

# **REPORT ON PRECEDING HEARING OF THE INTERESTED ENTITIES ON DRAFT DETERMINATION RELATING TO WHOLESALE OFFER “REDE ADSL PT” OF PT COMUNICAÇÕES**

## **1. FRAMEWORK**

By Determination of 21 April 2003, the Draft Determination relating to wholesale offer “Rede ADSL PT”-“PT ADSL Network” of PT Comunicações<sup>1</sup> was approved. This Determination was notified to the interested parties in order to pronounce themselves, in writing, in the stated period of 15 days, pursuant to Articles 100 and 101 of the Code of the Administrative Procedure.

In the scope of the preceding hearing, comments have been received from PT Comunicações, S.A.<sup>2</sup> (ahead assigned PTC) and from PT-Multimédia.Com (ahead assigned PTM.Com), Serviços de Acesso à Internet, SGPS, S.A.<sup>3</sup> and from the following operators: Media Capital Telecomunicações, S.A.<sup>4</sup>, OniTelecom - Infocomunicações, S.A.<sup>5</sup>, Sonae.com SGPS, S.A.<sup>6</sup> and Vodafone Telecel, Comunicações Pessoais, S.A.<sup>7</sup>.

In view of the Draft Determination, it has been established that PTC must modify its offer “PT ADSL Network”, until 01 June 2003, for the purpose of:

- (a) to eliminate the discounts on the monthly fees of the local and aggregate accesses foreseen in the offer;
- (b) to reduce in 20% the present monthly fees of the local accesses, in the various classes, and of the aggregate accesses;
- (c) ADSL service with a debit of 512 kbps/128 kbps, to establish the monthly fee for the wholesale offer equal to 50% of the lesser monthly fee for the retail, for this debit, exercised by the subsidiary companies of Portugal Telecom, SGPS.

## **2. COMMENTS OF GENERAL SCOPE**

The operators not belonging to Portugal Telecom, SGPS (ahead assigned “PT Group”) have considered the Draft Determination globally positive, by contributing for the promotion of a competitive market and for the development of the broadband services, as well as correcting some conditions which were advantageous to the subsidiary companies of Portugal Telecom, SGPS.

Sonae.Com believes that “PT Group” benefits from scale and scope economies and adjusts the technological development politics for cable and copper networks, since it withholds a dominant position in the broadband<sup>8</sup> Internet access market.

That position leads also, according to Sonae.Com, to a crushing strategy on profit margins of the competing ISP, hindering them to compete in the retail market. Being of the public interest the existence of market competition, Sonae.Com concludes to be fully justified the immediate intervention of ANACOM.

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<sup>1</sup> Ahead assigned “Draft Determination”.

<sup>2</sup> Letter dated on 23/05/03.

<sup>3</sup> Letter dated on 23/05/03.

<sup>4</sup> Letter dated on 02/05/03.

<sup>5</sup> Letter dated on 19/05/03.

<sup>6</sup> Letter dated on 21/05/03.

<sup>7</sup> Letter dated on 20/05/03.

<sup>8</sup> Either respecting the services supported in the copper network or the services provided through the cable network.

PTC believes that the offer “PT ADSL Network” reveals its dedication in the development of the Information Society and presents competitive conditions allowing the widening of the broadband offers in the retail market on the ISP’s side, resulting in obvious benefits for the consumers and contributing for high broadband penetration rate, observed in Portugal. Another company of the PT Group also asserts to be strongly involved in the development of the Information Society and in this context understands the offer “PT ADSL Network” and the role that this offer played in the widening of the broadband offer in the retail market on the ISP’s side.

PTC believes that the regulation prices resulting from the Draft Determination, in the absence of an urgent clarification of its final objective and ANACOM’s policy in this matter, for implying a total absence of previsibility on the evolution of the wholesale prices, puts into jeopardy decisions already taken, namely:

- (i) The coverage expansion of the service “PT ADSL Network” (87% of the access at end of 2003); and
- (ii) The development of new solutions that would make possible a greater flexibility to the customers of “PT ADSL Network” offer.

PTC still refers that the actual Draft Determination was pronounced pursuant to article 33 of the RESFT, while the previous ANACOM Determinations were supported by RERPT, approved by Decree-Law no. 290-A/99. This operator considers that the reasons imposing the regulatory framework alteration are not exposed, for, independently of its legitimacy, it is not consentaneous with the regulatory certainty environment, necessary to the development of the operator’s activity. To the best of PTC’s knowledge, in the broadband’s context, the regime of special access to the network, only applies to solutions “*bitstream*” type and not to ADSL solutions, such as “PT ADSL Network”<sup>9</sup> offer.

Finally, PTC considers that “*does not exist any legal obligation imposing PT Comunicações to make available the offer of the type concerned, since no regulation exists which allows ANACOM to exert a regulatory control over the same one*”. In this way, PTC believes that the exercised prices and discounts must be submitted to an analysis and *ex-post* control.

Concerning this matter, Sonae.Com considers that ANACOM can support its decision, both on the article 33 of RESFT, and on the article 16 of the Decree-Law no. 415/98<sup>10</sup>. And, according to this entity, nothing stops ANACOM to ground cumulatively its decision on both normative. This company points out still that, whichever the agreement, PTC is compelled to respect, and ANACOM to assure, the principle of equality and the prohibition of the discrimination.

ANACOM clarifies that at national and Community level, was defined as basic objective to pursue, the development of the broadband services, in which the services based on ADSL assume a relevant nature.

The promotion of conditions, to the level of the wholesale market, that assure the development of broadband service market, competitive at retail level is, thus, ANACOM’s priority. These conditions must respect the principles of non discrimination, transparency, equality and cost orientation and to result in an improvement of efficiency and of social wellbeing and cannot be dissociated from the relevant position of PTC in the access market.

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<sup>9</sup> PTC considers also that the new regulatory framework for the electronic communications, concerning the pertinent broadband wholesale market, foresees only the “bitstream” offers .

<sup>10</sup> According to Sonae.Com, the intention of adhesion to the wholesale conditions of PTC's ADSL network access consolidates a reasonable request of interconnection, pursuant to no. 1 and 2 of the article 6 of the related diploma.

Indeed, in view of present legal and market conditions, as well as of short term expectations, the “PT ADSL Network” offer seems to be the only effective possibility for development of a competitive market and for the massification of ADSL services.

Furthermore it has been formally requested ANACOM’s intervention in this matter with a view to correction of development distortions of a sound and competitive market. According to regulatory framework in force, this Authority may, on its own initiative and at any time, and must, on request by any of the parts, intervene when such is justified, namely, to guarantee an effective competition.

ANACOM really believes that:

- (i) The xDSL services offer by the operator with SMP in the fixed telephone network, in which is included the “PT ADSL Network” offer, is pictured as network special access figure pursuant to article 33 of RESFT;
- (ii) without prejudice to the predominance of this specific regime, it remains applicable, when compatible, to the fixed telephone network operators the disposals foreseen in the RERPT (see art.1, no. 2 of the preamble Decree-Law which approved the RESFT and art. 1, no. 3 of the RESFT), namely those reported in its Chapter III.

ANACOM already assumed in several locations this qualification of “PT ADSL Network” offer as a special access to the network.

From the very instant, the understanding conveyed in the results of the public consultation on local access competition, accomplished in 2000, where it was stated, although only in thesis, that *“the access to the debit, although not constituting an LLU variant, should be offered, in principle, from the moment where the ON initiates DSL service providing, in accordance with the principle of non discrimination, pursuant to art. 33 of the RESFT”*.

Later, in the course of “PT ADSL Network” offer and with regard to the contract of that service providing, ANACOM clarified PTC as for the framework applicable to this contract, referring the application to that offer of the special access network regime.

It was, thus, very clear for PTC the judicial structure subjacent to ANACOM’s performance.

It is stand out, also, that in the scope of the PT Group the integration of “PT ADSL Network” offer in the network special access figure of art. 33 of the RESFT, was already unequivocal.

Consequently it is stated in the letter of PTM.Com, of 24 June 2002, supported by legal advice of its legal advisers, that *“it has always constituted - as it constitutes - belief of Telepac that such offer would not be fit in the legal regime of the Decree-Law no. 290-A/99, of 30 July, consolidating, thus, an offer of special access to the network, controlled by art. 33 of the Decree-Law no. 474/99, of 8 November”*.

In the referred legal advice, it is stated that *“on the current national legislative scene, any kind of local network access which allows, on the same pair of copper, an operator (in this case, an THE ISP), to provide broadband data services, continuing the incumbent to provide voice services (as it seems to be the case of “PT ADSL Network” offer, in analysis) qualifies for the concept of network special access, being in that measure controlled by art. 33 of the FTS Regulation”*.

Furthermore and based on the regulatory framework of Open Network Offer, in force, the Commission has:

- reaffirmed the applicability of the **principle of non discrimination** to the operators with SMP whenever they use their fixed telephone network and, in particular, when they use themselves, any form of special access to the network; and
- stressed that the operators with SMP are forced to **satisfy all the reasonable requests of network access**, including the access points different from the terminal points, usually offered,

extending its concerns to the technical restrictions imposed by the incumbents, as far as the access points is concerned, offered currently.

This way, ANACOM ratifies the following understanding:

- (i) maintaining the qualification of “PT ADSL Network” offer as a special network access, as always was defended, as a matter of fact;
- (ii) consequently, maintenance of ANACOM’s capacity to control this PTC offer pursuant to art. 33 of the RESFT and Chapter III of the RERPT, making clear that these disposals do not exclude but complement each other.

As for the evolution of the access services for the broadband Internet, it is recognized a conspicuous evolution, with a growth rate of approximately 45% between the end of the 2002 and first trimester of 2003. This growth results either from ADSL service offers, or from offers based on cable network. It is noticed, however, that the market share of the PT Group by the end of 2002 was 83% or 71%, if we consider the market of ADSL services or the market of ADSL services and services supported by network cable.

Thus, the statistics presented by PTC must be studied with precaution, being desirable and probable that the present ANACOM’s Determination, when introducing conditions for the development of greater competition in this market, also contributes for the growth of ADSL services.

Relatively to the ADSL services offer available in the European Union, ANACOM believes that is not possible to make direct price comparisons, insofar as the known offers show distinct technique solutions, either through support technologies, protocols and used network equipment or through available network access points, consolidating differentiated price structures.

### 3. SPECIFIC COMMENTS

#### 3.1. Discounts

Sonae.Com, admitting that the mechanism of “retail minus” is applied to the various components of wholesale prices and to all service classes, refers that the reduction of 20% on monthly fees<sup>12</sup> is absorbed by the wholesale price reduction per customer in 50%.

OniTelecom refers that ANACOM’s determination should foresee the retroactive application of the decision, concerning the beginning of the offer operation or the discounts concession, due to ISPs, foreseen on a 5 years contract independently of having or not signed the contract, so as the operators who have not signed it, do not get harmed as opposed to subsidiary companies of Portugal Telecom, SGPS.

Both companies of the PT Group add that the practiced prices in “PT ADSL Network” offer are lined up with the prices practiced by their European counterparts.

In accordance with PTC, the “PT ADSL Network” offer shows up a level of minimum yield from the invested stocks in a long term perspective, not being positive the current yield, caused by the strategical nature attributed by PTC to the development of the broadband. In this way, it declares not to be able to accept decisions that imply an aggravation of the current negative yield of the offer and, therefore, compromise the viability of that offer in the long term, pointing out that, while private entity, cannot have offers in the market that show a negative yield level on average period.

PTC considers the discounts to be a licit method of price differentiation, since they show efficiency gains<sup>13</sup> and regulate themselves by objectives criteria, stressing that:

- (a) the discount system of “PT ADSL Network” has never intended to privilege some operators in relation to others;
- (b) the underlying principles for the construction of the discount table, are meant to stimulate the ISPs to reach high volumes of access and to keep them in a sustained way;
- (c) the volume discounts are lined up with the economy of costs of this business and that ANACOM understands as justification for this type of discounts;
- (d) the loyalty period is based on the need of recovery previsibility of the investment and very high fixed costs.

PTC considers that the weighed average of the discounts practised in 2003 must not be the criterion for the setting of a general discount of 20%. In respect to this, it mentions that the table of discounts had associated guarantees and established compensation based on quantity and in the commitment on service providing. It adds still, that the discounts structure was defined taking into account:

- (a) a penetration of 100.000 ADSL accesses in 2003 divided in identical quotas to the ones of the shortband Internet market; and
- (b) contractual terms between 5 and 3 years, both for the PT Group and for the remaining ISPs.

<sup>12</sup> That would include, according to Sonae.Com, the monthly fee of the accesses aggregated to themselves and, also, of the respective debit.

<sup>13</sup> Namely, scale economies in a context where the fixed costs predominate.

Such presupposition resulted, according to PTC, in an average discount of 10%, by the end of 2003. Thus, according to that operator, due to lack of commercial aggressiveness of the ISPs in general, the yield of this service is already lower than the levels projected initially, which, by itself, were already reduced.

PTM.Com considers having no reasons to judge that the way the “PT ADSL Network” offer was structured<sup>14</sup>, would aim its favouring, all the more since the time where the offer was presented to all the ISPs they found themselves in identical position and they had similar conditions to develop the relating access parks.

As referred in the Draft Determination, ANACOM believes that the discounts practice may not be non-competitive, which is verified when (i) it is justified by differences, due to the costs incurred into product or service offer, and the discounts founded, namely, according to the principles of cost orientation, transparency and non-discrimination, (ii) it does not affect negatively the market competition and (iii) resulting in an efficiency improvement and social wellbeing.

ANACOM acknowledges, so does PTC, which given the characteristics of this business (high fixed costs) scale economies do exist associated to the exploration of “PT ADSL Network” offer, which must be shown in the prices. In this context, this Authority believes that the relevant variable must be the total access park, and not the contribution from each company for that park, seeing that, for the purpose of costs, must be indifferent for PTC which companies contract the accesses. It must be equally pointed out that the resulting discounts from these economies, must not lead to competition distortions.

ANACOM believes that the loyalty discount can also lead to distortions of the competitive structure. As a matter of fact, the subsidiary companies of Portugal Telecom, SGPS have lesser incentives than the remaining operators to resort to alternative offers to “PT ADSL Network” offer, which would take them to contract this offer for superior periods, and, thus, to have access to bigger discounts. Furthermore, in accordance with the Community jurisprudence, the attribution of loyalty discounts from a dominant company is not acceptable, even if the competing companies managed to increase the market share.

Additionally, the previsibility need of investment recovery and of high fixed costs inherent to “PT ADSL Network” offer, invoked by PTC, does not legitimize the practice of loyalty discounts. On one hand, the realized investments answer to the global search from all the operators and, on the other hand, there are alternative mechanisms that would allow, if justifiable, the attainment of the levels of the search previsibility, necessary to the balance of its business, without, however, conditioning the market competition. As example of a mechanism of this type, normally implemented in similar circumstances, it is pointed out the contractual definition of methods, more or less flexible, of binding prevision of search from the service customers, conjugated with penalization for non-fulfilment.

ANACOM registers that, in spite of PTC having defined the discount structure estimating an average discount in 2003 of 10%, that company did not present new facts in relation to the presupposition used by this Authority to estimate the amount of the average discount. Indeed, ANACOM estimated that PTC would be practicing presently an average discount of 20%. Thus, the monthly fees reduction in the amount of those discounts will not have impact in the current average gain of PTC, allowing only the definition of a regular price for various the ISPs joining the offer.

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<sup>14</sup> Both according to quantity and loyalty

In view of the question placed by Media Capital, this Authority clarifies that the 20% reduction occurs on the present monthly prices for the local access and the aggregate access - those components on which the discounts occurred - not including, thus, the monthly price per Mbps of the aggregate access total debit.

In these terms, ANACOM maintains the disposed in the Draft Determination, in the sense of (a) to eliminate the discounts on the local and aggregate access monthly fees foreseen in the offer and (b) to reduce in 20% the present local access monthly fees, in the various classes, and of aggregate access.

With regard to the date of application of the measures defined now, ANACOM believes that there is no place for retroactivity and PTC must, in these terms, modify its "PT ADSL Network" offer, in force as from 01 July 2003.

### 3.2. "Retail Minus"

Sonae.Com considers that the fixing "retail minus" constitutes an adequate measure, for being the most apt allowing a constant monitoring of the fulfilment of the principle of non discrimination and, simultaneously, by not restricting the development of new retail offers. This company has indicated that the average amounts of the monthly aggregate access fee per customer can vary between € 7.11 and € 4.52 and that the additional cost of the ISP is close - with the park withheld in May 2003 and without optimization of the international connectivity cost - to € 10.0. It considers, thus, the application of a monthly fee of the wholesale offer equal to 50% of the lesser monthly retail fee practiced by the companies of the PT Group, adequate and susceptible to allow the ISPs to start to gain a positive profit margin in the commercialization of access retail services to the broadband Internet.

Sonae.Com still considers that PTC will have to invoice the ISPs applying, to the park of active customers, a corresponding amount to 50% of the lower retail fee practiced by the companies of the PT Group, abandoning, therefore, the concepts of local access and aggregate access<sup>15</sup>. In other words, it proposes, as for the monthly fees, the application of a:

- (a) base tariff table, concerning the guaranteed minimum quality in the "PT ADSL Network" offer and that would be paid according to the retail price ("retail minus" of 50%<sup>16</sup>);
- (b) complementary tariff table, applicable to *upgrade* situations in view of the guaranteed minimum quality in the "Network ADSL PT" offer, and consequently, requires the payment of an additional amount, indexed to the increased necessary capacity to assure the intended increase quality, applying, in this case, the current tariff table, foreseen for the monthly fees of the aggregate access and associated traffic, reduced by 20% such as foreseen in the Draft Determination.

In other words, Sonae.Com believes that the reduction "retail minus" of the wholesale price includes the local access and the aggregate access, being this, to its understanding, a necessary presupposed so that the foreseen reduction leads effectively to the elimination of the crushing on the profit margins and the situation of loss where the operators are in.

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<sup>15</sup> Sonae.Com believes that the traffic is invoiced in an improper way, insofar as, though the platform "PT ADSL Network" is shared by all the offer ISPs subscribers, the payment is made individually, resulting from that, the exclusive appropriation of the realized scale economies, by PTC. This way, it considers that PTC should invoice the wholesale access supply to the ADSL network, with total independence from the used aggregate accesses, but having them indexed to the local accesses park of each operator.

<sup>16</sup> Including all the physical means being necessary to guarantee the minimum quality inherent to the service (local accesses, aggregate accesses and traffic).

This entity also refers that, in spite of the approach to “retail minus” to stand in equality principle of the access conditions to the market and not in an analysis of orientation for the costs, nonetheless it becomes despicable to demonstrate that the reduction of 50% of the “PT ADSL Network” access fees would be always sustainable by the light of the principle of orientation for the costs<sup>17</sup>.

OniTelecom and Sonae.Com consider that the “retail minus” must be extended to all the foreseen speed debits. Otherwise, they believe that the PT Group will always be able to place in the market offers with different debits, at lowest prices, placing the ISPs back in a situation of competition inequality and, in the limit, crushing of profit margins.

Capital Media believes that the promotional price<sup>18</sup> of € 49.90 relating to the installation of the local access in the modality without *splitter* installation must be kept, all the more since all the subsidiary companies of the PT Group kept the corresponding retail price € 50.00, which makes Sonae.Com to believe in a predatory practice. Thus, it is proposed the application of “retail minus” to the amount of the local accesses installation and/or to guarantee that PTC does not make useless the effect of the determination, through the increase of the installation fees<sup>19</sup>.

Relatively to the price indexation of the wholesale offer to the lesser retail price practiced by the subsidiary companies of Portugal Telecom, SGPS, Capital Media stresses that a hypothetical price increase of (lesser) retail offer would have consequences in the wholesale offer, with direct implications in the costs structure of the remaining operators, for it suggests the definition of a wholesale price and the imposition of the obligation that between this price and the retail price practiced by the subsidiary companies of the PT Group should always exist a 50% differential.

It is still referred that the Draft Determination defines nothing as to the procedure to be adopted in regard to future alterations in the retail prices practiced by the ISPs of the PT Group, in particular as to the launching of promotional campaigns that last in the time and to the offer of new technical modalities.

PTC believes that ANACOM did not present grounding<sup>20</sup> to determine the application of “retail minus”, and considers this measure:

- (a) unjustified since the wholesale offer is competitive, even in view to the best Europeans practices; and
- (b) the value of 50% excessive and deeply out of time on the market trends.

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17 This operator presented estimates (based in the costs of the RUO (Reference Unbundling Offer) and in specific budgets, taking in 70 000 customers by the end of 1st trimester of 2003 and the available exchange offices on 31/03/03), showing that the prices resulting from the application of the “retail minus” are kept well above of the cost estimates, which, by itself, shows up amounts above of PTC real costs.

18 Which was in force until 31/12/02. The price currently in force is € 70, 00.

19 Still in relation to the local access installation fee, Media Capital registers that that price will always have to be supported, inclusively in situations where a user decides to move ADSL service provider. In accordance with this entity, such fact, together with the time that the process in itself takes, creates a huge barrier to service provider change when the user himself is dissatisfied with the service that is provided to him. Assuming that the greater component of this cost will be the installation of the DSLAM in PTC exchange office, which is done in the first service activation, Media Capital, considers that a reactivation amount of equal value to service activation is not justified.

20 Even recognizing the information absence on costs



It adds also that the model “retail minus” only pursues a legitimate goal when the *price leader* is the incumbent operator or the ISP of the group to which that operator belongs to and when this acts clearly in view of crushing of retail profit margin, which, according to PTC, does not correspond to the situation observed in Portugal considering that, are the remaining ISPs which have presented new retail offers, not being the price practiced by Telepac, which after its launching did not suffer any alteration, the lowest in the market.

PTC stresses, on the other hand, that the application of this measure might lead to the definition of wholesale prices until unsustainable levels just for mere competitors performance in the retail market (e.g., of price war), independently of the adoption of any criterion of economic efficiency on the part of the operators.

According to PTC, this measure will produce one of the two results, both undesirable:

- (a) ISPs persist in reducing the retail prices, being PTC forced to follow such reductions in the wholesale prices, which will have as consequences the definition of prices bellow the costs, discouraging the development of the broadband services, or
- (b) ISPs, similarly to the occurred in the scope of the access to the shortband Internet, do not reduce the retail prices, increase their profit margins and do not transfer benefits to the final users.

In the same way, PTM.Com expresses concern relatively to the application of the “retail minus”, pointing out that ADSL retail prices have been subject to an effective competition and that the implementation of such model will lead to a wholesale price reduction until unsustainable levels.

PTM.Com still refers that, in this scene, and in group logic, the companies of the PT Group will have necessity to make compatible options with the regulatory framework in force, fearing that, in the limit, such options have to be made at expense of retail offers, in other words, with losses for the competition in this market. On the other hand, it considers that this measure does not reward the grown effort, even knowing that such effort would be translated in a negative yield in a short term.

At present, Telepac withholds a share of about 80% of the supplied access, being in position of benefiting from significative economies occurring from the discounts structure of the wholesale offer and, eventually, also of scale economies, being able, thus, to offer, in the retail market, access offers to the Internet with prices hardly contestable by the competing companies. Thus, in the current market conditions, the development of an effectively competitive market would be harmed, namely not allowing the permanence of other operators in the market. This situation causes concerns to ANACOM, because, although in short term period, can result in eventual benefits for the final users, it compromises, in the medium and long term periods, the development of a competitive market and, therefore, does not guarantee supported benefits for the consumers.

On the other hand, ANACOM, attentive to the offer of Portugal Telecom, SGPS, has verified that, according to reported analysis of the Draft Determination, in the case of offer with debit of 512 kbps/128 kbps, the profit margin between the retail price and the costs resulting from the wholesale offer, excluding discounts, does not allow the compensations of the global costs for the retail service providing.

Also in this scope, with a view to provide the adequate conditions for development of the market, it is necessary to guarantee, with respect to company offers of the PT Group, the existence of enough profit margin between the wholesale and retailing prices.

This approach was, by the way, also adopted in other Member States, either in the scope of ADSL offers or in other matters.

Although being possible that, as the PT Group refers, the wholesale prices are reduced in result of price war in the retail market, such seems to be unlikely. As a matter of fact, the profit margin is defined as a percentage of the final retail price and reductions of this last one imply necessarily absolute drop on the profit margins. Anyhow, this Authority will follow carefully the evolution occurring in the market, intervening if necessary, with a view to guarantee that the objectives of the present determination - promotion of a competitive market - are fully attained. Such understanding is also valid as far as the prices of other offers or existing promotions is concerned or that might be launched in the market by companies of the PT Group.

In the scope of the global costs evaluation, associated to ADSL service providing in the retail market, only one entity has presented comments and quantitative information, to which is thanked for. Seeing that both the costs of the aggregate accesses, and the ISP specific costs present scale economies, it is admitted that, in view of significative evolution verified by the number of ADSL<sup>21</sup> services users and by the accumulating experience, the costs associated to ADSL retail services providing, will be reduced.

Indeed, according to the available data and in line with already referred in the Draft Determination, ANACOM estimates that, with a view to optimization of the available resources:

- (a) the monthly average cost of the total aggregate access per customer, taking into account already the 20% discount application on aggregate access monthly fee, tends, in medium term period, for € 4.0 and not for € 5.6;
- (b) the additional costs related to the network, maintenance, operation and customer relation gets closer to € 7, monthly fee, per customer.

ANACOM intends to foment a better efficiency in the services providing from the market agents, so as to reflect such efficiency gains in the final user. Another objective that ANACOM intends to pursue is the expansion of the “PT ADSL Network” offer coverage and the development of new offers, services and/or functionalities that provide the launching of innovative, diversified and complete offers on the various market agents’ side, maximizing the benefits for the users.

Within this framework, mind also the principle of the regulatory proportionality, ANACOM considers that the value associated with “retail minus” defined in the Draft Determination, must be reviewed establishing that, in ADSL offers with a debit of 512 kbps/128 kbps, the monthly fee of wholesale offers must not be higher than the lesser retail monthly fee practiced by the subsidiary companies of Portugal Telecom, SGPS, deducted by 40%.

Thus, it is guaranteed the existence of an adequate profit margin and is promoted a loyal competition in the retail broadband service market, nothing affecting, at this moment, the yield of PTC in the “PT ADSL Network”, such as elaborated by that operator.

The commentary by PTC relating to this company (or company of the Group) as not being leader in this market is not understood. In effect, it is thought that the evolution analysis of the retail prices and operators behaviour could not be dissociated from the market share of those operators, being in there, without doubt, PT Group the leader. On the other hand, the difference between the retail price practiced by the ISP of the PT Group and the lesser price practiced in the market is lower than 0,3%, having still to be stressed that the volume of included traffic is significantly superior in the case of Portugal Telecom, SGPS offer.

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21 It is noted that the ISPs growth rate not belonging to the PT Group is higher than the growth rate of the latter.

#### 4. OTHER MATTERS NOT REPORTED IN THE DRAFT DETERMINATION

OniTelecom still considers that ANACOM will have to review, at short term, the objectives of service quality and respective compensations for no fulfilment, considering that the conditions currently foreseen in the offer are extremely insufficient.

OniTelecom stresses also that ANACOM does not present any reference/position relating to the obligation of existing, concerning this offer, a non suspended contract of FTS with the PTC, which, in this operator's opinion, constitutes a *bundling* of services originating doubts in regard to its legality, having to be imposed the presentation of an alternative offer for customers not interested in FTS.

Sonae.Com considers that it must be adopted a reference offer to control the access and interconnection to a bigger number of interconnection points, for the purpose of allowing the efficient use of the available resources. Parallely, according to Sonae.Com, such reference offer should foresee:

- (a) the disaggregation of the different network and service elements, for not demanding the hiring of elements that are not strictly necessary to the operationalization of the access and interconnection; and
- (b) the possibility of the operator to define the characteristics of the retail offer, namely as for debits, contention taxes and other components such as the implementation of fixed IP systems.

In relation to the quality of service foreseen in the scope of the "PT ADSL Network" offer and, in particular, as for the degree of availability of service, ANACOM verifies that, based on more recent data, was effectively provided in practice a level of service much higher than the one guaranteed in the offer (99,96% and 96%, respectively).

Such could give evidence to the necessity of bringing near the guaranteed value to the value which is effectively verified. However, the important thing is, effectively, the level to which PTC fulfils. Nevertheless, ANACOM will continue to follow the evolution of this indicator so as to verify the need for intervention in this matter.

The remaining matters are for analysis by ANACOM, and the position of this Authority on the same matters, must be known in due time.