

Determination of 14.6.2002

## **RESOLUTION**

### **I - BACKGROUND**

1. Following the information sent by PT Comunicações (PTC) to ANACOM, on the 22nd of May 2002, that they had a new ADSL wholesale offer, which would come into force on that date, and a communication sent by ONI TELECOM, S.A. (ONI) that this offer had not been subject to any previous notice, ANACOM, based on the following considerations:

a) Should this situation be confirmed, there would be violation of the provisions contained in article 13, no. 1, subsection e) of RERPT approved by DL 290-A/99, from July 30, and also failure to comply with the non-discrimination principle foreseen in subsection a) of the same diploma, provided that some companies were aware of the change in the offer before other companies did; and

b) The change of PTC's ADSL offer requires a readjustment of the retail offers to which all the companies must have the deadline granted by law, being urgent to force compliance with said legal rule in case of any possible breach; plus, any situation that would place the companies under unequal circumstances, as far as the knowledge of said new offer is concerned, would distort the competition conditions, which, being confirmed, was urgent to avoid.

Decided, on May 24, pursuant to subsections c) and g) of article 9 of the Statutory Rules approved by DL nº 309/2001, from December 7, and no. 1 of artº 31 of RERPT approved by DL nº 290-A/99, from July 7, as follows:

- That PTC should immediately inform ANACOM on their compliance with the provisions contained in said legal rule;
- That, if compliance with the provisions contained in said rule did not effectively take place, PTC should immediately communicate to the interested parties that said offer would only be effective 30 (working) days after all interested parties were notified.

2. On May 27 ANACOM received a complaint from NOVIS Telecom, S.A. (NOVIS) regarding the changes made in PTC's ADSL offer (which is hereby reproduced), which requested with urgency the following:

- a) That the companies belonging to PT Group, namely PTM.com, should be prevented from providing any service based on this specific offer before all the remaining operators had time to adapt their offers, systems and communication means to the conditions hereby submitted, suggesting a 3-month deadline for that purpose;
- b) That an administrative lawsuit should be filed against PTC "under the terms of no. 1, subsection b) and no. 2 of Decree-Law no. 290-A/99 by each client of the ADSL offer trial of the new conditions (...)".

3. On May 28, PTC informed ANACOM that, on May 21, they had sent to the interested parties the new service offer conditions, starting on the next day the calculation of the deadline determined by ANACOM, as evidenced by notice dated May 28 which copy was attached thereto, in which they informed the interested parties that the new conditions sent on May 21 would only be applicable after the end of the deadline referred to in ANACOM's determination.

4. On the same day, May 28, ONI repeated the request addressed to ANACOM on the 23rd of the same month, asking for a complementary resolution so as to prevent, within a reasonable 2-month period of time, companies from PT Group to promote retail offers based on the new PTC's ADSL service wholesale offer.

5. On the 7th day of the current month of June, PTC communicated to ANACOM that *a new pilot project was initiated on May 22 that would reach the end on June 30, being exclusively intended to test the PT Comunicações' internal processes.*

Within the scope of this project a cargo test had been performed that would allow PT to evaluate their capacity and to conclude that the conditions were met for all the interested parties to immediately present this type of requests (corresponding to modality B of the service description, that is, without the

*splitter* installation in the client's house).

PTC informed that, on June 11, they would inform all the interested parties that they would receive the respective requests as from said date, starting to meet them as from July 8, *pursuant to ICP-ANACOM's resolution*.

## **II – ANALISYS AND RESOLUTIONS**

### **1. ADMINISTRATIVE PENALTY PROCEDURES**

1.1. The reply to ANACOM's fax given by PTC on May 28 said that, in fact, said company did not comply with the provisions contained in subsection e) of no. 1 of article 13 of RERPT, approved by DL n° 290-A/99. In fact, they had informed the operators on May 21 that the new ADSL offer conditions would come into force on the following day without giving the previous notice required by law. Therefore, following ANACOM's determination communicated by fax on May 24, they had to correct the situation.

(...)

1.2. According to NOVIS complaint there were signs that PTM.com was aware of the new PTC's wholesale offer much earlier than the other operators.

In fact,

On May 9, PT Multimédia (PTM) had asked the other entities of the Group, among which PTM.com, to indicate up to 12:00 a.m. of the following day 300 users for the realization of a trial project for launching of a ADSL service, with a speed of 512kbps/128kbps (upstream/downstream).

On an unspecified date, but necessarily between 10 and 23 May, Telepac II had sent to the testers a communication where they would be supposed to have a “*ADSL kit*”, mentioning as well that the service activation would necessarily be

made by May 23 and that the pilot test would take place till June 30.

Well, the kit, due to its features and components, contains the full definition of the product and full compatibility of the offered equipment with the new conditions of PTC offer, namely due to the self-installation capacity and to the new local access speed.

On the other hand, some commercial characteristics of the product were indicated such as the fact that there is *“total cost control through a fixed monthly payment”*.

In addition, those who would make those tests would be offered *“an ADSL connectivity till June 30”*, as well as *“the assignment of the kit as a loan. The client may chose to keep the equipment provided that he will maintain the ADSL connectivity after the pilot test, benefiting from a 50% discount in the price of the kit, that is € 75,00”*.

This offer, namely the fact that one would expect that the test would immediately be followed by a contract related to the new product, means that PTC's wholesale offer was already known by PTM.com. and Telepac II and that the tests are not only trials but that also include a commercial component.

Therefore, and provided that the facts will be confirmed, we conclude that those operators were already sufficiently aware in detail of the new offer conditions within a period of time that has allowed them to test their own retail offer 13 days before PTC offer was disclosed to all the other operators; and that they were given the opportunity to test the product based on PTC wholesale offer, which benefit the other operators did not have as well.

There are, though, strong signs of violation of the non-discrimination principle by PTC, disclosing to companies or companies of its group the change of the ADSL offer conditions, giving them a competitive advantage (which advantage, besides, seems to have been used by Telepac II).

It is also true that the last PTC communication (June 7) reveals that in fact the

performed tests had been carried out with the only purpose of evaluating the capacities of PTC itself.

However, this becomes unlawful since all the other operators were not given the possibility of participating in the tests, and due to the already mentioned circumstances, the same were proposed and revealed a relevant commercial component benefiting exclusively companies of PT Group.

(...)

## **2. SUSPENSION OF RETAIL OFFER DISCLOSURE**

As described, the Board of Directors considers that there was violation of the non-discrimination principle by PTC. (...) only an immediate action will allow to minimize, as much as possible, that third parties may take advantage of said fact – operators belonging to PT Group.

We will have, therefore, to consider the measures that may be adopted in this regard with the urgency that the facts require.

It is ANACOM's responsibility, among others, to ensure the *access of the communications operators to the networks, under transparency and equality conditions pursuant to the law*. – article 6, nº1, subsection e) of the respective statutory rules approved by DL nº 309/2001, from December 7.

Operators that supply network capacity to third parties are, as we have already said, obliged to ensure, under equality, transparency and non-discrimination conditions, access to the network against appropriate remuneration – art. 13, nº 1, subsection a) of RERPT.

ANACOM has, pursuant to the provisions contained in subsection g) of article 9 of its statutory rules, and in order to properly execute its duties, the power to give instructions.

The only way to sustain, as much as possible, the effects of the positive

discrimination that some operators seem to have benefited against others consists in allowing them to publicly present retail offers based on the new conditions offered by PTC and in determining that those already disclosed are suspended, until all the remaining operators are ready to present them. As a precaution measure, this determination should be extended to all the operators of the Group apart from the one who seems to have been favoured.

In the determination of the appropriate suspension deadline, two sorts of reasoning should be taken into account.

On the one hand, this deadline should be sufficiently large enough for any efficient operator to be prepared to submit a retail product. In this case, we will have to take into account that one of the operators - Telepac II – has already had advantages from knowing in advance, it seems, PTC offer and, as much as possible, we will have to restore equal conditions.

On the other hand, this deadline should be as short as possible, not only to meet the end users' needs but also not to restrict the operators' rights more than what is strictly necessary.

Under this terms, the Board of Directors resolves that, till July 8, 2002, no operator from PT Group may sell or disclose, by any means, retail offers based on the new PTC's ADSL wholesale offer conditions and also that the current commercial offers or launches be immediately suspended, without prejudice of the possibility of trials being performed by all the operators. This suspension shall be interrupted should any other operators start any selling or disclosing action based on PTC's offer.

The previous hearing of all interested parties on this resolution would destroy its useful effect because it would necessarily differ its effects for, at least, 15 days, which period could be used to take advantage from the violation of the non-discrimination principle. Therefore, pursuant to the provisions contained in subsection a) of no. 1 of article 103 of the Administrative Procedural Code, this formality is not required to be complied with.