

FINAL DECISION

Prices charged by PTC in respect of encoding, multiplexing, transmission and broadcast of free unrestricted access TV channels over the digital terrestrial television (DTT) network (MUX A)

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3. Decision

1. Facts

1.1 Request presented by Rádio e Televisão de Portugal, S.A. (RTP) – 10.07.2013

By letter dated 10.07.2013, RTP requests the intervention of ICP - ANACOM, so that this Authority, as a matter of urgency, and in the exercise of its legal powers, undertakes the *immediate mediation in the determination of the price charged by PT Comunicações, S.A. (PTC)* for the distribution of the encoding, multiplexing, transmission and broadcasting services of the television signal over the digital terrestrial network and additional coverage (hereinafter referred to as DTT price) and at the same time *launches and develops a process imposing on PTC the compliance with the principle of cost-orientation of prices in the determination of prices charged.*

RTP further declares that there is no understanding with PTC as regards the DTT price, which in its opinion far exceeds the price per Mbps proposed by PTC itself, and accepted by ICP - ANACOM, in its application to the call for tenders on MUX A¹, and requests of this Authority that the price determination is effective as from the date of the commencement of the service provision.

In summary, RTP claims that:

- (a) The DTT price charged by PTC, of EUR [BCI] [ECI] million per year, is manifestly unaffordable and excessive.
- (b) According to Decree-Law No. 31/2003, of 17 February², *“the price regime for the access to the television signal transmission and broadcasting network shall comply with the principles of transparency, non-discrimination and cost orientation”*³.

In RTP’s view, the rationale for these principles that apply to the pricing for access to the television signal transmission and broadcasting network is the monopoly situation in the provision of a service which, on top of all of this, is a matter of general interest. This situation, which existed in the analogue context, continues in the digital scenario. In this context, given that:

- DTT is currently the only way to ensure the universal provision of the public TV service;
- the signal broadcast is ensured on a monopoly regime by PTC; and
- the legal provision referred earlier makes no distinction between analogue transmission and broadcasting services and digital transmission and broadcasting services;

¹ Public tender for the allocation of a right of use for frequencies of a national scope for the digital terrestrial television broadcasting service (MUX A), opened by Regulation No. 95-A/2008, of 25 of February (hereinafter referred to as “Tender Regulation”) available at <http://www.anacom.pt/render.jsp?contentId=979860>.

² Statutory instrument which replaced the bases of concession of the telecommunications public service, published in annex to Decree-Law No. 40/95 of 15 February.

³ Article 16, paragraph 3.

RTP supports that the rationale for application does not change with the alteration of the broadcasting technology, that is, the identified rule should apply also to the digital service⁴.

- (a) The Tender Regulation established as criterion for the assessment of applications the average annual price for the provision of the service per Mbps in the first ten years.

However, paragraph 4 of article 19 of the Tender Regulation refers that “Where the holder of the right of use and television operators do not reach an agreement on the compensation due (...) ICP-ANACOM may determine a suitable remuneration in accordance with the regime set forth in paragraph 3 of article 43 of Law No. 5/2004, of 10 February”.⁵

RTP thus concludes that the DTT price not only ceased to be supported on the principle of cost-orientation of prices, but is now to be agreed on between the operator of the digital network and respective users, with a possible mediation of ICP - ANACOM⁶.

- (b) PTC requires EUR [BCI] [ECI] million per year for the distribution of each programme service over a multiplexer with a capacity of 9 SD programme services; this means, in RTP’s view, that PTC is adding to MUX A a value of around EUR [BCI] [ECI] million per year (9 x EUR [BCI] [ECI] million), which RTP deems to be “obscene” and likely, in its opinion, to require ICP - ANACOM’s scrutiny.
- (c) PTC does not indicate how the price was formed, which in RTP’s view would be essential to rule out any possibility that television operators were financing aspects of DTT operation which have nothing to do with the provision of the distribution service of which they are the beneficiaries.

In this context, RTC supports that it is not legitimate for television operators to bear:

- Full costs of operation of a multiplexer occupied by them in less than 50%;
- Costs associated to citizen communication and information plans regarding the analogue-to-digital transition process;
- Costs resulting from subsidies and decoder co-payments.

- (d) RTP declares that PTC will charge the Assembly of the Republic around EUR 420 thousand for the distribution of the signal of the *Canal Parlamento* over MUX A, which,

⁴ This is also a consequence of the principle of technological neutrality that applies in the field of electronic communications.

⁵ This provision lays down that “The NRA may determine appropriate remuneration in respect of imposed “must carry” obligations, which remuneration shall be applied in a proportionate and transparent manner, while ensuring that, in equivalent circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks”.

⁶ RTP declares that, in fact, this information was provided by ICP - ANACOM itself in the scope of the clarification provision procedure which preceded the period for submitting applications in the scope of the MUX A tender: “It is incumbent on the DTT operator to define and agree with television operators the conditions for its provision, including the remuneration for access to Multiplexer A transmission signal, as follows in fact from provisions in pages 11 (point 3.1 of the Technical Plan) and 29 (point A.1.1. of the Economic and Financial Plan) of the Specifications. Without prejudice, in the scope of the referred point A.1.1. (Offer Characteristics), applicants must present the annual average price for provision of the service per Mbit/s in the first 10 years” [response to a request for clarifications made by Vodafone, of 15.04.2008].

configuration differences safeguarded, raises very serious competition problems which must be assessed by the regulator, for the discrimination it represents.

In short, for RTP, given that this matter concerns a service of public interest which is provided in a monopoly situation by PTC, the price of the DTT broadcasting service should not reflect only PTC's investments in network-related capital goods and operational expenses, to be clearly cost-orientated and allowing the expansion of the DTT offer of programme services of the public service, such as the development of new functionalities and services.

1.2. Letter of RTP - 05.11.2013

Subsequently, by letter of 05.11.2013, RTP referred that it had not received "*any response or communication on the part of ANACOM, and given that the time limit for the conclusion of the procedure underlying the request is to expiry, save for a reasoned extension, in the course*" of November, requesting from ICP - ANACOM information on actions and steps already taken and to be taken by this Authority to get the procedure underway.

1.3. Requests for information made by ICP - ANACOM - 08.11.2013 and 11.11.2013

The procedure undergoing the investigation stage, ICP - ANACOM took the following steps:

- (a) RTP was requested⁷, under articles 56, 89, paragraph 1, and 90, paragraph 1, all of the Administrative Procedure Code (APC) to provide the following clarifications:
- Information on the negotiation process between RTP and PTC, namely how and when it took place;
 - Information on what was agreed on with PTC in the course of this negotiation process;
 - The specific reason for disagreement between RTP and PTC on the price charged for the service.

ICP - ANACOM also requested RTP to submit all information exchanged with PTC in the scope of the above-mentioned negotiation process.

- (b) The Authority notified PTC⁸ of RTP's requests, allowing the former to comment in writing thereon, if it so wished. On the same occasion, the Authority notified also that Sociedade Independente de Comunicação, S.A. (SIC) and Televisão Independente, S.A. (TVI) would be informed of the contents of the referred requests so that the latter, if they so wished, commented thereon as interested parties, as beneficiaries of "must carry" obligations imposed on PTC.

⁷ Fax ANACOM-S051569/2013, of 11.11.2013.

⁸ Fax ANACOM-S051568/2013, of 8.11.2013.

ICP - ANACOM also requested the following of PTC, for the purpose of article 108 of the Electronic Communications Law⁹ (ECL):

- Copy of contracts for the provision of the DTT service concluded on 2012 with SIC and TVI;
- Information on the reasons for the lack of agreement notified by RTP;
- Confirmation that DTT prices charged to television operators are those referred in PTC's letter of 04.01.2013;
- Information on the negotiation process with RTP, on aspects agreed on and those on which no agreement was reached.

(c) The Authority informed SIC¹⁰ and TVI¹¹ of the contents of RTP's requests, including the reference to article 19, paragraph 4, of the Tender Regulation, notifying these companies, as interested parties, of the opening of the procedure, so that they provided their comments on the referred requests, if they so wished.

1.4. ICP - ANACOM's decision to extend the deadline for conclusion of the procedure on the request submitted by RTP - 14.11.2013

By determination of 14.11.2013, the Management Board of ICP - ANACOM considered that it follows from the regime invoked by RTP (article 43, paragraph 3, of ECL *ex vi* article 19, paragraph 4 of the Tender Regulation) that both the holder of the right of use for frequencies and television operators have the possibility of requesting the intervention of this Authority in the absence of an agreement on the remuneration due for imposed "must carry" obligations; as such, RTP, as television operator benefiting from "must carry" obligations imposed on PTC, is entitled to present the request for intervention.

Assumptions which set the procedure in motion having been fulfilled, but ECL nor the Tender Regulation not establishing any specific procedural requirements on its course, ICP - ANACOM considered that it would be clearly subject to the regime laid down in APC, the deadline for conclusion of the procedure being subject to the general 90-day deadline (article 58 of APC).

However, bearing in mind that the analysis of the request was considered of high technical complexity and that ICP - ANACOM still required the necessary information to assess the matter so as to be able to issue a draft decision, the procedure thus being in its investigating stage, the Authority decided¹² to extend, for a period of 90 days, the time-limit for the conclusion of the procedure on the request submitted by RTP for the determination of the DTT price, having the referred decision been notified to RTP, PTC, SIC and TVI.

⁹ Law No. 5/2004, of 10 February, as amended and republished by Law No. 51/2011, of 13 September, and later by Laws No. 10/2013, of 28 January, and 42/2013, of 3 July, available at <http://www.anacom.pt/render.jsp?contentId=1099877>.

¹⁰ Fax ANACOM-S051571/2013, of 8.11.2013.

¹¹ Fax ANACOM-S051575/2013, of 8.11.2013.

¹² Taking into account the powers granted to it under article 43, paragraph 3, of ECL, and by article 19, paragraph 4, of the Tender Regulation, having regard to article 58, paragraph 2, of APC.

In the scope of this determination, and as regards the launch and development of the process that would enable the imposition on PTC of the principle of cost orientation in the formation of the service price, ICP - ANACOM further informed:

- (a) The imposition by ICP - ANACOM of a price control obligation, namely through the requirement for cost orientation of prices, is typically included in the scope of a market assessment procedure under ECL;
- (b) With the amendments introduced by Law No. 51/2011, of 13 September, a framework was set up which makes ICP - ANACOM subject to undertake a market assessment or the review thereof by certain dates (vd. article 59-A of ECL). However, none of these provisions applies to the market at stake here - the wholesale market of television broadcasting via digital terrestrial television -, as it is not mentioned in the European Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in force;
- (c) In this context, and although theoretically a decision to define such market could be possible, given that, under article 58, paragraph 3, of ECL, ICP - ANACOM is entitled to define markets that differ from those mentioned in the European Commission Recommendation on relevant markets, this Authority has not yet decided whether it is advisable and convenient to define and analyse the identified market; nevertheless, RTP's request shall be weighted, among other factors, in the scope of this decision;
- (d) Without prejudice, ECL provides for a specific procedure for market analysis and imposition of obligations, which has especially demanding outlines in the case of the definition of markets other than those provided for in the European Commission Recommendation on relevant markets, which means that, in case the market analysis procedure was initiated, the general 90-day deadline set out in the APC would never apply to the conclusion of such a procedure.

1.5. ICP - ANACOM's response to RTP - 20.11.2013

By letter dated 20.11.2013, ICP - ANACOM replied to RTP's letter of 5.11.2013, invoking the decision to extend the time-limit for the procedure on the intervention request presented by RTP (of which the Authority had been previously notified) and clarifying in brief the following:

- (a) That in the investigating stage, in addition to the preliminary internal analyses already carried out, interested parties - PTC, SIC and TVI, the latter two as beneficiaries of "must carry" obligations imposed on PTC - had been notified on the intervention request presented by PTC so that they could comment on the issue in writing, if they so wished;
- (b) RTP and PTC had been requested to provide specific information on the matter;
- (c) ICP - ANACOM was collecting relevant information for the issue under consideration, in the scope of the contact network developed with other regulatory networks.

ICP - ANACOM concluded by declaring that, further to the required steps, a draft decision would be prepared and submitted to the approval of this Authority's Management Board.

1.6. Response to ICP - ANACOM's request for information and comments by interested parties

Further to the faxes sent by ICP - ANACOM, interested parties submitted comments which are summarised below.

1.6.1. Response from PTC

By letter dated 22.11.2013, PTC express its surprise at the request for intervention presented by RTP and at the arguments presented to this Authority.

According to PTC, paragraph 3 of article 43 of ECL and paragraph 4 of article 19 of the Tender Regulation lay down that ICP - ANACOM is entitled to impose an appropriate remuneration for "must carry" obligations "where the holder of the right of use and television operators do not reach an agreement on the remuneration due as compensation for the "must carry" obligations", and given that PTC considers this Authority's action to be legally limited to situations where no agreement exists between PTC and television operators on the price, PTC sees no reason for the letter sent by RTP, given that both companies had in fact reached an agreement on the fundamental elements of the DTT service and on remuneration due for the "must carry" obligations.

According to PTC, the negotiating process developed with RTP culminated with the signature of the contract, [BCI] [ECI], and contracts concluded with television operators had been negotiated¹³, thus PTC finds it hard to understand why RTP would present an intervention request [BCI] [ECI].

PTC informed that, although the submission of the contract concluded with RTP had not been requested, this could be due to the lack of knowledge on the part of ICP - ANACOM of the respective conclusion and signature, and as such no lack of understanding existed between the companies, as a contract concluded freely and, it believed, in good faith between RTP and PTC was in full force¹⁴.

PTC submitted to ICP - ANACOM copies of the contracts concluded with SIC and TVI, and replied to issues raised on the fax dated 08.11.2013 as follows:

- (a) According to PTC, there was no lack of understanding with RTP, and all aspects analysed in the scope of the negotiating process were agreed on and reflected in the contract concluded willingly between the parties and which is in force as from [BCI] [ECI] ;
- (b) DTT prices agreed on and charged to all television operators (RTP, SIC and TVI) are those referred in PTC's letter of 04.01.2013, that is EUR [BCI] [ECI] million per year;
- (c) As regards the negotiating process which led to the signature of the contract with RTP [BCI] [ECI] , PTC refers that it "lasted some time", some aspects of the contract having

¹³ And formalized in full compliance with the commercial and business interests of PTC, but also of television operators, with respect for commercial and business good faith, in the scope of the contractual autonomy that governs any negotiating relationship.

¹⁴ PTC added that it could only send a copy of the contract concluded with RTP in case of an express order from ICP - ANACOM, as it is bound to a duty of confidentiality resulting from a contractual clause that prevents the respective disclosure without an order to legitimise or without a dispute, which is the case, as PTC does not identify any dispute opposing it to RTP.

been discussed in detail, namely technical issues, levels of service and penalties for non-compliance with levels of service;

- (d) PTC added that the conclusion of the negotiations and effective signature of the contract with RTP lasted longer relatively to TVI and SIC, due to [BCI] [ECI] .

PTC made some comments to the text of RTP's letter. PTC specifically:

- (a) Clarified that the DTT price currently agreed with television operators (EUR [BCI] [ECI] million per year) is lower than the value established in the MoU¹⁵ concluded on 21.04.2008 with RTP and that referred in the variant proposal presented in the scope of the MUX A public tender by PTC, and much lower than the price previously applied for the analogue distribution of the television signal (which according to PTC represents a very significant reduction of costs for RTP, of [BCI] [ECI]);
- (b) It supported that the distribution of the DTT signal was subject to a public tender, and that it had applied and won the tender, thus the established conditions for the service provision were consequently applied;
- (c) It referred that in the course of all this process, all market agents had had the opportunity to express their opinion, at the appropriate time, and it did not seem reasonable to question, in the current moment, all the process and respective procedures.

PTC ends by stressing that it believes that ICP - ANACOM must rule taking into account the firm agreement concluded between PTC and RTP, which in itself, and in the observance of applicable legal procedures, prevents this Authority from taking any action.

1.6.2. Response from RTP

RTP replied by letter received on 29.11.2013, as follows:

As regards the negotiating process between RTP and PTC, and the agreement reached in this scope, RTP informed that its current Management Board had taken office in September 2013 only¹⁶, thus its response could lack additional details concerning the beginning of the process.

It referred that its first documented approach on the DTT price concerns a MoU concluded with PTC on 21.04.2008, intended to integrate PTC's application to the MUX A public tender, in order to establish general guidelines which would frame and govern the constitution of a legal relationship between the parties, reflected in a "*contract for the provision of DTT services*". According to RTP, the MoU committed also to reflect the "*commercial conditions applicable to the provision of services by PTC to RTP further to the switch-off*".

As such, RTP refers that the MoU concluded with PTC did not have the legal nature of a contract, but a promise to enter into a contract with specific conditions, and the circumstances for its signature were totally different from those currently in force, given that, at the time, the price of the (analogue) television distribution was determined by ICP - ANACOM according to

¹⁵ Memorandum of Understanding.

¹⁶ Although this is the date referred in RTP's letter, it must be a mistake, given that the Management Board took office in September 2012 according to information provided at the time by the media.

the principle of cost orientation of prices. According to RTP, the expiry of ICP - ANACOM's regulation of the (analogue) television distribution reinforced the need felt by RTP to know how the digital (DTT) broadcasting price would be determined, nothing being referred in the MoU on this matter, and PTC having always refused to provide RTP with this information and to include it in the body of the contract¹⁷.

RTP declares that the first meeting with PTC on the contract for the provision of DTT services took place only on 15.10.2012, and the price for the service was not discussed, as "*the assessment and decision by both Management Boards were still pending*". RTP refers that in several meetings PTC communicated that the DTT price had already been agreed on with the previous RTP administration, corresponding exactly to the price paid by SIC and TVI for the broadcasting of their channels, thus PTC was unable to review the respective amount.

RTP referred also that, although in several occasions it raised with PTC the issue of the absence of transparency on the price formation criteria that would enable it to assess its appropriateness, as well as the issue of its unchangeable character over the duration of the contract, PTC, in the discussion of proposal to review the contract minute which was concluded on [BCI] [ECI], was never willing to meet issues raised by RTP, having invoked that it could not amend terms of a contract which was identical for SIC and TVI, for example, both as regards the price formation and its non-variation over time.

According to RTP, PTC's attitude could lead to an undesirable limitation of the distribution or technological development to the detriment of consumers, by hindering the supply of new programme services of the DTT public service, which legally could be regarded as abuse of a dominant position. As such, RTP considers that it is prevented from entering in a fair discussion on prices and on other conditions of the DTT service provision, having thus requested the intervention of ICP - ANACOM and also of Autoridade da Concorrência (The Competition Authority - AdC).

RTP clarifies that the main reason for disagreement with PTC concerns the amount required for the provision of the DTT service provision, as referred by letter sent to ICP - ANACOM of 10.07.2013.

Reaffirming such reasons, RTP adds the following:

- (a) It has legitimate doubts as regards the price the formation criteria of which remain non-transparent, although PTC was repeatedly requested to identify them (which the company declined to do);
- (b) It suspects that it is paying for an occupation of MUX A from which it is not benefiting and/or that such price reflects costs which television operators should not be forced to bear, as they have nothing to do with network investment or service provision, this suspicion being reinforced by the fact that the price charged by PTC is not oriented for the effective occupation of MUX A - measured in Mbps - although the right of use for frequencies (RUF¹⁸) assigned by ICP - ANACOM to PTC expressly so provides;
- (c) It refers that the price charged by PTC greatly exceeds the reference values per Mbps with PTC presented in the scope of the public tenders on MUX A and B to F, adding that the price per Mbps proposed by PTC was only made public by ICP - ANACOM on

¹⁷ Information which according to RTP was repeatedly requested from PTC.

¹⁸ Right of Use for Frequencies ICP-ANACOM No. 6/2008, available at <http://www.anacom.pt/render.jsp?categoryId=303315>.

20.03.2013 in the scope of the “*Final report on the analysis and examination of applications to the public tender for allocation of a right of use for frequencies of a national scope for the digital terrestrial television distribution service on the Multiplexer A*” (report of the public tender on the MUX A)¹⁹, that is, after RTP had concluded with PTC the contract for transmission and distribution of the DTT signal;

- (d) RTP adds that DTT prices charged by some European companies similar to PTC are, in relative terms, much lower than those charged by PTC;
- (e) The company adds that the price charged by PTC as regards the Canal Parlamento is seven times lower than the one charged for each of RTP’s programme services of a national scope, and according to RTP, channel RTP2 does not compete on the advertising market, and shares the same public interest grounds.

RTP declares that it signed, on [BCI] [ECI], the contract under the conditions established by PTC, and expresses its wish to review the price and to adjust it contractually to the specific factors which determined its formation, and to improve the conditions of provision of the DTT service, aiming for the fulfilment of the universality principle which it is bound to meet, given that the prices charged by PTC prevent it from launching new FTA²⁰ channels and from actively participating in the enhancement of the digital television offer in Portugal.

As regards ICP - ANACOM’s request to “*submit all conditions exchanged with PTC in the scope of the negotiating process*”, RTP clarifies that there were no written communications in the scope of the price negotiation.

Given that RTP failed to attach to its response of 29.11.2013 a copy of the contract concluded with PTC, which had not been mentioned by the company in the request for intervention presented in 10.07.2013, and deeming ICP - ANACOM that it is relevant in the scope of the analysis of the request, this Authority ordered RTP²¹, bearing in mind articles 89, paragraph 1, and 90, paragraph 1, both of the APC, to submit a copy of the referred contract.

On this occasion, ICP - ANACOM made it very clear that RTP could have requested from ICP - ANACOM, under the applicable legislation and when deemed to be appropriate, to be provided with access to the MUX A public tender report - as in fact other bodies did, access thereto having been granted - and as such RTP’s statement is considered to be incomprehensible.

By letter received on 10.12.2013, RTP submitted a copy of the contract signed on [BCI] [ECI] with PTC.

As regards the clarification transmitted to RTP, this company declared to be surprised with the analysis made, not only because it corresponds to a substantive assessment at an eminently investigating stage, but also because effectively ICP - ANACOM only submitted to public scrutiny a report of relevant general interest, on 20.03.2013, almost five years after it was drafted.

RTP adds that ICP - ANACOM seems to take for granted the divergence between prices announced by PTC in its tender application and those currently charged. In this respect, RTP

¹⁹ Available at:

http://www.anacom.pt/streaming/TDTrelatorio_final_Mux_A.pdf?contentId=1156003&field=ATTACHED_FILE

²⁰ Free-to-Air.

²¹ Fax ANACOM-S056804/2013, of 03.12.2013.

refers that it is incumbent on ICP - ANACOM, based on RTP's request, to assess the discrepancy between the price presented to tender by PTC, factor which in fact corresponded to a sub-criterion for application assessment (paragraph 1 of article 13 of the respective regulation) and which contributed to the number of points obtained by the applicant, and the price effectively charged by PTC, much higher than the value set out therein. According to RTP, it is this discrepancy, built on the absence of information, which would allow interested parties to know the formation mechanisms of the price charged by PTC, coupled with the position of strength taken by this company in several contractual matters, which is definitely the reason why the will of television operators was not expressed freely in this process, ICP - ANACOM's intervention being thus justified.

1.6.3. Response from TVI

TVI informed ICP - ANACOM, by letter received on 22.11.2013, that it concluded on 18.04.2008 a MoU with PTC, which was included in PTC's application for the MUX A tender, in which the parties acknowledged that at the time it was not yet possible to define with the required accurateness and detail the contents of a future contract, namely at a technical, legal, economic and financial level.

Later, on [BCI] [ECI], TVI and PTC concluded a "contract for the provision of the signal encoding, multiplexing, transmission and broadcasting services over a digital terrestrial network for the transmission of free unrestricted access television programme services" (MUX A), and the conditions for the service provision were mainly determined and set out by PTC. According to TVI, it was not able to present an effective negotiation alternative, as it was not aware of some of the economic grounds underlying their determination.

TVI refers that its MUX A occupation plan, both video and audio, is as follows, having also been provided a specific total broadband to be shared with other television operators:

Table 1: MUX A video and audio occupation plan, included in the contract concluded with PTC

[BCI]

TV channel	Average video band	Linear audio band	Audio description band	Teletext band	Variance allowed for Video	EPG Schedule and Print
TVI	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	(1)

[ECI]

Note: All values in Mbps

(1) Value to be shared.

As regards the price for the service, and given that technical and economic conditions of the provision of the DTT service were predetermined by PTC, TVI pays PTC, as from 2012, for the service of transmission and broadcasting of TVI programmes, in SD²², over the digital terrestrial television, an annual amount close to EUR [BCI] [ECI] million.

However, according to TVI, PTC presented a different price in its application to the MUX A public tender, given that in the MUX A public tender report, the price proposed by PTC, as from 2011, is EUR 888.5 thousand per Mbps.

²² Standard Definition.

TVI, referring that, under the RUF, PTC is under the obligation to reserve 9.0 Mbps and 640 Kbps of capacity, respectively for the video and audio components, in the Mainland, of service programmes, in standard definition²³, that is five service programmes (RTP1, RTP2, SIC, TVI and the so-called 5th channel), each service programme requires the capacity reservation of 1.928 Mbps, which corresponded, under the tender application presented by PTC, to EUR 1.706.472,8 (1.928 Mbps × EUR 885.100) per year. Consequently, according to TVI, there is a mismatch between the value effectively paid to PTC and that which TVI should pay for the service, under the application presented by PTC to the MUX A public tender.

The capacity provided in the MUX A being 19.91 in the Mainland²⁴, this seems to suggest, according TVI, that PTC, in the calculation of the price borne by TVI, divided what would be the full cost of the MUX A borne by PTC among the five programme services (RTP1, RTP2, SIC, TVI and the so-called 5th channel). It may thus be concluded that TVI is paying an amount which greatly exceeds the price due for the capacity effectively used in the distribution of its SD general programme service. As such, TVI believes that PTC, taking advantage of the fact that it is the sole licensed operator for the provision of the DTT service, reflects in the annual amount paid by TVI the price corresponding to 1/5 of the total MUX A capacity, without any additional spectrum ever have been used by TVI.

TVI declares this situation to be particularly serious given that PTC is for all purposes bound to the obligations arising under the MUX A public tender, as well as to commitments undertaken in its tender application, namely the economic rationale for the service price, both of which are integrating part of the RUF²⁵.

TVI makes also a reference to the process of migration from the analogue to digital broadcasting, and the low population uptake of the DTT platform, to conclude that television operators were directly harmed with this process, which resulted in fewer homes with access to television via DTT.

TVI questions why ICP - ANACOM has not yet undertaken the assessment of television distribution and broadcasting markets in Portugal, given that the European Commission, in a letter sent to ICP - ANACOM, on 6 March 2012, in the scope of the process PT/2012/12941, refers as follows:

“Although alternative broadcasting platforms have emerged, ANACOM has not yet performed a new market analysis, having however declared its intention to do so after the final switch-over of the analogue television to digital terrestrial television, planned to take place late April 2012. The Commission urges ANACOM to carry out a new market analysis as soon as possible and to notify the Commission of the results, in accordance with article 7 of the framework Directive”.

Lastly, TVI supports that given PTC’s monopolistic situation in the market of the distribution and broadcasting of the digital terrestrial television, and taking into consideration that PTC was in the past made by ICP - ANACOM to decrease the price of the analogue television distribution and broadcasting service, the analysis of economic conditions associated to the provision of the DTT service should be guided by the application of the principles of transparency, non-discrimination and cost orientation of prices.

²³ Cf. points a) and b) of paragraph 1 (clause 15, paragraph 4 a) of RUF No. 06/2008).

²⁴ Cf. report, paragraph 56.

²⁵ Cf. clause 17 of the RUF.

As such, TVI accompanies the request presented by RTP, and asks ICP - ANACOM to launch and develop the process that allows the imposition on PTC of the principle of cost orientation of prices in the formation of the price of encoding, multiplexing, transmission and broadcasting services of the digital terrestrial signal and additional coverage. Additionally, according to TVI, the market analysis of television distribution and broadcasting services which ICP - ANACOM must carry out, must take into consideration that the broadcasting of the Canal Parlamento over DTT allegedly²⁶ costs EUR 420 thousand per year.

In summary, TVI:

- (a) Accompanies the intervention request made by RTP so that ICP - ANACOM urgently assesses economic conditions associated to PTC's provision of DTT services;
- (b) Considers the price charged by PTC to be excessive, and ICP - ANACOM must take action to revise it downwards, on account of the commitments undertaken by PTC in its application to the MUX A public tender;
- (c) As regards the redefinition of the DTT price, TVI supports that ICP - ANACOM cannot ignore the fact that PTC is legally under the obligation not to discriminate TVI relatively to other television operators, requesting ICP - ANACOM's intervention so as to ensure, in a transparent manner, that no discriminatory situations exist among television operators, including the Canal Parlamento and current and future public service channels, as far as the DTT service price is concerned, and in case ICP - ANACOM reaches the conclusion that excessive and discriminatory prices were charged in the provision of the DTT service, TVI reserved the right to be compensated for sums overpaid.

1.6.4. Response from SIC

By letter received on 22.11.2013, SIC informed that it deemed itself to be an interested party in the procedure and declared that relevant information on the subject would be submitted at a later point in time, to be included in the scope of the procedure.

Given that until 02.12.2013, ICP - ANACOM had not received any additional information, SIC was required²⁷, for the purpose of article 89, paragraph 1, and 90, paragraph 1, of APC, to send relevant information on the matter.

By letter of 12.12.2013, SIC briefly informed that it deemed PTC's DTT service provision to be manifestly over-priced relatively to the likely cost structure of the service. Moreover, according to SIC, the wholesale price of the DTT service charged in Portugal exceeds the values of PTC's successful tender, and no reason is found for the alleged lack of conformity.

In this context, SIC expects this procedure to result in the rectification of prices charged by PTC in the scope of the DTT service, prices which have placed a significant and unjustified burden on its own cost structure.

In a detailed analysis of the matter, SIC highlights that, according to the variant application submitted by PTC in 2008 to the MUX A public tender, PTC proposed an annual average price

²⁶ Vide Competition Authority, 2013, «Televisão Digital Terrestre em Portugal», pg. 33.

²⁷ Fax ANACOM-S056442/2013, of 02.12.2013.

for the provision of the service per Mbps in the first 10 years, of EUR 746.4 thousand (net of VAT), as compensation for coverage levels guaranteed and for the offer characteristics which channels could make available to their viewers, taking into account the capacity provided in the MUX A (of 19.1 Mbps in the Mainland and of 22.12 Mbps in the Azores and Madeira).

SIC refers that it concluded with PTC on 21.04.2008, a MoU which set out, among other aspects, that the price to be charged by PTC would be EUR [BCI] [ECI] million per year (net of VAT) and that the total price charged, for the simultaneous analogue and digital broadcasting could not exceed the total value invoiced in 2007, corresponding to the distribution of analogue broadcasts, that is, EUR [BCI] [ECI] million.

Later, in the scope of the encoding, multiplexing, transmission and broadcasting services of free unrestricted access television programmes (MUX A) concluded between PTC and SIC, on [BCI] [ECI], it was established that SIC would pay PTC for the provision of DTT services a single sum of EUR [BCI] [ECI] million (for the access to the network and services provided in the scope of the process of technological alteration) and, in the course of the contract, a monthly sum of EUR [BCI] [ECI].²⁸ As such, according to SIC, PTC currently charges for DTT services an annual amount of EUR [BCI] [ECI] million (net of VAT).

In its communication, SIC also refers to EU studies and reports on DTT to support that PTC charges every month an excessive amount.

SIC stresses that some of these documents show indicators that transversally suggest a founded expectation that the analogue-to-digital migration process would generally imply in European Union Member States a decrease of operational costs borne by the broadcasting operator, and consequently, a decrease of prices charged to television operators.

As regards prices for the provision of DTT services practised in the European Union, and not being provided with specific information on this matter, SIC refers to presentations prepared by *Broadcast Networks Europe* (May and June 2013) which shows the monthly cost of distribution per channel (27-country European Union), of about EUR 0.01 per home. On the basis of this average value, and applying it to the calculation of distribution costs of the DTT service in Portugal, SIC estimates a total monthly cost of EUR 60 thousand per channel (or EUR 720 thousand per year per channel), value which is EUR [BCI] [ECI] lower than the monthly price charged by PTC to SIC.

SIC admits that this is an estimate of the average monthly cost subject to the confirmation and/or confrontation with prices effectively charged in each country by the respective digital terrestrial television operators. However, in SIC's opinion, even if a reasonable margin was added to this estimated cost, the difference to the price charged currently by PTC would still be quite substantial.

As regards the non-compliance with the PTC's variant tender application, SIC refers that taking into account the average value of EUR 746.4 thousand per Mbps to which PTC committed itself in the scope of the variant tender application, an occupation of [BCI] [ECI] Mbp would correspond to an annual cost of EUR [BCI] [ECI] and not of EUR [BCI] [ECI], which has been effectively the value paid by SIC for the DTT service. SIC alleges that this higher cost (of around EUR [BCI] [ECI] million every year) represents an unaffordable and insurmountable sum in its accounts.

²⁸ Values net of VAT.

SIC believes that PTC should not charge it more than the value set out in the tender application on account of having assumed that the MUX A would have more clients than it actually has, and considers that SIC nor any other operator is responsible for the low uptake of this platform. In SIC's opinion, this concerns the activity's own risks, and the results achieved by PTC should only be imputed to the low quality of the service provided, having recent studies proven a bad quality signal in several points of the country.

SIC considers that the situation is aggravated by the fact that PTC was the sole tender applicant, thus the "guarantee" of competition usually attached to tender procedures with multiple competitors failed to exist in this case. In this context, prices presented by PTC may be inflated relatively to underlying costs of the service provision, given that the contracting authority was not even able to make any price comparison with alternative tender applications.

SIC further stresses that it is publicly known that the price charged by PTC for the distribution of the signal of the Canal Parlamento, over DTT, is much lower than that charged to other operators, which SIC fails to understand. It declares that the annual price to be paid for this distribution should be the same as that charged to other MUX A users, as the contract for provision of services clearly refers that there must not be discrimination in the price charged to the various television channels.

In this context, SIC considers that the price it is charged by PTC should be decreased to the same sum charged to Canal Parlamento.

SIC hopes that ICP - ANACOM conducts an in-depth analysis of DTT service prices currently charged by PTC in the light of possible methodologies for the assessment of excessive pricing, supporting that this Authority is able to obtain information (on the underlying cost structure and price benchmarking at European level) which SIC itself, as well as other interested parties in the ongoing procedure, has no means of obtaining.

In brief, SIC declares that more detailed data are still required to reach a conclusion with certainty on the allegedly excessive nature of prices currently practised by PTC, but there are sufficient indicators that prices charged in Portugal are disproportionately higher than real costs of the DTT service.

In this context, SIC considers it essential that ICP - ANACOM puts an end to the discrepancy between prices charged and those defined in the tender application submitted by PTC, imposing the compliance with obligations undertaken by PTC, in compliance with the variant tender proposal that was selected.

1.7. Request for information submitted to the *Autoridade da Concorrência* (AdC)

Having ICP - ANACOM become aware, through RTP itself, that this company had also requested the intervention of AdC on this matter, ICP - ANACOM requested of AdC, by fax sent on 29.01.2014, information on the subject-matter and progress of the procedure concerning the request for intervention made by RTP to that Authority.

In response to the request, AdC²⁹ informed as follows:

²⁹ Letter AdC with reference S-AdC/2014/483EA-2013/190, of 07.02.2014, received on 13.02.2014.

On 18 July 2013, RTP lodged with AdC a complaint against PTC for likely abuse of dominant position occurred in the field of encoding, multiplexing, transmission and broadcasting services of the television signal over the digital terrestrial network and additional coverage. RTP specifically considered this likely abuse of dominant position to result from the existence of excessive and discriminatory prices associated to the wholesale offer of services provided by PTC.

In its complain, RTP requests of AdC that it prevents PTC from, allegedly, continuing to exploit its dominant position in the market associated to the wholesale supply of transmission and broadcasting services of the unrestricted access television signal, having informed, on the same date, that a request for intervention had been lodged with ICP - ANACOM.

AdC refers to ICP - ANACOM's determination of 2 August 2007³⁰, in which this Authority concluded that the wholesale market of broadcasting services for the delivery of content transmitted to final users was a relevant product and service market within the electronic communications sector susceptible to *ex ante* regulation, and that Grupo PT held significant market power in the identified market, having imposed on it the obligation not to unduly discriminate in the provision of access to services and to the network under consideration as well as to charge cost-oriented prices in the scope of that provision.

AdC refers that the television signal broadcasting services ceased to be supported on the analogue technology to, alternatively, be supported on the digital technology, adding that *"based on the assumption that this technological change did not invalidate ICP - ANACOM's conclusions as regards the definition of relevant market, Grupo PT still held significant market power"*. Consequently, AdC states that, according to ECL, obligations likely to be imposed on Grupo PT in the scope of the market under consideration would continue to include non-discrimination in the offer of access and interconnection and price control.

AdC thus considers *"...that a regulatory intervention by ICP - ANACOM, in the exercise of the respective powers and duties, would best address the concerns raised by the facts on which RTP's complaint is based. As such, AdC has decided to wait for the conclusion of the analysis of such facts by ICP - ANACOM, to assess the opportunity of acting in the scope of its assignments"*.

In the light of the position taken, AdC requests ICP - ANACOM to *"inform AdC of the conclusions of this procedure, after it comes to an end"*.

1.8. Draft decision

Following the request for intervention made by RTP to ICP - ANACOM, to undertake the immediate mediation in the determination of the price charged by PT Comunicações, S.A. (PTC) for the provision of those services and, at the same time, to launch and develop a process imposing on PTC the compliance with the principle of cost-orientation of prices in the determination of prices charged for the service provided, the Management Board of ICP - ANACOM, by determination of 14 March 2014, decided as follows:

1. *To close the procedure on the request made by RTP for immediate mediation in the determination of the DTT price, not intervening on this occasion in its review, taking into account grounds mentioned above, namely, the existence of contracts concluded between PTC and television operators, including RTP, the fact that it may not be concluded unequivocally*

³⁰On the wholesale market of broadcasting services for the delivery of content transmitted to final users. Available at: http://www.anacom.pt/streaming/merc18_delib2ag07.pdf?contentId=507471&field=ATTACHED_FILE.

that the charged price is excessive and the circumstance that, as regards the possible existence of abuse of dominant position by that company, the competent Authority has not identified an issue which required its intervention, at least not in the short term, given that it decided to wait for the conclusion of this procedure to assess the opportunity of acting in the scope of its assignments.

2. *To develop an in-depth investigation of costs of DTT services provided by PTC.*

3. *To determine that this Authority shall assess the opportunity of launching the process of analysis of markets wherein the DTT service is integrated after the conclusion of the procedure referred in point 2. and after the results of the public consultation to be developed on the DTT future are known.*

4. *To submit point 1. above to the prior hearing of interested parties , under articles 100 and 101 of the Administrative Procedure Code, as well as to the general consultation procedure provided for in article 8 of Law No. 5/2004, of 10 February, as amended and republished by Law No. 51/2011, of 13 September, a time-limit of 20 working days being granted in both procedures, so that interested parties may comment on the issue in writing.*

Comments from PTC, RTP, TVI and the DTT blog in Portugal were received within the time limit set, in response to the consultation procedure.

Comments from SIC were also received, however after the prescribed date, and for this reason they are not considered in this decision. Nevertheless, they are provided in this Authority's website.

Comments received in this context and ICP - ANACOM's views thereon were duly taken in consideration in the drafting of this document, being the subject-matter of a separate report, which may be consulted at this Authority's website, being deemed to be an integral part of this decision.

2. Analysis

2.1. Framework of the request(s)

As referred in point 1.1. above, RTP requested ICP - ANACOM's intervention so that this Authority, in the exercise of its legal powers, "*undertakes the immediate mediation in the determination of the price charged by PTC*" for the provision of the encoding, multiplexing, transmission and broadcasting services of the television signal over the digital terrestrial network and additional coverage and at the same time "*launches and develops a process imposing on PTC the compliance with the principle of cost-orientation of prices in the determination of prices charged*".

In the body of the letter addressed to this Authority, the Applicant fails to specifically integrate the requests in any legal or regulatory standard.

However, in the annex to the referred communication, RTP expressly invokes article 19, paragraph 4, of the Tender Regulation, referring that ICP - ANACOM's intervention provided for therein, under article 43, paragraph 3, of ECL, "*is part of the purpose*" of its letter, which leads this Authority to conclude that the Applicant integrates in request for "*mediation of the service price*" in this procedure for intervention.

As regards the request that this Authority "*launches and develops a process imposing on PTC the compliance with the principle of cost-orientation of prices in the determination of prices charged*", it must be stressed that, according to applicable sector legislation, the imposition of a price control obligation, namely via cost-orientation of prices, is typically covered by a market analysis procedure, as defined in articles 55 *et seq.* of ECL, and as such ICP - ANACOM considers that it may conclude that this additional request by RTP refers to the launch of such a procedure.

It is thus in this legal framework that both requests from RTP will be analysed below.

2.2. Request for mediation in the price determination

Article 19, paragraph 4, of the Tender Regulation, lays down that "*where the holder of the right of use and television operators do not reach an agreement on the compensation due for "must carry" obligations provided for under the preceding paragraph, ICP-ANACOM may determine a suitable remuneration in accordance with the regime set forth in paragraph 3 of article 43 of Law No. 5/2004, of 10 February*".

On its turn, article 43, paragraph 3, of ECL lays down that ICP - ANACOM "*... may determine appropriate remuneration in respect of imposed "must carry" obligations, which remuneration shall be applied in a proportionate and transparent manner, while ensuring that, in equivalent circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks*".

2.2.1. RTP's legitimacy, identification of other interested parties and deadline for conclusion

Reaffirming what was stated in ICP - ANACOM's decision of 14.11.2013, extending the deadline for the conclusion of the procedure on the request submitted by RTP, it follows from article 43, paragraph 3, of ECL, *ex vi* article 19, paragraph 4, of the Tender Regulation, that both the holder of the right of use for frequencies and television operators are entitled to request the

intervention of ICP - ANACOM, in the absence of an agreement on the remuneration due as compensation for “must carry” obligations imposed. As such, this Authority considered RTP, as a television operator benefiting from a “must carry” obligation imposed on PTC, to be entitled to submit the intervention request.

Being fulfilled the assumptions that get the procedure on track, and in the absence of specific procedural requirements for an intervention request under article 43, paragraph 3, of ECL, ICP - ANACOM pursued the investigation stage under provisions of APC.

Moreover, considering that, not only RTP, but also SIC and TVI, are beneficiaries of “must carry” obligations imposed on PTC, ICP - ANACOM acknowledged the latter as interested parties and involved them in this procedure. In this context, SIC and TVI were notified of the launch of the procedure, being given the opportunity to comment on the contents of RTP’s requests³¹, as well as of the decision to extend the deadline for conclusion of the procedure.

In their respective comments³², SIC and TVI expressly supported this request for intervention.

As such, and regardless of the complexity of the analysis and incompleteness of the information available on the matter, ICP - ANACOM is under a legal duty to rule on the request submitted, the time-limit of which ran out after the expiry of the 90-day-extension approved on 14.11.2013.

2.2.2. ICP - ANACOM’s competence for intervention

(a) Article 43, paragraph 3, of ECL

Article 43, paragraph 3, of ECL³³ provides that ICP - ANACOM is entitled to determine an appropriate remuneration as compensation for “must carry” obligations imposed on holders of networks on whom such obligations fall. This is an essential power that ensures citizen access to certain television programme services, and it is granted in this perspective of pursuing general interests³⁴.

In this case, these obligations were imposed on PTC, further to the MUX A public tender, as set out in RUF ICP - ANACOM No. 6/2008³⁵, that is, the obligation to reserve capacity and to “*ensure the transmission, including the encoding, multiplexing, transmission and broadcasting of free unrestricted access programme services held by licensed or concessioned operators...*”, namely RTP1, RTP2³⁶, SIC and TVI³⁷, guaranteeing a 100% population coverage³⁸.

³¹ Cfr. point 1.3. above.

³² Cfr. points 1.6.3. and 1.6.4. above.

³³ Which transposes article 31 of the Universal Service Directive.

³⁴ Cfr. article 43 of ECL: “1 - It is incumbent on the NRA to impose “must carry” obligations, for the transmission of specific radio and television programme services and complementary services, in particular accessibility services to enable appropriate access for disabled end-users, as specified under the law by the competent body of the media area, upon undertakings providing public communications networks used for the distribution of radio or television programme services to the public, where a significant number of end-users of such networks use them as their main means to receive radio and television broadcast channels.

2 - The obligations set out in the preceding paragraph shall be imposed only where they are necessary to meet clearly defined objectives of general interest and shall be reasonable, proportionate, transparent and subject to a regular review.”

³⁵ Chapter IV, article 15 *et seq.*

³⁶ And RTP Acores and RTP Madeira, in the respective Autonomous Regions.

It follows from the national legal framework that television operators (RTP, SIC and TVI) are bound, under their respective qualifying documents, to ensure the full coverage (RTP1 and RTP2) or nearly full coverage (SIC and TVI) of the national population through the respective television programme services.

The result of the confluence of these various obligations is that the holder of the RUF associated to MUX A must develop and maintain a DTT network of a national coverage and ensure transmission of the four national general-content channels³⁹, being incumbent on the latter to deliver the signal to PTC for broadcasting purposes.

Given that, at present, there are no alternative networks that ensure the required level of coverage free-of-charge to final users, it follows from the regime set out above that a mutual obligation to enter into a contract exists between PTC and beneficiaries of “must carry” obligations.

This obligation to enter into a contract, associated to the need to remunerate the service under consideration, justifies the fact that the legislator - in line with European Union law - established ICP - ANACOM’s intervention powers (article 43, paragraph 3, of ECL) in the determination of the appropriate remuneration as compensation for “must carry” obligations.

The provision under consideration, consequently, does not simply establish a power, which ICP - ANACOM may freely decide or not to exercise. In fact, the law provides for a real intervention power/duty, subject to the need to ensure, on the one hand, the safeguard of general interests underlying the imposition of “must carry” obligations⁴⁰, and, on the other hand, the pursuit of this Authority’s assignments within the legal framework⁴¹ and, consequently, of regulation objectives set out therein.

ICP - ANACOM’s decision must thus be taken by weighting, specifically, the option that best protects interests of users and citizens (namely, which provides them with a wider range of choices and better quality services)⁴², that promotes the offer of television programme services and avoids competition restrictions⁴³, and that encourages an effective and efficient use of frequencies⁴⁴. At the same time, this option cannot fail to take into account the principle of good-faith and the respect for regulatory predictability⁴⁵, decisions being taken through an intervention in strict compliance with the principle of proportionality⁴⁶, by duly balancing conflicting interests, as well as with the principles of transparency and non-discrimination⁴⁷.

³⁷ As well as the so-called 5th channel.

³⁸ Note that this may be achieved via additional means of coverage, pursuant to the RUF.

³⁹ And RTP Acores and RTP Madeira, in the respective Autonomous Regions

⁴⁰ Namely, to ensure the free unrestricted access public television service, as well as to provide, under the same conditions, other channels that are outside the scope of television public service, but are deemed by the State to require a similar protection, on account of the pluralism of information and equality among citizens.

⁴¹ Namely as regards the observance of commitments which the undertaking obtaining the right of use has made in the course of a competitive or comparative selection procedure (article 32, paragraph 1 g) and article 112, both of ECL).

⁴² Article 6, paragraph 1 h), of ICP-ANACOM Statutes; article 5, paragraph 1 c) and paragraph 2 a), article 15, paragraph 2 d), and article 31, paragraph 2, of ECL. *Vide* also paragraph 4 of APC.

⁴³ Article 5, paragraph 1 a), paragraph 2 b), paragraph 5 c) and d), and paragraph 9, article 15, paragraph 2 b), and article 31, paragraph 2, of ECL.

⁴⁴ Article 5, paragraph 2 d), and article 15, paragraph 1 and 2 c), of ECL.

⁴⁵ Article 6-A of APC; article 5, paragraph 5 a), and article 32, paragraph 1 g), of ECL.

⁴⁶ Article 5, paragraph 2, of APC; article 43, paragraph 3, article 5, paragraph 5, and article 20, paragraph 2, of ECL.

⁴⁷ Article 43, paragraph 3, of ECL.

In addition, as article 43, paragraph 3, of ECL leaves open the determination of the moment⁴⁸ in which ICP - ANACOM may intervene to set the price, its implementation being left to this Authority's discretion.

It was in this framework that, in this case, when establishing the rules for the MUX A tender, ICP - ANACOM decided to favour, as a first step, the free operation of the market - embodied in the right of market actors to freely negotiate the access price - its power of intervention being left for a later point in time, if necessary.

A different perspective on the Regulator's ability for intervention would endanger compliance with constitutional and legal imperatives, which this Authority is bound to pursue, in the absence of an agreement (or in case of a discrepancy on the contents of an agreement) between the holder of the RUF and television operators.

(b) ICP - ANACOM's competence for intervention in the absence of an agreement

In compliance with the above, article 19, paragraph 4, of the Tender Regulation lays down that *"where that the holder of the right of use and television operators do not reach an agreement on the compensation due for "must carry" obligations provided for [as regards "must carry" channels] under the preceding paragraph, ICP-ANACOM may determine a suitable remuneration in accordance with the regime set forth in paragraph 3 of article 43 of [ECL]"*.

In this regard, it must stressed that:

- (a) RUF ICP - ANACOM No. 6/2008 granted to PTC, which is governed by ECL, the Tender Regulation and the respective specifications, establishes, by reference to the tender submitted in the variant scenario⁴⁹, the annual average price for the provision of the service per Mbps which PTC may charge television operators.

In this context, it was established that *"prices (...) may be revised by agreement with television operators and must be communicated to ICP - ANACOM"* (clause 16, paragraph 4).

- (b) MoUs concluded by PTC with RTP and with SIC (which are part of the application presented by PTC to the MUX A tender) establishes that the price per national general-content channel, for services considered, is EUR [BCI] [ECI] million and that [BCI] [ECI] (emphasis added).
- (c) In contracts for provision of services concluded in the meantime by PTC with RTP, SIC and TVI, the annual price per channel currently paid by television operators is EUR [BCI] [ECI] million per television channel (plus a single sum invoiced on the date of conclusion of the contract for "access to the network and services provided in the scope of the process of technological change" of EUR [BCI] [ECI] million in the case of RTP, EUR [BCI] [ECI] million in the case of SIC and EUR [BCI] [ECI] million in the case of TVI), plus EUR [BCI] [ECI] million for RTP Açores and RTP Madeira.

⁴⁸ Ultimately, nothing prevented ICP-ANACOM, if it so chose, to determine the remuneration amount before allocating the RUF.

⁴⁹ Which was maintained, in spite of the revocation of Muxes B to F. *Vide* recital j) of ICP-ANACOM's determination of 12 July 2010, available at <http://www.anacom.pt/render.jsp?contentId=1037454>.

This means, first of all, that the parties directly or indirectly involved in the tender procedure understood that, as far as prices are concerned, the commercial negotiation between the parties was favoured, and consequently, the price could change throughout the course of the RUF, namely **[BCI] [ECI]**.

In case of absence of agreement between the parties, ICP - ANACOM's intervention has been provided for in article 43, paragraph 3, ex vi article 19, paragraph 4, of the Tender Regulation.

This was, in fact, the position which was adopted by ICP - ANACOM in a transparent way in the report on the public consultation to which the Tender Regulation was submitted⁵⁰.

In the comments presented in this scope, PTC immediately raised the issue of the high level of uncertainty of the regulation as regards the economic viability of the operation, and according to that company it was crucial that ICP - ANACOM determined in an objective *ex ante* fashion, the rules that applied to the pricing that television operators should pay for the use of the infrastructure, referring also that, under the established regime, ICP - ANACOM could intervene after the license was awarded, setting lower prices than those on which the tender application was based. The company adds that the process under which the Multiplexer operators could set the prices should be identified, by indicating, for example, which capital remuneration should be considered or the form or quantification of investments and costs incurred for the network operation, thereby removing the uncertainty resulting from a potential *ex post* intervention from ICP - ANACOM at the request of television operators.

In its understanding, ICP - ANACOM declared as follows:

"First of all, it is relevant to declare that any "business plan" always carries uncertainty, namely on the side of demand for services and revenues that may be obtained, and applications in the scope of the tender concerned by this report are no exception.

Notwithstanding, and according to article 19, paragraph 3, of the Draft Tender Regulation on the MUX A, ICP - ANACOM's power for intervention had been provided for in article 43, paragraph 3, of ECL (...).

As such, ICP - ANACOM may determine, in a proportional and transparent manner, what it deems to be an appropriate remuneration for access, in case the parties have not reached an agreement, and there is no indication that there must be an upstream determination of the price or of the methodology to be used in its definition. On the contrary, in the light of the requirement of proportionality of imposed obligations, it makes sense that this Authority intervenes only, and clearly sets out the prices, where parties fail to reach an agreement through commercial negotiation. Otherwise, if this Authority defined from the outset a price or the specific rules for its imposition, the right of market actors to freely negotiate the access price would be limited." (emphasis added).

It may be thus concluded that PTC participated in the tender being fully aware that there was a risk that ICP - ANACOM, under article 43, paragraph 3, of ECL, could define *ex post* lower prices than those presented in its tender application.

Consistently, although in the specific context of the prior hearing report on the decision concerning the price of analogue broadcasting⁵¹, of 9.3.2012, ICP - ANACOM later clarified:

⁵⁰ Vide page 9 *et seq.* of the report, available at: http://www.anacom.pt/streaming/consulta_mux_a.pdf?contentId=559635&field=ATTACHED_FILE

“As referred in the DD, “in the scope of the allocation of a right of use for frequencies for the terrestrial digital television broadcasting service (for Multiplexer A), a price for the provision of the terrestrial digital television broadcasting service was presented, which must be observed by PTC pursuant to article 16 of the right of use for frequencies No. 6/2008, allocated by ICP-ANACOM by determination of 20.10.2008” (emphasis added). This (...) without prejudice to ICP - ANACOM’s regulatory powers, arising from ECL and from the Tender Regulation, as well as to the possibility, provided for in article 16, paragraph 4, of PTC’s qualifying document, for prices to be reviewed, by agreement with television operators.

Thus, in the absence of an agreement or in case of termination of MoUs or of any other agreements concluded between PTC and television operators, and with a view to minimize any uncertainty felt by market actors, this Authority clarifies that, according to available information, the following prices must be applied:

(a) For the digital terrestrial broadcasting service, prices provided for in the right of use for frequencies No. 6/2008, by reference to the application presented by PTC in the scope of the public tender for allocation of a right of use for frequencies of a national scope for the digital terrestrial television broadcasting service (multiplexer A), approved by Regulation No. 95-A/2008, of 25 February, and in case of an absence of agreement between the parties (PTC and television operators) ICP - ANACOM is entitled to take action in the scope of the regime of article 43, paragraph 4, of ECL, determining an appropriate remuneration which must be applied in a proportionate and transparent manner;

(b) For the analogue terrestrial broadcasting service, a cost-oriented price as regulated in this decision, by reference to the last data from PTC’s cost accounting system.

Each television operator must assess whether provisions laid down in the MoU or in any other agreements that have been concluded, or to be concluded in the future, bring about more benefits than the application of the above-mentioned prices, the agreement between the parties as a market solution thus being deemed as a priority.

Consequently, PTC’s comment that the existence of an agreement (Mou) between PTC and television operators should prevent ICP - ANACOM from adopting measures provided for in the DD does not stand up - and PTC wrongly claims that this intervention is not based on any regulatory or contractual grounds. In fact, this agreement even seems to be questioned by television operators, and for this reason ICP - ANACOM deems it necessary to take action, setting, in the scope of its powers, a cost-oriented price for the analogue terrestrial broadcasting service, which will be useful in the absence of an agreement, as mentioned above” (emphasis added).

(c) ICP - ANACOM’s competence for intervention under an agreement

It must be determined whether the intervention power-duty of the Regulator remains in case an agreement has been concluded between the parties.

It must be recalled here that PTC, in its letter of 22.11.2013 (vd. point 1.6.1. above) takes the view that ICP - ANACOM’s action is legally limited to situations of absence of agreement

⁵¹ Page 6 et seq. of the Report, available at http://www.anacom.pt/streaming/relat_audSPD_14Out2011.pdf?contentId=1116186&field=ATTACHED_FILE.

between PTC and television operators as far as price is concerned, adding that this factor is not mentioned in the letter sent by RTP to this Authority “...given that in this case both companies reached an agreement on the fundamental elements of the digital terrestrial television service and determined the remuneration due for “must carry” obligations”.

However, PTC’s position is not supported by the framework laid down. In fact, not only does article 19, paragraph 4 of the Tender Regulation (which refers to article 43, paragraph 3 of ECL) not absolutely guarantee the absence of intervention by this Authority in the determination of the price on which an agreement exists between PTC and the television operator, as the Regulation in which that provision is included does not exclude other forms of intervention.

In fact, the Regulation clearly indicates that the RUF to be granted is governed by provisions of ECL, which includes rules on the imposition of obligations following market definition and the identification of significant market power, as well as article 43, paragraph 4, which confers on ICP - ANACOM an intervention power which is not constrained by the requirement of an absence of agreement. A different reading would reduce the general and abstract scope of this provision in terms which could compromise other situations where the obligation to determine remuneration was required to safeguard the public interest or on account of the reasonableness of obligations under consideration.

It follows from the above that the existence of an agreement between the parties does not exclude the applicable legal and regulatory framework, and, as such, it does not absolutely guarantee the absence of intervention of this Authority in the determination of the price. ICP - ANACOM’s decision to take action under article 43, paragraph 3, of ECL, is necessarily based on the respect for the principle of good-faith as well as for the principles of proportionality, transparency and non-discrimination.

While it is true that above-mentioned principles, especially the proportionality principle, justify that ICP - ANACOM uses these powers, as a rule, only in the scenario described in article 19, paragraph 4, of the Tender Regulation, other scenarios must not be excluded, exceptionally, which justify (or even require) the intervention of the Regulator in the determination of prices for the provision of DTT services, to ensure the protection of general interests underlying obligations imposed on PTC and on television operators.

This may be the case, for example, in certain circumstances, of agreements which prevent or discourage an effective or efficient use of frequencies and the provision of a wider choice of television programme services to users. This may also be the case of a lack of agreement that limits the relations to a single television operator. In this scenario, ICP - ANACOM’s intervention may have to be extended to prices charged to other operators, who have concluded contracts, where required to avoid discriminatory situations.

Nevertheless, as a corollary of the above, it must be stressed that ICP - ANACOM’s intervention “power-duty”, defined in article 43, paragraph 3, of ECL, is limited to the determination of “*an appropriate remuneration as compensation for imposed must-carry obligations*”, which means that the Regulator’s action in this scope may not set the price charged for the transmission of Canal Parlamento over MUX A or of other programme services that do not benefit from “must carry” obligations.

Taking into account the conclusion presented, it may be alleged that PTC is bound to charge a specific price, to which it committed in the scope of the tender, or that it is entitled to charge the price indicated therein, free from any regulatory intervention.

This line of argument must be rejected, as explained below.

i. As regards the price indicated in the tender

According to the Tender Regulation and Specifications, the *“average annual price for provision of the service per Mbps in the first 10 years”* was one of the sub-criteria to be considered in the assessment of applications. Tender instruments did not provide for a different presentation of the price.

In this context, PTC, in its application, presented an annual average price of provision of MUX A per Mbps, for the first 10 years, of EUR 746.4 thousand per Mbps, and the reference price for the period 2011-2018 corresponded to EUR 888.1 thousand per Mbps.

At the same time, PTC integrated in its application MoU concluded with each of the television operators, under which it intended to charge an annual price per channel (national channels benefiting from “must carry” obligations) of EUR [BCI] [ECI] million.

It is stressed that this price determination per channel - provided for in the various MoU - was not a tender requirement, deemed thus to be an additional element freely presented by PTC. It would thus not be legitimate on ICP - ANACOM’s side at the tendering stage to bind the applicant to such a price.

In this scope, it cannot be argued that the price was already set out in the MoU, as a simple substantial change of circumstances would require a renegotiation.

Lastly, having been presented a total average price per Mbps (in compliance with the tender instruments) and a price per channel, the two of them being irreconcilable, there is no doubt that, in the light of the current legal framework, the price required to be specified in the Tender Regulation, and which was used to assess the merit of the application, must prevail. In fact, this is the price safeguarded in RUF No. 6/2008, which refers to the *“average annual price for the provision of the service per Mbit/s”*⁵².

ii. As regards PTC’s binding link to the price presented

In the light of the above, it must be clarified whether PTC is bound to charge this price or if it is entitled to charge it.

It follows from the tender instruments - in line with the current legal framework⁵³ - that in addition to obligations arising from the law, the holder of the right of use for frequencies may be subject to conditions corresponding to commitments undertaken in the scope of the respective tender.

In this scope, RUF No. 6/2008 restates that PTC is bound to comply with all commitments set out in the tender application⁵⁴ and determines that PTC *“may (...) charge television operators an annual average price of provision of the service per Mbit/s, in the first ten years from the date of issue hereof, under the tender application”* adding that these *“annual average prices of provision of the service per Mbit/s, referred in the variant scenario and base application, may*

⁵² Clause 16, paragraph 1, of the RUF.

⁵³ Namely, article 32, paragraph 1 g) of ECL.

⁵⁴ Clauses 12, paragraph 1, and 17, of the RUF.

*be reviewed upon agreement with television operators and must be communicated to ICP - ANACOM”.*⁵⁵

As such, there is no doubt that the annual average price of provision of the MUX A per Mbps is one of the commitments undertaken by PTC in its tender application, and given that the assessment and success of its application depends on this factor, among others, a legal binding link must exist after the RUF has been assigned.

However, PTC is **(tends to be) bound to a maximum price**⁵⁶. A different conclusion would make no sense, as it would mean that PTC would be unable to charge lower prices to television operators broadcasted over the DTT even if it so wished, which would lead to an absolutely unjustified competition distortion, contrary to the regulatory objectives of this Authority.

The fact that the commitment with the price per Mbps binds only as regards its non-increase is justified by the integration of this criterion in the tender instruments. In fact, the aim was first and foremost to ensure that the future holder of the RUF would not use its negotiating power, strengthened due to its exclusive provision the DTT service, to demand excessive remuneration that would prevent the achievement of regulatory objectives underlying ICP - ANACOM's activity.

iii. As regards PTC's right to charge the reference price

Having been clarified that the commitment does not establish a maximum value per channel, but a maximum value for the MUX A average price per Mbps, in its entirety, it remains to be seen whether PTC, in addition to being bound (in principle only) to charge that maximum reference price, is also entitled to charge the price it sees fit, up to that value, free from regulatory interference.

The response to this question must be negative, given that:

- Article 21, paragraph 4, of the Tender Regulation lays down that *“The allocation of the rights to use the frequencies does not confer on its holder any other rights which do not result from the exact terms contained in the allocation title, whereas no facts arising from the allocation, in any way, of new services or rights of use or modification incidentally of circumstances may be cited”*;
- From the RUF granted to PTC does not, and could not, arise a right to the non-intervention of ICP - ANACOM in prices. Being allocated under ECL, article 20, paragraph 1, of that law determines that *“conditions, rights and procedures applicable to the exercise of the activity, including the rights of use or rights to install facilities, may only be amended in cases of objective justification and in accordance with the principle of proportionality, by means of law, regulation or administrative act, as appropriate”*;
- It follows from the above that ECL confers on ICP - ANACOM the power/duty to intervene in the determination of DTT prices whenever required (via a

⁵⁵ Clause 16, paragraphs 1 and 4, of the RUF.

⁵⁶ This was also AdC's opinion on the matter, which described the price indicated in the tender as a “maximum reference price”. Vide «Televisão Digital Terrestre em Portugal», June 2013, § 141. Available at: http://www.concorrencia.pt/vPT/Estudos_e_Publicacoes/Estudos_Economicos/Comunicacoes_Electronicas_e_Media/Paginas/Televisão-Digital-Terrestre-em-Portugal.aspx?lst=1

proportional measure) to ensure the pursuit of public interests underlying the legal framework, and that this intervention may take place even in case there is an agreement between PTC and a television operator on the price to be charged;

- Perfectly in line with the applicable legal framework, RUF No. 6/2008, which could never aim to deviate from higher standard legal provisions, refers, via applicable provisions of the Tender Regulation, the possibility of ICP - ANACOM taking action to determine prices in case of a lack of agreement between PTC and television operators;
- Both the tender provisions and the RUF expressly provide for the possibility of subsequent alterations to the conditions of allocation of the right of use for frequencies, which include alterations with possible impact on the costs of the platform. In fact, clause 3 of the RUF determines that PTC *“is bound to comply with standards published in the future, even if they establish provisions not provided for at the date of allocation of the right of use, but which result from needs or requirements of public use of the service provided, under the regime provided for in article 20 of [ECL]”*.

In brief, and in the light of the above, it must be concluded that PTC, when applying to the public tender, was aware that it could be subject to ICP - ANACOM's intervention at the level of prices of DTT services, in the scope of a future exploitation of the RUF concerned, both under article 43, paragraph 3 of ECL, and under the process of definition of relevant markets, identification of significant market power and consequent imposition of obligations.

Moreover, the rationale underlying the public tender and regulatory objectives which must be pursued by ICP - ANACOM are not consistent with a view which granted PTC the right the charge the annual average price of provision of the MUX A per Mbps proposed in the tender.

It follows from the tender specifications that the assessment of the quality of the economic and financial plan presented was expressly based on estimates on the evolution of prices to be charged and demand/use of services, the presence of a significant factor of future risk (whose weighing and management fashion would be taken into account by ICP - ANACOM in the process) being stressed.

This issue was not unnoticed by PTC that raised the risk matter in the scope of the consultation on the draft Tender Regulation, as referred above in point **(b)**. PTC was at the time mainly worried with the possibility of intervention on the part of ICP - ANACOM, at the request of television operators, to reduce prices, confirming that it was aware that it was not entitled to charge the price indicated in the tender application.

Replying to the issues raised at the time by PTC, ICP - ANACOM confirmed the presence of the risk, which would have to be managed by PTC, and this Authority's power of intervention *a posteriori* as far as prices as concerned, as referred in the preceding point⁵⁷.

ICP - ANACOM added that in case of an intervention *a posteriori* on prices, the risk of attack against the “profitability of the project submitted to tender”, referred by PTC, would be unlikely, “in view of the framework and moment of intervention”.⁵⁸

⁵⁷ Report of the Public Consultation on the Draft Regulation, pg.11.

⁵⁸ Report of the Public Consultation on the Draft Regulation, pg.12.

In brief, having been demonstrated that PTC is not bound to the price proposed to tender (which has the nature of a maximum reference price) nor it is entitled to charge it, there is no doubt on ICP - ANACOM's ability for intervention on this matter.

2.2.3. Assessment of the request for intervention in the price

It becomes clear from the description of facts presented in part 1. of this draft decision, and in spite of some uncertainty resulting from the initial formulation of the request by RTP, that it was acknowledged, and as such, demonstrated, that RTP (as well as SIC and TVI) reached an agreement and effectively concluded with a contract for provision of DTT services.

Notwithstanding, RTP maintains its request for the intervention on the part of ICP - ANACOM, and SIC and TVI, as interested parties, support such request, as described above.

In this context, and in line with the framework laid down in the preceding point on ICP - ANACOM's competence for intervention, it is concluded that the power provided for in article 43, paragraph 3, provided for ECL, may only be legitimately exercised in case:

- a) It is concluded that the agreement between (at least) PTC and RTP is non-existent; or
- b) It is concluded that there are grounds, on an exceptional basis, in the light of a proportionality judgement, for an intervention on the part of ICP - ANACOM, as regards the terms on which prices of DTT services were agreed on between PTC and television operators.

As far as a) is concerned, there is no doubt that RTP, as well as SIC and TVI, concluded a contract with PTC for the provision of DTT services; in fact, the former requested this Authority's intervention **[BCI] [ECI]** after its conclusion. Consequently, this Authority may only consider assumptions for intervention to be verified in case the referred contracts are deemed to be inexistent or invalid, pursuant to mandatory legal provisions.

In the present case, it follows from part 1. of this draft decision⁵⁹ that all operators, with greater or lesser degree of development, put forward arguments to support the invalidity of contracts, on the basis of the violation of competition law.⁶⁰ However, data which enable a decisive conclusion on the presence of obvious signs of a violation of competition law or of any other legal provision that may lead to the invalidity of contracts under consideration have not been presented, nor are they available to ICP - ANACOM.

Moreover, there are judicial channels which television operators may use to claim contract invalidity, which have not been resorted to.

In addition, it is stressed that RTP informed ICP - ANACOM that **AdC's intervention** was requested on this matter⁶¹.

Having AdC confirmed that RTP lodged a complaint for a possible abuse of dominant position, on account of the alleged existence of excessive and discriminatory pricing associated to the wholesale offer of DTT services provided by PTC, it seems, however, that it may be concluded

⁵⁹ Points 1.6.2., 1.6.3. and 1.6.4.

⁶⁰ It is stressed here that RTP also requested AdC's intervention on this matter (cfr. points 1.6.2. and 1.7.)

⁶¹ Point 1.6.2.

from the position conveyed by this Authority to ICP - ANACOM, summarized in point 1.7. above, that there was no matter requiring intervention, at least on the short time, on the part of AdC, given that the Authority decided to wait for the conclusion of this procedure to assess the opportunity of acting in the scope of its assignments.

In fact, in its response, AdC refers that based on the assumption that the technological change - analogue-to-digital - would not change ICP - ANACOM's conclusions as regards the definition of the wholesale market of broadcasting services for the delivery of content transmitted to final users, Grupo PT would continue to hold significant market power, and obligations likely to be imposed would continue to include non-discrimination in the provision of access and interconnection and price control.

It must be clarified from the outset on this matter that ICP - ANACOM, by determination of 2 August 2007⁶² only defined the wholesale market of television broadcasting through terrestrial analogue networks as relevant market for the purposes of *ex-ante* regulation.

The referred technological alteration - from analogue to digital - does not have, and could not have, on its own, automatic effects relatively to the former market analysis, so as to bring about a market definition, a declaration of significant market power and an appropriate imposition of regulatory obligations.

In this context, it is stressed that the market under consideration is not included in the Commission Recommendation in force on relevant markets⁶³, reference being made on this matter to point 2.3. above, on the request for the development of a process that allows the imposition on PTC of the principle of cost orientation of prices.

As far as b) is concerned (intervention on an exceptional basis, in the light of a proportionality judgement, on the terms on which prices of DTT services were agreed on between PTC and television operators), ICP - ANACOM is not aware of any data which enable the identification, at the present time, of a situation of clear risk to the compliance with public interests underlying the regulation of MUX A, in terms that sufficiently justify a restrictive intervention of private interests at stake, nor have they been presented.

In addition, the fact that the MUX A prior hearing report - which identifies the annual price per Mbps proposed by PTC in the scope of the referred tender - was published after contracts were concluded, is not a sufficient reason for deeming contracts under consideration as invalid.

ICP - ANACOM takes this opportunity to restate that, under the applicable legislation, RTP could have requested of this Authority, when it saw fit, to be provided with access to the referred report, as in fact other bodies did, such access having been granted.

In 2013, noticing that several requests for access to the report concerned were submitted and considering that it did not include any information of a confidential nature, ICP - ANACOM decided to make it available in its website, together with other elements on DTT, namely the overall report on spectrum control and monitoring action, which took place between January 2011 and March 2013, in the scope of supervision activities of the digital transition process.

⁶² Decision on the definition of product and geographical markets, assessments on significant market power and the imposition, amendment or suppression of regulatory obligations in the wholesale market of broadcasting services for the delivery of content transmitted to final users (market 18 of Commission Recommendation 2003/311/EC of 11 February 2003).

⁶³ Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation.

On the other hand, the framework defined in the Tender Regulation, and invoked by RTP in annex to the letter in which the request for mediation is presented, entitled the applicant to request this Authority's intervention, in case of disagreement and previously to the conclusion of a contract with PTC, for the purpose of the determination of an appropriate remuneration for compensation of "must carry" obligations imposed on the latter.

Without prejudice, as regards the **DTT service price**, there are two aspects which must be considered:

- (a) On the one hand, there is the issue of the allocation of capacity on MUX A. The annual price of EUR 885.1 thousand per Mbps was determined taking into account the costs estimated in the tender application, and, as mentioned in the report on the MUX A public tender, bearing in mind the capacity provided on MUX A of 19.91 Mbps in the Mainland and of 22.12 Mbps in the Autonomous Regions. This means that the tender application was based on the assumption that the full available capacity of MUX A would be assigned, directly or under reservation, to television operators (RTP 1, RTP 2, RTP Açores, RTP Madeira, Sic, TVI and 5th channel). The referred price was calculated admitting the full use of the capacity installed by television operators who had at the time MUX A broadcasting rights.

As regards the capacity in MUX A, the following relevant developments are stressed relatively to PTC's tender application:

- First of all, PTC is not receiving any revenue for the so-called 5th channel, contrary to expectations provided for in its application.

It is recalled in this scope that further to the launch of the public tender for the licensing of a general-content and free unrestricted access programme service of a national scope (the so-called 5th channel) to be carried over MUX A, ERC determined the exclusion of both tender applications presented, by ZON II and Telecinco, having considered that they lacked the necessary legal and regulatory requirements.

According to information conveyed by ERC⁶⁴ on April this year, a judicial decision has been issued endorsing ZON's decision to withdraw from the challenge lodged against ERC's Determination. Telecinco has also voluntarily withdrawn from the dispute.

- Second, in ICP - ANACOM view, the obligation which fell on PTC to reserve capacity for the shared HD channel expired, under RUF ICP - ANACOM No. 6/2008.

Although there are different opinions on this matter, the terms on which the obligation for reservation of capacity for shared HD broadcasts was constituted and how it is expressed, namely in RUF ICP - ANACOM No. 6/2008, lead to the conclusion that it expired.⁶⁵

⁶⁴ ERC letter of 3 April 2014, with reference 1601/ERC/2014. Available at <http://www.erc.pt/pt/deliberacoes/deliberacoes?pagina=6>

⁶⁵ In this regard, it should be mentioned that SIC, by letter of 14 August 2012, informed ICP - ANACOM that in its opinion, based on the preamble of Resolution of the Council of Ministers No. 12/2008, of 22 January, the intention and spirit of the statutory instrument is to establish high definition broadcasts as a determining factor before and after the switch-off, which in its view would be seriously jeopardized with the provision of broadband over MUX A to one more television channel, supporting, as such, the non-expiry of the reservation of capacity for the shared HD

Resolution of the Council of Ministers No. 12/2008, of 22 January (RCM 12/2008)⁶⁶ is at the origin of this obligation, requiring *“the reservation of broadcasting capacity, in non-simultaneous mode until the closure of analogue television broadcasting, of high definition transmissions of programme services distributed in Multiplexer A, provided that technical conditions allow”* (emphasis added).

It must be recalled that prior to the adoption of this Resolution, the Government launched a consultation, by the middle of 2007, on the issue of the occupation of the remaining capacity of MUX A⁶⁷, at the end of which it was concluded that such capacity should allow each of the existing “channels” one-off broadcastings of HD programmes (provided that not simultaneously) and an additional SD channel.

It would be - and still is - technically impossible to accommodate in MUX A (due to DVB-T and MPEG4 standards) all channels benefiting from “must carry” obligations (RTP1, RTP2, SIC, TVI and the 5th channel)⁶⁸ in HD. Consequently, a continuous HD broadcast of the referred programme services would necessarily require the assignment of more spectrum to (at least) a new multiplexer (one more network).

As such, as far as HD broadcasts in non-simultaneous mode are concerned - which would be ensured in the remaining capacity of MUX A - , RCM 12/2008 defined the switch-off as deadline for the respective reservation of capacity. The continuous HD broadcast would then be dealt with subsequently, if and when technically possible, in line with preamble of RCM 12/2008, as this simultaneous broadcast would impossible to be carried out in MUX A.

The deadline established was fully in line with the acknowledged purpose of these one-off broadcastings of HD programming elements. This was a transitional solution (during simulcast) relatively to full HD and, as such, it was regarded as a factor inducing the voluntary analogue-to-digital migration of final users.

In compliance with the above, the Tender Regulation associated to MUX A implemented determination in RCM 12/2008, having been established in its article 20 (“Obligations to reserve capacity and transmission in high definition”) that *“the holder of the right of use is further bound, under the terms of the Resolution of the Council of Ministers no. 12/2008 of 22 January, to reserve capacity, as specified in the tender specifications, for the broadcast, in non-simultaneous mode until the closure of analogue television broadcasting, of high definition transmissions of programme services [meaning RTP1, RTP2, SIC, TVI and the 5th channel]”* (emphasis added).

channel. On its turn, in its Determination 94/2013, referred in footnote 64, ERC refers that it is at least questionable that the obligation to reserve capacity for high definition broadcasts expired with the end of analogue broadcasts, and that it is in fact possible to support exactly the opposite, on the basis of the beginning of RCM No. 12/2008, referring that this is at least the position taken by SIC (referring to the same letter of 14 August 2012).

⁶⁶ Available at <http://www.anacom.pt/render.jsp?contentId=979869>.

⁶⁷ Taking into account the capacity reservation which MUX A should guarantee, resulting from the Television Law itself - that is, the capacity to broadcast analogue channels (RTP1, RTP2, SIC and TVI, and RTP Açores and RTP Madeira in the respective Autonomous Regions) - and the technological framework of the tender (DVB-T and MPEG4 standards), it was necessary to question the market on the remaining capacity of MUX A. *Vide* framework document of launched consultations (<http://www.anacom.pt/render.jsp?categoryId=251646>) as well as the preamble to RCM 12/2008.

⁶⁸ And RTP Açores and RTP Madeira in the respective Autonomous Regions.

PTC presented in its application a solution consisting in the allocation of 5 Mbps (average video speed) for the HD broadcasting of programming elements⁶⁹, allowing the maintenance without discontinuity of all SD broadcasts of programme services benefiting from “must carry” obligations on MUX A.

Having the right of use for frequencies associated to MUX A been allocated to PTC, the respective qualifying document [clause 15, paragraph 1 c)] of RUF ICP - ANACOM No. 6/2008] lays down that the company is bound to reserve capacity for high definition digital broadcasts, throughout national territory, until the analogue switch-off, in non-simultaneous mode - one programme service in each moment, with free unrestricted access, of programming elements of television programme services.

As is widely known, in compliance with Resolution of the Council of Ministers No. 26/2009, of 17 March⁷⁰, and under the Switch-Off Plan, approved by ICP - ANACOM⁷¹, the switch-off occurred on 26 April 2012.

As such, and according to the several provisions mentioned above and background in which it arises, PTC’s obligation for reservation of capacity, in the terms imposed in the respective qualifying document, for HD broadcasts - corresponding to a speed of 5.384 Mbit/s⁷² - expired when that fact took place, and consequently, at the moment no “must carry” obligation exists as regards those programming elements.

- Third, AR TV - Canal Parlamento, is currently occupying capacity on MUX A, and PTC receives remuneration for the broadcast of this service.

In this respect, it is highlighted that the future of MUX A and DTT evolution is still very unclear, namely as regards (i) the provision of new contents in the free-to-air platform, (ii) the broadcast of current HD television programme services, involving new networks/MUXs, (iii) the opportunity and appropriateness of introducing new business models, namely Pay-TV, as well as (iv) likely interest in the provision of services of a different geographical scope.

- (b)** On the other hand, elements available to ICP - ANACOM, from data in PTC’s application and more recent costing data, are not such as to lead to the conclusion that the annual price of EUR 885.1 thousand per Mbps is excessive, even if this costing information had not been yet audited.

Prices charged in other countries for DTT seem not to be an appropriate reference to assess whether the DTT price per Mbps in Portugal is appropriate, given for example, the technical differences in terms of adopted networks and technologies, models underlying the DTT business and channels used in each MUX, and the geography and demography of the country.

⁶⁹ Vide “Final report on the analysis and evaluation of the applications to the public tender for the allocation of a right of use for frequencies of a national scope for the digital terrestrial television service, associated with Multiplexer A (Mux A)”, available at:

http://www.anacom.pt/streaming/TDTrelatorio_final_Mux_A.pdf?contentId=1156003&field=ATTACHED_FILE

⁷⁰ Lays down the basic methodology for the transition to the DTT broadcasting system and the switch-off date. Available at: <http://www.anacom.pt/render.jsp?contentId=979705>.

⁷¹ Determination of the Management Board of 24.06.2010, available at <http://www.anacom.pt/render.jsp?contentId=1033345>

⁷² Vide clause 15, paragraph 1 c) of RUF ICP - ANACOM No. 6/2008.

Without prejudice, prices identified with other regulators and also collected by this Authority were as follows, presenting wide differences between them:

- Between EUR 70 and 700 thousand per Mbps per year depending on the MUX coverage (between 79% and 91% of the population) in Slovakia;
- EUR 89 thousand per Mbps per year, in Croatia;
- EUR 766 thousand per Mbps per year, in Finland;
- EUR 7 million per year per each SD free unrestricted access channel in France.

On the other hand, television operators failed to present substantiated and detailed information on prices practised in other countries⁷³.

Bearing in mind data mentioned above, ICP - ANACOM considers that it is unable to take action now, in the scope of the review of the DTT price per Mbps, given that it lacks data that justify this review, without prejudice to the promotion of an **in-depth investigation to the costs of DTT services charged by PTC, which is already underway following the issue of determination of 14 March**.

2.3. Request for the application of the principle of non-discrimination by reference to the price charged to Assembleia da República

It must be taken into account, first and foremost, that in the framework of electronic communications, and insofar as capacity reservation and “must carry” obligations provided for in the RUF allocated to PTC have been observed, this company is entitled to use the remaining capacity in MUX A to provide other electronic communications services, and there is nothing to prevent that it is used for the broadcast of Canal Parlamento (paragraph 4 of Resolution of the Council of Ministers No. 12/2008, of 22 January and clause 6, paragraph 2, of RUF).

Under Law No. 36/2012, of 27 August, which amended Law No. 6/97, of 1 March, allowing the disclosure of parliamentary work on DTT, a signal provision duty exists on the part of the Assembly of the Republic, and distribution operators of television programme services hold a right to broadcast the signal/access to the signal. In other words, PTC is not made subject, as DTT operator, to capacity reservation and “must carry” obligations as far as the Canal Parlamento is concerned, and such obligations have also not been imposed in the scope of the broadcast of this channel in cable distribution networks⁷⁴.

The explanatory statement of the respective draft law refers that *“there has been no change in the special nature of Canal Parlamento”* and *“this nature and special status determine that to Canal Parlamento is not applied the television law”*.

⁷³ As referred above in the section on Facts, SIC mentioned that it did not possess specific information on the matter, referring to studies prepared by Broadcast Networks Europe (May and June 2013) which present, with no detail or grounds, a monthly cost of distribution per channel (27-member European Union) of about EUR 0.01 per home. RTP also refers that DTT prices charged by some European companies similar to PTC are, in relative terms, much lower than those charged by PTC, however no specific and substantiated values are presented.

⁷⁴ Note also that ERC, in the scope of its competencies, did not specify Canal Parlamento as beneficiary of “must carry” obligations.

The position of television operators according to which the annual price to be paid for the distribution of Canal Parlamento (or by various television channels or MUX A clients) must correspond to the annual price paid by current television operators is based on the assumption, on the part of operators, that there is a non-discrimination obligation as regards the price charged for DTT.

However, as referred earlier, Canal Parlamento does not benefit from a “must carry” obligation on MUX A, and as such the regime of article 43 of ECL (which is specific for “must carry” obligations) does not apply to the regulation of this price.

On the other hand, in the light of the above and in the absence of additional elements, it is deemed that the implementation of a possible obligation of contractual non-discrimination would require weighing whether the specificity of Canal Parlamento would allow a different treatment relatively to television operators.

In addition, the broadcast of Canal Parlamento differs from that of other MUX A channels, both as regards the capacity used and the duration of the daily broadcast.

3. Decision

Whereas:

- a) RTP requested the intervention of ICP - ANACOM, so that this Authority, in the exercise of its legal powers, *“undertakes the immediate mediation in the determination of the price charged by PTC”* for the provision of the encoding, multiplexing, transmission and broadcasting services of the television signal over the digital terrestrial network and additional coverage, in the framework of article 19, paragraph 4, of the Tender Regulation, which refers to an intervention of ICP - ANACOM under article 43, paragraph 3, of ECL;
- b) Not only RTP, but also SIC and TVI, as beneficiaries of “must carry” obligations imposed on PTC, are interested parties in this procedure, and as such, these companies expressly supported this request for intervention;
- c) Regardless of the high technical complexity and incompleteness of the information available on the matter, ICP - ANACOM is under a legal duty to rule on the request submitted, the time-limit of which ran out after the expiry of the 90-day-extension approved on 14.11.2013;
- d) It was demonstrated that contracts were concluded between television operators and PTC, including RTP, as was found in the course of the procedure;
- e) ICP - ANACOM may only intervene under article 43, paragraph 3, of ECL, where it is concluded that agreements concluded are non-existent or invalid, or that there are grounds, on an exceptional basis, in the light of a proportionality judgement relatively to a possible harm to public interests and regulatory objectives, for an intervention on the part of the regulator, as regards the prices agreed on;
- f) Both data in PTC’s MUX A tender application, and more recent costing data, are not such as to lead to the conclusion that the price charged is excessive;
- g) Data which enable a decisive conclusion on the presence of obvious signs of a violation of competition law or of any other legal provision that may lead to the invalidity of contracts under consideration have not been presented, including by AdC in reply to the request for information it was sent, nor are they available to ICP - ANACOM;
- h) ICP - ANACOM is not aware of any data which enable the identification, at the present time, of a situation of clear risk to the compliance with public interests underlying the regulation of MUX A, in terms that sufficiently justify a restrictive intervention of private interests at stake, nor have they been presented;
- i) At the same time, RTP requested that ICP - ANACOM *“launches and develops a process imposing on PTC the compliance with the principle of cost-orientation of prices in the determination of the service price”*, which, according to applicable sector legislation, is typically covered by a market analysis process, as defined in articles 55 *et seq.* of ECL;
- j) ICP - ANACOM is the competent body to undertake the definition and analysis of markets, being incumbent on the Authority to decide, within its margin of discretion, on the opportunity and appropriateness of launching a market analysis procedure;

- k) Several issues which may significantly influence the DTT service market and its analysis are still pending;
- l) The specific procedure on market analysis and imposition of obligations has especially demanding outlines in the case of the definition of markets other than those provided for in the European Commission Recommendation on relevant markets, which means that this a complex and lengthy procedure, clearly incompatible with the 90-day general deadline provided for in the APC;
- m) An in-depth investigation to the costs of DTT services charged by PTC is already underway, and elements presented by the company in reply to the request for information it was sent is now undergoing an analysis;
- n) The results of the referred investigation to DTT costs will allow a quicker and more substantiated decision on whether a market analysis is required;
- o) The Management Board of ICP - ANACOM, by determination of 14 March 2014, approved a draft decision on the price charged by PTC for the encoding, multiplexing, transmission and broadcasting services over a DTT network of free unrestricted access television channels (MUX A), following the intervention request made by RTP to ICP - ANACOM, to undertake the immediate mediation in the determination of the price charged by PTC for the provision of those services and, at the same time, to launch and develop a process imposing on PTC the compliance with the principle of cost-orientation of prices in the determination of prices charged for the service provided, having submitted point 1. thereof to the prior hearing of interested parties, under articles 100 and 101 of the Administrative Procedure Code, and to the general consultation procedure provided for in article 8 of Law No. 5/2004, of 10 February, as amended and republished by Law No. 51/2011, of 13 September, a time-limit of 20 working days having being granted in both procedures, allowing interested parties to comment on the issue in writing;
- p) In reply to the consultation procedures, comments from PTC, RTP, TVI and the DTT blog in Portugal were received within the time limit set, and positions taken by respondents and ICP - ANACOM's views thereon have been included in the "report of the prior hearing and general consultation procedure on the draft decision on the price charged by PTC for the encoding, multiplexing, transmission and broadcasting services over a DTT network of free unrestricted access television channels (MUX A)", which is deemed to be an integral part of this decision.

The Management Board of ICP - ANACOM, bearing in mind its competencies provided for in articles 43, paragraph 3, and 56, both of Law No. 5/2004, of 10 February, as amended and republished by Law No. 51/2011, of 13 September, hereby determines:

To close the procedure on the request made by RTP for immediate mediation in the determination of the DTT price, not intervening on this occasion in its review, taking into account grounds mentioned above, namely, the existence of contracts concluded between PTC and television operators, including RTP, the fact that it may not be concluded unequivocally that the charged price is excessive and the circumstance that, as regards the possible existence of abuse of dominant position by that company, the competent Authority has not identified an issue which required its intervention, at least not in the short term, given that it decided to wait for the conclusion of this procedure to assess the opportunity of acting in the scope of its assignments, and to reassess the matter in the scope of the public consultation and of an in-

depth investigation of costs of DTT services provided by PTC, which has been already launched and which may be used as an input in the analysis of the market in which the DTT service is integrated, on which this Authority will take a decision in due course.