



EUROPEAN COMMISSION

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SG-Greffe (2007) D/207191

Autoridade Nacional de Comunicações
(ANACOM)
Avenida José Malhoa No. 12
P-1099-017 Lisboa
Portugal

For the attention of:
Mr. Alvaro Dâmaso
Chairman
Fax: +351 21 721 2703

Dear Sir,

Subject: Case PT/2007/0707: Remedies related to the market for voice call termination on individual mobile networks in Portugal

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

I. PROCEDURE

On 26 October 2007, the Commission registered a notification received from the Portuguese National Regulatory Authority, Autoridade Nacional de Comunicações ("ICP-ANACOM"), concerning the amendment of price control remedies in the market for voice call termination on individual mobile networks².

The national consultation³ ran parallel to the Community consultation. The deadline for the Community consultation under Article 7 of the Framework Directive is 26 November 2007.

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 Market 16 in the Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with the Framework Directive ("the Recommendation"), OJ L 114, 8.5.2003.

³ In accordance with Article 6 of 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 (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

The draft measure covers the amendment of price control obligations previously⁴ imposed on mobile network operators in Portugal.

In the previous notification, ICP-ANACOM proposed, inter alia, to impose a two-year glide path based on benchmarks. Based on that glide path, the operators' termination rates were to be gradually decreased from March 2005 and to reach symmetry by October 2006. ICP-ANACOM stated further that it would define costing methodologies and cost-oriented prices following a further consultation on this issue.

In the current notification, ICP-ANACOM has decided to re-examine and update the remedies imposed by its decision of 25 February 2005. ICP-ANACOM states that the market analysis set out in its decision of 25 February 2005 remains valid and therefore the remedies imposed on the SMP operators remain in place. ICP-ANACOM considers that a new market analysis is unnecessary. However, at the same time, ICP-ANACOM is imposing further price reductions on the SMP operators which shall come into effect from 1 January 2008 until 31 December 2008. Since October 2006 the mobile termination rates ("MTRs") are symmetrical and are at the level of €0.11. The new glide path proposes further reductions based on benchmarking and at the same time introduces asymmetry. The new glide path proposes to introduce the following termination rates:

- €0.0800 per minute for TMN and Vodafone and €0.0960 per minute for Optimus, from 1 January, 2008,
- €0.0750 per minute, for TMN and Vodafone and €0.0900 per minute for Optimus, from 1 April, 2008,
- €0.0700 per minute, for TMN and Vodafone and €0.0840 per minute, for Optimus, from 1 July, 2008, and
- €0.0650 per minute for TMN and Vodafone and €0.0780 per minute, for Optimus, from 1 October, 2008

ICP-ANACOM justifies the proposed asymmetry primarily based on the following reasons: (i) Optimus entered the market 6 years after the two other mobile network operators; (ii) Optimus has higher costs resulting from lower traffic volumes and thus lower scale economies; (iii) traffic imbalances contribute to Optimus making significant net payments to the other two mobile network operators and there are strong network effects in the market which cause a competitive disadvantage for Optimus. ICP-ANACOM claims that the strong network effects are intensified by TMN and Vodafone's

⁴ In its notification, assessed by the Commission under case PT/2004/0129, ICP-ANACOM designated Telecomunicações Móveis Nacionais, S.A. ("TMN"), Vodafone Portugal, Telecomunicações Pessoais, S.A. ("Vodafone") and Optimus Telecomunicações, S.A. ("Optimus") as having SMP in the market for voice call termination on individual mobile networks in Portugal. ICP-ANACOM proposed to impose the following regulatory remedies on the SMP operators: (i) access; (ii) non-discrimination; (iii) transparency; (iv) accounting separation; and (v) price control and cost accounting. The national measure implementing the above-described regulatory remedies was adopted by ICP-ANACOM on 25 February 2005.

practice of on-net/off-net price differentiation. Concerning network effects, ICP-ANACOM also refers to market surveys indicating that it is becoming increasingly important to consumers that their contacts belong to the same network. Furthermore, ICP-ANACOM refers to the opinion of Autoridade da Concorrência ("AdC"), the National Competition Authority, which raised concerns about the on-net/off-net retail price differentials and the competitive disadvantages of smaller operators. AdC stated that the asymmetry proposed by ICP-ANACOM would sufficiently address the competitive disadvantages of smaller operators, resulting from scale economies and network effects.

III. COMMENTS

The Commission has examined the notification and has the following comments⁵:

(1) **Imposition of different price control methodology without a new market analysis**

The proposed price control remedies represent a substantial change from the previous approach adopted by ICP-ANACOM. By way of the February 2005 measure, ICP-ANACOM imposed a glide path on the SMP operators whereby the termination charges reached symmetry in October 2006. ICP-ANACOM intends to reintroduce asymmetry on the basis of the same market analysis. This proposed glide path is in fact a different remedy which, according to ICP-ANACOM's view, aims to correct the perceived network effects that place Optimus at a competitive disadvantage and which have not been ameliorated since ICP-ANACOM's decision of February 2005.

The Commission reminds ICP-ANACOM that MTRs should normally be symmetric and that asymmetry requires an adequate justification. It is recognized that, in certain exceptional cases, an asymmetry might be justified by objective cost differences which are outside the control of the operators concerned.

The fact that a MNO entered the market later and that it therefore has a smaller market share can only justify higher termination rates for a limited transitory period. The persistence of a higher termination rate would not be justified after a period long enough for the operator to adapt to market conditions and become efficient and could even discourage smaller operators from seeking to expand their market share.

The Commission notes that ICP-ANACOM justifies asymmetric MTRs for Optimus with traffic imbalances, Optimus making significant net payments to the other two mobile network operators as well as strong network effects. However, operators may themselves be able to influence network effects, and traffic imbalances may in fact be amplified by the proposed asymmetric level of MTRs. For this reason, the Commission stresses the importance of reducing MTRs to the level of costs of an efficient operator which takes into account only those objective cost differences as defined above.

⁵ Pursuant to Article 7(3) of the Framework Directive.

While the Commission welcomes that termination charges are going down overall, the Commission calls upon ICP-ANACOM to reconsider the proposed asymmetry of MTRs with regard to Optimus.

(2) Need for a coherent European approach

The Commission considers that a cost orientation obligation is a robust method for price control in mobile call termination markets where the level of the mobile termination rates is based on the costs of an efficient operator. The Commission notes that ICP-ANACOM has not yet implemented cost orientation as was envisaged during its first notification (PT/2004/0129) but that its implementation is a priority for 2008. Given the importance of regulating mobile termination rates effectively and in a consistent manner, the Commission encourages ICP-ANACOM to work in close co-operation with the European Regulators Group and the Commission to arrive at a coherent approach on this matter across the EU, and to revisit an analysis in light of a common European approach as soon as this has been established.

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

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 12 of Recommendation 2003/561/EC⁶ 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 Commission⁷ within three working days following receipt whether you consider that, in accordance with Community and national rules on business confidentiality, 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,
Philip LOWE
Director General

⁶ 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.

⁷ Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32.2.298.87.82.



EUROPEAN COMMISSION

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For the attention of:
Mr. José Amado da Silva
Chairman
Fax: +351 21 721 2703

Dear Sir,

Subject: Corrigendum of the English version of Case PT/2007/0707: Remedies related to the market for voice call termination on individual mobile networks in Portugal

Please find below the corrected text for the comments letter SG-Greffe (2007) D/207191 of the European Commission.

Please read on page 1:
For the attention of
Mr. José Amado da Silva

Yours faithfully,
For the Commission,
Philip LOWE
Director General