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Determination of 3.8.2000

RESULTS OF THE CONSULTATION PROCEDURE AND ICP'S POSITION REGARDING SIGNIFICANT MARKET POWER

FOR THE PURPOSES OF THE PROVISIONS OF DECREE-LAW NO. 415/98, OF THE
31ST OF DECEMBER

I. Background

In the current environment of open and competitive markets, the interoperability of public telecommunications services must be facilitated and encouraged, on the basis of the general guiding principles of the promotion of the interests of users, the efficiency of the allocation of the resources used and the sustained development of the sector.

In this context, the creation of interconnection conditions is a fundamental factor in the determination of the structure and intensity of competition and organisations with significant market power (SMP) must be able to demonstrate that these conditions are based on objective criteria and comply with the principles of transparency, non-discrimination and cost orientation, when applicable.

Accordingly to Decree-Law no. 415/98 of 31/12, Decree-Law no. 290-A/90 of 30/07 and Decree-Law no. 474/99 of 08/11, which introduced community Directives 97/33/EC, 92/44/EEC, as amended by 97/51/EC, and 98/10/EC, respectively, it is ICP's duty, upon prior approval of the Direção Geral de Comércio e Concorrência – DGCC (Department of Trade and Competition), to determine, state and publish yearly the list of entities with significant market power.

Those entities with significant market power have already been notified for the purposes of the Fixed Telephone Service Operating Regulations and the Public Telecommunications Networks Operating Regulations. Accordingly and for the purposes of Decree-Law no. 474/99, PT was notified as an entity with significant market power in the fixed telephone networks market and/or the fixed telephone service, and is therefore subject to the various types of obligations detailed in the said legislation. PT was declared to be an entity with significant market power in the leased lines market, according to Decree-Law no. 290-A/99, and is therefore subject to the corresponding obligations stipulated in the said legislation¹.

It is worth mentioning that Decree-Law no. 415/98 refers to the notification of entities with SMP in four markets: (i) the interconnection market; (ii) the fixed telephone networks and/or fixed telephone services market; (iii) the leased lines market and (iv) the mobile telephone networks and/or mobile telephone services market. Decree-Law no. 290-A/99 defines the leased lines market as a relevant market and Decree-Law 474/99 applies to the fixed telephone networks and/or fixed telephone services market.

So far as the markets mentioned in Decree-Law no. 415/98 are concerned, it is presumed that entities, which have a market share of a telecommunications market in the geographic area in which they are licensed to operate above 25%, have SMP.

According to no. 3 of article 7 of the said decree-law, ICP may determine (a) that an entity with a market share less than 25% has significant market power and (b) that an entity with a market share above 25% does not have significant market power. It is also the ICP's duty, in this context, to evaluate the market power of certain entities according to the following criteria: (a) capacity to influence market conditions, (b) the ratio between sales volume and the size of the market, (c) control of the means of access to end users, (d) capacity to access financial resources and (e) market experience in the supply of products and services.

¹ See <http://www.icp.pt/actual/decpsms.html>

Interested entities were consulted regarding the criteria to be used to define the market, with special emphasis on the national interconnection market, given its intrinsic complexity, in order to enrich the decision-making process regarding the notification of entities with SMP, according to Decree-Law no. 415/98.

Therefore ICP invited all operators and the DGCC to take part in the consultation process. According to the interest revealed by those approached, the ICP arranged meetings with interested parties, namely TMN, Telecel, Optimus, PT, Apritel, Marconi, Maxitel, Novis, Jazztel, MCI, Broadnet, ONI, REN, REFER and Repart, at which matters such as the definition of the relevant market (including the definition of the geographic market), the market and market share evaluation methodology, the specification and applicability of the criteria described in no. 4 of article 7 of Decree-Law no. 415/98 and the corresponding national and community regulations were discussed.

II. The Consultation process

So far as the discussion document “Significant Market Power”² is concerned, various entities submitted their replies to and other comments to the ICP regarding the questions raised.

Most of the replies considered market shares to be very important in the evaluation of SMP. The general opinion was that the total revenues of the market in question are the most appropriate indicator for the evaluation of market shares. It should be noted that the criteria presented in no. 4 of article 7 of Decree-Law no. 415/98, namely the capacity to influence the market and the control of the means of Access to end users, are considered to be fairly relevant to such an analysis.

Presented hereunder is a summary analysis, which states the main results (see the four table annexed hereto, which summarise the individual comments of each entity). The operators are not identified, as authorisation from them to release this information has not been sought.

1. Do you agree that total revenues of the market in analysis are the best indicator for measuring market shares in that market? Can other indicators be used? If yes, which? Revenue per user? Number of users? Call minutes? Others?

The almost unanimous opinion is that the total revenues of the market in question are the most appropriate indicator for the evaluation of market shares. It is worth mentioning the differing opinion of one of the mobile operators, which suggests traffic volume as the best parameter to evaluate the market shares of interconnection market operators and the opinion of another mobile operator, which considers the use of the alteration of market shares over time to be more important and that traffic volume and revenues should at least be used.

2. Which additional parameters do you consider the most relevant? Why? Should they have the same weight for all markets? Or, could their weighting differ according to the market? Which specific indicators do you consider that are relevant for the analysis of additional parameters?

² See the document “Consultation – Significant Market Power 2000”

The additional criteria, which are considered to be most relevant, are the capacity to influence market conditions and the control of the means of access to end customers, which should not be applied uniformly. It should be noted the individual position of one of the operators with SMP, to the effect that the existence of global partnerships is relevant to the evaluation of SMP, in the context of growing globalisation. One of the mobile operators mentions the possibility of considering “churn”, in the context of the capacity to influence market conditions.

3. *Do you agree that the current characteristics of the “main” markets, as defined, make it unnecessary to define submarkets for products and services within each of the said markets,? If not, how do you propose that submarkets be defined?*

The general opinion is that the definition of product/services submarkets is currently unnecessary. An exception is one of the operators with SMP, which proposes an analysis both by geographic submarkets and by products and services, and states that centralised analysis in broad markets would not take account of the high level of competition in certain submarkets. A mobile operator suggests the possibility of defining submarkets should not be neglected, particularly in the analysis of the composition of the customer portfolios of certain operators or in relation to geographic areas of activity.

4. *Do you consider that interconnection revenues derived from international traffic should be included? If affirmative, do you think that all net revenues should be included? Or only revenues from call termination? Or only revenues from call origination? Why?*

Excluding the special case of two of the operators consulted (both of which do not have SMP), respondents considered the use of revenues from international traffic to be relevant to the determination of the interconnection market. Opinions are divided regarding the use of total net revenues or termination revenues only.

5. *Do you agree that revenues from call termination on the mobile networks are a suitable indicator of fixed-to-mobile traffic? Do you propose another indicator for the present or for the future?*

Generally speaking, respondents agreed that revenues from call termination in mobile networks are an appropriate indicator for fixed-to-mobile traffic. One of the mobile operators suggests the use of traffic volume to evaluate fixed-to-mobile traffic, in addition to total revenues, while another mobile operator considers that traffic volume is the most appropriate criteria, as was stated in the reply to question 1.

6. *Do you agree that transit revenues should be included in the calculation of the market shares of operators in the national interconnection market?*

Generally speaking, respondents agreed with the inclusion of transit revenues in the calculation of market shares, although two of the operators consulted took a different view. One of the mobile operators suggests that revenues from leased lines for interconnection could also be taken into consideration.

7.1 *Do you consider that revenues from internal interconnection should include: (a) all internal interconnection traffic on the fixed network or (b) all internal*

interconnection traffic on the fixed network except revenues for internal interconnection on the local fixed network?

It is a unanimous opinion that internal interconnection revenues should include all the internal interconnection traffic of the fixed network. One mobile operator considers that if the internal traffic revenues of mobiles are not taken into consideration, then, in the fixed network, only long distance internal revenues should be taken into consideration. Otherwise all the interconnection traffic of the fixed network should be taken into consideration.

7.2 Do you consider the values charged for (a) call termination in fixed network interconnection and (b) call termination on the mobile network in mobile network interconnection to be accurate proxies of revenues?

All respondents, except four operators, considered the proxies submitted by ICP to be suitable. One of the mobile operators considers that the traffic volume should be the parameter used to define the market and operators' market shares. Another mobile operator has misgivings regarding the use of the termination charge in a mobile network as a proxy for internal traffic, as the amount charged to customers for this internal traffic will tend, on average, to be less, which would distort the analysis. This operator suggests that the appropriate proxies are the revenues of each operator from internal traffic divided by the number of traffic minutes.

8. Do you agree that the entities notified for the purposes of DL 474/99 and DL 290-A/99 respectively should correspond to those entities with SMP in the "fixed telephone networks/services" and "leased lines" markets, for the purposes envisaged in DL 415/98?

All respondents agreed, that, at present, the entities notified according to DL 474/99 and DL 290-A/99 are currently the entities with SMP in the "fixed telephone networks/services" and "leased lines" markets, for the effects of DL 415/98.

9. Do you agree with the use of revenues as a measurement parameter of the national mobile networks/services market? Or should this indicator be restricted to revenues proceeding from the provision of mobile telephone services?

Apart from two operators, the respondents agreed that revenues should be used as a measurement parameter for the national mobile networks/services market. One of the mobile operators and one of the new fixed operators considered that this indicator should be restricted to revenues from the supply of mobile telephone services.

10. What procedure do you consider to be most appropriate towards situations where the market share of an operator wavers around the 25% threshold?

The almost unanimous opinion is that the criteria presented in no. 4 of article 7 of Decree-Law 415/98 should be applied in the event of intermittent fluctuation of the market share of the relevant entities. One of the operators suggests that a variation band around the 25% threshold should be adopted, within which no alteration would be made in relation to the previous year's notification.

III. ICP's Position

Given the analysis conducted, the evolution of the market, the guidelines laid down in the ONP Committee documents, the practice adopted in other Member-States and the results of the consultation process, ICP's view is that:

1. Given the special characteristics of the markets in question, there is currently no need to divide the "main" markets into submarkets and market shares have a relevant weight in the notification of entities with SMP.
2. It is accepted that the revenues from the market in question is the most appropriate indicator for the evaluation of that market and market shares, and is a criteria, which is intrinsic to the concept of market power. Even though data regarding the number of customers and traffic volume is important, there may be similar levels in different entities, which nevertheless have a differing make-up (e.g. customers in the residential segment and customers in the business segment or local tariff call and long distance calls have differing characteristics), which is reflected in the differing relative positions of each operator .
3. So far as the definition of the market share evaluation parameters are concerned, ICP considers that, given the matters outlined above, the following guidelines should be adopted.
 - A. In the mobile telephone network/services market, market shares shall be calculated on the basis of the sales volumes of the companies in that market.
 - B. In the methodology adopted this year by ICP, the national interconnection market is basically evaluated on the basis of the revenues from the termination of traffic (except for inter-network transit traffic and the carrying of incoming international traffic, which are also taken into consideration) this market is defined, in practice, by the interconnection services, which lead to the following revenues (after the application of the relevant discounts):
 - i) Interconnection revenues of mobile and fixed operators, which is a consequence of the termination, in their networks, of calls originated in other national networks. So far as fixed-to-mobile traffic is concerned, the revenues of mobile operators were deemed to be the difference between the retail price and the interconnection tariffs paid to PT.
 - ii) Interconnection revenues arising from national mobile-to-mobile transit traffic and by the carrying of incoming international traffic.
 - iii) Interconnection revenues of fixed and mobile operators derived from the termination of international traffic.
 - iv) "Internal interconnection" revenues imputed to fixed network operators and mobile network operators. Internal interconnection traffic is deemed to correspond to all traffic carried within the fixed network and mobile network of each operator. Internal interconnection traffic within

the fixed network is valued at the average termination price of mobile-to-fixed calls. In mobile networks, this valuation is at the average price, per operator, of the termination of mobile-to-mobile calls in its network.

Transactions between the operators, referred to in paragraphs a) and c) of article 6 of Decree-Law no. 415/98, which correspond to switched call transit, termination and origination services, were taken into consideration for this purpose.

- C. It is considered, with regard to the fixed telephone networks and/or services market, that the results of the consultation process and EU guidelines should also be taken into consideration, which has the consequence that the entities notified as having SMP for the purposes of Decree-Law no. 474/99 may also be notified as having SMP in the fixed telephone networks/services market, for the purposes of Decree-Law no. 415/98.
- D. So far as the leased lines market is concerned, as in the case of the fixed telephone networks and/or services market, the entities notified as having SMP in the leased lines market for the purposes of Decree-Law no. 290-A/99 are also entities which may be notified as having SMP in the leased lines market, for the purposes of Decree-Law no. 415/98.
4. The 25% market share should be an important reference in the analysis of market shares, but this should also be conducted in conjunction with the criteria mentioned in no. 4 of article 7 of Decree-Law no. 415/98. The capacity to influence the market and the control of the means of access to end-users are of particular importance, according to the results of the consultation process. ICP may also take into consideration the ratio between sales volume and the size of the market, capacity of access to financial resources and experience in the supply of products and services in the market. Therefore, ICP may consider that an entity, which has a market share above 25%, does not have SMP, or that an entity, which has a market share below 25%, has SMP.
5. The capacity of a specific operator to maintain service prices, which are significantly different from their costs, in a sustainable manner, including the possibility of the existence of strategies to differentiate prices at the level of the various market segments, should be taken into consideration in the analysis of the capacity to influence the market. On the other hand, indicators, such as the number of switched lines (in the case of fixed telephone service operators), the number of active mobile telephones (in the case of land-based mobile service operators), or, according to the results of the consultation process, the importance of the existence of partnerships or holdings of or in distribution network companies or companies with access to end customers, could be taken into consideration in the analysis of the capacity to control the means of access to end customers.