

---

Determination of 16.4.2008

## DETERMINATION

### Settlement of a dispute between PTC and Tele2 on power consumption in the scope of the RUO

#### I

#### FACTS

##### 1. Application submitted by PT Comunicações

11. By letter dated 9 February 2007<sup>1</sup>, PT Comunicações, SA (PTC) applied for the intervention of ANACOM, pursuant to article 10 of Law no. 5/2004, of 10 February (Electronic Communications Law - ECL), to settle a dispute between that company and Telemilénio - Telecomunicações, sociedade unipessoal, Lda. (Tele2), concerning the failure to pay bills issued by PTC for power consumption in spaces engaged by Tele2 in the scope of the reference unbundling offer (RUO).
- 1.2. In its application, PTC refers that, in the scope of the RUO, Tele2 owns equipment installed in 122 exchanges of the fixed network, in a co-installation regime. The company adds that, for the operation of such equipment, PTC provides the necessary power in compliance with provisions in the RUO - point 4.2.1.3, Annex 3 and Annex 14.
- 1.3. PTC states that Tele2 decided not to install its own power meters and that this company referred that explanations to PTC on this decision were not in order as it was a simple question of internal convenience.
- 1.4. PTC informs that it ascertained the power consumption to be billed under the RUO and that it sent Tele2 the correspondent bills for the purpose of payment.

As regards this power consumption, PTC declares that Tele2 failed to pay the full amount indicated in the bills, the sum yet to be paid, of **[CONFIDENTIAL INFORMATION]** corresponding to the period from September 2005 to the date on which ANACOM's intervention was applied for (9/2/2007), without prejudice to any default interest to which PTC is entitled.

---

<sup>1</sup> Received at ANACOM on the same date (ANACOM-E08677/2007).

- 1.5. According to PTC, Tele2 informed that “*before any equipment has been installed no consumption of DC power occurs*” and that even after this installation, the equipment “*was only connected definitively after the transmission network had been installed*”, thus Tele2 deems that the power consumption is due only after this network has been installed.
- 1.6. PTC refers also that Tele2 put forward arguments which concern the former’s negotiating good faith, which would be at stake as PTC invokes that it has no control on the moment as from which equipment is effectively installed and connected to the transmission network. PTC states that, in the opinion of Tele2, it is up to PTC, in case of doubt, to evidence this in appropriate fora.
- 1.7. Given this reasoning, PTC informs that it conveyed to Tele2 the following view:
  - “*Given that Tele2 has chosen not to install power meters, PTC will invoice power consumption under the provisions of the RUO, namely point 4.2.3 of Annex 14*”;
  - “*The decision on the connection of equipment is exclusively incumbent on Tele2, which is aware of terms agreed on and provided for in the RUO*”.Notwithstanding, PTC declares that it was not possible to reach an agreement with Tele2.
- 1.8. PTC states that the RUO lays down that this company must provide a co-installation service, which requires: provision of space, facility of access and provision of electrical infrastructure. Thus, in its opinion, it does not follow from this offer a *sine qua non* link between these facilities and any issue concerning the transmission network, as the provision of electrical infrastructure forms part of the co-installation “package”.
- 1.9. As regards the “good faith” issue raised by Tele2, PTC considers that it makes no sense as this dispute is about compliance with rules clearly provided for in the RUO.

## 2. ANACOM's request for elements

2.1. Paragraph 2 of article 10 of the ECL establishes that ANACOM's intervention must be requested within at the most one year from the date on which the dispute commenced. Therefore, this Authority may only assess a dispute settlement application after finding that this intervention condition, among others, has been met.

PTC's description did not enable this Authority to reach a conclusion on this preliminary issue, and thus it was requested of that company that it submitted<sup>2</sup> within 10 working days the necessary elements to assess the matter, namely documents stating the date on which:

- PTC submitted bills to Tele2 on this company's power consumption, ascertained pursuant to the RUO;
- Tele2 refused to pay; and
- Tele2 argued that "*power consumption is due only after the transmission network has been installed (...)*".

2.2. ANACOM informed Tele2 that it had requested such elements from PTC<sup>3</sup> and, strictly for the purpose of assessing the intervention assumption of paragraph 2 of article 10 of the ECL, invited this company to present within 10 working days all elements deemed relevant.

### 2.1. PTC's reply

2.1.1. PTC submitted its reply within the deadline, by letter dated 20 April 2007<sup>4</sup>, and restated the issue raised on its application for intervention of 9 February, that is, the company wished to know whether Tele2, as beneficiary of the RUO, was entitled to interpret this Offer in the sense that it is not bound to pay the power assumed to have been consumed, under rules provided for therein.

PTC restates that power invoicing is based on the provision of electrical infrastructure, being up to Tele2 to decide whether it should install the means to measure the effective consumption of its equipment; in case it chooses not to, power consumption must be invoiced pursuant to the RUO (last paragraph of point 4.2.3 of Annex 14 of the RUO). It attached an email dated 15 September 2006, in which allegedly Tele2 confessed it has already consumed power yet to be paid.

---

<sup>2</sup> Letter ANACOM-S10185/2007, of 3/4/2007.

<sup>3</sup> Letter ANACOM-S10182/2007, of 3/4/2007.

<sup>4</sup> ANACOM-E22527/2007.

- 2.1.2. PTC also attached copies of bills sent to Tele2 from 26/9/2005 to 23/3/2007, concerning the period from September 2005 to March 2007, declaring that they have not been paid in full.
- 2.1.3. PTC also informs that the basis for refusal to pay on the part of Tele2 only became final following the notification of this company, on 27 September 2006 (also attached to the letter), document which also includes the date on which Tele2 invokes that “*power consumption is due only after the transmission network has been installed (...)*”.

## **2.2. Tele2’s reply**

- 2.2.1. Tele2 also submitted its reply within the deadline, by fax dated 20 April 2007<sup>5</sup>, and confirmed that PTC had invoiced power consumption, attaching for the purpose a bill dated 15/2/2006, entitled: RUO - Co-installation Monthly Consumption DC Power.
- 2.2.2. Tele2 also informed that it had refused to pay because: 1) it makes no sense for PTC to demand payment for consumption that never took place; 2) the company had already informed PTC its interpretation of the RUO, and was determined to act accordingly, that is, it would only pay for power consumption after its equipment was effectively installed and connected to the transmission network.

## **3. Notification and reply from Tele2**

- 3.1. By letter dated 15/5/2007<sup>6</sup>, ANACOM conveyed to Tele2: (i) the request for dispute settlement submitted by PTC on 9/2/2007, under article 10 of the ECL, as well as (ii) documents received on 23/4/2007, to assess the preliminary issue concerning the intervention condition laid down on paragraph 2 of that article.  
  
In this letter, ANACOM notified Tele2 to state in writing, if it so desired, its opinion on PTC’s application, within 10 working days<sup>7</sup>.
- 3.2. Tele2 replied within the deadline, by letter<sup>8</sup> and fax<sup>9</sup>, both of 30/5/2007.
- 3.3. First of all, Tele2 considers that the conditions for the Regulatory Authority’s intervention, provided for in article 10 of the ECL, have not been met, thus this Authority lacks competence to settle the dispute under consideration, and therefore it is prevented from ruling on the merits of the matter. Tele2 specifically invokes the inadequacy of ANACOM’s intervention and PTC’s delay in submitting its application.

---

<sup>5</sup> ANACOM-E22522/2007.

<sup>6</sup> Letter ANACOM-S17804/2007.

<sup>7</sup> On the same date, ANACOM informed PTC it had notified Tele2 (Letter ANACOM-S17805/2007, of 15/5/2007).

<sup>8</sup> ANACOM-E30323/2007.

<sup>9</sup> ANACOM-E30329/2007.

3.4. As regards the inadequacy of ANACOM's intervention in this dispute:

Article 10 of the ECL lays down that it is incumbent upon this Authority, at the request of either party, to settle, by way of a binding decision, any dispute connected to the obligations arising under that law between undertakings subject thereto, on national territory.

Tele2 does not dispute that both PTC and itself are electronic communications operators subject to obligations set out in the ECL, however it invokes that it is not clear that the issue at stake falls under the concept of "*dispute connected to the obligations arising under the Electronic Communications Law*".

In this respect, Tele2 considers that the dispute between the two companies is about an issue of civil, obligational, law, not a matter of violation of regulatory provisions, let alone direct or indirect infringement of any provision of the ECL. Tele2 considers that this dispute is upstream of the provision of the RUO, as it does not concern the means to invoice (a matter regulated by the RUO) but the existence of a fact which establishes the obligation to pay, that is, the existence of consumption to be invoiced, having regard to the fact that the RUO sets out a rule to estimate consumption and not the legal pre-assumption of its existence.

In the light of the above, Tele2 deems that ANACOM lacks material competence to assess the dispute under article 10 of the ECL.

3.5. As regards the application's delay:

Tele2 considers that the Regulatory Authority may not intervene as more than one year had elapsed after the dispute begun.

For the purpose, Tele2 invokes that, contrary to what PTC seeks to argue, the dispute did not start on 27/9/2006, as the email it sent on that day to PTC was only one of many mails (not the first) through which Tele2 expressed its view on the matter, explaining why it considers that claimed amounts are not due.

Thus, according to Tele2, the first communication made to PTC regarding this dispute dates 28/9/2005 (the email having been attached to the reply), after having received for the first time in September 2005 a bill with amounts due for power consumption. On that occasion, Tele2 explicitly stated that: 1) charged amounts were inappropriate; ii) at that time, no equipment had yet been installed in any exchange; iii) thus the amount charged for power consumption was not due.

Tele2 adds that its disagreement with this issue is also a result of the behaviour of the company, having failed to pay, for a year (from September 2005 to September 2006) the amounts due for power consumption according to bills submitted by PTC.

The company thus concluded that the date on which the dispute started goes back to September 2005.

- 3.6. In case ANACOM decides not to reject the application based on the reasoning of the previous items, Tele2 challenges the facts presented by PTC as regards power consumption, restating that the RUO only establishes rules to estimate consumption, which only makes sense, for the purpose of calculating amounts, if the equipment is ready to effectively consume power.
- 3.7. Within this context, Tele2 informs that at the time PTC sent the first bill, no equipment had yet been installed in the exchanges, and only from September 2005 onwards the respondent started to increasingly and regularly place its devices in PTC's exchanges.

It adds that this equipment was also connected in a progressive way, in the course of a process which began only in May 2006 and finished in September the same year.

- 3.8. Tele2 stresses it always paid the amounts due for power consumption, according to the estimate provided for in the RUO, as from the moment its equipment was connected. It specified (attaching a table) that whether or not the equipment was operating, it was connected from the moment it was able to function, that is, from the moment PTC delivered the transmission network, as regards the Lisbon and Oporto sites, and on the day PTC delivered the signal transmission, in the sites outside Lisbon.
- 3.9. Tele2 considers that only as from this moment it would be legitimate for PTC to charge for power consumption.
- 3.10. Tele2 states that it is not true that PTC had no means to assess if the equipment was consuming power or not because, although it could not be aware of whether the equipment was connected, it could not ignore whether that there was an increase of power consumption as Tele2 started to install equipment.
- 3.11. In this case, Tele2 refers that there was no such increase, because, as it mentioned to PTC, the equipment stayed unconnected for a long time, being up to PTC to adduce evidence to the contrary, which was not the case.
- 3.12. The respondent added also that it informed PTC at all times which equipment was connected and that it always paid the amounts that corresponded to power consumption estimated for this equipment, which can be demonstrated by the gradual decrease of the difference between amounts presented by PTC and the amount paid by Tele2 and by the fact that, from the moment all the equipment was connected (October/November 2006), the amounts were fully paid, although no commercial offer had yet been made for such equipment.
- 3.13. Tele2 also questions why PTC attached to the application the bills concerning the period from November 2006 to January 2007, as the correspondent amounts are not in debt, as well as those for February and March 2007, which were not due at the time PTC submitted its application to ANACOM.
- 3.14. As regards bills before November 2006, the last communication between the two companies on supposedly unpaid amounts goes back to September that year, and since then PTC did not claim any other amount, thus Tele2 was satisfied that PTC had acknowledged its reasoning for not paying amounts claimed.

**In the light of the above-mentioned facts, on 31 October 2007, the Board of Directors of ANACOM approved a draft decision, having determined, in the scope of the administrative dispute settlement, provided for in article 10 of the ECL:**

1. **To reject PTC's application** for dispute settlement, pursuant to point b) of paragraph 1 of article 11 of the ECL, on account of the expiry of the time-limit to request ANACOM's intervention, laid down in paragraph 2 of article 10 of that statutory instrument;
2. **To clarify** that point 4.2.3, b) of Annex 14 of the RUO defines prices to be paid by OLO for con-installation services provided by PTC, irrespective of when equipment is installed and connected. Parties are entitled to establish, by agreement, that amounts for power consumption, calculated on the basis of the formula provided for in the RUO, are due only after the co-installation service provision has started. In this case, parties must lay down the necessary conditions to render the agreement operational, namely those conditions that enable PTC to know the effective date as from which the collection of these amounts is due.

**Interested parties were notified of the prior hearing process**, under articles 100 and 101 of the Code of Administrative Procedure, having been given a 10- working-day deadline to respond in writing.

Contributions from PTC and Sonaecom SGPS, S.A., on behalf of Tele2, company of which it is a shareholder, as well as ANACOM's views thereon and the reasoning for the Regulatory Authority's options are comprised in the **Prior Hearing Report, attached to this determination and a part thereof.**

## II

### ASSESSMENT

#### **1. Preliminary issues: verification of the conditions for ANACOM's intervention provided for in article 10 of the ECL**

##### **1.1. Material competence**

As described in more detail in point I – 3.4 of this determination, Tele2 considers that ANACOM lacks material competence to assess this dispute as its subject-matter is upstream of the provision of the RUO. According to Tele2, the dispute is about the existence of the fact giving rise to the obligation (consumption to be invoiced), a matter of obligational nature, not the means to invoice, which in fact is subject to a sector approach.

Paragraph 1 of article 10 and point a) of paragraph 1 of article 11, both of the ECL, set out that the administrative dispute settlement mechanism may only be resorted to where a dispute connected to the obligations arising under that Law, that is, obligations related to the sector, is at stake.

To know if this condition is fulfilled, it is necessary to assess whether that is the case here, in the light of the applicable sector framework.

As mentioned earlier, the RUO deals with power consumption by OLOs, in the scope of the co-installation service, in several items (4.2.1 and 4.2.1.3, Annexes 3 and 14). Provision is made therein for rules on the supply of electrical infrastructures as a mandatory element of the co-installation service, technical features and conditions of the power supply and other electrical infrastructures and power consumption prices.

It follows from the facts described above in I that the core issue of the dispute is about whether the OLO must pay PTC for power consumption as from the moment the co-installation service begins to be provided, in case the OLO chooses not to install the means to measure the effective consumption of its equipment. As the parties themselves refer, this dispute is based on a differing interpretation of the rules of the RUO on this matter, and therefore the respective solution entails its correct interpretation and application. These provisions are sectoral in nature, as the RUO is based on obligations falling on PTC that result from sector legislation, and regarding which ANACOM has competence to intervene [cfr. Regulation (EC) no. 2887/2000 of the European Parliament and of the Council, of 18 December 2000, on unbundled access to the local loop, and articles 68, 69 and 72 of Law no. 5/2004].

Consequently, it must be concluded that the Regulatory Authority is endowed with material competence to assess the dispute under consideration, given that its subject-matter falls within the scope of sector regulation, as well as within obligations resulting from the ECL for the purpose of the application of the mechanism provided for in article 10 of this Law.



## **1.2. Deadline to apply for a dispute settlement**

Tele2 argues that the date on which the dispute started goes back to September 2005, as the first communication to PTC on this dispute dates 28/9/2005, and Tele2 failed to pay amounts for power consumption stated in PTC's bills concerning the period from September 2005 to September 2006.

In fact, in the email sent to PTC on 28/9/2005, Tele2 challenges several issues concerning the bill for September that year, one of the issues being the amount charged for power.

In this context, Tele2 declares that in its opinion, the OLO that chooses not to install a meter should be invoiced on the basis of the maximum power of the equipment only where the equipment has already been installed, which was not the case at the time. This view is contrary to PTC's understanding, which applies the formula provided for in the RUO, as a result of the provision of electrical infrastructures, in the scope of the co-installation "package".

It should be noted that in the email of 27/9/2006 (attached by PTC to the process) Tele2 refers that since the moment it started to unbundle exchanges (emphasis added) it has used and conveyed to PTC a consistent argument concerning its interpretation of point 4.2.3. of Annex 14 of the RUO, stating that the application of the calculation method provided for therein only makes sense after the equipment has been installed and is ready for operation, that is, after the equipment has been effectively connected. Tele2 specifies that telecommunications equipment will only be connected to a power supply when it is also connected to a transmission network, given that up to that moment it would be subject to a useless operation risk.

In the scope of the prior hearing of interested parties, PTC attached several emails sent to and received from Tele2 between September 2005 and September 2006, which show that the parties undertook to settle the conflict by agreement; however this was not possible as both parties maintained their initial diverging positions, thus leading to this dispute.

The disagreement on the moment from which PTC may legitimately charge for power consumption, pursuant to the RUO, clearly arose between the parties on September 2005, not only following the communication of Tele2 on September 2006.

Moreover, consistently with the position conveyed to PTC, Tele2 refused to pay from this moment the amounts charged for power consumption.

In the light of the foregoing, it must therefore be concluded that the date on which the dispute begun goes back to September 2005, and thus on the day PTC submitted its application (9/2/2007) the maximum period of one year, set out in paragraph 2 of article 10 of the ECL, had been exceeded. In this case, the cause to reject an application to settle a dispute provided for in point b) of paragraph 1 of article 11 of the ECL is fulfilled, and ANACOM is thus prevented from making a binding decision to settle the issue.

## 2. Interpretation of the rules in the RUO on power consumption

Without prejudice to the preceding point, ANACOM must acknowledge the weight of this dispute's subject matter in the performance of contracts concluded between OLO and PTC for the provision of the co-installation services. Given that, as a rule, OLO have not placed any power meters of their own, other conflicts may arise on account of a diverging interpretation of the rules in the RUO.

For this reason, and for the sake of legal certainty and safety, the Regulatory Authority deems it must clarify the interpretation the parties must give to point 4.2.3 of Annex 14 of the RUO.

The RUO (point 4.2.1) lays down that PTC must provide a physical co-installation service, which requires: (i) provision of space, (ii) facility of access and (iii) provision of electrical infrastructure.

Annex 14 of the RUO establishes, in point 4.2.3 b), the prices for power consumption in an open space co-installation service. As a rule, "*the OLO is responsible for the installation of means to measure the effective consumption of its equipment*", power consumption being charged to the OLO on a monthly basis, based on a meter reading, at prices establishes therein.

*"Where the OLO decides not to install the appropriate measuring means, the monthly power consumption to be paid by the OLO shall correspond:*

- *to the consumption that corresponds to the maximum power of equipment, for each piece of equipment or equipment set owned by the OLO in a given installation, with a consumption up to 5 Kw;*
- *to a minimum consumption of 20% of the maximum installed power, for each piece of equipment or equipment set owned by the OLO in a given installation, with consumption that exceeds 5 Kw.*

*In case PTC decides to undertake effective power consumption measurements, even if resorting to isolated measures, it may adjust the respective monthly consumption of an OSP."*

In fact, where the OLO chooses not to install power consumption meters, PTC has no way of finding out the effective consumption of installed equipment, thus the RUO rule associates the power consumption to the maximum power of equipment, to be communicated by the OLO to PTC in the application for co-installation (see the respective form in Annex 15).

From the moment PTC provides co-installation space, the OLO is entitled, at any time, to install and connect its equipment, regardless of whether PTC is aware of the date on which the effective connection took place. This installation and effective use are thus outside of the control of PTC (although the company is aware that work is ongoing at its exchanges).

In this context, the RUO lays down that the OLO is responsible for the choice, supply, installation and management of its equipment, PTC's inspection being carried out only at the level of safety, technical compatibility, equipment functionality and access (points 4.1.1 and 5.2). No reference is made with regard to dates or deadlines to install OLO equipment, namely in Annexes 3 and 6, which define the conditions and procedure for physical co-installation.

It should be noted that it is not incumbent upon PTC to verify the date on which the equipment was effectively connected by a specific OLO, by identifying the increase of power consumption in exchanges concerned. In fact PTC may be prevented from doing so, as many operators co-installed in its exchanges may undertake to connect their own equipment at the same time, thus the consumption increase that results from the operation of each OLO's equipment is merely marginal. In this case, PTC will not be able to establish a link between the consumption increase and the connection of equipment.

In line with the above, point 4.2.3.b) of Annex 14 of the RUO defines prices to be paid by OLO for co-installation services provided by PTC, regardless of when equipment is installed or used. As referred earlier, the OLO can at any time install the appropriate measuring means, paying only for the consumption that results from the meter reading.

Nevertheless, there is nothing to prevent the parties, by agreement (in principle, in the contract concluded in the scope of the RUO), from laying down other conditions, which establish that amounts for power consumption, ascertained on the basis of the formula provided for in the RUO, are due only after the co-installation service provision has started, namely as from the moment the co-installed equipment is effectively connected (that is, following the power-up). In this case, parties must lay down the necessary conditions that enable PTC to know the effective date as from which the amounts due for power consumption may be collected, by namely providing for the obligation on the OLO to communicate to PTC the date on which active equipment is brought into operation/effectively connected.

### III DETERMINATION

Therefore, in view of the above described circumstances, the **Board of Directors of ANACOM**, in the scope of the assignment provided for in point q) of paragraph 1 of article 6 of its Statutes, approved by Decree-Law no. 309/2001, of 7 December, and in the pursue of the regulation objective provided for in point a) of paragraph 1 of article 5 of Law no. 5/2004, of 10 February, **hereby determines, in the scope of the administrative dispute settlement provided for in article 10 of the ECL, as follows:**

- 1.To reject PTC's application** for dispute settlement, pursuant to point b) of paragraph 1 of article 11 of the ECL, on account of the expiry of the time-limit to request ANACOM's intervention, laid down in paragraph 2 of article 10 of that statutory instrument;
  
- 2.To clarify** that point 4.2.3, b) of Annex 14 of the RUO defines prices to be paid by OLOs for con-installation services provided by PTC, irrespective of when equipment is installed and connected. Parties are entitled to enter into agreements on other conditions, which namely establish that amounts for power consumption, calculated on the basis of the formula provided for in the RUO, are due only after the co-installation service provision has started. In this case, parties must lay down the necessary conditions to render the agreement operational, namely those conditions that enable PTC to know the effective date as from which the collection of these amounts is due.