

ASSESSMENT OF MEANS TO IMPLEMENT OBLIGATIONS MAINTAINED ON THE PT GROUP IN THE SCOPE OF MARKET 12

A. Framework

1. By determination of 3 April 2008¹, the Board of Directors of ICP-ANACOM made known that it would *“complete by the end of April the assessment of means to implement obligations maintained on the PT Group in the scope of market 12, within the limits defined in the obligations imposed under the referred assessment, which shall be submitted subsequently to the consultation procedure to which this Authority is bound pursuant to the ECL”*.
2. In the scope of the assessment of market 12², the obligations in the Table below were imposed:

Obligations	Wholesale broadband access market including broadband access services supported in the public switched telephone network and in cable distribution networks
Access and use of specific network resources	<ul style="list-style-type: none"> • Access to the PSTN at different points • To negotiate in good faith with companies requesting access • Not to withdraw access to facilities already granted
Transparency in the publication of information, including reference offers	<ul style="list-style-type: none"> • Publication of a broadband access reference offer (“PT ADSL Network”), identifying clearly the alterations between versions, integrating SLAs and compensation for non-compliance
Non-discrimination in the access and interconnection provision and respective information provision	<ul style="list-style-type: none"> • Not to unduly discriminate in providing access to the network • 30-day pre-notice to alter wholesale offers – in case of significant alterations to wholesale offers, this time-limit is extended to two months • The launch of retail offers is subject to the provision of equivalent wholesale offers in the “PT ADSL Network” • To submit information on maximum, average and minimum time-limits for supply and damage repair and degree of availability (broken down per installation modality and per operator)
Accounting separation in relation to specified activities related to access and/or interconnection	<ul style="list-style-type: none"> • Costing and accounting separation system
Price control and cost accounting	<ul style="list-style-type: none"> • To establish cost-oriented prices (broadband access services supported in the public switched telephone network) • Price control (“retail-minus”)
Financial report	<ul style="list-style-type: none"> • To make available accounting records (cost accounting system), including data on revenues received from third parties

3. Obligations imposed and currently prevailing are in fact those provided for in articles 67 to 72 and 74 to 76 of Law no. 5/2004 of 10 February (ECL), namely:
 - (a) Transparency in the publication of information, including reference offers;
 - (b) Non-discrimination in the access and interconnection provision and respective information provision;
 - (c) Accounting separation in relation to specified activities related to access and/or interconnection;
 - (d) Meeting reasonable requests for access;
 - (e) Price control and cost accounting obligations.

¹ <http://www.anacom.pt/render.jsp?contentId=572167>

² <http://www.anacom.pt/render.jsp?categoryId=152484>

4. Subsequently to the determination that approved the assessment of market 12, taken on 24 June 2005, ICP-ANACOM took the following measures in the scope of this market:
- (a) On 28 July 2005³, ordering PT Comunicações, S.A. (PTC) to amend its “PT ADSL Network” wholesale offer, in order to remove the condition that prevents it from making a migration procedure effective as long as no termination request is received from the provider from which the end user is migrating, to bind it to initiate the migration procedure on the moment it receives the request for provision on the part of the provider to which the end user is migrating;
 - (b) On 13 October 2005⁴:
 - Making migration requests free of charge to providers, for all speed alterations, regardless of the aggregation mode and whether a service provider alteration (transfer between providers) is to take place or not;
 - Preventing the discontinuation of classes of service currently in force;
 - Ordering a consistent review of local access prices of the different classes.
 - (c) On 21 April 2006⁵, introducing new situations of free migration requests (which was applied to all cases through determination of 3 October 2007);
 - (d) On 3 October 2007⁶, rendering operational the “retail minus” rule, imposed in the assessment of market 12, thus aiming to increase predictability and transparency of the rule by enabling the PT Group to safely anticipate whether offers to be launched are compatible with the regulatory framework. Moreover, companies of the PT Group were ordered to inform ICP-ANACOM of conditions applied at retail level, including any available promotions, ten days ahead of the day on which such conditions were to come into force.
5. In the scope of the assessment of retail offers of the PT Group, for the purpose of compliance with the “retail-minus” rule, and previously to the referred determination of 3 October 2007, ICP-ANACOM pursued some *ad-hoc* actions, making the launch of some retail offers communicated by companies of the PT Group subject to the adjustment of wholesale offers, so as to conform to the “retail-minus” rule.
- B. Assessment of means to implement obligations maintained on the PT Group in the scope of market 12**
6. In order to receive and discuss the perspective of the PT Group on the assessment of means to implement obligations maintained on that Group, so as to enrich its

³ <http://www.anacom.pt/render.jsp?categoryId=215692>

⁴ <http://www.anacom.pt/render.jsp?categoryId=215642>

⁵ <http://www.anacom.pt/render.jsp?categoryId=193042>

⁶ <http://www.anacom.pt/render.jsp?categoryId=254542>

decision-making procedure, ICP-ANACOM invited PTC to provide its opinion on the situation⁷.

7. PTC deems that *“what in fact should be considered is the very existence of obligations, not the degree of flexibility under which they are implemented”*. Consequently, *“given that the consultation on the reassessment of markets 11 and 12 is planned for mid-May”*, it feels that it would be *“beneficial and justified that the “retail-minus” rule was reviewed in particular, so as to make it less demanding.”*
8. This company also maintains that *“it would be wise, sensible and fully justified to weaken the price monitoring of broadband retail offers provided by the PT Group, given the present market structure and competitiveness, and for as long as ICP-ANACOM does not conclude the reassessment of this market.”*
9. PTC thus presents a set of proposals on updates and adjustments to the margin squeeze method, deemed by the company to be fair and appropriate, and does not present any other suggestions on the review of the means to implement other obligations that fall on the PT Group.
10. Update proposals presented by PTC are analysed herein (section B.2) and shall be included, where deemed justified and appropriate, in the method defined in determination of 3 October 2007, however not in the perspective defined in the determination of 3 April. The reason for this is that the determination that defines the method for assessment of situations of margin squeeze states that *“The method defined herein and respective values shall be updated within one (1) year at the most, in case new data on speed per access and other market data identified by interested parties, duly substantiated, justify this step”* which means that, in the light of new information that implied, within the defined method, new figures for the “retail-minus” rule, ICP-ANACOM would necessarily carry out such review.
11. ICP-ANACOM thus considers that the obligation implementation assessment should go beyond a simple review or update of the method to assess margin squeezes, given other aspects that must also be analysed, a matter focused in the following section.

B.1 Assessment of the possibilities of implementation of obligations maintained on the PT Group in the scope of market 12, apart from the update of the “retail-minus” method

12. In this scope, and although PTC failed to provide an opinion on other possibilities of review of the means to implement obligations maintained on the PT Group in the scope of market 12, other than the review of the “retail-minus” method, ICP-ANACOM deems that a detailed examination of this subject is necessary, having weighted available information.
13. The means of implementation currently in force were thus analysed, namely:

⁷ PTC was invited to participate in a meeting to discuss the matter, however it decided not to show up, providing its opinion on means to implement obligations maintained on the PT Group by letter of 17 April 2008.

- The notification of retail offers 10 working days in advance;
- The provision for new situations of free migration requests;
- The review of the assessment method of margin squeeze situations in broadband offers provided by the PT Group.

Notification of retail offers 10 working days in advance

14. As regards this matter, attention was given to the redefinition or suppression of the 10-working day time limit given to companies of the PT Group to inform ICP-ANACOM of the conditions practised at retail level, including any promotions, as regards the date of the entry into force of the conditions.
15. Consideration was given, as far as this subject-matter is concerned, to:
 - (a) Arguments laid down in determination of 3 October 2007 and strengthened in determination of 7 February 2008⁸;
 - (b) The decision not to issue, under paragraph 1 of article 128 of the Administrative Courts Procedural Law, and only during the ongoing preliminary ruling, a substantiated resolution declaring that the public interest would be seriously harmed if the determination was temporarily suspended, following an application for suspension of effectiveness presented by PTC and PT.Com, which means that the 10 working day time limit is not in force;
 - (c) The market evolution since the mentioned determination of 3 October 2007, resulting from ZON Multimedia's spin-off.
16. It is deemed that there is an acceptable balance between rules that aim to avoid abuse of SMP on the part of the PT Group and the flexibility and swiftness needed by this group to face an environment that, since the clarification of 3 April, is now deemed to be more competitive.
17. It should be stressed that the removal of the requirement for previous notification results for PTC in an increased duty to carefully assess *a priori* the compliance with the "retail-minus" rule, together with the need for quick action on the part of ICP-ANACOM in case it acknowledges market offers that fail to comply with that rule.
18. In any case, the PT Group must notify ICP-ANACOM of all new offers within at the most 5 working days from their entry into force.

Provision for new situations of free migration requests

19. ICP-ANACOM weighted also the possibility of removing the provision making migration requests free of charge to providers, for all speed alterations, regardless of the aggregation mode and whether a service provider alteration (transfer between providers) is to take place or not.
20. However, it is deemed that this obligation represents a specification of the obligation not to discriminate, which should be maintained.

⁸ See <http://www.anacom.pt/render.jsp?categoryId=268562>.

21. Note that this specification arose from the decision taken by the PT Group to, in certain occasions, migrate (automatically) its retail customers to higher speed offers, maintaining the retail price. In these situations, PTC proposed to grant free migrations only for classes under consideration. It was considered that, given the principle of non-discrimination, migration should be provided free of charge in all circumstances, both between different providers, between traffic aggregation modes (ATM ad IP) or even between classes of service.
22. None of the evolutions verified in the market or its present situation, namely the alteration of the market structure further to ZON Multimedia's spin-off, justifies an amendment of the corresponding regulatory framework, and consequently, there are no reasons to alter ICP-ANACOM's views on the subject.

B.2 Review of the method to assess situations of margin squeezes in broadband offers provided by the PT Group

23. As referred earlier, PTC, by letter of 17 April 2008, submitted proposals to alter the method to assess situations of margin squeezes in broadband offers. ICP-ANACOM analyses in the attachment hereto the different proposals presented, as referred, in order to improve the adjustment of the established method to the information now made available.
24. It should be taken into account that the price control obligation, made effective through the "retail-minus" rule, was imposed in the scope of the assessment of market 12, and will necessarily remain in force until the next market assessment is concluded.
25. The proposals presented by PTC relatively to the review of the method to assess situations of margin squeezes in broadband offers concern:
 - (a) Adaptation of the method to the Naked DSL (NDSL);
 - (b) Adaptation of the method to the offer with Ethernet aggregation, so that consideration is given to Regional IP aggregation;
 - (c) Update (to 2008) of retails costs considered in the method, through a reduction by 5%;
 - (d) Consideration of additional revenues to which operators have access and which are not yet considered in the method, namely revenues from additional traffic, antivirus or VoIP, where applicable⁹;
 - (e) Adoption of a larger average loyalty period for final users, given that *"it would be more reasonable to assume an average customer loyalty arrangement between 48 to 60 months"*;
 - (f) Alteration of the level of aggregation on which falls the evaluation of margin squeeze, offers no longer being considered on an individual basis, to be taken in account a *"typical portfolio of broadband offers (to be defined in the light of existent offers on the part of several operators)"*.

⁹ PTC submits information on additional revenues registered in 2007 associated to antivirus and additional traffic services.

26. ICP-ANACOM takes the view that the proposals on the update of retail costs considered in the method are acceptable, and that additional traffic revenues should be considered, however the remaining proposals are rejected, on the grounds laid down in the Annex hereto.

C. DETERMINATION

Without prejudice to the conclusions that result from ongoing market analyses, namely analyses of markets 4 and 5 of the European Commission Recommendation on relevant markets and considering:

- (a) The views taken by ICP-ANACOM in the scope of ZON Multimedia's spin-off, published on 3 April 2008¹⁰;
- (b) The results of the assessment carried out in the previous sections, which is an integral part hereof;
- (c) The analysis in the Annex attached hereto;
- (d) That on 30 April 2008, the Board of Directors of ICP-ANACOM approved a draft decision on the assessment of means to implement obligations maintained on the PT Group in the scope of market 12, granting, under articles 100 and 101 of the Code of Administrative Procedure, a prior hearing to interested parties, and that comments received, the respective analysis and grounds for the decision are comprised in the "Report of the prior hearing on the draft decision concerning the assessment of means to implement obligations maintained on the PT Group in the scope of market 12", which is an integral part hereof,

the Board of Directors, in the scope of powers provided for in article 6, points b), e), f) and n) of the Statutes, approved by Decree-Law no. 309/2001, of 7 December, in the pursue of assignments provided for in points b) and g) of article 9 of the same Statutes, taking into account the regulation objectives provided for in points a) and c) of paragraph 1 and b) and c) of paragraph 2 of article 5 of Law no. 5/2004 of 10 February and to implement measures determined further to the assessment of the wholesale broadband access market, hereby determines as follows:

1. In point 2 of determination of 3 October 2007, for:

"Companies of the PT Group must inform ICP-ANACOM of conditions applied at retail level, including any available promotions, ten (10) working days ahead of the day on which such conditions are to come into force, submitting grounds that evidence compliance herewith."

Read:

"Companies of the PT Group must inform ICP-ANACOM of conditions applied at retail level, including any available promotions, within at the most five (5) working days after the day on which such conditions come into force, submitting grounds that evidence compliance herewith."

¹⁰ Available at: <http://www.anacom.pt/render.jsp?contentId=572167>

2. In determination of 3 October 2007, rectified by determination of 31 October 2007, all references to the marketing fixed cost of the offer (CF) and to the marketing costs of unmetered offers ($C_{RET-TEMP}$) shall be replaced¹¹, respectively, by:

$$CF = 3.24 \text{ Euros}$$

$$C_{RET-TEMP} = 2.49 \text{ Euros}$$

In particular, in point 1 of the decisional part, for:

- €3.43 + €0.10 × $PR\zeta_{SIVA}$ + €0,05 × $CONS$, for unmetered offers;
- or
- €2.63 for metered offers.

Read:

- €3.24 + €0,10 × $PR\zeta_{SIVA}$ + €0,05 × $CONS$, for unmetered offers;
- or
- €2.49 for metered offers.

3. In determination of 3 October 2007, the additional traffic revenue (P_T), for unmetered offers, is €1.18.

In particular, in point 1.1 of the decisional part, for:

$$P = \frac{(1-d_I) \times I}{T} + M - \frac{n \times d_M \times M}{T}, \text{ for unmetered offers;}$$

Read:

$$P = \frac{(1-d_I) \times I}{T} + M - \frac{n \times d_M \times M}{T} + P_T, \text{ for unmetered offers;}$$

Where $P_T = \text{€}1.18$

4. Other obligations in the mentioned determination of 3 October 2007 shall remain in force.

¹¹ Adjustments apply also to calculations or examples based on these variables.