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TO IMPROVE THE  
REGULATOR'S  
EFFICIENCY AND  
PERFORMANCE  
CAPACITY

(OBJECTIVE 3)

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## ● ● 5 To improve the regulator's efficiency and performance capacity (Objective 3)

The various activities developed in pursuit of the objective "to improve the regulator's efficiency and performance capacity" and those also related to cross-organisation internal practice and management are described and detailed in the Activities Report and are not covered in this report.

This section includes the actions related to audits and cost models and actions of market supervision, monitoring and penalties which contribute to the enforcement of the decisions taken in respect of market regulation, assuring their effectiveness and enhancing the regulator's

performance capacity. There are also references to the development in 2009, of the processes of administrative litigation and dispute resolution.

Likewise, contributing to better knowledge of the market and better quality and reasoning of regulatory decisions, the various studies promoted by this Authority are also referenced in this section, concluding with an indication of a number of measures to promote efficiency and streamlined procedures and to implement the new fee system established at the end of 2008.

## ● ● 5.1 Audits and cost models

The cost models and respective audits are important tools for the implementation of cost orientation obligations, affecting different operators with SMP on certain markets and/or the USP in the electronic communications sector and postal area.

### 5.1.1 Analytical Accounting System (AAS) of PTC

Following the audit of the 2004 and 2005 results of PTC's AAS, conducted by an independent auditor selected by this Authority, ICP-ANACOM, by determination of 16 December 2009, published the system's respective declaration of conformity, whereas a set of determinations and recommendations for the improving the AAS was notified to PTC.

With respect to the 2006 results, ICP-ANACOM awarded the respective audit on 10 August 2009.

### 5.1.2 Cost models

#### Public consultation on cost models

Given the significant change in the existing context regarding the launch in 2005 of the public consultation on cost models, which occurred particularly as a result of the publication of the EC Recommendation on accounting separation and cost accounting systems as well as the recommendation on termination rates (mobile and fixed), and recognizing that both the consultation document and the contributions received may be outdated, ICP-ANACOM opted to inform the market, by determination of 28 October 2009, on the next developments expected in this area, thereby addressing a number of the issues covered by the public consultation, whereas interested parties will always have the opportunity to comment. In particular, note is made of: (i) the award made to two consulting companies of two studies (the methodology to be used for calculating the cost of capital to be considered and the framework of curtailment costs in the PTC Regulatory Costing System); (ii) the completion of a consultancy study to make a comprehensive assessment of the current Regulatory Costing System of PTC and its possible revision; and (iii) to launch an international tender for the development and implementation of a model of termination on mobile networks (in accordance with the EC Recommendation).

#### Definition of the methodology to be used for calculating PTC's cost of capital for 2009-2011

With respect to the obligation of price control and cost accounting to which PTC has been made subject, provision is made in article 74 of the ECL, that ICP-ANACOM shall "take into account the investment made by the operator and allow it a reasonable rate of return on the capital invested, taking the risks involved into account(...)". This rate corresponds to the rate of cost of capital.

EC Recommendation 98/322/EC of 8 April sets out that: (i) "charges for interconnection be cost-oriented, including a reasonable return on investment"; and (ii) "the cost of capital of operators should reflect the opportunity cost of funds invested in network components and other related assets".

Taking into consideration the impact that the cost of capital has on the unit costs of products or services, and that it is essential to define a proper methodology for determining the cost of capital, it was considered that this issue should be given to consultation by an independent company with expertise in this area.

For this purpose, by determination of 21 January 2009, ICP-ANACOM awarded the contract to carry out the consultancy with respect to the cost of capital of PTC.

Subsequently, based on the study undertaken by the consultants selected, by determination of 17 November 2009, a draft decision on the methodology for calculating PTC's cost of capital with respect to the 2009-2011 period was submitted to the prior hearing of interested parties and the respective final decision was adopted in 2010.

#### Study on the curtailment costs of PTC

According to EC Recommendation 98/322/EC - on interconnection in a liberalised telecommunications market - "a well defined cost-allocation system will enable at least 90 % of the costs to be allocated on the basis of direct or indirect cost-causation." The costs of the services provided by PTC currently include a portion relative to common costs which comprise, among other items, so-called curtailment costs which are associated with a staff restructuring programme, comprising early retirement and suspension of staff contracts.

Given the significant impact that curtailment costs have on the unit costs of PTC's products and services, it was considered important that this issue be thoroughly studied in order to analyze the amount of curtailment costs determined by PTC and critically evaluate their inclusion for regulatory purposes. Accordingly, by determination of 21 January 2009, an award was made for the conduct of a consultancy study on the curtailment costs of PTC, which was carried out during 2009 with a view to developments in this area in 2010.

#### **Regulatory costing for mobile operators**

With the publication, on May 2009, of the EC Recommendation on the regulatory treatment of fixed and mobile termination rates in the European Union, NRA are bound to calculate the incremental costs of providing the voice termination service (fixed or mobile) by an efficient operator, mainly based on current costs provided by Long Run Incremental Costs (LRIC) and bottom-up cost models, whereby the technology considered should be the most efficient available in the period covered by the model.

By determination of 7 October 2009, ICP-ANACOM approved the launch of a public tender for the development and implementation of a costing model for mobile termination, and following this tender awarded the work on 19 March 2010, whereas the development of the model began in the first quarter of 2010.

#### **5.1.3 Analytical Accounting System (AAS) of CTT**

Pursuant to article 19 of the Basic Law and clause 13 of the Concession, CTT, as concessionaire company for the provision of the US of postal services and operation of the

postal network, is bound to maintain an AAS which enables: (i) determination of the revenues and direct and indirect costs of each of the reserved services and each of the non-reserved services and (ii) separation between the costs associated with the various basic operations making up the postal services (collection, handling, transportation and distribution). The maintenance of this system further aims to ensure adherence to the principle of cost orientation of prices, in accordance with paragraph 3 of article 2 of the Price Convention.

ICP-ANACOM, or another entity which it so designates, is competent to audit this system, to verify its compliance with the obligations under the relevant legislation, as well as with national and international standards and best practice, and with the principles, determinations and recommendations established and issued by this Authority, to ensure the credibility of the results. It is also incumbent upon ICP-ANACOM to publish an annual declaration attesting to the system's compliance.

In this context, and following the audits of the 2005 and 2006 results of CTT's AAS, on 14 January 2009, approval was given to the report of the prior hearing, the declarations of conformity of the AAS (2005/2006) and the determinations and recommendations made with a view to improving the AAS of CTT.

During 2009, the audit and associated consultations were performed with respect to the examination of the 2007 results of CTT's AAS.

Also in 2009, the process was initiated to award the audit of the 2008 results of CTT's AAS, which award was approved in 2010.

## ● ● 5.2 Supervision, enforcement and sanctioning

### 5.2.1 Supervision and enforcement

#### Communications market

In line with the procedures adopted in previous years and taking into account the strategic guidelines of ICP-ANACOM, various types of enforcement action were undertaken, aimed at enhancing the protection of consumer rights and ensuring that conditions exist for the operation of open and competitive markets. Such actions focus, in particular, on the detection of irregular situations in portability processes, on the resolution of constraints in PTC exchanges in the context of the RUO, the conditions of supply and provision of value-added services based on message sending and the operation of the E112 service, as regards obligations of transmission of data relevant to the location of emergency calls, which must be provided by electronic communications operators.

To provide consumers, as well as the operators and service providers involved, with more information, several studies were conducted to monitor the quality of service of the mobile telephone networks, covering the mainland, the autonomous regions of Madeira and the Açores and several railway lines, in addition to a survey on quality of service in broadband Internet access.

As part of ICP-ANACOM's activity of monitoring the market and with a view to compiling indicators on mobile stations and users, traffic, financial data, quality of service and network infrastructure which enable measurement of data, such as the level of development and use of the mobile service and the assessment of the development of competition in the provision of the services, by determination of 8 July 2009, this Authority approved the final decision on the set of statistical indicators to be submitted by mobile service providers on a quarterly basis.

#### Equipment market

ICP-ANACOM is responsible for overseeing compliance with Decree-Law no. 192/2000 of 18 August, which establishes the regulatory framework for the placing on the market, free movement and putting into service in the national territory of Radio and Telecommunications Terminal Equipment (R&TTE)<sup>32</sup>. In providing market oversight with respect to this type of equipment, 48 processes were sent for analysis

with a view to litigation, resulting from the detection of irregularities.

It should be noted that in late 2009, a workshop was held entitled Application of the RTTE Regime in Portugal, which, in addition to providing an opportunity to disseminate the R&TTE regime, served to present the European market surveillance campaigns in which ICP-ANACOM participated, in cooperation with its European counterparts.

#### ITED (Telecommunications Infrastructure in Buildings) and ITUR (Infrastructures for Telecommunications in Housing Developments, Urban Settlements and Concentrations of Buildings)

In terms of ITED oversight, 400 inspections were conducted of telecommunications infrastructure in buildings during 2009, with a non-compliance rate reported of 20 %.

### 5.2.2 Sanctioning

During 2009, 80 cases were brought for offences arising from breaches of the ECL and other legislation, whereas more detail is provided of the activities developed in this area in this Authority's Activities Report.

About half of the actions brought resulted from situations involving breaches of the ECL, especially due to failure to provide required information to ICP-ANACOM and due to issues related to number portability.

With respect to proceedings brought for breach of other legislation (45 cases), note is made, in particular, of 5 cases related to postal services and resulting from failures to comply with the obligation to provide this Authority with the information required for verification and inspection in respect of the obligations and conditions attached to licenses or authorizations, 13 cases associated with the private use LMS and 12 cases connected to terminal and radio equipment.

In terms of the framework scheme of administrative offences within the communications sector, particularly with respect to electronic communications, and taking into account that the sector is undergoing constant evolution and becoming increasingly complex, with specific needs, there are grounds

for a dedicated scheme of offences, allowing more effective action to be taken in terms of prevention and sanctioning of the multiple types of infringement. As such a draft law on such a scheme was prepared by ICP-ANACOM and submitted to the Government, giving rise to Law no. 99/2009 of 4 September.

The scheme approved by that law has allowed the simplification and consequent streamlining of procedures, without jeopardising the guarantees of the accused, and contains some special solutions which seek to respond to the requirements of general deterrence.

This establishes a tripartite classification of offenses according to their severity, reflected in the limits of the applicable fines, which depend on whether the offences are committed by natural or legal persons, and in the case of latter, according to the size of the offender.

The minimum and maximum fines were increased with respect to the general scheme of offences, but not for those already established in the ECL.

A system governing the loss of unclaimed objects was also established, distinct from that provided for in the Criminal

Proceeding Code, which is characterized by being faster and having no costs for individuals.

The sector's own and specific needs call also for new procedures, such as: (i) warnings, applying to minor offenses which consist of reparable irregularities that did not result in significant damage, and (ii) summary proceedings, for possible application prior to formal accusation, for minor or serious offences.

In line with the provisions of the ECL, mandatory pecuniary penalties may be applied to offenders, with a view to cessation of the offence, wherever provided for legally.

The full implementation of Law no. 99/2009 depends on the adaptation of various pieces of sector legislation; whereas it is necessary, in the application of each one, to define the severity of the offence, as well as the specific limits of the fines which should vary - within the limits established under the framework scheme, according to the envisaged social repercussions of the offence. Such adjustments will be completed in 2010.

## 5.3 Administrative litigation

Although the number of processes of administrative litigation declined slightly from the previous year, the level

of litigation in 2009 remained relevant, as shown in the following table.

### Cases initiated in 2008 and processes carried forward | Table 17

<b>2009 Processes - 8</b>	
Precautionary Procedures (suspension of validity)	1 (closed)
Special Administrative Action	7 (1 closed)
<b>Cases carried forward - 40</b>	
Precautionary Procedures (suspension of validity)	4 (closed)
Special Administrative Actions	27 (3 closed)
Action for annulment	5
Joint Administrative Actions	3 (1 closed)
Action to Enforce a Right (tax)	1
<b>Employment cases carried over from previous years - 2</b>	
Actions	2

Source: ICP-ANACOM.

The precautionary procedure submitted in 2009 refers to the application for suspension of validity, submitted by the companies of Grupo PT, of article 1 of the new Portability Regulation; it was dismissed due to definitive sentence having already been passed.

Of all the special administrative actions presented in 2009, the following should be noted (i) relating to determination of ICP-ANACOM of 14 January 2009 on the definition of geographic markets, assessment of SMP and the imposition, amendment or withdrawal of regulatory obligations concerning the market of wholesale (physical) network infrastructure access at a fixed location and wholesale broadband access, brought by Vodafone, and (ii) relating to the partial annulment of ICP-ANACOM determination of 11 March 2009 on the publication of quality of service performance levels in the RUO, LLRO, RDAO, Rede ADSL PT and WLRO, brought by PTC.

The remaining actions initiated in 2009 refer to more specific issues related in particular to the mobile broadband access service, number portability, compensation for non-compliance with quality of service under the RUO and general conditions associated with the provision of mobile trunking services and the tender for the allocation of frequencies in the 450 MHz band.

Of the processes brought forward and ended in 2009, the plaintiff's application was upheld in one case only, related to the clarification of questions of law, whereas two precautionary procedures, brought with respect to the determination of 2 July 2008 on mobile termination price control, were dismissed.

## ● ● 5.4 Settlement of disputes

During 2009, ICP-ANACOM, pursuant to the administrative dispute resolution scheme provided for in article 10 of the ECL, intervened in several disputes between operators, related to:

- number portability - refusals of electronic requests;
- misuse of guttering which is the property of PTC;
- interconnection of Radiomóvel - Telecomunicações, S.A. (Radiomóvel) with other operators;
- alleged improper billing of ADSL loop migration;
- payment of compensation for breach of levels of quality of service established in the RUO and LLRO;
- termination rates of nomadic VoIP service;
- remuneration conditions of 760 service;
- fees and conditions of routing traffic from the former Tele2.

Some of these disputes were decided in 2009 while others, because they remained uncompleted or because they required further analysis, were carried over to 2010.



## ● ● 5.5 Studies

### **Study on vertical separation in Portugal**

The study Vertical functional separation in the electronic communications sector - What are its implications for the Portuguese market? conducted by Oxera (after selection by public tender) and published on 3 August 2009, analyzed vertical functional separation in the electronic communications sector in Portugal, covering a range of issues, including the European and national regulatory framework, literature on the advantages and disadvantages of vertical separation *versus* vertical integration, case studies on experience of vertical separation in the electronic communications sector in other countries (United Kingdom, Sweden, Italy, Australia and New Zealand) and in other sectors (post, gas, electricity, roads and railways) and the assessment of any implementation of a vertical separation solution in Portugal.

Specifically, an assessment is made, in particular, of the extent to which the obligation of vertical separation may be an appropriate solution to address the position of PTC as holder of SMP on the broadband market, and also to enable ICP-ANACOM to achieve its statutory objective of promoting competition in networks and services in the electronic communications sector.

This matter was examined in the light of existing information - which in view of the authors of the study would need to be expanded to allow better appreciative judgement - and given a different set of separation options, especially in terms of complexity, costs and impacts.

### **Study on broadband with a focus on mobile broadband**

Due to poor information available at the level of scientific research on the major differences between the various types of broadband Internet access, ICP-ANACOM (in partnership with its counterpart in Brazil - ANATEL) asked a group of prestigious scholars in the U.S. (Academic Team) to conduct a study in this respect.

This study, entitled Scientific Research Project coordinated by ICP-ANACOM and ANATEL with a focus on Mobile Broadband, was published on 9 October 2009 and focused,

among other aspects, on characterizing residential broadband users by type of access, on their patterns of use and propensity to switch operator.

The results of this study suggest that the volume of hours of broadband Internet use is relatively consistent between different age groups and regions in Portugal and, in general, older users have a lower number of hours of use, while wealthier users use broadband Internet for longer.

The main factors associated with switching operator (or not) seem to be access speed and features of the service itself.

Concerning the differences between fixed broadband access and mobile broadband access, according to the results of this study, while the first is valued by individuals seeking to access the Internet at home and higher bandwidth, Mobile Broadband access is valued specifically for its mobility. However, the pattern of use is relatively similar between the two types of broadband user.

With respect to the characteristics of the population, it was found that, in general, individuals with higher income and higher levels of education prefer mobile broadband access over fixed broadband access.

### **Study on improving broadband adoption indexes**

In certain international comparisons, broadband penetration continues to be calculated based solely on the number of fixed broadband accesses (as is the case of index used by the OECD). However, these indexes have limitations because cases, such in the Portuguese case, where the current number of mobile broadband accesses is greater than the number of fixed broadband accesses are placed at a competitive disadvantage compared to countries where mobile broadband has not yet reached an advanced stage of development.

In this respect, ICP-ANACOM considered that it was necessary to conduct a study to develop a more efficient index for calculating broadband penetration, and to this end and in

partnership with ANATEL, a study of this nature was sought from the Phoenix Center for Advanced Legal and Economic Public Policy. The study *The Broadband Adoption Index: Improving Measurements and Comparisons of Broadband Deployment and Adoption* was published on 5 August 2009 and states that the optimal number of accesses is not provided by 100 % penetration of the population but only by the percentage which actually takes some advantage from these accesses, determined by appropriate indices.

#### **ECSI Portugal Study 2008 - National Customer Satisfaction Index**

In August 2009, the ECSI Portugal 2008 - National Customer Satisfaction Index was published on ICP-ANACOM's website; this study covers the communications sector, and in particular, fixed and mobile network services, Internet access (fixed and mobile) services, subscription television distribution and the postal service. This part of study, as last year, was exclusively sponsored by ICP-ANACOM, which also gave its support in data collection, whereas the conclusions and recommendations are the sole responsibility of Instituto Superior de Economia e Gestão of Universidade Nova de Lisboa.

With regard to customer satisfaction, compared with results obtained in the ECSI Portugal study of 2007, the subscription television distribution sub-sector is reporting positive development (with more positive variations reported in the seven estimated indices), while the postal sub-sector shows an opposite trend with negative changes in almost all indices. Note should also be made of the marked positive trend reported in subsectors related to the fixed network, subscription television distribution and Internet access with respect to the perceived value index. This development may, perhaps, be connected to the increased level of consumer demand for these services.

#### **Study on the internal procedures of providers of electronic communications services for handling complaints**

As part of the steps taken to enhance the protection of consumer interests, in 2009 ICP-ANACOM concluded the study on the internal procedures of providers of electronic communications services for the handling of complaints, began in 2008. In 2010, according to the data collected and conclusions drawn from the study, this Authority will assess the possible adoption of measures in this context.

#### **Other studies in the field of electronic communications**

ICP-ANACOM also conducted a number of internal studies, which are unpublished, on subjects related to the evolution of voice services, retail prices applicable to on-net and off-net traffic of mobile networks, the technological evolution of WiMax systems and citizens with special needs.

#### **Study on comparisons of the prices of UPS providers in the EU**

As part of the activities carried out by ICP-ANACOM in the context of regulating the postal communications sector, a study was conducted on Comparisons of prices of providers of the universal postal service in the European Union. Published on 25 November 2009, this study sets out to make a systematic and current comparison between a wide range of postal services provided under the US by the respective operators of the Member States of the EU.

It was concluded from this study that in Portugal the prices of national parcels up to 2 kg and national priority mail up to 20 g were maintained, with increases seen in all other prices studied - national non-priority mail up to 20 g and cross-border *intra-community* mail up to 20 g<sup>33</sup> - although less than the average price of services in the EU.

<sup>33</sup> Both in standard format.

It is further noted that, with the exception of sending non-priority cross-border *intra*-community up to 20 g, current prices in euros are below the EU average. When prices are analysed in terms of purchasing power parity, they are again found to be below the average of the EU, with the exception of sending non-priority cross-border *intra*-community and priority national mail up to 20 g.

It was also reported that there was an overall slight improvement in the position of prices in Portugal compared to other EU countries, whereas, as in 2008, prices in euros remain below the EU average, with the exception of sending non-priority cross-border *intra*-community up to 20 g.

#### **Indicators relating to postal services**

Aiming to provide ICP-ANACOM with information on indicators on traffic, financial aspects and on the postal network which enable it to assess the level of development and use of postal networks, and also gauge the relative positions of the providers in the liberalised area and their development over time, on 11 March 2009, this Authority approved the final decision on the set of statistical data which providers of postal services are required to send on a quarterly basis.

## ● ● 5.6 Other measures to promote efficiency

### **Availability and use of electronic media in communication with ICP-ANACOM**

By determination of 23 December 2009, ICP-ANACOM approved the draft decision on the provision and use of electronic media in procedures which involve communication between this Authority and radio network or station licensees, as well as all requirements which apply in this context, under the terms of Decree-Law no. 151-A/2000 of 20 July, in the wording set forth by Decree-Law no. 264/2009 of 28 September.

The primary intention is to ensure more rapid and effective forms of communication by this Authority and market participants.

### **Amateur and amateur satellite services**

On 2 March 2009, Decree-Law no. 53/2009 was published, updating and simplifying the rules governing use of the amateur radiocommunications service from a technical point of view and in terms of the administrative procedures to be observed in the exercise of the amateur activity.

## ● ● 5.7 New fee models applicable to the use of the radio spectrum and numbering resources and to suppliers of electronic communications networks and services

Since 1 January 2009, new general fee models have been in force, whose main characteristics were detailed in the 2008 Regulation Report (pursuant to Administrative Rule no.1473-B/2008 of 17 December). By determination of 2 October 2009, ICP-ANACOM adopted a package of measures related to the new tariff regime applicable to network and service providers. This new regime consists of the following:

- approval of the calculation of the costs of regulating the activity of supplier of electronic communications networks and services, as 33,036,969 euros. It should be noted that, taking into account the existence of a transition period for the implementation of this new fee model, in this first year of its implementation, only a third of the value of the costs of regulation is recovered by the respective fees;
- launch of an audit of the providers of electronic communications networks and services which, in 2008, reported the highest levels of relevant income, and by sample, the others, to ensure uniformity of criteria for the calculation of this type of revenues;
- issue of invoices associated with the new fees, taking into account the provisions of the Administrative Rule and, in particular, the transition period.