to be fundamentally built on social assumptions, rather than on economic ones.

PTC invokes also the references to economic efficiency criteria mentioned in the two referred public consultations, of 2005 and 2008, and in ECL, which lays down (article 96, paragraph 1a)) that, where the calculation of CLSU is to be undertaken, "all means to ensure appropriate incentives so that providers comply with universal service obligations in a cost efficient manner shall be considered", to identify an alleged contradiction in the regulator's performance.

PTC stresses also that the use of the running cost approach is a recommended practise which is commonly resorted to at international level for regulation purposes, referring namely documents produced by BEREC and examples of other NRAs. It further declares that the use of historical costs is very harmful to PTC as the amount of CLSU is substantially reduced.

Finally, PTC refers that the regulator applies double standards, as it proposes, for the assessment of the notion of unfair burden, using the values of PTC's revenue shares, which integrate variables that take into account the economic value of services provided by PTC to its customers, while for the calculation of CLSU, historical values are used, which have nothing to do with the economic valuation of services of a company or of assets used for their provision.

VODAFONE

VODAFONE is of the opinion that, although ICP - ANACOM refers that the USP is bound to accept all customers, the US Directive and the ECL refer to the granting of reasonable requests, thus the scope of CLSU should cover only costs related to these reasonable requests, not to all of them, taking into account the financial capacity of customers voice service.

As regards the use of historical costs, VODAFONE refers that the impact of certain accounting procedures should be excluded from these costs, among which those related to the re-evaluation of assets, namely the most relevant ones, such as the one carried out in 2008, which significantly increased costs and which have been previously considered in the economy of the USP, avoiding a double compensation of costs not incurred. As regards the referred re-evaluation occurred in 2008, VODAFONE states that, although it accepts that the basic network's value may exceed the accounting records, that re-evaluation should have taken place at the time of the purchase so that the network transaction value illustrated in the most realistic way the real value of the basic network engaged in the US provision.

Invoking a 1996 EC Communication ((OM(96) 608)[21], VODAFONE also considers that historical costs related to network modernisation (namely those related to fibre optic networks) should be excluded, as they should not be deemed to be US costs.

Moreover, it is of the opinion that the use of historical costs should necessarily entail the consideration of efficiency parameters in the performance of US provision, ensuring that costs arising from inefficient and redundant investments are not considered as US costs. In this respect it refers costs with PTC's human asset restructure and reduction program, which according to VODAFONE are a result of inefficiencies accumulated over many years. In this context, the company further mentions PTC's decision to outsource certain services, which later were again internalized, a decision which, according to VODAFONE, not having been the most appropriate, should not imply that the respective costs are considered in the scope of the determination of a possible CLSU unfair burden.

VODAFONE considers it inappropriate that the value of the cost-of-capital rate to be applied until 2008 is the one resulting from PTC's CAS (which is likely to be adjusted after an audit process), as that rate has been recently set at 10.3%, and it is likely that in 2008 the USP's cost-of-capital resulting from the CAS exceeds the referred 10.3%. Moreover, VODAFONE believes that a possible compensation of CLSU burdens implies the determination of a specific and lower cost-of-capital rate, given that the US provision risk is lower than most other lines of business.

VODAFONE considers it also inappropriate to use the target return on capital defined for the period 2009-2011, as it was set based on a glide-path which aimed to avoid a sharp reduction of the cost-of-capital. VODAFONE supports that, as ICP - ANACOM had already considered a 10.3% cost-of-capital value, which is already a high value in the light of its estimates, it makes no sense to allow the USP to be compensated for the use of a higher cost-of-capital.

VODAFONE does not agree with ICP - ANACOM's position that CLSU are a result of the sum of the various deficit US components, for the following reasons: in case a given provision starts to show negative margins, and only subsequently starts to generate positive margins, that provision should be considered for the purpose of the determination of CLSU, given that the USP provided it only because it was compelled to do so; some obligations start to generate positive margins when their value increases with assets of other operators (for example numbers of clients for directories and directory enquiry services), thus this provision should be considered for the purpose of CLSU determination, as it represents an additional benefit; the difference between the operation with and without US obligations should cover all inherent benefits, and as such all positive margins of US obligations; the methodology should be applied up to the designation of the future USP; in the scope of the procedure for choosing a new USP, that USP should be compensated for CLSU, which will have underlying the logic of costs and benefits for the company providing the US, thus any positive margins shall be considered in the values submitted to tender, and even more so, they should be considered in this methodology; if components generating positive margins fail to be considered, the US burdens on the USP will be compensated but not all benefits will be considered, thus placing the USP in an advantageous position vis-à-vis the remaining operators.

[21] Communication from the Commission on assessment criteria for national schemes for the costing and financing of universal service in telecommunications and guidelines for the member states on operation of such schemes, available at http://eur-lex.europa.eu/Result.do?T1=V5&T2=1996&T3=608&RechType=RECH_naturel&Submit=Pesquisar

VODAFONE thus considers that the CLSU must be calculated taking into account benefits and costs of all components integrating the US provision.

ZON

ZON considers that the existence of positive margins of some US components should compensate the negative margins of other components. This view is based on the fact that in practice it is impossible for other providers to provide services which contribute with a positive margin for the USP, taking into account the high entry costs and the current UPS's strong presence on the ground.

ZON considers also that the US provision should be limited to the first residence, which would imply an additional reduction of US costs.

B. ICP-ANACOM's view

ICP - ANACOM believes that the presented methodology has a sufficient level of detail which allows it to be applied in a rigorous and objective manner, and any "abusive use", as invoked by CABOVISÃO, will not fail to be detected and corrected in the scope of audits intended to validate data conveyed by the USP.

It must also be stressed that the referred audits may also play an active role in the assessment of whether cost representation is appropriate in a cost accounting context, namely taking into consideration the need to conciliate the imputation of US costs with global CAS costs, incorporating concerns related to the inefficiency of the USP.

According to the methodology adopted by ICP - ANACOM in the DD, the calculation of CLSU is achieved by comparing PTC's current situation as USP, in which it is bound to comply with a set of obligations to which costs and revenues are associated, to a hypothetical situation, in which, in case it was not the USP, it would not be forced to comply with the referred obligations. This comparison enables the calculation of costs which PTC would avoid and revenues it would lose in case it did not provide the service to unprofitable customers and in unprofitable areas, as well as of indirect benefits that, associated to those obligations, it would no longer enjoy.

It should be noted that this approach is about determining whether CLSU borne by the USP in a given year are unfair, in order to be compensated. Consequently, the presented approach aims to determine, for each year under consideration, whether the burden is unfair, and if so, how much it amounts to. This approach does not aim to determine if the US, in a long-run perspective, is in itself an unfair burden. Only in this context it would make sense to compare the current situation with a hypothetical scenario in which PTC would never have had the obligation to provide the US; however, were such task to be done, a long-term approach would have to be followed, which in the present case is highly questionable. In fact, as widely known, there has always been an explicit connection between the so-called basic network and the US provision, which could hardly be broken up.

ICP - ANACOM disagrees with suggestions made by ONITELECOM, VODAFONE and ZON to include provisions with positive margins in the CLSU calculation. Positive margins obtained with the provision of one of the US components should not be used to compensate or reduce the negative margins of other components of this service.

The compensation of costs of an US component with revenues of another is contrary to the regime provided for in annex IV of Directive 2002/22/EC, transposed to paragraph 1a) of article 96 of the ECL, which lays down that net costs of US obligations is calculated as the sum of net costs of specific components of US obligations.

The methodological approach adopted in the DD, which thus corresponds to legal provisions and is followed in several EU countries is based, as referred earlier, in the comparison between the real situation, in which a company must comply with a given set of US obligations, and a hypothetical situation in which that company was not subject to such obligations.

Accordingly, a provision that generates a positive margin would always be maintained by the company, even in the absence of US obligations. Independently of those obligations, as the provision under consideration would prove to be a profitable one, the company would always have an incentive to provide it, removing it from the calculation of CLSU; otherwise, the company would be penalized for the profitability obtained by the provision in question, if it did not receive full compensation for burdens with other provisions.

The argument that the provision under consideration has not always been profitable, and as such it should be integrated in the CLSU calculation, is only valid, considering the used approach, for the years in which that situation can be demonstrated. In fact, in case a provision proves not to be profitable for a given year, it should be considered for the calculation of CLSU for that year and no longer for the years in which it was profitable.

As for the references to whether the US obligations should be restricted to reasonable requests and to the first residence, it must be clarified that the obligation of network connection and access to fixed telephone services, specially the issue of reasonableness, is deemed to involve from the outset the acceptance by the USP of all clients, regardless of their geographical location and profitability, the referred reasonableness having always been strictly interpreted, in the perspective of consumer protection.

In fact, the law does not establish any restriction in this scope, and historically it has always been understood that the USP was bound to ensure the satisfaction of all requests for network access. Paragraph 2 of article 4 of Decree-Law number 458/99 only allowed the USP to refuse requests of connection to the fixed telephone network and FTS access based on grounds specified in the Operation Regulations in force at the time which in neither case admitted the refusal to provide access to the network in second homes.

Having those statutory instruments been repealed and although the ECL provides for the obligation to meet all reasonable requests of connection to the public telephone network at a fixed location and of access to public fixed telephone services at a fixed location, ICP - ANACOM maintained that PTC should meet all requests for network access.

It should be recalled that the purpose of this exercise is to determine whether the CLSU of each of the years integrated in the period concerned represent an unfair burden, and it cannot be ignored that in all the years until now, as far as known, the USP has not refused to provide the US, invoking the referred reasonableness. It is also not expected that within the period until the designation, pursuant to article 99 of ECL, any refusals are put forward on those grounds, thus in fact, all connections must be considered.

In its response, PTC gives a very significant relevance to the use of historical costs (adopted in the methodology included in the DD) to the detriment of the use of running costs, which the company supports. Highlighting the fact that this approach is supported by PTC only, as all

other respondents agreed with the use of historical costs, it is important to consider this issue carefully.

The CAS implemented by PTC, which has been subject to several audits under the law, is built on the basis of historical costs, and fed by PTC's general accounting system, with which it must be compatible. The CAS has been consistently used as a pattern to assess compliance of several components of PTC's activity (as USP and holder of SMP) with applicable regulatory and legal principles.

Notwithstanding the doubts raised by ICP - ANACOM in several occasions on whether the methodology for allocating costs to the various dimensions of PTC's activity is up-to-date (which led the Authority to provide for a measure in this scope in its Activity Plan for 2011-2012), this Authority takes the view that the accounting data based on historical costs best reflects costs effectively incurred by PTC in the provision of the US. In this context it is stressed that the system currently in force was implemented according to the methodology proposed by PTC itself.

As the purpose of this exercise is to determine whether CLSU for each year are an unfair burden, and if so, to calculate the respective value, which should be financed externally to PTC, ICP - ANACOM considers that no better information exists than the one provided by the company itself to comply with its information duties on the various fronts with which it must act (for example, tax administration, shareholders, sector regulators) and which is subject to regular audits by the Regulator.

Nevertheless, for the sake of argument, ICP - ANACOM acknowledges that an approach based on historical costs, which is already available and which has always been used, could be abandoned, and that a specific costing system, based on running costs, could be built, to assess costs in which the USP would have incurred due to the obligations assumed with the US. In this case, which would abandon the discussion of what did happen due to decisions taken in the past, to focus on what would have happened in case decisions were taken today, in addition to the increased difficulties related to the actual operation of these considerations, this analysis would also require the consideration of criteria of efficiency. In fact, it is not enough to consider that an investment made 10 years ago, for a given value, would have a different value had it been done today; it is necessary - by moving away from what really happened - to question if that investment would be the same today, in a technological and network topology perspective.

With the approach it proposes, PTC aims only to correct the first part of the assessment - from yesterday to today - failing to consider the adoption of any efficiency analysis. This occurs even when its proposal is justified with the fact that the adoption of running costs is a recommended practise, overlooking the fact that this takes place in parallel with the adoption of criteria of efficiency, as provided for, for example in Commission Recommendation on the Regulatory Treatment of Termination Rates, which is based on the model of an efficient operator.

For these reasons, ICP - ANACOM decides to maintain the approach of the determination of CLSU based on historical costs, which are consistent with PTC's costing model. This approach does not entail double standards, as claimed by PTC, as it considers market shares for the purpose of the determination of the notion of unfair burden, which integrate variables which take into account the economic value of services provided by PTC to its clients. It can be easily understood that this is so because as market shares are a ratio, it is important that the numerator and denominator are consistent, and all revenues (PTC's revenues in the

numerator and the market's revenues in the denominator) are used in the same terms, which result in fact from accounting information, representing revenues effectively received in the period under consideration by the various operators taken into account.

Still on this issue of the use of historical costs, ICP - ANACOM finds it odd that PTC refers the use of the referred cost pattern as being "very harmful", as for the 2001-2003 period, that company presented to ICP - ANACOM a CLSU estimate of around EUR 100 million, per year, on the basis of precisely historical costs.

As regards PTC's allegations that ICP - ANACOM had opted for the use of a pattern of running costs, the following must be clarified:

- In the public consultation on cost models[22], carried out in 2005, the considerations laid down (which were not reflected in subsequent decisions) refer that "*the costs that reflect efficient market conditions are forward-looking costs, given that they refer to costs that would have been incurred in the long run by an efficient operator that would have produced a service using a network built today with the most up-to-date technology, faced by current input prices and taking future demand into account*" (emphasis added). For this reason, the consideration of forward-looking costs cannot be limited to a simple exercise of changing or adapting historical costs into running costs, as the forward-looking costs referred in the public consultation entail the modelling of a (fictitious) network, built today with the most efficient technology.

  In the same consultation it is also referred that "*This method* [running costs] *helps overcome most of the difficulties associated with historical costs, while maintaining incentives for investment and use of more efficient technologies that help increase productivity and reduce costs, given that the cost base includes such technologies"*(emphasis added).

- PTC argues that the use of running costs is considered in ICP - ANACOM's Decision, of May 2010, on termination prices of mobile networks[23], in Guidelines for implementing EC Recommendation on Accounting Separation & Cost Accounting Systems[24] and in BEREC's report[25] on regulatory accounting practises.

  In this regard it should be stressed that all documents identified by PTC convey the notion of an efficient operator, and they are all consistent with the idea of abandoning the historical cost approach only when this dimension in considered. Moreover, the reference to forward-looking costs or running costs implies, as acknowledged in the documents under consideration, the modelling of an efficient network. On the contrary, the US aims to ensure that results presented on past and present provisions effectively reflect costs incurred, thus the methodology must be applied to an actual network, not on a modelled network, corresponding to a hypothetical and efficient operator.

[22] Available at http://www.anacom.pt/render.jsp?contentId=788398

[23] Decision on the obligation to control prices in wholesale markets of voice call termination in individual mobile networks, of May 2010.

[24] Guidelines for implementing the Commission Recommendation C (2005) 3480 on Accounting Separation & Cost Accounting Systems under the regulatory framework for electronic communications.

[25] Regulatory Accounting in Practice 2010.

- In respect of the prior hearing report of the determination of 30.01.2008 on the evaluation of net costs incurred through the US provision, also invoked by PTC, ICP - ANACOM took the following position: "*although the available accounting system is based on historical costs, it could make sense to complement the analysis taking into consideration criteria of efficiency (...). This matter should be further reflected in the scope of the definition of the methodology for calculating CLSU referred to in the DD*".

  Note that the reference to "complement the analysis" is far from implying a suggestion of replacement of historical costs for running costs. Moreover, no reference was made to running costs but only a consideration of criteria of efficiency, which are not necessarily incorporated *per se* in running costs, as PTC acknowledges.

- Relatively to the alleged reservations demonstrated by WIK in its report "*Methodology for calculating the net cost of PTC's universal service obligation (USO) and the definition of an «excessive burden»*" concerning the approach followed by ICP - ANACOM, without prejudice to the fact that the document under consideration is not binding upon the regulator, it is clarified that although that adviser referred that running costs are generally considered to be the best practise, as PTC mentions itself, WIK refers also that PTC's accounting records have been accepted by ICP - ANACOM, and seem to be consistent with the determination of CLSU on the basis of historical costs, thus the methodology proposed by WIK is based on the last cost pattern.

- PTC invokes also an internal document (Information ANACOM - I06221/2006) to support the idea that ICP - ANACOM had considered the adoption of historical costs, as well as its reaction to the presentation made by PTC, accompanied by external advisers, at a meeting in September 2009. On this matter, ICP - ANACOM clarifies that the referred document is internal information, drawn up by staff of ICP - ANACOM, which is not binding on the Authority, and repudiating PTC's arguments in this scope is deemed not to be required. As regards the meeting of September 2009, restating what was said at its opening, it was not a negotiation session, and was only intended to allow PTC to present its opinion on the methodology for calculating CLSU and the notion of unfair burden. Likewise, the exchange of correspondence between ICP - ANACOM and PTC, to obtain clarifications on the methodology presented by PTC's advisors in the referred meeting (fax of 02.10.2009) may not be considered, in any way, as an acceptance, even a tacit one, of that methodology.

Lastly, it must be stressed in this scope, that even considering the use of historical costs to be appropriate, OPTIMUS and VODAFONE show concerns, namely as regards potential inefficiencies which these costs could incorporate and investments for modernizing the network, restructuring human assets and reassessing assets (such as amortizations) included therein. ICP - ANACOM considers that, in the scope of audits to CLSU estimates, a thorough examination will be carried out on how costs are charged to the US provision, and within the latter, the different provisions and the various geographical areas. It should be clarified, however, that the USP should not be prejudiced for improving its US-engaged network, given that these services must be provided under certain parameters of quality of service defined by ICP - ANACOM.

As regards comments on the cost-of-capital, presented specifically by VODAFONE, ICP - ANACOM considers that the decision on the rate value to be applied did not have a retroactive application, so in this context that retroactivity is also not deemed to be justified.

The US does not have to constitute an exception, and consequently, if there is a glide-path for the evolution of the rate to be applied, that glide-path shall be used.

Finally, it is clarified, as regards financial costs related to delays in the compensation of CLSU referred by PTC, that this matter does not concern the years up to 2006, inclusive, as up to that period no unfair burden is deemed to having taken place. For the subsequent years, it must be referred that due to the nature of the accounting approach, it is only possible to finance any CLSU after they have been calculated, which implies the closure of accounts for the respective year, the calculation of data according to the CAS and the performance of audits. So in fact article 95 of ECL cannot realistically be applied, for a year *n*, before *n*+2 years, and the law does not provide for any compensation regime for this natural delay, as is the case with the provision of the telex fixed service, telegraphic service, broadcasting service and mobile maritime service, whose negative operating margins, if any, resulting from compliance with obligations established in the concession contract (in annex to Decree-Law number 31/2003) must be compensated every year by the State.

In addition, the benchmark related to CLSU compensation in other European countries generally reinforces the idea that a certain degree of administrative delay is implicit as regards that compensation, noting for instance the case of Italy, which in 2007 took decisions for 2003, and Spain, which also in 2007 took decisions for the period 2003-2005.

4.2. Connection to the public telephone network at a fixed location and access to publicly available telephone services

4.2.1. Determination of unprofitable areas

A. Responses received

CABOVISÃO

CABOVISÃO takes the view that having been determined the avoidable costs and lost revenues of each MDF, ICP - ANACOM should make clear which costs and revenues will be considered.

For this purpose, it deems that ICP - ANACOM must take into account the positive margins of all services provided on access lines of unprofitable customers, such as television and internet service, and not only costs related to the FTS provision. CABOVISÃO stresses the need to take into consideration only the positive margins of those services, to avoid burdening CLSU with costs of other services.

In conclusion, CABOVISÃO refers that attention should be drawn also to the fact that costs of access to the public telephone network at a fixed location and access to publicly available telephone services could be compensated via the customer's subscription of a different service, other than the FTS.

CABOVISÃO considers that another alternative would be, as regards CLSU calculation, to take into consideration only customers whose contract with PTC is limited to the US supply (having basic communication needs, such as FTS), a matter which must be articulated with the avoidable costs of unprofitable customers, so that profitable customers are not subsidized.

CABOVISÃO is also of the opinion that one alternative operator in the exchange area, either co-installed or cable, should be reason enough for considering that area as a

profitable one, or otherwise, that an area should only be considered unprofitable in case of absence of an alternative operator or of a promotional offer by the USP, deemed to be intended only to deter the entry of new competitors.

CABOVISÃO refers that it agrees with ICP - ANACOM's position on the "*enclave*" criterion, supporting that, ultimately, an unprofitable area surrounded by profitable areas could automatically be considered a profitable area, falling on PTC the burden of proving that this is not so.

ONITELECOM

ONITELECOM agrees with the methodology presented for determining profitable areas, but has reservations on the accuracy of information obtained based on PTC's accounting records. In this scope, it refers that it does not understand why costs identified by PTC with the US provision (around EUR 150 million) are so high, namely compared with costs verified in Spain.

OPTIMUS

OPTIMUS agrees with the methodology proposed by ICP - ANACOM for the determination of unprofitable areas, including iterations put forward and the application of plausibility criteria. However, it considers that these criteria should only apply to areas deemed to be unprofitable, and could never result in the increase of unprofitable areas.

Fully supporting the "enclave" criterion, OPTIMUS believes that the effective competition criterion should be replaced by the criterion of "*existence of an alternative operator to the USP*", given that if an alternative operator existed (cable TV or co-installed operator) in a certain area, it would be unacceptable if the USP failed to cover it, or, in the absence of the US obligation, it discontinued the services provided there, all the more so because, this company believes, the incumbent benefits of competitive advantages relatively to potential new entrants, such as special advantages in the set up and purchase of the network supporting the US provision.

In this regard, OPTIMUS justifies that cable operators should be considered, as investments in these networks are very high, and to make them profitable a legitimate expectation of consumption of services more expensive than voice services is required. This issue is all the more important due to the fact that the main cable operator integrated the same group of the USP. OPTIMUS finds it hard to believe that this operator, sharing information in the same group, would have built a cable network, had it known that the area was not commercially attractive. According to OPTIMUS, PTC may not allege that a given area has no commercial interest for the purpose of CLSU calculation, when the Grupo PT has decided to proceed to the construction of a second network/infrastructure in the same area, the first network being the one over which the US is provided. In these conditions, OPTIMUS proposes, for the purpose of the application of the criterion of existence of alternative operators, that efforts are made to obtain a complete record of cable networks and that areas with at least one alternative operator to PTC (either cable or co-installed) are defined as profitable areas.

OPTIMUS suggests also that a third criterion is applied, on the "*existence of clients with promotional offer*s". According to OPTIMUS, the adoption of these offers in unprofitable

areas will only make sense if the USP considers that, in fact, at issue should not be considered for CLSU calculation purposes, otherwise a cover would be provided for client retention mechanisms and consequently entry into the market by potential competitors would be deterred.

Lastly, OPTIMUS stresses the need for a correct definition of the exchange area. If after the entry of an alternative operator in an exchange, PTC decides to shift part of the clients to a new area of the exchange, so that the exchange (or both exchanges resulting from the shift) is no longer attractive for alternative operators, the new area should never be considered as an unprofitable area, as the alteration would be due to administrative reasons, or in extreme situations, it would aim to decrease the commercial attractiveness of the area under consideration for alternative operators.

PTC

PTC does not agree with the need for successive iterations in the determination of unprofitable areas, considering that these iterations make the model overly complex and threaten its reasonableness, suggesting a two iteration limit, invoking its recent experience with a model developed with the collaboration of an adviser and the need for a fair balance between the effort required and the material result achieved in terms of the increase of accuracy of that result.

PTC refers also that, as regards the effects of removing unprofitable areas, two effects have not been considered: i) adjusting the volume of profitable areas for no longer receiving calls originated in unprofitable areas; and ii) avoiding the double exclusion of traffic between unprofitable areas.

PTC agrees with the DD's approach not to consider the substitution calls, given their marginal effect, although mentioning that "*this is a further mechanism followed by ICP - ANACOM that decreases the CLSU results to be achieved through the methodology to be approved*".

PTC refers also that it strongly disagrees with the "plausibility criteria", considering that this type of "administrative correction" makes the methodology for calculating CLSU volatile and arbitrary, giving the regulator an enormous amount of discretion for considering as profitable areas which should be unprofitable according to the established criteria. In this scope, it refers that no NRA has incorporated what it deems to be an "administrative manipulation" in the identification of unprofitable areas, which directly conflicts with the need for accuracy, transparency and clearness of the calculation methodology.

It specially criticizes the criterion of "effective competition", as it feels that the presence of alternative operators in a given area is, at the most, an indicator of the existence of a niche of profitable customers in that area that justifies the investment of other operators, and that fact can even make the area less profitable or even unprofitable for the USP, given the *cream-skimming* strategies adopted by other operators, who in this context benefit of below cost local loop prices.

According to PTC, the USP, in the absence of US obligations, would not cease to provide the service in the areas deemed to be unprofitable according to the methodology, but, as in the case with alternative operators, it would probably provide the service structuring

the offer so as to address it only to the most profitable market niches, without bearing net costs of serving areas and customers of low economic interest in the same area.

PTC alleges further on this criterion that it is able to lead to absurd results determined by the fact that investment (or disinvestment) strategies adopted by alternative operators could influence the range of profitable areas, challenging the lack of guidelines on elements invoked by PTC to support that these areas should not be deemed profitable, as well as the burden of proof which according to the DD falls on the company.

PTC refers also that it disagrees with the "*enclave*" criterion generally along the same lines as those used to criticise the previous criterion, as also for this criterion it is bound to demonstrate that a given area which the model has already considered to be unprofitable remains in fact unprofitable, although it constitutes an enclave, which according to PTC is unacceptable, as well as subjective and generator of uncertainties.

In this respect, it considers that the profitability of an area is not automatically determined by that of adjacent areas, but by other criteria, such as its geography, density and age composition of the population, the level of income and competition framework. Moreover, access infrastructures (with an important role in the global investment) cannot be shared by adjacent areas. By way of example, the company mentions investments in new fibre optic access networks, which in its opinion will show many examples of "enclaves".

PTC is concerned about the cost information requirements, deemed to be unfeasible, as they involve an unreasonable and disproportionate data collection effort, given that the required information is not broken down by MDF, expressing also its opposition against the degree of discretion which in its opinion is associated to the identification of avoidable costs. As regards the breakdown of costing information, PTC refers that the available information does not have the required detail, and disagrees also with WIK's option to resort in the alternative to a sample for collecting that information.

In the alternative, PTC proposes the implementation of the methodology it developed in 2009 with PricewaterhouseCoopers, LLP (PwC), that, on the basis of operational data which characterize each of the exchange areas, such as: loop length, support infrastructure, density of copper pairs, extent to which the support infrastructure is shared with other services provided to clients and average access costs calculated based on costing models, broken down by classes of costs, with the indication of which are distance-sensitive, breaks down these costs according to the various areas of PTC's exchange. To these costs are also associated avoidability ratios, being thus obtained the avoidable access costs per exchange area.

PTC is of the opinion that this approach avoids the problems raised by the methodology proposed by ICP - ANACOM, associated to the costs of obtaining the detailed information per MDF and the degree of discretion left to the regulator as to the classification of each cost as avoidable or not.

Still on the issue of avoidable costs, PTC refers to the list in Appendix 1 of the DD, stating that the various services mentioned therein should not be considered for the purposes of CLSU calculation.

PTC believes that national traffic wholesale services, mixed traffic, additional services of the Autonomous Regions and the operation and maintenance services/management to operators should not be considered, as these services are clearly independent of US

accesses and would thus be provided, even if PTC was not the USP. It further refers that complementary services of the Autonomous Regions including the paging service and the mobile multi-user service have been discontinued, and have no associated turnover.

As regards the inclusion of the Leased Lines Reference Offer (LLRO), PTC believes that this is a business with its own commercial dynamics, focusing on the business market, with an economic rationale which is independent of the US provision, thus this service would be provided on an autonomous basis in a scenery where PTC was not USP (resorting to other technologies and/or different network topologies). PTC thus takes the view that LLRO should not be taken into account for the purpose of CLSU assessment. It refers also that a substantial part of leased lines does not even rely upon the copper network.

As regards lost revenues, PTC does not agree with ICP - ANACOM's approach, which ignores the existence of discounts and alternative tariff plans, which place the average price of accesses below the basic price, defined in the standard tariff, thus revenues would be established above their real value. PTC stresses also the need to estimate international inbound traffic per exchange.

VODAFONE

VODAFONE does not agree with the assumption in the methodology established in the DD that calls received (from profitable areas to unprofitable areas) would not be made in case the USP was not provided in unprofitable areas, doubting that clients in general would not be reachable given the level of penetration of mobile services. VODAFONE thus believes that, ultimately, it could be accepted that only a small percentage of calls would not be made. According to VODAFONE, this logic is consistent with the one adopted by ICP - ANACOM as regards substitution calls, having been considered in this scope that if the USP discontinued the US provision in certain areas and for certain unprofitable customers, these clients would find ways to make at least part of these communications.

Relatively to the criterion of effective competition, VODAFONE considers that the analysis of profitable areas should include cable distribution networks, given the high degree of penetration of that infrastructure and because in certain areas the major competitor of the USP is a cable operator. Moreover, VODAFONE considers it unlikely that two operators would be co-installed in a given area without any cable operator operating therein.

VODAFONE considers that ICP - ANACOM's approach could ultimately lead to the use of more stringent criteria that those used in the scope of markets 4 and 5[26], for which an area is deemed to be competitive where there is at least one co-installed operator and the percentage of cabled homes of the main operator in the exchange area exceeds 60%.

It thus supports that in case only co-installed operators are considered, the competition criteria should consider only one operator and not two as the methodology under consideration suggests. Given the obligation to ensure that all reasonable requests of access to the network and of access to telephone services are met at least by one company, the existence of a co-installed operator means that that obligation is also carried out by a body under no obligation to provide the US. In this case, VODAFONE

[26] Available at http://www.anacom.pt/render.jsp?contentId=611898

considers that the compensation of costs incurred may lead other co-installed operators to finance the USP for providing the service in an area in which both compete and where a cable operator may also already exist, in addition to the fact that the service may not be based on regulated wholesale offers, as the area under consideration could be, at the same time, be considered competitive.

VODAFONE stresses further that mobile technologies have not been considered in the definition of the effective competition criterion. Given that the US provision must be technology-neutral, VODAFONE refers that attention should be drawn to the threshold as from which the service provision in a given area would not be profitable, including through homezone solutions.

In this regard, it refers also that ICP - ANACOM's approach is doubly beneficial for the USP and doubly harmful for remaining operators, as it considers that a small number of co-installed operators could be the result of inappropriate conditions of wholesale offers and not of the potential profitability of the area. On this issue, it highlights Sonaecom's decision not to provide services to residential customers in case this entails using PTC's wholesale offers.

As regards avoidable costs, VODAFONE supports that accumulated depreciation exceeding the value of purchase of assets should not be considered, and in case of network reassessment, inherent costs should not be considered for the purpose of CLSU determination.

ZON

ZON considers that when accounting for costs and revenues, all services existent in a given home, not only those based on FTS, should be included, as it deems that it is very likely that the USP may cross-sell its services to an US client and supply all services.

According to ZON, mobile solutions should be considered when choosing the most economical solution for providing the service, which would lead to a reduction of costs associated to the set up and maintenance of the FTS in the US scope, as where a mobile network is available, the FTS should be provided without resorting to the US.

ZON refers also that the FTS development, via US, allowed the development of other services which contributed to the enlargement of the associated infrastructure, creating economically profitable areas.

As regards the determination of unprofitable areas, ZON does not agree with the criterion adopted by ICP - ANACOM, "*namely the use of the geographic segmentation, which results from the decision taken by this Authority on 14 January 2009, for the reasons previously put forward by ZON, on several occasions, as due to the shift of PTC's points of customer service, the consistency between areas defined by ICP - ANACOM (currently undergoing a review) in the referred DD will certainly make difficult a thorough examination of profitable areas and unprofitable areas*." It also considers that it is not coherent to adopt the IAS concept of geographic segmentation to the FTS reality, as it is difficult to provide the former (in broadband) in some areas of the country.

ZON thus proposes a "cluster" at MDF level (geographic level), to enable the determination of which are profitable and which are unprofitable.

Relatively to the criterion of effective competition, ZON considers that the presence of a co-installed operator is enough. Moreover, it considers that the existence of mobile network coverage should be enough to consider the area competitive at FTS level, as all mobile operators provided homezoning solutions.

B. ICP-ANACOM's view

In relation to reservations showed by ONITELECOM about PTC's accounting data, ICP - ANACOM stresses that they shall be duly audited and that the implementation of the methodology for determining CLSU in the years they constitute an unfair burden will also be carefully verified, namely data feeding it.

ICP - ANACOM clarifies that in the calculation of profitable and unprofitable areas consideration must be given to services integrated in the US (FTS and public pay-phones) as well as other services provided over US accesses, even if they do not result from an obligation to provide the US, such as ADSL or IPTV services, insofar as they generate positive margins.

Grounds for this option result precisely from the fact that the USP may be able to derive from the provision of those services positive margins which will only exist because services under consideration are provided over US accesses. Accordingly, in case services at issue generate negative margins they shall not be taken into account for CLSU calculation purposes, as their provision is not a result of an obligation imposed on the provider, thus they should not contribute to increase CLSU.

In this context, ICP - ANACOM deems as unacceptable CABOVISÃO's proposal that only customers that have only subscribed FTS should be considered for the purpose of determining unprofitable areas.

Specifically as regards services referred by PTC, at the level of costs, which should not, according to that company, be included in the calculation of CLSU, ICP - ANACOM considers that national traffic wholesale services, mixed traffic, and the operation and maintenance services/management to operators are services to which what was referred above clearly applies, that is, although they are not US obligations, they are provided in unprofitable areas due to that obligation, and as such, they shall be taken into account whenever they generate positive margins. The additional services of the Autonomous Regions shall not be considered, given the information provided by PTC.

The assumption that LLRO would still be provided in the absence of US obligations, although resorting to other technologies and/or different network topologies, as referred by PTC, is merely theoretical. In effect, services under consideration are still provided in many cases over the US access network, and as such constitute a direct benefit of that provision.

PTC refers also that is disagrees with the proposed methodology for determining revenues as it ignores discounts and alternative tariff plans. In this scope, the following must be highlighted:

i) The practice of discounts and of alternative tariff plans is a result of PTC's commercial options, namely in the perspective of protecting its market share, and does not follow from obligations undertaken as USP. Thus when carrying out the task of determining CLSU, identifying the costs and revenues which the USP would

no longer have if the company was not under US obligations, it can be easily understood why the revenues to be considered must be calculated on the basis of the US tariff, inherent to the obligations undertook, as any discount practised would remain if obligations did not exist, as its adoption arose from an act of will of the operator;

ii) Moreover, the inclusion of such discounts and alternative tariff plans, for which the USP is fully responsible, in CLSU calculation, would imply the reduction of lost revenues and consequently the increase of CLSU. Consequently, PTC's competitor operators, as payers for the US compensation fund, or the State, directly, would have to finance the offers implemented by PTC to protect itself and to meet market competition. This is deemed to be a legitimate objective, however its consideration in terms of CLSU is not, given the negative implications in terms of competition, or State aid, according to whether the compensation fund is implemented or the financing is guaranteed directly by the Portuguese State.

On these grounds, the extent of PTC's proposal is not understood, nor can it be accepted.

ICP - ANACOM rejects PTC's comments on substitution calls, stressing that this mechanism is not a special characteristic of the methodology used by the regulator, as it is in fact a situation which actually occurs, and in fact other regulatory authorities also refer to this concept, such as the Belgium regulator ((Institut Belge des Services Postaux et des Télecommunications – BIPT) and the Irish regulator (COMREG). Notwithstanding, as it is acknowledged that the final effect is merely marginal, ICP - ANACOM opts not to use it.

ICP - ANACOM understands the arguments put forward by PTC as regards iterations, which draw attention to their degree of complexity and the risk of an absence of reasonableness as to the material accuracy of the result. Therefore, it considers that the number of iterations must have a limit, establishing that no more than five iterations shall be carried out, and that the iterative process shall end where the number of MDF integrating unprofitable areas achieved in iteration *N* does not show a variation above 3% relatively to iteration *N* - 1.

PTC refers also that the iteration approach fails to consider two effects. The first concerns the adjustment of the volume of profitable areas for no longer receiving calls originated in unprofitable areas. In the respect, it is clarified that lost revenues and avoidable costs associated to calls made are taken into consideration in the areas where they have been originated, thus the referred areas are the only ones affected in case such calls are no longer made. The only exception to this rule occurs precisely with calls with an inverse direction and which, in the scope of iterations, are reclassified as lost revenues and avoidable costs of unprofitable areas.

As to PTC's second concern, on a possible "double exclusion" of traffic between unprofitable areas, ICP - ANACOM considers that this situation does not take place, as calls made in unprofitable areas to other unprofitable areas only affect areas where they are originated, at the level of lost revenue and avoidable costs, and never where they are terminated, precisely to avoid double counting.

Still on the issue of calls made from profitable areas to unprofitable areas, VODAFONE considers that, given the level of LMS penetration, it should be considered that only a small part of these calls would not be made, a rationale declared to be consistent with what ICP - ANACOM proposes for substitution calls.

It is stressed on this matter that in a scenery in which the US was discontinued, consumers would have available several possibilities for making and receiving calls. Even if it was considered that a part of clients, given the US discontinuation, could in fact opt for receiving calls through LMS, it is not guaranteed that this would benefit the USP, as ICP - ANACOM has referred for substitution calls, given that the Group PT does not provide the FTS exclusively and it is not safe to assume that the USP would continue, in this situation, to use the fixed network. Accordingly, the proposed procedure is maintained.

As regards plausibility criteria, ICP - ANACOM rejects PTC's allegations that the referred criteria contribute to make the methodology volatile and arbitrary. ICP - ANACOM considers that the application of criteria is defined in a precise and objective way, and it is duly substantiated.

In this respect, it must further be highlighted that most respondents, except for PTC, consider that the effective competition criterion should only provide for one co-installed operator, or for a cable operator, or even for the mere existence of homezone offers, so that a given area was considered profitable and, as such, remained served by PTC, if a situation of US discontinuation occurred.

ICP - ANACOM effectively considers that the presence of providers in a given area is an evidence of competition, as a provider who is not subject to specific obligations of service provision in that area will only provide it if the area is profitable or is likely be profitable in a near future. This approach has in fact been used by ICP - ANACOM, after a market consultation, in the case of the assessment of markets 4 and 5, however it must be referred that in this scope it was decided that the simple presence, in a given MDF, of an alternative operator to PTC, failed to demonstrate that that MDF should be considered profitable.

As to PTC's arguments, it is acknowledged that providers other than the USP could in theory design offers intended to segment customers, so as to capture the interest of consumers who generate higher revenues, thus an MDF will generally not be profitable just because a co-installed operator is present. In any case, this situation will only occur a priori in areas of major size and asymmetries, which include sufficiently differentiated clients. Moreover, alternative operators may only provide double play and triple play offers, in which the FTS is only an accessory service, and most of the time, these offers are the ones which ensure profitability in the area under consideration.

Therefore, ICP - ANACOM takes the view that these arguments strengthen the option for rejecting an approach based on the co-location of only one alternative operator in a given MDF.

As the DD shows, ICP - ANACOM took the view that it should adjust the methodology used in the analysis of markets 4 and 5, not considering, in the methodology now at issue, the inclusion of an MDF of a given municipality with cable coverage exceeding 60% as key pull factor for that MDF's profitability, as it would be practically impossible to ensure the necessary information to do so, on a consistent basis during the relevant period. ICP - ANACOM is thus of the opinion, having analysed the arguments presented by PTC and other operators, that maintaining the approach proposed, based on two co-installed operators, is the best option for determining whether the MDF integrates a profitable area.

Notwithstanding, it is underlined that ICP - ANACOM acknowledges that this matter should not be approached in an automatic manner, in the light of the above-mentioned arguments. Consequently, MDFs identified based on the co-installation of two alternative operators are likely to integrate competitive areas, but only insofar as evidence is not presented to demonstrate that the area is not profitable. It is further clarified that, naturally, this criterion will only be applied to areas that, following the application of the methodology for calculating CLSU, are considered to be unprofitable.

As regards the inclusion, in this approach, of homezone offers, the fact that they have been made available is not sufficient, on its own, to draw definitive conclusions on the profitability of a given area. The provision of the referred offers in a given area results from the existence of an installed mobile network, whose provision implies only a negligible marginal investment, which cannot compare to the investment which a fixed network operator or a co-installed operator needs to do to provide an FTS offer in a given area.

Still on this issue, it should also be stressed that the calculation of CLSU must take into account the operator that exists, with the technologies it uses.

In the light of the above, ICP - ANACOM deems that the existence of homezone offers should not be considered for the purpose of the assessment of the level of profitability of a given area, and consequently it should not be taken into account in the application of the competition criterion.

As regards the comparison between the application of the criterion of effective competition in this methodology and in the scope of markets for wholesale network infrastructure access at a fixed location and wholesale broadband access (markets 4 and 5), although the approaches are similar, they apply to different situations. In the case of markets 4 and 5, PTC, as provider with SMP, is bound to a set of obligations which is eased as regards areas considered to be competitive. In the case of the US, the identification of competitive areas has a very different effect on PTC, as this situation does not entail for PTC any less strict obligations, resulting only in the costs calculated in those areas not being considered as eligible for compensation.

In any case, it is stressed that the difference between considering one or two co-installed operators is not very significant, bearing in mind that between 2004 and 2010, in most exchange areas where operators are co-installed, there is always more than one operator in this situation.

OPTIMUS suggests that an additional plausibility criterion is included as regards the existence of promotional offers by the USP. ICP - ANACOM considers that this criterion falls under the criterion of effective competition, as it is the presence of alternative operators that leads to the provision of these offers. The argument that these offers are only intended to discourage competition is already taken into account when, in the calculation of revenues, the consideration of discounts is not allowed. The specification of a new plausibility criterion is thus deemed to be unnecessary.

As regards the enclave criterion, ICP - ANACOM clarifies that it does not consider, contrary to what PTC suggests, that the profitability of an area may be determined by that of adjacent areas. ICP - ANACOM clarifies that, in this case, it intends to assess to what extent would the USP, if US obligations were no longer imposed, continue to serve a given area, even if it proved not to be profitable, in case it was surrounded by profitable areas,

which it would naturally continue to serve. In these circumstances, the understanding that the USP would opt to provide services in the referred area is maintained, thus for the purposes of CLSU calculation the referred area should not be accounted for.

As regards the examples referred by PTC concerning next generation networks (NGN), it is deemed that such networks are still under a set up stage, their investments being far from stabilized, thus it is natural that there are multiple enclave situations which, at the moment, do not necessarily imply non-investment options, but simply different investment schedules. ICP - ANACOM is naturally willing to analyse, on a case-by-case basis, the MDF considered to be unprofitable, to which the enclave criterion may apply, including those that are mostly constituted by NGN.

Relatively to the definition of exchange areas, notwithstanding ICP - ANACOM's concerns on the issue of the relocation of loops to different points of customer service, it is considered that in the scope of the application of the methodology for CLSU calculation, this issue with have a low impact. In fact, most relocation situations have already taken place in the past, and not necessarily for administrative reasons, and it is not likely that in the future they will have a very important weight, given priority investments in NGN, which make the impact of that relocation less relevant.

PTC does not agree with the methodology proposed by ICP - ANACOM to identify the costs of accesses, identifying two disadvantages: i) the high costs of obtaining data per exchange; and ii) the degree of discretion left to the regulator as to the classification of each costs as avoidable or not. In alternative, the company proposes a methodology based on determining national average costs for the various cost items, which are later applied to the exchange areas, based on the respective operational data, on which "avoidability ratios" would later be applied.

The methodology proposed by PTC, as described, leads to an assessment which is not at all consistent, and suggests concerns, namely as regards the application of avoidability ratios whose determination criterion is not identified. The critical element for assessing CLSU concerns costs of access/local network and it must be based on a determination/assessment as precise as possible of assets involved in each area, as the referred costs present major variations across the country.

ICP - ANACOM finds it rather odd that PTC does not have the elements at issue in each area of the exchange, and if this situation is demonstrated and substantiated, the Authority will admit the possibility of resorting to alternatives to the consideration of assets installed in each MDF, namely the resort to the breakdown of costs among the various areas, insofar as the final goal of the exercise is not hindered, of ensuring a minimum reliability of costs considered in each area given their specific characteristics.

Specifically of the identification of all costs and revenues, ICP - ANACOM is not in a position to carry out that determination at the moment. Nevertheless, the Authority requests the USP to discriminate and identify them, so that they may be validated and audited.

In the case of costs at the level of access, they must be identified for each MDF; for other services, they may be defined based on national average values. As regards revenues, they must be determined for each MDF, based on supplied amounts, as referred earlier, and subject to iterations resulting from the effects of received calls.

4.4.2 Determination of unprofitable customers in profitable areas

A. Responses received

CABOVISÃO

CABOVISÃO is of the opinion, as regards unprofitable customers living in profitable areas, that ICP - ANACOM should automatically consider such areas as profitable, unless unambiguous, concrete and individual evidence shows otherwise.

ONITELECOM

ONITELECOM agrees with PTC's approach for indentifying unprofitable customers in profitable areas, although it shows concerns as regards the accuracy of information obtained via PTC's accounting records.

PTC

PTC disagrees with the option not to consider within CLSU calculation the customers living in profitable areas that present insufficient revenues to cover the respective costs. According to PTC, this approach does not have a legal basis, as it follows from paragraph 2 of article 96 of ECL, that unprofitable customers must be deemed as a whole. It is necessary to determine which customers are unprofitable and not why they are unprofitable.

On the other hand, it refers that the approach proposed by ICP - ANACOM fails to consider the commercial criteria which frame the decisions taken by operators as regards whether to provide services certain customers, and has no practical consistency. In this respect, PTC alleges that if it were free from US obligations, the company would segment customers in bundles and tariff schemes adapted to various consumption profiles, designed to ensure a given level of profitability. In a framework of commercial freedom, PTC would thus be able both not to accept unprofitable customers (for generating insufficient revenues) or to serve them under different conditions (for example, by increasing the access price).

Additionally, as regards the methodology proposed by ICP - ANACOM, which according to PTC includes many ambiguities, the company questions which thresholds will be defined so that costs are considered abnormally high, or revenues insufficient. It also refers that the individual identification of unprofitable customers in profitable areas would require a profitability analysis which ultimately would have to be carried out on a case-by-case basis according to each customer. This situation would be unfeasible and unreasonable as regards the resources involved, namely at the level of information systems.

PTC disagrees also with the alternative considered in the DD - to resort to a "representative sample" - which is deemed to be ambiguous.

According to PTC, to assume an average value for a set of exchange areas the real access costs of which do not follow a normal distribution, thus considerably distorting the value calculated per exchange area, requires a considerable detail so that the different characteristics of the exchange areas are taken into consideration, in terms of density, soil, geography, type of infrastructure (ducts, masts, underground cables), average loop length and their distribution, among other factors. PTC can only stress the fact that this is

a subject which is not considered in any other methodology for calculating CLSU, at least to its knowledge, thus it feels that ICP - ANACOM's approach is not in line with practises which are deemed to be the best at international level in this regard.

The company thus suggests that the methodology jointly developed with PwC is followed.

PTC refers in this regards that it gathered a high level of data so that it would achieve for each exchange area the distribution of net revenues per class of revenue.

As far as access costs are concerned, the approach followed by PTC establishes, based on detailed geographic and volumetric information for each exchange area, the relative weights of exchange areas in access costs, which were then applied to existing costing information (at national level), previously aggregated in categories of costs specifically created for this purpose, to which avoidability rations were also associated, thus being obtained avoidable costs of access differentiated by exchange area.

In each exchange area, these costs are then modelled according to the distribution of the loop length in each exchange area, thus being obtained the distribution of accesses per classes of costs.

Based on both these types of distributions, the model then calculates the proportion of clients that are unprofitable in each exchange area, and the CLSU that are generated.

PTC considers that, in comparison with the approach proposed by ICP - ANACOM, in both its variants, the methodology it implemented does not veer to the extreme, which is impossible to meet, of identifying unprofitable customers individually, but notwithstanding it is sufficiently accurate, being based on very detailed and factual information, thus not resorting to samples which would compromise the accurateness of the analysis.

VODAFONE

VODAFONE considers that the analysis of the determination of unprofitable customers in profitable areas must take into account the available alternative technologies, thus a customer deemed to be unprofitable, for its high access cost, should be served by a different technology, thus decreasing the cost associated to the service provision.

In the concrete case of customers with a high access cost, VODAFONE restates that the affordability of the price must be analysed according to the financial capacity of the user requesting the US, thus a user with financial capacity must resort to alternative technologies, such as the mobile service, so that CLSU are not penalized.

B. ICP-ANACOM's view

As regards the exclusion, the CLSU calculation purposes, of unprofitable customers in profitable areas, for presenting very low revenues, ICP - ANACOM maintains its opinion that this is a marginal situation, the calculation of which generates an additional complexity to the methodology, without any increased value at the level of the accuracy of the accounts. PTC has not submitted information to change this view, namely data on the materiality of these revenues.

ICP - ANACOM considers, as far as profitable areas are concerned, that their (access) costs will generally not be very high, as otherwise they would have been considered as unprofitable areas. Thus in average the cost of access of profitable areas will be, at the most, equivalent to the national average cost of all areas, although it will likely be lower, given that there are unprofitable areas whose average costs are higher.

At the level of revenues, even if they are restricted to access, it should be noted that they should cover the costs of that access, due to the fact, as referred above, that average costs likely to be lower that national average costs are at issue. It can thus be understood that the situations in which, in profitable areas, the revenues of some clients are not enough to cover the costs of US provision are likely to be very small or practically non-existent. Under these circumstances, it is considered that the provider, even if it was not under US obligations, would have no interest in segmenting its offers so as to exclude those clients, and would thus continue to serve them with the prospect that their consumption profile would change.

As paragraph 3 of article 96 of ECL lays down, the list of end-users covered by paragraph 2 b) only includes those which would not be served by a commercial operator which did not have an obligation to provide the US. Considering the location of users in question and their access costs, it is likely that PTC would have concluded with those customers a contract for supply of services.

It is noted that this approach meets PTC's concerns on the difficulty to carry out a case-by-case profitability analysis, client by client, simplifying the methodology which thus focuses on the identification of clients with higher costs.

Additionally, it is clarified that other NRA (Italy, France and Spain) in their respective methodologies for calculating CLSU, have not even considered the existence of unprofitable customers in profitable areas, except for customers enjoying social tariffs, as is the case of customers within the "Retired People and Pensioners" plan.

Without prejudice to the preceding considerations, as is the case with the methodology for determining unprofitable areas, ICP - ANACOM admits the possibility, in case this situation is demonstrated and substantiated, of accepting alternative ways of determining unprofitable customers living in profitable areas, under the terms laid down in the view on section 4.2.1, insofar as a true reflection of the facts is ensured.

Likewise, ICP - ANACOM accepts also in this context to limit the number of iterations to five, establishing that the iterative process shall end where the number of unprofitable clients living in profitable areas in iteration *N* does not show a variation above 3% relatively to iteration *N* - 1.

As regards the concerns showed by VODAFONE, on the consideration of reasonableness criteria on the scope of US connections and on the use of wireless technologies, these have already been analysed and replied to in previous points.

4.3. Retired people and pensioners

A. Responses received

CABOVISÃO

CABOVISÃO welcomes the regulator's effort on this issue, and deems that the exercise of estimating the price elasticity of demand suits the intended purpose. It refers also that the elasticity could be higher than the value estimated, as this segment is very sensitive to the price factor.

CABOVISÃO refers further that ICP - ANACOM's analysis seems not to consider the fact that the charge of the traditional "subscription" was massively replaced by the charge of a value which can be converted in minutes of calls.

As far as values in question are concerned, which are deemed to be very high, CABOVISÃO takes the view that ICP - ANACOM should consider additional variables. It refers that the alleged burden with the discount could be a minor profit, and that it is not impossible that the price paid, even with the discount, is enough to pay the maintenance and overhead costs involved, insofar as the effect of the contribution in the fixed investment which benefited from a public funding is removed.

Moreover, CABOVISÃO considers that, just like the CLSU for the period preceding the liberalization have not been compensated, and it seems that this decision results from the idea that, in the absence of an alternative, negative margins would be compensated by other benefits, it could also be considered that "Retired People and Pensioners" would not look for alternatives for "historic" and "sociologic" reasons. In this respect, CABOVISÃO refers that PTC itself declares that one of the reasons for choosing an operator is loyalty, which results from the relationship established within the US scope.

CABOVISÃO stresses finally that if compensation was due for all discounts granted, a part of it would constitute a margin for PTC, given that the discount is calculated on the basis of the client's invoice and not of the actual cost. In this respect, CABOVISÃO refers that PTC's margin is considerable, and that it can be assumed that FTS margins could be equivalent to the average. Therefore, the granting of compensation, if any, should be limited to the necessary amount to make up the cost of service provision, otherwise, instead of compensating an unfair burden, a loss of profit, as it were, would be ensured.

On the other hand, adds CABOVISÃO, in the presence of evidence of substitution, it is doubtful that such profit could even be reached. According to CABOVISÃO, thus, this matter should be considered for the purpose of CLSU definition and unfair burden existence assessment, since hardly could a burden be deemed to be unfair if it fails to prevent, which has been the case - refers CABOVISÃO - an appropriate remuneration of invested capital.

OPTIMUS

OPTIMUS fully agrees with the approach proposed by ICP - ANACOM in this context, namely with the application of an adjustment factor related to the price elasticity of demand.

OPTIMUS refers specifically that, given that in Portugal the purchasing power is lower than in other countries, and considering that a segment of very low-income customers is at issue, it is likely that the price elasticity of demand is even higher in Portugal, especially for this segment. On the other hand, given that there are in Portugal voice offers without any

associated fixed cost, it is very likely that in this segment the price elasticity of demand variable is very high.

PTC

PTC absolutely cannot agree with the consideration of the effect of the price elasticity of demand, referring in this scope that ICP - ANACOM ignores the background for the determination of 17.05.2007 - which PTC challenged in court - imposing on the company the referred burden, as well as the context in which that determination was imposed, thus the proposal comes as an unacceptable surprise.

PTC extensively shows in its response the background for the mentioned determination by ICP - ANACOM, since Decree-Law number 20-C/86, quoting several parts of minutes of meetings held by this Authority's MB, as well its challenge to proceedings brought by the company, to conclude that it cannot suffer loss by reason of the situation it was in between 1986 and 2006.

According to PTC the combined effect of i) the financing rules of the US compensation fund, requiring PTC to be a net payer of the fund, ii) the effect of the price elasticity of demand of 0.295 and iii) the delay with which PTC will be compensated relatively to the situation had Decree-Law number 20-C/86, of 13 February, remained in force, results in the deterioration of PTC's position in the scope of the compensation for burdens with "Retired People and Pensioners", of a magnitude which PTC deems to be unacceptable, and contrary to motivations based on which determination of 17.05.2007 was approved.

PTC is thus of the opinion that burdens with "Retired People and Pensioners" should be fully taken into account, and in case an elasticity effect is considered, which it begrudges, it should not take on the magnitude given by ICP - ANACOM in the DD. PTC refers also that no other regulator has considered the existence of that effect and that the WIK study also fails to mention it.

PTC thus alleges that as low-income "Retired People and Pensioners" show a price elasticity which is lower that other population segments (namely for having little access to substitute products, such as mobile phones, for showing a considerable amount of inertia towards the adoption of new technologies and for valuing more fixed lines for security and reliability reasons), it makes no sense to use studies which not only concern different periods but also focus on specific markets without considering the segment at issue here.

Lastly, PTC stresses the need for taking into account within CLSU calculation the delay in the compensation of these costs, as stated by the regulator in the challenge to the above-mentioned proceedings, which has not been dealt with in the DD.

ZON

On this issue, ZON refers that ICP - ANACOM should take account of the provision of other services by the US provider, such as the PTVS, namely through DTH – *Direct-to-Home*[27], thus the respective revenues should be considered.

[27] Satellite television broadcasting service.

B. ICP-ANACOM's view

It is ICP - ANACOM's opinion that the methodology proposed for determining CLSU concerning the "Retired People and Pensioners" provision is the most appropriate.

Although an effective cost is not reached when the methodology is applied, as referred by CABOVISÃO, ICP - ANACOM considers that there is an opportunity cost which must be taken into account.

Accordingly, although the loss of revenue associated to the discount on the monthly charge is not formally a cost, it cannot but be acknowledged that this loss of revenue only exists because an US obligation was imposed on PTC, and as such it must be considered for CLSU calculation purposes.

In fact, it is in the scope of this US provision that the identification of the cost is most immediate and clear, given that it is easy to establish a comparison between the provision at issue and the one that would result from the normal commercial activity of the company.

In this context the provision of other offers to "Retired People and Pensioners" is irrelevant for CLSU determination, given the fact that even if the customer is overall profitable, it cannot be denied that PTC only grants the discount at issue because it is bound to do so. In any case, it is clarified that any benefits arising from aspects related to the loyalty of clients will be taken into account in the scope of the assessment of indirect benefits.

Moreover, if the same methodology used to assess unprofitable areas was applied, considering costs effectively incurred and including positive margins of other services provided, there would be a risk of double counting "Retired People and Pensioners", in case they were unprofitable customers, a risk which does not arise with the methodology proposed.

Note also that the obligation to provide the "Retired People and Pensioners" offer, associated to a cost corresponding to the discount granted, implies that in its absence PTC would receive the equivalent to the full amount charged to a "normal" customer, except in the situations in which the client under consideration opted for terminating the contract with PTC, disconnecting the service, precisely for not being given the referred discount.

It is this price elasticity of demand effect that in ICP - ANACOM's opinion must be added in the scope of the calculation of costs of this provision. It should be highlighted, in this respect, that PTC itself acknowledged elsewhere[28] that this effect existed, so it is legitimate to reflect it in the calculation of CLSU.

Anyway, it is acknowledged that values presented in the DD were obtained on the basis of studies which in some cases are not recent and may not necessarily reflect the national reality, specially the "Retired People and Pensioners" segment. ICP - ANACOM will thus promote a study intended to estimate the effect of the price elasticity of demand, replacing the value indicated in the DD by the one that results from that study.

As regards PTC's allegations that this effect is not considered by any other regulator, the referred effect has in fact been considered in Spain, in the past, for CLSU calculation

[28] PTC' letter of 13.02.2007, on "Retired People and Pensioners".

purposes, as follows[29]: "*Para este tipo de usuários* [with special tariffs]*, Telefónica calcula el coste neto del servicio universal como la diferencia entre la tarifa que aplica al resto de los usuarios y la tarifa que carga a este tipo de clientes, multiplicada por el número de clientes de este tipo y ajustada por un factor de elasticidad. (…) El ajuste por la elasticidad de la demanda de acceso telefónico a la cuota de conexión trata de tomar en cuenta el hecho de que si Telefónica de España incrementara la cuota de conexión la demanda de líneas telefónicas disminuiría. Del mismo modo se procede con la cuota de abono, donde también es necesario introducir un factor de elasticidad para considerar el hecho de que si aumentara la cuota de abono algunos abonados se darían de baja*".

As to the references made by PTC on the background for the determination of 17.05.2007[30], it is stressed that even before that determination, the granting of the discount to "Retired People and Pensioners", as well as PTC's compensation for the award of that benefit resulted from Decree-Law number 20-C/86. In the light of that Decree-Law the discount did not integrate the US. That provision started to be framed within the US as from the determination of February 2007, thus as from this date the reimbursement of costs arising from that provision is subject to another framework - that which arises from the ECL - and not from Decree-Law number 20-C/86, which in the meantime was repealed, thus it makes no sense to compare compensations received within these two frameworks.

Moreover, at no time did ICP - ANACOM declare that PTC would be compensated in the amount equal to that received while obligations imposed under Decree-Law number 20-C/86, of 13 February, were in force[31].

At the time of the approval of the determination referred to earlier, as well as of the prior hearing and public consultation which preceded it, ICP - ANACOM in fact undertook to consider the 50% discount to be granted within the scope of the "Retired People and Pensioners" tariff in the scope of CLSU calculation, having declared that this aimed to ensure the continuity of principles underlying the model so far in force (2007), namely through the possibility of compensating PTC for costs incurred with the provision of the offer to "Retired People and Pensioners".

However, the fact that ICP - ANACOM considered the discounts at issue in the US scope is not a direct and automatic guarantee of financing. In fact, both in the scope of the determination and in the scope of the public consultation report, it was referred not only that such a consideration would take place in the framework of the application of articles 95 and 96 of ECL, but it was also stressed that the possibility of compensation would take place if ICP - ANACOM acknowledged the existence of CLSU associated to the US provision. This last statement implicitly conveys the possibility of absence of CLSU, a situation in which the burden with "Retired People and Pensioners" would not be compensated.

Finally, it must be clarified that the present exercise does not intend to compare PTC's situation with the financing of the "Retired People and Pensioners" discounts directly assured by the State and the consideration of these discounts for CLSU purposes. As seen earlier, ICP - ANACOM aims to compare PTC's situation with and without US obligations,

[29] CMT's Decision of July 2003, available at http://www.cmt.es/cmt_ptl_ext/SelectOption.do?nav=busqueda_resoluciones&hcomboAnio=2003&hcomboMes=7&categoria=todas&sesion_sol=03-07-2003

[30] Available at http://www.anacom.pt/render.jsp?contentId=1074876

[31] Available at http://www.anacom.pt/render.jsp?contentId=960487

which in the specific case of "Retired People and Pensioners" requires the comparison between the current situation and a situation in which the USP was not under the obligation - determined in the US scope - to grant discounts for that type of clients. In this perspective, the comparisons between both the situations are groundless.

On PTC's comments on compensation delays, ICP - ANACOM refers to its view on section 4.1, on "General Principles". Moreover, it is restated that, until 2006, the granting of the referred benefit was not regulated as US provision, which only occurred after the determination of 2007, when the reimbursement of costs arising from that benefit was bound to comply with rules in ECL on US financing. The fact that the State reimbursed PTC every year for the burden of the discount granted to "Retired People and Pensioners", in the period preceding 2007, does not legally require, having this discount been framed within the US, that the reimbursement system complies exactly with the same rules.

4.4. Provision of a comprehensive directory and of a directory enquiry service

A. Responses received

CABOVISÃO

CABOVISÃO considers that the positive value of these US components should be deemed at least as indirect benefits, as these benefits would not exist if PTC had not been designated as USP. In this respect, CABOVISÃO refers that the consultation of the process shows that this is the position taken by TERA Consultants[32], as it refers that the display of the USP logo on paper directories constitutes an indirect benefit (brand enhancement).

PTC

PTC agrees with the approach proposed by ICP - ANACOM, and has no material reservations to express. However, it considers that it is incumbent on the regulator to detail the methodology to be applied in the calculation of net costs associated to these components.

VODAFONE

VODAFONE strongly disagrees with ICP - ANACOM's view that the positive components of US should not reduce the negative value of other components.

VODAFONE considers that, having the USP negative margins at the beginning of the provision of these components, it can only be concluded that the current provision results from the US obligation, as it is unlikely that the USP would have started this provision had it not been compelled to do so.

VODAFONE refers further that the USP is the only operator with data on clients of all operators and, as such, in addition to tangible benefits, it also enjoys intangible benefits resulting from that provision.

[32] This concerns the proposal submitted by this consultancy company to the international public tender launched by ICP - ANACOM in the scope of the definition of the methodology.

ZON

ZON supports that any positive margins generated by these components should be accounted for in CLSU, as apart from the USP no other bodies provide the services in question, given that PTC's size, the size of the target market and the service provision history are all unsurpassable obstacles.

Specifically on the "118" service, ZON refers that in case this component ceased to be provided by PTC, the company would be able to maintain the "1820" commercial service, which in practise would plunder the "118" even more, reducing its profitability.

The company thus proposes not only that the positive margins of the service are considered but also that the "1820" directory enquiry service is provided via the "118", which should have a flexible tariff, and in the alternative, the margins of the "1820" service should be accounted for as CLSU.

B. ICP-ANACOM's view

As regards the issue of considering provisions with positive margins, this Authority restates what it established in the scope of chapter 4.1, which stresses that the methodological approach is based on the comparison between the real situation, in which a given company has a set of US obligations and a hypothetical situation in which that company would not be burdened with those obligations.

In case the services present positive margins, this means that even in the absence of US obligations the company would be interested in providing them, that is, they would be provided regardless of US obligations, thus they should not be considered for the purposes of CLSU calculation. However, it is important to distinguish between advantages resulting from the size of PTC's client database, regardless of its US condition which would enable it to provide a directory service in all cases, from the advantages associated to the US provision.

As regards data on clients, ICP - ANACOM rejects the idea that this is an exclusive benefit for the USP and recalls that under paragraph 4 of article 50 of ECL "*undertakings which assign telephone numbers to subscribers shall meet all reasonable requests for the supply of the relevant information on the respective subscribers for the purposes of the provision of publicly available directory enquiry services and directories, in an agreed format and on terms which are fair, objective, cost oriented and non-discriminatory*".

As regards PTC's comments concerning the need to define and apply the methodology to these US components, ICP - ANACOM considers that as these provisions are made available in a profitable way, the definition of the methodology to be used in the calculation of the respective net costs, which could be justified for purposes of a consistent approach, would turn out to be a sterile exercise which would not contribute to improve or ensure the transparency of the regulator's action, given that the calculation of CLSU for this component will not be carried out.

4.5. Adequate provision of public payphones

A. Responses received

PTC

PTC agrees with the approach proposed by ICP - ANACOM, and has no material reservations to express on the matter.

VODAFONE

VODAFONE has doubts on the need for a public pay-phone network with the current coverage/capillarity, given the technological alternatives. As such, the analysis of this provision should consider the real use of this alternative access to fixed voice services which, on VODAFONE's opinion, is clearly marginal, taking into account the available solutions provided by fixed and mobile operators.

ZON

ZON has doubts on whether it is possible for all public pay-phones to receive calls. In this respect, it refers that PTC must have wasted a considerable amount of revenue associated to call termination in the public pay-phones under consideration. For this reason, ZON considers that this functionality should be implemented and disclosed, being added to CLSU a margin for the provision of the service of call reception in all public pay-phones.

B. ICP-ANACOM's view

The calculation of CLSU concerning the provision of public pay-phones is based on the obligation which has been in force over the last few years, thus any alterations to the current obligation, if any, for example further to the public consultation on public pay-phones, which ended on 20.04.2011[33], will only have an effect in the future, as from the moment on which they are implemented.

As regards the suggestion of considering a margin for the provision of the service of call reception in public pay-phones, ICP - ANACOM stresses that this service is not specified as an obligation in the scope of the US provision of public pay-phones. Accordingly, the Authority considers that the referred margin, which would be fictional, should not be included in the calculation of CLSU for public pay-phones.

Without prejudice, PTC must consider the service under consideration, to the extent it is provided, when applying the methodology, namely in terms of avoided revenues.

[33] Available at http://www.anacom.pt/render.jsp?contentId=1079932

4.6. Indirect benefits

4.6.1. General comments

A. Responses received

CABOVISÃO

In addition to the benefits identified by ICP - ANACOM, CABOVISÃO considers also that account should be taken of benefits arising from the provision of directories and directory enquiry services, from the wholesale business and from volume discounts in the purchase of goods and services, as the US is not a marginal activity for PTC.

PTC

PTC states in this matter that it will be necessary to establish calculation assumptions and procedures for measuring quantities which, in most cases, are nothing else than abstract projections, which can only be rendered operational, in its view, if there is a significant level of simplification and a set of assumptions to model the calculation of costs/benefits. This situation, according to the company, places on ICP - ANACOM a special obligation to justify the criteria to be considered in the calculation of immaterial benefits.

As regards indirect benefits, PTC stresses that consideration must be only given to the ones which result for PTC from the provision of the US, not to those which generate from other factors, including the fact that PTC is the incumbent operator.

VODAFONE

As far as indirect benefits are concerned, VODAFONE highlights the fact that its value generally represents a high percentage relatively to the US costs, referring the example of France, where such benefits have been between 71% and 45% between 2003 and 2008.

B. ICP-ANACOM's view

As regards the possible benefits of the wholesale business, its provision is deemed to be a direct benefit in the scope of the application of the CLSU calculation methodology to the service of connection to the public telephone network at a fixed location and access to publicly available telephone services.

Relatively to the consideration of volume discounts, it is considered that such discounts should only be considered relevant for amounts much more significant than the ones involved in case of discontinuation of the US, which is exactly what is aimed to be modelled.

As regards PTC's observations on the fact that it is the incumbent operator, it is clarified that the methodology considered is not intended to reflect that status, but focuses on the effects of a possible discontinuation of the US. However, it is noted that ultimately even the designation as USP arises from the fact that PTC is the incumbent operator.

4.6.2. Corporate reputation and brand enhancement

A. Responses received

CABOVISÃO

CABOVISÃO takes the view that the brand promotes the whole Grupo PT, or at least its fixed business, and it is overall enhanced by the US provision, thus it must be enhanced in a less limitative manner that reflects the benefits for the whole group.

ONITELECOM

As regards corporate reputation and brand enhancement, ONITELECOM disputes that the criterion is based on revenues from services included in the US relatively to the remaining revenues, as in its opinion it should be proportional to costs, so that the benefit is not artificially reduced.

OPTIMUS

OPTIMUS stresses the weight of this indirect benefit within the group of indirect benefits, and considers that given the large client database of the USP, due to its USP condition, the degree of visibility of the brand, and consequently of its reputation, is higher. This is a very significant benefit at the level of the decrease of the marketing investment a "normal" operator would have to do to reach the same level of visibility.

Not only is the value of the PT brand deemed to be substantial, but OPTIMUS refers also that specific brands of certain segments (TMN, Sapo or Meo) are leveraged in the brand of Grupo PT, which originates from the fixed segment, and which is generally associated to services included in the US scope. Thus, most part of the value of the PT brand should be deemed as an indirect benefit of the US provision.

OPTIMUS disagrees with the way of calculating the part of the PT brand value put forward by ICP - ANACOM, and as an alternative proposes the following: i) to consider that the brand value should be fully attributed to domestic operations (considering that in most international operations the PT brand is not used); ii) to assign a value to the fixed business based on a percentage of revenues generated by this business in the total of domestic revenues of the Grupo PT - an approach which is nevertheless regarded as conservative by OPTIMUS, iii) to calculate the value of the benefit based on the percentage of accesses that generate CLSU in the total of FTS accesses.

OPTIMUS also mentions the importance of taking accesses into consideration and not revenues, considering that the benefit results from a scale factor measured in number of clients and not in revenues.

Deeming its own approach to be still extremely conservative, namely for accounting for the proportion of FTS revenues, OPTIMUS stresses that other countries have opted for more simple and transparent approaches, such as a fixed percentage on the advertising investment value or on the business volume, which may be arbitrary, but are also efficient, transparent and simple to implement. The company recalls in this context that, in the UK, 20% of the marketing and retail sales investment made by British Telecom was considered.

It refers further that a more complex approach could involve the calculation of marketing & sales costs necessary to reach the US client database, acknowledging however that this would be more difficult to implement.

As several approaches are possible, OPTIMUS considers that an approach which is transparent, well substantiated, simple to implement and to validate, should be selected, and that it is not acceptable that, due to calculation difficulties, criteria which minimize the US provision value are promoted.

PTC

PTC considers that the approach adopted in the DD may not appropriately achieve the additional value that results from the US provision, as it admits that the brand benefit is constant and linear for all products and based on the group's brand. As such, it favours an approach based on a market study, involving client surveys on the "PT Comunicações" brand, to assess the additional value of the latter as a result of the US provision.

PTC alleges also that with the decision taken by ICP - ANACOM, in May 2007, imposing the repercussion of the 50% discount applicable to "Retired People and Pensioners" on SLRO accesses that supported services provided to "Retired People and Pensioners", PTC was to a certain extent no longer regarded as the sole USP. In this company's opinion, this must be taken into account, quoting the prior hearing report of the determination of 2007 which provides that "*this will be considered in the scope of the assessment of indirect benefits of the universal service provision*".

PTC further invokes the APC in this respect to request additional measures of inquiry. One of the aspects referred to in this context concerns a market survey for assessing the impact of the USP quality in the corporate reputation and brand enhancement, alleging that the failure to carry out this measure could lead to a decision based on incorrect data with serious consequences for PTC.

VODAFONE

VODAFONE considers that the resort to companies that determine brand enhancement is not the most appropriate method, as brand enhancement is often considered speculative and subject to significant changes. It thus considers that the brand enhancement should be calculated through an average of values presented in more than one study.

On the other hand, it considers that a methodology based on the allocation of a brand value supported on the number of existing lines in the US scope relatively to the total is not the best manner of allocation, as these clients are not able to choose another USP.

According to VODAFONE, an appropriate methodology for determining the brand value should assess the positive impact for PTC of being the USP in Portugal. For this purpose, VODAFONE refers the example of the French regulator (ARCEP), which took account of the "extra-charge" clients would pay the company for services provided before deciding to change operator, in the scope of which the brand "France Telecom" was enhanced in EUR 21.05 million in 2006.

However, VODAFONE considers that there are other benefits related to corporate reputation, such as: the USP being regarded as the body with "natural" rights to set up

the network on private buildings, namely fiber to the home (FTTH) networks, in the scope of which obstacles are allegedly placed in the way of other operators; the preference of customers for the PT operator when choosing a fixed service provider and the fact that the USP is not forced to stop providing the service to unprofitable customers, granting it a more positive image than other operators that must react in such situations.

B. ICP-ANACOM's view

A far as corporate reputation and brand enhancement are concerned, ICP - ANACOM takes the view that, for the purpose of enhancement of indirect benefits associated to the brand, bearing in mind that the US provision falls exclusively on PTC, the brand enhancement does not result only from PTC and even less from the US provision. In this context, ICP - ANACOM considers that the proposed approach is the most appropriate, and also that it is substantiated, transparent and likely to be implemented and validated. It has been used by the Spanish regulator on similar lines to the ones proposed, for the assessment of the indirect benefit associated to corporate reputation and brand enhancement.

The resort to market surveys not only considerably delays the process, but gives no guarantees of an increased reliability and objectivity, namely for the complexity associated to the choice of questions to be made and enhancement of the respective replies, as the assessment considered in the DD is carried out by a body whose main activity is precisely to evaluate brands.

Accordingly, it is deemed that it is not appropriate to take any additional measures of inquiry, as requested by PTC.

As regards the reference to the impact on the brand of ICP - ANACOM's determination on the repercussion of the 50% discount granted to "Retired People and Pensioners" in the SLRO, the Authority takes the view that such an impact would be clearly immaterial.

This Authority fails also to see the logic reasoning for the allocation of the benefit in terms of costs, as suggested by ONITELECOM, as the brand effect is produced on clients and on their behaviour (namely in terms of traffic they generate). It also does not seem preferable to resort to accesses as suggested by OPTIMUS as that number does not reflect the whole market reality.

4.6.3. Ubiquity

A. Responses received

PTC

PTC invokes the position of the French regulator (ARCEP) to consider that the ubiquity effect is mainly a result of the fact that it is the incumbent operator, not the US provider.

The company is of the opinion that loyalty in situations of change of location is also determined by factors other than the acknowledgement or gratefulness towards PTC for ensuring the service under unprofitable conditions in the past, a fact which, according to PTC, the referred clients are not aware of, in most cases. Choice factors are becoming increasingly related to the price, the quality of service, the loyalty or customer support

service, thus PTC considers that the calculation formula should incorporate a factor which represented the percentage of clients the company would have even if it was not the USP.

In any case, PTC prefers the resort to purchase costs, as understood within the life-circle scope, considering that in terms of communications all operators benefit from an ubiquitous presence.

B. ICP-ANACOM's view

As regards the fact that PTC considers that most benefits resulted from the fact that it is the incumbent operator, not the USP, the Authority refers to its view in section 4.6.1. Moreover, the approach adopted in the DD on this matter, which PTC identifies as not having been adopted in the French case, was used in the Spanish and British cases.

Still on PTC's position, now as far as purchase costs are concerned, it is stressed that what is really at issue here is the USP's capacity to maintain clients that change location and that one of the fundamental US characteristics is exactly the fact that it must be provided throughout the national territory. Therefore, this obligation is deemed to be relevant in the perspective of benefits inherent to ubiquity, namely in terms of costs of client acquisition, which are negligible in a situation in which the customer does not change operator.

4.6.4. Life-cycle effects

A. Responses received

PTC

PTC considers that the proposed calculation formula is not feasible, as it requires the identification of clients which in the last 5 years showed revenue variations equal to or higher than the level required to no longer present a negative margin individually, data which according to the company does not exist or is impossible to obtain. It also refers that there are uncertainties as to the retention of unprofitable customers, arguing that customers do not show loyalty in 100% of cases, thus some of them would have abandoned PTC during the 5 years at issue, a matter which must be taken under consideration.

On the other hand, it considers that even if PTC was not under US obligations, after clients became profitable, it would compete for them, and it is likely that some of the clients could be won.

Finally, PTC deems that the value to be accounted for in this context should correspond to the cost of winning unprofitable customers that became profitable in scenery in which PTC was not the USP, warning that any increase in communication expenses would currently be overall absorbed by mobile operators.

B. ICP-ANACOM's view

Given the comments made by PTC on the absence of data on clients which in the last 5 years showed revenue variations equal to or higher than the level required to no longer present a negative margin individually, and taking also into account that the known

benchmark points towards a low expression of that benefit in the total of indirect benefits, it is accepted that this benefit is not considered for the purpose of calculating CLSU. The impact of including such a benefit would not be significant and does not justify the resources used to calculate it.

4.6.5. Advertising on public payphones

A. Responses received

PTC

PTC only refers that the advertising value is not the same for all public pay-phones, thus it suggests that a study is carried out to assess the adverting space cost according to the region where each public pay-phone is located.

B. ICP-ANACOM's view

ICP - ANACOM accepts that the advertising value may not be the same for all public pay-phones. However, carrying out a study to measure the differences between the various public pay-phones will likely have costs that exceed the benefits intended to be reached. Therefore, it is considered that an advertising space average value should be used, and that specific values can be accepted as long as they are justified by PTC and its determination does not delay the process.

4.6.6. Operation of a customer database

A. Responses received

CABOVISÃO

CABOVISÃO refers that the benefit resulting from the customer database associated to the provision of telephone directories and directory enquiry services should be deemed as an indirect benefit.

PTC

PTC broadly agrees with the approach proposed by ICP - ANACOM.

VODAFONE

VODAFONE does not agree that the customer database to be enhanced is the one that corresponds to unprofitable customers, as PTC only has access to information on profitable customers of other operators because they are compelled to make that information available.

VODAFONE stresses also that such information has a value which is not negligible, as it cannot be replicated, thus it should be considered in the determination of CLSU.

ZON

As regards the customer database of unprofitable customers, ZON is of the opinion that taking into account a context of strong competition in the provision of PTVS and LMS, the database should be considered for indirect benefit purposes, given also the market share of the companies of the Grupo PT for those services, as well as the growth speed of the referred share.

B. ICP-ANACOM's view

ICP - ANACOM clarifies that it s not accurate to state that only PTC has information on profitable customers and that this information cannot be replicated - in the case of directories, if an operator other than the USP requests an information, other operators must also provide it, in the light of paragraph 4 of article 50 of the ECL.

It is also noted that the USP is bound to comply with provisions applicable within the scope of rules related to the processing of personal data and the protection of privacy in electronic communications (specifically article 13 of Law no. 41/2004, of 18 of August).

4.6.7. Mailing

A. Responses received

CABOVISÃO

CABOVISÃO refers that, even if a negative connection with the payment associated to the sending of invoices is alleged, this does not prevent such invoices from attaching advertising pamphlets.

PTC

PTC broadly agrees with the approach proposed by ICP - ANACOM.

B. ICP-ANACOM's view

In the light of the comments presented, ICP - ANACOM decides to maintain its view on this issue.

4.6.8. Regulation fees (paragraph 1b) of article 105 of ECL)

A. Responses received

CABOVISÃO

CABOVISÃO refers that it fully agrees with ICP - ANACOM's view as to fact that the deduction of regulation fees is a benefit for PTC, and, as such, in theory, it should be considered for CLSU calculation purposes.

In this respect, CABOVISÃO refers further that it disagrees with the manner of calculating the regulation fee, especially with the referred deduction, and considers it illegal, unconstitutional and a State aid that leads to serious competition restrictions. CABOVISÃO

considers also that that deduction, which increases the fee paid by remaining operators, clearly infringes Community Law.

CABOVISÃO considers also the ICP - ANACOM should not draw consequences from an illegal situation - the USP designation in disrespect for the mechanism provided for in the US Directive - such as the failure to consider revenues resulting from the provision of the US for the purpose of calculating regulation fees.

In this context, although it supports ICP - ANACOM 's view that the referred deduction is a benefit for PTC, CABOVISÃO cannot agree with the proposal for calculating that benefit. In fact, it considers that the proposed solution is not appropriate, because the manner of calculating the fee takes into account US revenues and not revenues subtracted from costs.

CABOVISÃO considers that the regulation fee problem should be solved otherwise, and that the regulator should retroactively correct the overall value of relevant revenues of operators, so as to include the total of US revenues, and to accordingly reduce the contribution applicable to all operators.

OPTIMUS

OPTIMUS agrees with the proposed approach of deeming as a benefit the exemption from the regulation fee, but only in a factual perspective and while the situation is not corrected, as it totally disagrees with the referred exemption, recalling what it has argued elsewhere on this matter.

PTC

As far as regulation fees are concerned, PTC takes the view that the approach proposed by ICP - ANACOM is illegal, as it neutralizes the effects of the tax exemption provided for in Administrative Rule number 1473-B/2008, removing an effect safeguarded by the legislator in that statutory instrument, and which in its opinion is aimed for the application of the principle of equality, because if PTC was not the USP it would not have such revenues and thus would not have to pay fees on their account.

PTC restates that, in a hypothetical scenery in which it was not under the obligation to provide the US, it would also not have revenues from the provision of that obligation, thus it would not pay any fee for those revenues.

This exemption may thus not be qualified as a benefit to be considered for the purposes of CLSU calculation, alleging PTC that ICP - ANACOM is taking the place of the tax legislator, which in its view is clearly illegal and could be deemed to be a misuse of powers, and any decision taken within the direction of the DD in this matter should be considered null and void.

VODAFONE

Recalling that it challenged since the start the fee calculation method in Administrative Rule number 1473-B/2008, VODAFONE refers that it agrees with the view taken by ICP - ANACOM on the consideration of the deduction of relevant revenues presented by PTC as

an indirect benefit of the US provision. VODAFONE considers that the "discount" which the referred deduction entails is quite significant and burdens the remaining operators which end up bearing a higher percentage of the amount of regulation costs.

In this context, VODAFONE considers that the benefits arising for PTC from being exempt from paying fees due for occupying public domain, by virtue of the bases of concession, should also be taken into account.

ZON

ZON is of the opinion that the adoption of US rules imposes an immediate repeal of the exemption rule benefiting revenues resulting from the US provision in the scope of rules that determine regulation fees.

B. ICP-ANACOM's view

In its DD, ICP - ANACOM referred that not considering, for the purpose of the calculation of fees due for the provision of electronic communications networks and services, the revenues resulting from the US provision constitutes an indirect benefit.

ICP - ANACOM acknowledges that PTC has presented valid comments which lead this Authority to partially change its position laid down in the DD.

PTC namely refers that in a scenery in which it was not under the obligation to provide the US, it would also not have revenues resulting from the provision of that obligation, thus it would not pay any fee for those revenues.

ICP - ANACOM generally accepts this argument. In fact, as regards the application of the methodology for calculating CLSU, for the determination of unprofitable areas and unprofitable customers in profitable areas, in case the payment of fees referred to the total of PTC's revenues, the part of the payment resulting from US revenues would have to be considered an (avoidable) cost arising from unprofitable areas and unprofitable customers living in profitable areas, likely to be compensated within the US framework. As the referred payment was not made, due to the non-consideration of revenues arising from the US provision in the calculation of fees, then in that case no cost must be taken into account, nor any benefit.

However, PTC's arguments as regards the effect of the payment of fees in the case of "Retired Persons and Pensioners" cannot be accepted. In this case, the calculation methodology is different, as it is not based on the estimate of avoidable costs and lost revenues, but only on the consideration of lost revenues relatively to the situation of normal commercial operation - the discount granted to "Retired Persons and Pensioners". Accordingly, contrary to the situation described before, on unprofitable areas and unprofitable customers in profitable areas, in this situation, in case no US obligations existed, PTC would have paid a higher fee than the one it did pay (as revenues from "Retired Persons and Pensioners" would have been higher given the absence of the discount).

In the light of the above, ICP - ANACOM considers that, in the case of "Retired Persons and Pensioners", consideration should be given to the benefit resulting for non

accounting for the revenues resulting from this US provision for the purpose of fee calculation.

As regards the fee for use of the underground, it is clarified that in the current regulatory framework, the situation referred by VODAFONE, according to which PTC is exempt from paying fees for occupying public domain by virtue of the bases of concession, is not supported by the law.

In fact, with the entry into force of the ECL in 2004, the exemption provided for in the previous General Bases of Telecommunications[34] (Law number 91/97, of 1 August) was repealed and a non-discriminatory treatment of all companies, in the scope of rights of way, was laid down. Accordingly:

- Municipalities were given the possibility of establishing a municipal fee for rights of way (MFRW) for all undertakings providing publicly available electronic communications networks and services, at a fixed location - that is, for the concessionaire PT and all other companies (*vide* article 106 of the ECL). This regime was subsequently clarified by article 12 of Decree-Law number 123/2009, of 12 May, as amended by Decree-Law number 258/2009, of 25 September, which explicitly states that the collection of any other fees, charges or remunerations for the use or exploitation of property of the municipal public and private domain is not allowed;
- An exemption for all electronic communications operators, that is, once more a non-discriminatory exemption, concerning municipal fees for rights of way due to the State and Autonomous Regions was laid down (*vide* article 106, paragraph 4 of ECL); and
- The exemption from the municipal license requirement enjoyed by the concessionaire was repealed (*vide* article 127, paragraph 3 of ECL) and all undertakings were made subject to the same regime of infrastructure set-up before the municipal authorities (*vide* article 19, paragraphs 5 to 7 of ECL). Later, the regime of infrastructure set-up before the municipal authorities was established in the mentioned Decree-Law number 123/2009.

5. Conclusion

Following the analysis of the comments made by interested parties in the scope of the prior hearing and public consultation procedures, which were taken into due consideration, ANACOM saw fit to amend the following aspects of its draft decision, both as regards the definition of unfair burden and the methodology for calculating CLSU.

In this scope, in addition to editorial amendments and changes reinforcing or clarifying arguments now developed, the following amendments to the DD subject to public consultation and prior hearing are hereby stressed:

- The decision on unfair burden applies an uniform criterion for its definition in the periods prior to and following the tender procedure for the designation of the USP;

[34] Cfr. article 127, paragraph 1a) of ECL.

- As regards the time-limit defined in the DD for sending information for the preliminary calculation of the CLSU, ICP - ANACOM determines a 90-day deadline, extendable to 180 days, in case the respective grounds are duly submitted and accepted;
- Relatively to the minimum threshold as from which CLSU funding is justified, ICP - ANACOM determines it is set at EUR 2.5 million;
- With regard to iterations performed when applying the costing methodology to the determination of unprofitable areas and unprofitable customers in profitable areas, it is determined that the iterative process ends where the number of MDF integrating unprofitable areas or where the number of unprofitable customers living in profitable areas achieved in iteration N does not show a variation above 3% relatively to iteration N - 1, and in any case no more than five iterations are to be carried out;
- With respect to the cost and revenue components to be used in the application of the methodology for calculating the CLSU, it is admitted that alternative forms to those presented by ANACOM may be used, including the use of functions to breakdown costs between different areas and customers, provided that the ultimate aim of the exercise, to ensure a true reflection of the facts, is not jeopardised;
- As regards the effect of price elasticity of demand for customers who are "*Retired People and Pensioners*", ICP - ANACOM will carry out a study so as to estimate it, replacing the value indicated in the DD for the value that results from that study;
- ICP - ANACOM accepts not to take into account the life cycle indirect benefit for purposes of CLSU calculation;
- With regard to unprofitable areas and unprofitable customers in profitable areas, ICP - ANACOM accepts that the failure to consider revenues from the provision of the US when calculating the fees due for the provision of electronic communications networks and services does not constitute an indirect benefit, which is limited to the case of "*Retired People and Pensioners*".

All the referred amendments have been duly reflected in the decision on unfair burden and the methodology for calculating CLSU.

List of acronyms and abbreviations

ADSL	Asymmetric Digital Subscriber Line
NRA	National Regulatory Authority
MB	Management Board
CLSU	*Custos líquidos decorrentes da prestação do serviço universal* (net costs of the universal service)
APC	Administrative Procedure Code
DL	Decree-Law
DTH	Direct-to-Home
EBITDA	Earnings before interests, depreciations and amortizations
FTTH	Fiber to the home
IPTV	Internet Protocol Television
ECL	Electronic Communications Law
LTE	Long term evolution
MDF	Main distribution frame
MARKET 4	Market for wholesale (physical) network infrastructure access at a fixed location
MARKET 5	Market for wholesale broadband access
LLRO	Leased Lines Reference Offer
RUO	Reference Unbundling Offer
SLRO	Subscriber Line Resale Offer
USP	Universal Service Provider
PT ADSL Network	Asymmetric Digital Subscriber Line Reference Offer
NGN	Next Generation Networks
ROCE	Return on capital employed
ROI	Return on investment
IAS	Internet access service
CAS	Cost Accounting System
FTS	Fixed Telephone Service
LMS	Land Mobile Service
DD	Draft Decision(s)
PTVS	Pay-TV Service
US	Universal Service
CJEU	Court of Justice of the European Union
MFRW	Municipal Fee of Rights of Way

List of operators

AR TELECOM	AR Telecom – Acessos e Rede de Telecomunicações, S. A.
CABOVISÃO	Cabovisão – Sociedade de Televisão por Cabo, S. A
GRUPO PT	Grupo Portugal Telecom
ONITELECOM	OniTelecom – Infocomunicações, S. A.
OPTIMUS	Optimus – Comunicações, S. A.
PTC	PT Comunicações, S. A.
PT PRIME	PT Prime - Soluções Empresariais de Telecomunicações e Sistemas, S. A.
RTP	Rádio e Televisão de Portugal, S.A.
TMN	TMN – Telecomunicações Móveis Nacionais, S. A.
VODAFONE	Vodafone Portugal – Comunicações Pessoais, S. A.
ZON	ZON TV Cabo Portugal, S. A.

List of Other Bodies/Organizations

ARCEP	Autorité de Régulations des Communications Électroniques et des Postes
BIPT	Institut Belge des Services Postaux et des Télécommunications
EC	European Commission
CMT	Comisión del Mercado de las Telecomunicaciones
COMREG	Commission for Communications Regulation
OFCOM	Office of Communications
BEREC	Body of European Regulators for Electronic Communications
PwC	PricewaterhouseCoopers, LLP
EU	European Union
WIK	WIK-Consult GmbH