

The information is also available in Anacom's Internet website in:

<http://www.anacom.pt/template31.jsp?categoryId=264002>

Determination of 19.12.2007

DETERMINATION

Resolution of a dispute between Tele2 and PT Comunicações in respect of the suspension of the provision of the service of pre-selection activations

I

FACTS

1. The request of Tele2

- 1.1. On 7 September 2007¹, Telemilénio – Telecomunicações, sociedade unipessoal, Lda. (Tele2) presented ANACOM with a request to resolve a dispute between this company and PT Comunicações, S.A. (PTC), pursuant to article 10 of Law no 5/2004 of 10 February (*Lei das Comunicações Electrónicas* – LCE (Law of Electronic Communications)) with respect to the administrative resolution of disputes.
- 1.2. In its request Tele2 recalled that attention had been called to various deactivations of pre-selection (PS) customers, including those with single billing, which had been sent to them by PTC “contrary to the provisions in the applicable regulations and in the determinations of ANACOM on this subject”.
- 1.3. Tele2 notes that, following this conduct, PTC informed it that it intended to suspend access to the service of activation, under the interconnection agreement in force between the parties (letter of 22/8/2007, in annex).

¹ ANACOM-E51873/2007

- 1.4. It is the position of the petitioner *“that this represents a further violation of the provision in the Subscriber Line Reference Offer (ORI) and in the Subscriber line Resale Offer (ORLA)”*. While these set out that failure to make payment constitutes a reason for the suspension of the services or loss of rights to the ORLA, Tele2 considers that it is not in a situation of non-compliance by way of not owing anything to PTC within the scope of these offers.
- 1.5. Tele2 recalls that, on 24/11/2006, it had already requested the intervention of the Regulator, requesting that PTC be prohibited from suspending its service of PS and other derived services, such as the ORLA. This request was based on the fear that PTC would penalise a competitor by defending its interests and concern for the respect of the Regulation of Selection and Pre-selection (SPS), especially with respect to the processes of deactivation, which, according to Tele2, will be verified.
- 1.6. According to Tele2 and as previously communicated to ANACOM, failure to follow the procedures for PS deactivation by PTC and consequent unlawful deactivation of numerous customers of Tele2 caused heavy losses to this company, which, derived from unlawful behaviour, gives Tele2 the right to a compensatory credit equivalent to the losses suffered.
- 1.7. Therefore, Tele2 decided to operate the credit compensation mechanism, which became effective in respect of the declaration of one of the parties to the other (article 848 of the Civil Code). It is the position of the petitioner that this signifies that the obligation of payment in respect of the wholesale interconnection service of Tele2 to PTC is made void, given that it could not be considered to be in breach of an obligation that no longer existed.
- 1.8. Tele2 concluded that, in this light, there is no basis to the argument put forward by PTC for the suspension of the services of interconnection,

whereby this company “intends to ignore the provision in the ORI and in PRI (which specifically fixes the conditions of service suspension)”.

- 1.9. The petitioner further recalls that, in response to its request for intervention of 24/11/2006, ANACOM refrained from stating a position on this issue due to its consideration that it was considered a mere hypothesis. Therefore, in view of the letter sent by PTC on 22/8/2007, Tele2 considers that this is no longer a mere hypothesis, given that PTC has made it clear that it intends to suspend the provision of services under the ORLA.
- 1.10. **In this light, Tele2, under the terms of article 10 of the LCE requests the urgent intervention of ANACOM, prohibiting PTC from suspending the provision of services to Tele2, at least until the matter is definitively resolved in the law courts.**

2. Response of PTC

- 2.1. By notice of 02/10/2007², ANACOM notified PTC of the request for the resolution of disputes presented by Tele2, by which it was given a period of 10 working days to respond. On the same date, Tele2 was informed of this notice³.

PTC was notified on 03/10/2007, and presented its response to ANACOM on 18 October 2007, being within the fixed period.⁴

- 2.2. PTC considers that the essential issue enshrined by the request of Tele2 was to know whether the provision of the service of activation of PS to Tele2 may be legitimately suspended with basis in non-payment.

² ANACOM-S46111/2007

³ ANACOM Notice -S46112/2007

⁴ ANACOM-E62251/2007

- 2.3. In this context, PTC mentioned various clauses of the interconnection agreement made between the parties (an extract of which is in annex), according to which:
- PS is covered by the agreement;
 - the activations of PS are paid and invoiced under the agreed terms;
 - late or outstanding payment of any instalments due under the agreement, for a period of over sixty days, gives the right to suspend the respective provision of the service.
- 2.4. The respondent further recalled that Tele2 already recognised that the service of activations of PS formed part of the agreement of interconnection, enclosing a letter of the petitioner along these lines, and that ANACOM, in its determination of 20/6/2007, recorded that, in the event of non-payment by the OPS, PTC may legitimately suspend or interrupt the provision of the respective services under the terms set out, in particular, in clause 27 of the agreement.
- 2.5. The respondent is of the position that it was inappropriate to wait, not only as a result of the law, but also because, despite PTC *«“supporting” and helping, in accordance with the asymmetric regulation in force, many services provided by its competitors, it is a commercial society which, like all others, has profit as its aim (...)*». It added that the only service that it is obliged to provide, even where the beneficiary does not pay, is the fixed telephone service (by being provider of the universal service), and even in this case, only after the provision of a demanded guarantee.
- 2.6. In respect of the legal compensation of credits, PTC recalls that, in its determination of 20/6/2007, ANACOM had considered itself competent to deal, in respect of the resolution of disputes, with the issue of suspension of the services, but not competent to deal with the resource to the legal compensation of credits as a basis of suspension of the payments, which PTC considers as having nothing to do with the sector.

- 2.7. In respect of the debt of Tele2, PTC affirms that it is not true that, with regard to the notification of the suspension of the service of activations of PS, Tele2 owed them nothing. To the contrary, Tele2 owed precisely **[CONFIDENTIAL INFORMATION]**, as referred to in the letter of 22/8/2007 which it sent to Tele2.
- 2.8. PTC communicated that demand was only made to Tele2 for payment of **[CONFIDENTIAL INFORMATION]** due to the deduction of **[CONFIDENTIAL INFORMATION]** from the total amount, in respect of an invoice due for payment by 9/7/2007, given that on that date, the 60 days set out in interconnection agreement with reference to this invoice and which would give legitimacy to the suspension of the service had not lapsed.
- 2.9. PTC also attached an *e-mail* from Sonaecom of 14/9/2007, informing it that it had settled the amount referred to in the previous point, on behalf of its Telemilénio subsidiary.
- 2.10. Finally, PTC made reference to “other confusions” of Tele2 about the offers of PTC, as well as an affirmation of the petitioner that PTC “intends to suspend the provision of services under the ORLA”, which it considers motiveless and in need of demonstration.
- 2.11. PTC considers that, although Tele2 appears to still be “angry” about acts of deactivations of PS already resolved elsewhere, “it does not demonstrate the least loss which it alleges that it has suffered”, while PTC is trying to demonstrate the losses which it has suffered due to the delays of Tele2 in the presentation of electronic requests for deactivation of PS
- 2.16. **In this light, PTC is of the position that ANACOM should recognise that it has the right to suspend the service of activations of PS, with basis in non-payment, archiving the procedure with regard to the remaining issues.**

II ANALYSIS

1. As a result of the facts set out in I, by determination of 20/6/2007⁵, ANACOM rejected the request of Tele2⁶, consubstantiated in the prohibition of PTC to suspend the services of PS and others dependent on it, due to the absence of any fact which corresponds to the existence of a dispute and only the “fear” of Tele2 that PTC may come to suspend these services due to non-payment.
2. On 22/8/2007, PTC effectively notified Tele2 that it should proceed with payment of the sums due, under penalty of suspending the provision of the service of activation of PS from 17/9/2007, while Tele2, subsequent to this communication, again requested the intervention of ANACOM in order to prohibit PTC from carrying out such a suspension.
3. ANACOM is of the position that, as far as the presentation of this request is concerned, that is to say on 7/9/2007, there was effectively a dispute in existence for the purposes of article 10 of the LCE, which justified the intervention of Regulator in respect of the matter of the suspension of the services of interconnection.
4. As set out in the determination of 20/7/2007 (point II – 2), the issue of the suspension of the services of interconnection with basis in non-payment constitutes material handled and regulated at a sectoral level under the following terms:
 - In the first place, the Reference Interconnection Offer (ORI) of PTC sets out that failure of or delay in the payment of any instalment due under the interconnection agreement or in the framework of the Offer itself constitutes grounds for interruption or suspension of the services [point 29, 2º §, c)].

⁵ See <http://www.anacom.pt/template31.jsp?categoryId=246743>

⁶ Request presented on 24/11/2006, pursuant to article 10 of the LCE.

- Likewise, such is set out in clause 27, paragraphs 1, 2 and 3, point c) of the interconnection agreement made between PTC and Tele2.
 - Meanwhile, the Subscriber Line Resale Offer (ORLA) of PT, according to point VII of the Minimum Items defined by determination of ANACOM of 29/4/2005, sets out that the beneficiary automatically loses the right to the ORLA, for a period of 3 months, in the event of 3 occurrences of non-compliance with the terms of payment to PT with respect to the invoices in respect of the ORLA, within a period of 1 year, falling to PT to bill and charge for all the respective network lines.
5. Considering this framework and given the concrete situation of non-compliance of Tele2 described above, PTC will have the right to suspend the service of activation of PS, with basis in non-payment.
 6. This conclusion is not subject to any assessment of the issues that are exclusively of the law courts of Civil Law, invoked by Tele2 to give basis to the alleged lack of debt. As previously mentioned in the determination of 20/6/2007, such issues fall beyond the powers of intervention of this Authority in respect of the process of administrative resolution of disputes.
 7. ANACOM is only competent to recognise the right of PTC to suspend the service due to untimely payment, under the terms of sectoral regulation. The circumstances behind this non-compliance, which may be analysed by the courts and which may give rise to a right of compensation of Tele2 with regard to PTC, are not covered by the present determination.
 8. However, in the period of time which lapsed between the presentation by Tele2 to ANACOM of the request for the resolution of disputes and the reply of PTC, Sonaecom, on behalf of its subsidiary Tele2 made payment to PTC of the sums due in respect of the service of activations of PS.
 9. Settlement of this debt by the petitioner ends the conflict between the parties, giving termination to the present process of resolution of disputes.

10. In this light and especially in view of the fact of there having been a prior process of resolution of disputes, now concluded, with the same parties and about the same subject, as well as the termination of the present process in accordance with that set out in the previous point, it is the position of ANACOM that the hearing of interested parties would not have any useful or significant result.

Therefore, with basis in point a) of paragraph 2 or article 103 of the Code of Administrative Procedure, considering that the interested parties have already stated their positions on all relevant issues, ANACOM intends to dispense with the prior hearing in the present procedure.

III

DETERMINATION

Accordingly, in view of the evidence, **the Board of Directors of ANACOM**, in the exercise of its assignments conferred upon it by point q) of paragraph 1 of article 6 of its Statutes as approved by Decree-Law no 309/2001 of 7 December, and in pursuit of the objective of regulation set out in point a) of paragraph 1 of article 5 of Law no 5/2004 of 10 February, **determines, in respect of the process of administrative resolution of disputes, set out in article 10 of the LCE:**

1. **To terminate the process of administrative resolution of disputes** initiated by the request of Tele2 of 7/9/2007, pursuant to article 10 of LCE, due to the cessation of the dispute existing between the parties;
2. **To dispense with the prior hearing of interested parties**, pursuant to point a) of paragraph 2 of article 103 of the Code of Administrative Procedure, in respect of point 1 of the present determination.