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Autoridade Nacional de Comunicações
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PORTUGAL

For the attention of:
Mr Álvaro Dâmaso, Chairman of the Board
Fax: +351-21-721-10-04

Dear Mr Dâmaso,

Subject: Case PT/2004/0091: Remedies related to the retail markets for fixed telephony in Portugal

Case PT/2004/0092: Remedies related to the wholesale market for fixed call origination and the wholesale market for fixed call termination in Portugal

Comments pursuant to Article 7 (3) of Directive 2002/21/EC¹

I. PROCEDURE

On 22 July 2004, the Commission registered two notifications by the *Autoridade Nacional de Comunicações* (“ANACOM”) concerning (i) the obligations to be imposed on Portugal Telecom (“PT”) in respect of both the retail markets for fixed telephony and the wholesale market for fixed call origination in Portugal where PT has been found to have significant market power² (“SMP”), and (ii) the obligations to be imposed on all individual network operators having SMP in their respective wholesale fixed call termination markets³, namely Cabovisão, Coltél, Jazztel, Novis Telecom, OniTelecom, PT, Refer Telecom and Vodafone Telecel.

The national consultations⁴ run in parallel with the Community consultation under Article 7 of the Framework Directive, and the deadline for all consultations is 10 September 2004.

¹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (“Framework Directive”), OJ L 108, 24.4.2002, p. 33.

² Cases PT/2004/0053 to 0059 and PT/2004/0060.

³ Case PT/2004/0061.

⁴ In accordance with Article 6 of the Framework Directive.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (“NRAs”) and the Commission may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Case PT/2004/0091

By the notified draft measures, ANACOM proposes a range of remedies to be imposed on PT in the fixed retail markets identified as follows:

- Market 1: access to the telephone network for residential customers
- Market 2: access to the telephone network for non-residential customers
- Market 3: local and national telephone services for residential customers
- Market 4: local and national telephone services for non-residential customers
- Market 5: international telephone services for residential customers
- Market 6: international telephone services for non-residential customers
- Market 7: telephone calls to non-geographic numbers

| Market | 1 | 2 | 3 | 4 | 5 | 6 | 7 |
|---------------------------------|---|---|---|---|---|---|---|
| Obligation | | | | | | | |
| Transparency ⁵ | X | X | X | X | X | X | X |
| Non Discrimination ⁶ | X | X | X | X | X | X | X |
| Cost orientation ⁷ | X | X | X | X | X | X | |
| Accounting system | X | X | X | X | X | X | X |
| Accounting separation | X | X | X | X | X | X | X |
| Price affordability | X | | X | X | | | |
| Wholesale Line Rental | X | X | | | | | |
| C(P)S | X | X | | | | | |
| Numbering plan ⁸ | | | | | | | X |

In the residential markets for access, local and national calls, ANACOM proposes to apply a price cap. In the non-residential markets, ANACOM does not intend to impose such an obligation but will instead continue to monitor closely the price evolution. In respect of international calls, ANACOM considers that a price cap is not necessary, given that prices have been decreasing for a number of years and competition is expected to develop steadily. For fixed-to-mobile calls (both in the residential and non-residential markets), ANACOM intends to continue to enforce price affordability through cost-orientation of the fixed operator retention⁹, notwithstanding the measures to be taken regarding mobile termination.

⁵ Publication of tariff plans, terms and conditions of supply.

⁶ In line with Article 10(2) of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (the “Access Directive”), OJ L 108, 24.4.2002, p. 7.

⁷ Obligation imposed in order to prevent price-related abuses both in the non-residential and residential markets, and also to avoid cross-subsidies between residential and non-residential markets.

⁸ In order to overcome a situation where certain non-geographic numbers provided for to accommodate “cost-shared services” were being misused to provide value-added services with allegedly excessive prices and where poor or misleading information was given to consumers, ANACOM considers it necessary to maintain a management of the numbering plan.

⁹ The difference between retail revenue and the cost to the operator of termination.

In respect of local and national calls from PT's customers to customers of other fixed networks, ANACOM states its intention to continue to enforce the principle that off-net prices be equal to on-net prices.

By virtue of the Portuguese Act¹⁰ the obligation of Carrier (Pre-) Selection ("C(P)S") is automatically imposed on operators having SMP in the access markets. In addition to the C(P)S requirement, ANACOM considers that the current state of competition in the fixed narrowband retail markets requires the introduction of a wholesale line rental ("WLR") offer. According to ANACOM, this offer will enable operators and service providers to develop their own retail offers, in a single bill, adding customer value through innovative services and competing with offers of PT that may combine access and telephone call services. In light of the impact of WLR, ANACOM may re-balance the price cap.

II.2. Case PT/2004/0092

By the notified draft measures, ANACOM proposes a range of remedies to be imposed in respect of the wholesale markets for call origination on PT's networks and for fixed call termination on individual networks, as follows:

| Obligation | Market | Origination on PT's network | Termination on PT's network | Termination on others networks |
|------------------------------|---------------|------------------------------------|------------------------------------|---------------------------------------|
| Transparency ¹¹ | | X | X | |
| Non Discrimination | | X | X | |
| Accounting system | | X | X | |
| Accounting separation | | X | X | |
| Access on reasonable request | | X | X | X |
| Cost orientation | | X | X | |
| Price control | | X | X | (X) ¹² |

In respect of cost orientation for termination, ANACOM considers that, taking into account the asymmetry between the dimension of PT's network and other networks, the different scales of production, the different timing of market entry, and the present discrepancy of termination prices, it would not be proportionate at this stage to impose cost-oriented termination prices on SMP operators other than PT. ANACOM states that such operators should be granted a gradual transition to cost orientation in order to allow them to invest in own infrastructure. During that period, they only have the obligation to charge fair and reasonable prices. However, ANACOM indicates that it would only accept a difference of up to 20% between PT's and other operators' termination prices.

In respect of both call origination and termination on PT's network, ANACOM intends to impose on PT the obligation to make available an interconnection flat-rate capacity offer at wholesale level.

Finally, ANACOM considers that, a yearly revision of the interconnection prices, based on the expected evolution of productivity and efficiency of the dominant operator, is presently the best possible option for enforcing the price control and cost orientation obligations.

¹⁰ Article 84 of Law no. 5/2004, of 10 February, transposing article 19 of Directive 2002/22/EC.

¹¹ Publication of a Reference Interconnection Offer ("RIO"), prices, terms and conditions, technical information, information in relation to quality of service.

¹² Obligation to provide fair and reasonable prices.

III. COMMENTS

The Commission has examined the notifications and has the following comments¹³.

- (1) **Wholesale line rental (WLR):** ANACOM considers that WLR allows PT's competitors to bundle their products and services in the retail markets as they deem most efficient, thus complementing carrier pre-selection and indirect access in the calls markets. In general, the Commission considers that WLR can be an appropriate remedy to address the lack of competition in the relevant retail markets. In any event, the need for market entrants to rely on inputs such as WLR should decrease, over time, as they increase investment in their network infrastructure.
- (2) **Asymmetrical application of remedies:** The Commission reiterates that obligations imposed under the Access Directive should be based on the nature of the problem identified, proportionate and justified. The Commission invites ANACOM to monitor closely the development of the cost structures of the operators on which the obligation to charge "fair and reasonable prices" is imposed and to assess whether its current assumptions on "fair and reasonable prices" will remain relevant over the period of the market review.

Pursuant to Article 7(5) of the Framework Directive, ANACOM must take the utmost account of comments of other national regulatory authorities and the Commission and may adopt the resulting draft measure and, where it does so, shall communicate it to the Commission.

The above comments reflect the Commission's position on these particular notifications, and are without prejudice to any position it may take vis-à-vis other notified draft measures.

Pursuant to Point 12 of Recommendation 2003/561/EC¹⁴ the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission¹⁵ within three working days following receipt whether you consider, in accordance with Community and national rules on business confidentiality, that this document contains confidential information which you wish to have deleted prior to such publication. You should give reasons for any such request.

Yours faithfully,
For the Commission,
Olli Rehn
Member of the Commission

¹³ Pursuant to Article 7(3) of the Framework Directive.

¹⁴ Commission Recommendation 2003/561/EC of 23 July 2003 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC, OJ L 190, 30.7.2003, p. 13.

¹⁵ Your request should be sent either by email: INFSO-COMP-ARTICLE7@cec.eu.int or by fax: +32.2.298.87.82.