REASONED RESOLUTION

PT Comunicações, S.A., TMN – Telecomunicações Móveis Nacionais, S.A. and PT Prime – Soluções Empresariais de Telecomunicações e Sistemas de Informação, S.A. applied for the suspension of the effects of article 1 of Regulation no. 87/2009, of 18 February, amending paragraph 2 c) and f), and paragraph 5 of article 13 and also paragraphs 1, 2 and 4 of article 15, all of Regulation no. 58/2005, of 18 August, in all cases combined with article 4 of Regulation no. 87/2009.

Pursuant to paragraph 1 of article 128 of the Administrative Court Procedure Code, ICP-ANACOM was thus prevented from requiring Applicants to comply with regulatory provisions as from the moment the Authority was notified to challenge the interim application, a situation which would be maintained unless it acknowledged that the deferral of the implementation of these provisions would seriously harm the public interest.

That is so, in fact. The harm caused by the deferral of the application of provisions concerned to the Applicants exceeds that which generally results from the suspension of any administrative act and even that (being already more serious than the latter) which generally results from the suspension of regulatory provisions.

In point of fact:

In embodying, in the Administrative Court Procedure Code, the possibility of suspension of effects of provisions, the legislator provided for two mechanisms that, as mentioned in the «Comentário ao Código de Processo nos Tribunais Administrativos» by Aroso de Almeida and Fernandes Cadilha, *enable the mitigation of negative consequences for legal security and public interest that could result from the general acceptance of applications for the suspension of effects of provisions. On the one hand, the main proceedings may converge towards non-application of the provision concerned in the case under consideration (...), which means that, in these cases, the suspension of effects of the provision would be limited to the specific situation of the applicant, without jeopardising requirements relating to the public interest*.

On the other hand, one of the requirements for the application for declaration of unlawfulness of rules with general compulsory application by whoever deems to be harmed by such provisions is the refusal by any court to apply the rule, in three different court procedures, based on its unlawfulness. Given the instrumental nature of interim measures, the same requirement applies to the application for suspension of effects of provisions with general application.

Although Applicants do not mention whether the interim measure is to have a general scope or instead whether they intend the scope of the measure to be restricted to this court procedure, this second scenario is most likely.

Nevertheless, the practical effect of such an interim measure would be very similar to a general suspension of provisions – although the respective legal conditions have not been met – given the position of Applicants in the market and in the portability process.

In fact, Applicants received in January, February and up to March the 3rd 2009, inclusively, the following rate of portability orders, relatively to total portability orders: 77%, 69% and 72%.

This circumstance alone shows the harm on the public interest that would always arise if regulatory provisions were suspended, would in this case be aggravated.

This effect is intensified by another circumstance: Applicants take in the portability process an overwhelming majority position as donor/holder provider (DP).

Rules the suspension of which has been applied for have an impact in the portability process, namely as regards its simplification, especially changes aimed for companies in the position of DP.

If the application of these rules was suspended as far as Applicants were concerned, in the course of the interim measure, while other operators were bound to comply therewith – when taking the position of recipient providers -, the former would benefit from these simplifying rules but would not be bound thereto, as donor providers.

The portability system was established to facilitate the entry in the market of new operators, which means that the incumbent operator and companies of the Group should not benefit from less demanding rules on the subject. In fact the market share held by the PT Group, which exceeds by far that of other companies, is reason enough to qualify as 'perverse effect' a situation in which the Applicants benefit from a situation where more favourable rules apply to them, even if for a transitory period.

It must also be highlighted that the portability is a functionality introduced in 2001 for fixed networks and in 2002 for mobile networks, more than 1.200.000 having been ported by the end of February 2009. Having been established as an instrument to facilitate customer acquisition to new operators, which at the time originated from incumbent operators, it soon became a functionality which is important above all for users, which are allowed to benefit from the effects of competition in telephone services without the barrier of having to change their telephone numbers.

The Portability Regulation was thus altered in order to provide better conditions for users. As the Statement of Reasons of the draft regulation refers, "*With these amendments, the responsibility of the recipient provider throughout the whole process is highlighted, rules of effectiveness between providers are introduced and subscriber protection is strengthened*." These rules of effectiveness also aim, naturally, to benefit the consumer.

More specifically as regards the amendment of paragraph 2c) of article 13 of Regulation no. 58/2005, it should be noted that during 2008 the rate of success of portability orders – number of orders placed by the RP which were accepted by the DP – registered a marked deterioration: in January 2008 it was 85,7% and in January 2009 only 58%. The operation of simplifying rules was thus urgent, in order to put an end to *over zealous practises*, which were general among operators, that exceeded concerns really necessary to ensure the coincidence between the person placing the portability order and the subscriber of the number to be ported. These practises strongly undermined the market development and injured especially consumers, creating an artificial barrier to the change in operators, contrary to the objective underlying the introduction of the number portability functionality.

It was based on this fact, as indicated in the report of the public consultation on the draft regulation, that this Authority decided that the New Regulation would take effect in two different moments, the first being 10 days after the respective publication ("*These amendments may be easily implemented, and in the view of ICP-ANACOM they enhance the effectiveness of the procedure immediately, with evident benefit for users*").

And although it was clear that the entry into force of amendments on 4 March would not have an impact on computer systems between operators, and thus a change in the supporting Portability Specification would not be required at this stage, ICP-ANACOM published on 1 March a *Clarification Notice* explaining this fact (http://www.anacom.pt/streaming/en_nota_esclarecimento_regport_2mar09.pdf?contentId=860919&field=ATTACHED_FILE). Amendments that involve the change in the referred Specification only take effect within 5 months, given the need for an agreement between operators on the subject and the fact that its implementation in the referred information systems needs time for development and tests.

As regards amendments to article 15 of Regulation no. 58/2005, as well as the addition to paragraph 5 of article 13, on the increase of minimum capacity to process ported numbers, so as to update this value, and the absence of a threshold as from 1 January 2010, the referred public consultation report refers: "*This is a measure used in most EU countries, avoiding an obstacle that, while technical in its origin, in practice proved to be another means used by incumbent operators to administratively limit the number of portability orders received*" and "*…again, it is recalled that, in the scope of the review of the Community regulatory framework for electronic communications, the improvement of the portability provision among rights of users is reinforced*".

It must be stated in this regards that this Authority is currently investigating complaints received by several companies (Zon TV Cabo Portugal – S.A., Sonaecom – Serviços de Comunicações, S.A. and AR Telecom – Acessos e Redes de Telecomunicações, S.A.) against one of the Applicants, PT Comunicações, S.A., that, after having exceeded on several occasions (for example, in February and July 2008) the required minimum limit, rejected portability orders on account on an alleged over-allocation, when this minimum had not been achieved.

Therefore, a further 5-month delay in the entry into force of rules that could be implemented forthwith is not deemed to be acceptable, as these are rules that also simplify internal procedures of companies. It makes no sense to suspend the application of these rules, especially to bigger companies, to whom most of portability orders are addressed.

As Applicants have not established the real impossibility to comply with obligations concerned within the established deadlines nor, obviously, any negative consequences to the general market and consumers in particular, an urgent public interest is deemed to exist requiring the implementation of these rules not to be deferred.

Therefore, on the meeting held on 4 March 2009, the Board of Directors determined, pursuant to and for the purposes of article 128, paragraph 1, of the Administrative Court Procedure Code, to declare that the deferral of the implementation of article 1 of Regulation no. 87/2009, of 18 February, amending paragraph 2 c) and f), and paragraph 5 of article 13, and also amending paragraphs 1 and 2 and adding paragraph 4 of article 15, all of Regulation no. 58/2005, of 18 August, would seriously harm the public interest.

Lisbon, 4 March 2009