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Determination of 24.6.2005

## **CHANGES TO THE “PT ADSL NETWORK” WHOLESALE OFFER**

### **I. BACKGROUND AND CURRENT SITUATION**

On 21 March 2005, PT Comunicações informed ICP-ANACOM and Internet Service Providers (ISPs) of a number of changes to its “PT ADSL Network” offer.<sup>1</sup> These changes included:

- (a) the introduction of two new classes of access: 4 Mbps / 256 kbps (class 12) and 8 Mbps / 384 kbps (class 14), with maximum contention of 1:50 and local access prices of €19 and €25 respectively<sup>2</sup>;
- (b) reduction of the price of class 11 (2 Mbps / 512 kbps) from €22 to €17, with upstream bandwidth reduced to 128 kbps;
- (c) discontinuation of class 0 (512 kbps) and class 10 (1 Mbps) as a consequence of their migration to class 11 (2 Mbps / 128 kbps).

ICP-ANACOM welcomed the introduction of new local access classes with higher bandwidth, and on 29 March informed PT Comunicações that:

- (a) it agreed with migration plans that involved no additional costs for ISPs, where implemented by option of the operators and never by obligation;
- (b) all local access classes introduced over IP aggregated mode should also be available over ATM aggregated mode;
- (c) the introduction of new classes of access should not necessarily imply the withdrawal of the existing classes, since this would reduce the choices open to end users and could jeopardize fair market competition,

and ordered PT to make changes to its wholesale offer in accordance with the observations given.

At the same time, ICP-ANACOM ordered PT Comunicações to provide information on the prices of the retail offers which Grupo PT intended to introduce, so that it could verify the existence of competitive conditions. This information was provided by PT Comunicações on 30 March.

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<sup>1</sup> According to PT Comunicações the affected ISPs were informed of the changes on the same day.

<sup>2</sup> According to PT Comunicações, these offers would be available only over aggregated IP.

Subsequently, on 5 April, its preliminary appraisal having led ICP-ANACOM to consider that in the light of available data there were strong indications of margin squeeze, ICP-ANACOM ordered the suspension of the introduction by PT Comunicações of the conditions announced for its “PT ADSL Network” offer until the appropriate competitive conditions were shown to be in place. On the same day, this Authority requested additional information on estimated traffic consumption of the new offers so that it could better evaluate the margins available to the ISPs.

PT Comunicações provided the requested information on 7 April, giving indications on preliminary findings on the migration of clients across classes and on a pilot introduction of the 4 Mbps offer.

At the same time, and subsequent to the comments made to ICP-ANACOM by ISPs, this Authority held a series of meetings with the ISPs, including PT Comunicações, to hear the concerns of the ISPs and to enrich its decision-making process.

In general terms, the ISPs expressed concerns regarding:

- (a) the price level of the new wholesale offers announced by PT Comunicações and respective margins vis-à-vis retail prices;
- (b) the price of aggregated access, and the fact that the respective price structure penalizes smaller ISPs;
- (c) the discontinuation of classes 0 and 10;
- (d) the migration period to class 11 in the event that classes 0 and 10 are discontinued;
- (e) the absence of clearly-defined procedures for the migration of clients to class 11.

On 19 April, PT Comunicações informed ICP-ANACOM and the ISPs of its changes to the conditions initially announced. These changes were:

- (a) reduction in local access prices for:
  - a. Class 0 (512 kbps / 128 kbps) – from €16 to €14.25;
  - b. Class 11 (2 Mbps / 128 kbps) – from €17 to €14.50;
  - c. Class 12 (4 Mbps / 256 kbps) – from €19 to €16.50;
  - d. Class 14 (8 Mbps / 384 kbps) – from €25 to €24;
- (b) a reduction in monthly prices per-Mbps of aggregated access from between €359.14 and €251.39 to €160;
- (c) provision of the new classes for ATM aggregated mode;
- (d) a reduction of around 12% in per-Mbps prices of the retail price of access via ATM aggregated mode;
- (e) a change in the upstream bandwidth of class 11 (2 Mbps / 512 kbps) to 128 kbps;
- (f) provision for discontinuation of class 10 (1 Mbps) and its migration to class 11 with no changes in bandwidth charges for ISPs;

- (g) provision for the publication, 29 April, of a “Plan for the phased reception of applications for the provision of and changes to the 2 Mbps, 4 Mbps and 8 Mbps classes”;
- (h) a proposal that applications for bandwidth changes to the 2 Mbps, 4 Mbps and 8 Mbps classes be free for the ISPs for a period of 6 months from the day on which the new conditions of the offer take effect.

On the same day, PT Comunicações announced that in view of the complexity of the process it was prepared to hold bilateral meetings with the ISPs involved to analyze and discuss the implementation of the process.

On 29 April, in accordance with its announcement of 19 April, PT Comunicações published its “Plan for the phased reception of applications for the provision of and changes to the 2 Mbps, 4 Mbps and 8 Mbps classes”, indicating for each access in which week migration was planned to take place and the maximum bandwidth available with migration (*see* point 4 below).

In their communications sent respectively by fax on 26 April and by letter on 29 April, OniTelecom and Sonaecom expressed their opinions with regard to the conditions announced by PT Comunicações on 19 April.

Both companies expressed their surprise at the public announcement by the PT Group that the new offer had been previously approved by ICP-ANACOM, with OniTelecom maintaining that it was “essential that ANACOM issue pronouncement on its agreement (or otherwise) with the contents of the new version of the offer”.

With regard to the conditions of the offer, both companies acknowledged a significant improvement relative to the version of the offer announced on 21 March; Sonaecom observed:

- (a) “the profitability of the 512 kbps offer ensures (...) return on investment of 7 months”;
- (b) “with regard to the 2 Mbps offer, profitability is already positive, in line with that previously possible with the 512 kbps product”, although the company in question considers this profitability to be insufficient.

OniTelecom and Sonaecom called for the introduction of a retail-minus rule (applicable both to local access and aggregated access) covering classes 11, 12 and 14; they also viewed a margin squeeze test to determine the reduction of margins in any retail broadband offer by Grupo PT as compulsory.

Furthermore, OniTelecom proposed the postponement of the introduction of the retail offers of Grupo PT, while Sonaecom urged ICP-ANACOM to rule that PT Comunicações could not introduce any retail offer of capacity greater than 2 Mbps for a period of one year, or until its market share had reached 50%.

OniTelecom also proposed that the prices established for local access and aggregated access services be applied retroactively, with effect from the beginning of 2005 at least, suggesting that the monthly price per-Mbps for the total bandwidth of the IP aggregated accesses be reduced at least to €100.

Sonaecom considered that the offer gave cause for concern from the point of view of fair competition in the broadband market, with specific regard to:

- (a) the 6-month grace period for migration to classes 11, 12 and 14, which the company views as an abuse of a dominant position;
- (b) the withdrawal of classes 10 and 13 and the reduction of the upstream bandwidth for class 11; Sonaecom did not however explain the reasons for its grievances in this respect;

Sonaecom urged ICP-ANACOM to order:

- (a) an exemption from wholesale costs in the migration of clients from 512 kbps and 1 Mbps to new bandwidth (2 Mbps, 4 Mbps and 8 Mbps), independent of which ISP the clients opt to use and of the wholesale service on which access is based (PT ADSL Network – IP or ATM – or the reference offer for unbundled access to the local loop);
- (b) that the process for changing broadband ISP be modified, since in the view of Sonaecom it is essential that, on reception of requests for ADSL activation from clients using the services of another ISP, PT Comunicações should proceed to its implementation even where the outgoing ISP has not cancelled the access for those clients.

## **II. ASSESSMENT OF THE CONDITIONS OF THE 19 APRIL OFFER**

### **1. WHOLESALE PRICES AND RETAIL PRICE DIFFERENCE**

In calculating the difference between the retail prices practised by the PT Group companies and the wholesale prices applied to the ISPs, the estimated average increase in traffic consumption by end users as a result of their adoption of the new offers is an important factor which must be included in the equation. In other words, end users are likely to change their habits as a result of the increased bandwidth available with the 2 Mbps, 4 Mbps and 8 Mbps offers.

In addition to basing their calculations on different current consumption figures, PT Comunicações and Sonaecom presented estimates based, respectively, on (i) preliminary findings on the migration of clients across classes and on a pilot introduction of the 4 Mbps offer; and (ii) real observation of a sample of approximately 5 thousand clients using the 2 Mbps service (based on LLU). The migration of clients from 512 kbps to 2 Mbps would result in an increase of approximately 50% and 100%, according respectively to PT Comunicações and Sonaecom. OniTelecom has not yet provided its estimates for increased traffic.

With particular regard to the 2 Mbps offer ICP-ANACOM considers:

- (a) the estimate of PT Comunicações to be too low, since the real figures provided by this company relative to the 1 Mbps offer suggest significantly higher consumption, albeit for unlimited national retail traffic, and with the further proviso that the estimated figures, as acknowledged by PT Comunicações, are preliminary; the conditions and form of communication of the pilot offer are unknown;
- (b) the estimate of Sonaecom to be too high, since it is based on measurements made at local loop access points and the traffic limitations the company enforces in retail appear, on first analysis and relative to the limitations which the PT Group intends to impose in the new offers, less restrictive.

In the light of the above, and in the absence of more detailed information allowing a better appraisal of future use which may be subject to restrictions as part of retail offer parameters – i.e. surcharges for additional traffic – ICP-ANACOM shall adopt, for purposes of estimating the difference between the retail prices practised by the PT Group companies and the wholesale prices incurred by the ISPs, a figure midway between the two estimates. This without prejudice to the monitoring of changes in consumption with the new offers.

For the 4 Mbps and 8 Mbps classes, ICP-ANACOM posits an increase in proportion to consumption; i.e. migration from local access at 2 Mbps to local access at 8 Mbps implies an increase in consumption of 75%.

Another important factor in the evaluation of the wholesale cost of aggregated access for the ISP is the contention rate, which in practice limits the bandwidth available to clients when various clients are concurring for use of a common and limited resource (available bandwidth). Maximum guaranteed contention on the PT Comunicações network for the 512 kbps offers and for the new offers is 1:50, which is the figure used in estimating margins. We shall also take into consideration the real contention rate offered in practice by PT Comunicações, which according to Sonaecom is in the order of 1:25.

The increases in consumption estimated by ICP-ANACOM and consumption (in kbps) as a function of the contention rate considered are presented in the following table:

Migration from:	512 kbps		512 kbps to 2 Mbps		2 Mbps to 4 Mbps		4 Mbps to 8 Mbps	
	1:50	1:25	1:50	1:25	1:50	1:25	1:50	1:25
Increase in consumption:	-		1,750		1,375		1,375	
Consumption (kbps)	10	20	18	36	25	49	34	68

In view of the above suppositions we can project the following estimates for the difference between the retail prices of the PT Group and the wholesale prices paid by ISPs as a function of consumption:

**Table 1.** Consumption at 1/50 contention (13 thousand clients)<sup>3</sup>

	512 kbps		2 Mbps		4 Mbps		8 Mbps	
	Price	%	Price	%	Price	%	Price	%
Previous offer	€9.5	32%	-	-	-	-	-	-
Offer of 19 April	€12.9	44%	€10.7	36%				

<sup>3</sup> The estimated difference between the retail prices of the PT Group and the wholesale costs incurred by OSPs in the 512 kbps and 2 Mbps offers is not considered confidential since the retail prices used by ICP-ANACOM in its calculations are those currently practised on the retail market for the 512 kbps offer (since the PT Group has already publicly announced that it is to quadruple available bandwidth for the 512 kbps offer free of charge and automatically for all its clients).

**Table 2.** Consumption at 1/25 contention (13 thousand clients)<sup>3</sup>

	512 kbps		2 Mbps		4 Mbps		8 Mbps	
	Price	%	Price	%	Price	%	Price	%
<b>Previous offer</b>	<b>€6.4</b>	22%	-	-	-	-	-	-
<b>Offer of 19 April</b>	€10.7	36%	€7.4	25%				

We can conclude therefore that for the offer announced on 19 April the estimated difference between the retail prices of the PT Group and the wholesale prices of the ISPs are, generally speaking, significantly higher than the difference previously existing with the 512 kbps offer, and thus fair conditions of competition do exist.

More particularly, the estimated difference between the retail prices of the PT Group and the wholesale prices of the ISPs in the 2 Mbps offer – the offer which is expected to attract the largest proportion of clients – is approximately 14% higher than the margin available to ISPs for the 512 kbps offer, taking the two consumption scenarios into account.

In our view it is important to define a single monthly price per-Mbps for aggregated access, a change which would benefit smaller ISPs and help eliminate the barriers to entry in the broadband market.

In the light of the available information and notwithstanding future changes introduced as a consequence of changes in traffic consumption in aggregated IP access by the ISPs, we consider the monthly per-Mbps backbone access price of €160 to be fair, since it guarantees competitive conditions for the ISPs, is coherent with other existing wholesale offers, and provides the appropriate incentive for investment.

## **2. INTRODUCTION OF NEW ACCESS CLASSES FOR ATM AGGREGATED MODE AND REDUCTION OF RETAIL PRICES PER-MBPS FOR AGGREGATED ATM ACCESS**

PT Comunicações has introduced new offers in its aggregated ATM service and reduced per-Mbps retail prices for aggregated ATM access by approximately 12%.

With regard to monthly payments for local access over ATM aggregated mode it should be noted that in the analysis attached to the draft determination on the “PT ADSL Network” offer – with ATM aggregated mode of 26 August 2004, ICP-ANACOM mentioned the possibility of adopting the respective price subsequent to review of the reference offer for unbundled access to local loop installation price.

Therefore, in view of the recent reduction in the installation price of the reference offer on unbundled access to the local loop,<sup>4</sup> and in an attempt to preserve coherence between the various offers and the appropriate incentives to investment, monthly prices for local access over ATM aggregated mode have to be changed.

The maximum monthly price of local access over ATM aggregated mode should be reduced to €7.05, i.e. the current monthly rate (€9.50) minus the difference between the local loop installation price prior to the determination of 13 April 2005 (€96.26, including eligibility) and the price set in the aforementioned determination (€38), in force for two years.

<sup>4</sup> See ICP-ANACOM determination of 13 April 2005.

### **3. REDUCTION OF UPSTREAM BANDWIDTH OF CLASS 11 (2 MBPS / 512 KBPS) TO 128 KBPS, DISCONTINUATION OF CLASSES 10 AND 13, AND ACCESS MIGRATION PLAN**

According to the most recent figures (Q1 2005), competing ISPs had approximately one hundred clients in class 11 (2 Mbps / 512 kbps) and around eight hundred clients in class 10 (1 Mbps / 256 kbps); class 13 had not yet been introduced in this period.<sup>5</sup>

The offer of 19 April includes the reduction of upstream bandwidth from 512 kbps to 128 kbps in class 11 and the withdrawal of classes 10 and 13, the former automatically migrating to class 11<sup>6</sup>, with all migrations to classes 11, 12 and 14 occurring within 6 months of the introduction of the offer being free of charge.

As previously mentioned, on 29 April, PT Comunicações informed the ISPs of its “Plan for the phased reception of applications for the provision of and changes to the 2 Mbps, 4 Mbps and 8 Mbps classes”, indicating for each access in which week migration was planned to take place and the maximum bandwidth available with migration (*see* point 4 below).

The alteration of the upstream bandwidth of class 11 to 128 kbps and the discontinuation of classes 10 and 13 gave no serious cause for concern to most ISPs. Those ISPs who did comment on the matter said they would need detailed knowledge of the client migration processes, as well as at least 60 days for migration to begin, given they would need time to notify their clients and prepare their own migration procedures. Two ISPs felt that there might be some commercial interest in retaining class 10 (1 Mbps / 256 kbps), since aggregated access prices are coming down.

In its communication of 19 April, Sonaecom voiced certain concerns which were not included in its earlier communication of 8 April 2004. In the later communication the concerns and suggestions presented to ICP-ANACOM focused on the costs of the “PT ADSL Network” wholesale offer and the presentation of detailed procedures for the migration of clients to class 11. This document does however address these concerns.

#### **Reduction of upstream bandwidth in class 11**

ICP-ANACOM observes that the reduction of upstream bandwidth in class 11 means no local access class now offers upstream bandwidth of 512 kbps.

However, in view of:

- (a) the limited number of existing accesses with this bandwidth for the alternative ISPs (according to data from Q1 2005): one access for one ISP, approximately a dozen for another, around twenty for yet another and about a hundred for another);
- (b) the absence of statements expressing concerns with this question by the alternative operator with the highest number of accesses in the current class 11;
- (c) the absence of any known offers based on the unbundled local loop, with the exception of the recent Clix offer at 16 Mbps, with upstream bandwidth of 512 kbps,

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<sup>5</sup> Introduced on 9 May.

<sup>6</sup> The OSPs can migrate to another class if they wish.

ICP-ANACOM does not consider the reduction of the upstream bandwidth in class 11 as harmful to market interests, although it reserves the right to decide in the future that an offer incorporating 512 kbps upstream is necessary.

### Discontinuation of classes 10 and 13

With regard to the withdrawal of class 10, ICP-ANACOM observes the existence of a new class which, at a lower local access price, offers a downstream bandwidth four times higher with identical upstream bandwidth. Therefore, the discontinuation of class 10 does not cause any problems to the market.

Before			Now		
Class 10		€ 20	Class 12		€16,5
1024 kbps	256 kbps		4096 kbps	256 kbps	

ICP-ANACOM does not consider the withdrawal of class 13 to raise any issues as this class was only be introduced on 9 May.<sup>7</sup> With the exception of Sonaecom – which provided no reasons for the concerns it voiced – no ISP has expressed its opposition to this discontinuation.

### Migration costs

Sonaecom maintains that the migration of clients from 512 kbps and 1 Mbps to new bandwidths (2 Mbps, 4 Mbps and 8 Mbps), independent of which ISP the clients opt to use and of the wholesale service on which access is based (PT ADSL Network – IP or ATM – or the reference offer for unbundled access to the local loop) should be free.

As mentioned above, in its fax of 29 March 2005 to PT Comunicações, ICP-ANACOM accepts that the migration of clients from the 512 kbps and 1 Mbps classes to new bandwidths (2 Mbps, 4 Mbps and 8 Mbps) occur at no cost to the ISPs.

Care must be taken, however, to ensure coherence across the different offers. Therefore, the exemption from charge enjoyed by ISPs regarding bandwidth alteration requests offered for the 2 Mbps, 4 Mbps and 8 Mbps classes should be extended to all bandwidth alterations, independent of the aggregation technology and regardless of whether the alteration involves a change of service provider.

In view of the observations made by the ISPs with regard to problems in migration across these providers, ICP-ANACOM intends to conduct an analysis of the processes related with this type of migration. If necessary, it shall order changes to the current migration process, with the objective of making it quicker, easier, and more efficient.

#### 4. PLAN FOR THE PHASED RECEPTION OF APPLICATIONS FOR THE PROVISION OF AND CHANGES TO THE 2 MBPS, 4 MBPS AND 8 MBPS CLASSES

On 29 April, PT Comunicações presented its “Plan for the phased reception of applications for the provision of and changes to the 2 Mbps, 4 Mbps and 8 Mbps classes”, and expressed its willingness to hold bilateral meetings with the ISPs involved to analyse and discuss the implementation of the process.

<sup>7</sup> As indicated in PTC’s communication to ICP-ANACOM and ISPs on 2 March 2005.

Examination of the migration plans sent to the ISPs reveals that it was planned to automatically migrate clients then in class 10 as early as the week beginning 23 May, a timescale which in some cases would not allow ISPs to contact their clients to ask if they wished to move to another class of service (i.e. not 2 Mbps).

In light of the above, ICP-ANACOM views it important that the implementation of new conditions be monitored as closely as possible, with particular regard to the migration process, which should be non-discriminatory and which should allow ISPs the chance to contact their clients to determine to which class they wish to be migrated.

### **5. EFFECTIVE DATE OF CONDITIONS OF OFFER**

The changes made to prices for local access as well as aggregated IP and ATM services in the “PT ADSL Network” wholesale offer were a result of the recent introduction of classes 12 and 14 and the alteration to the upstream and downstream bandwidths available with class 11, with a consequent assessment of the effects of these new conditions. Therefore, there can be no grounds for making the conditions in the present version of the offer retroactive.

ICP-ANACOM considers, in this situation, advance notice of 30 days for the entry into effect of the conditions of the “PT ADSL Network” wholesale offer to be sufficient.

It should be noted that regulatory action should lead to the creation of structural market conditions which enable healthy competition and provide equal starting conditions for all ISPs. In this way ISPs can compete from a perspective of efficiency and, most importantly, the satisfaction of consumer interests. The activity of the regulator should never aim to promote conditions whereby certain operators are artificially favoured or prejudiced, with negative consequence for their clients or the clients of other ISPs.

Therefore, Sonaecom’s proposal that the PT Group companies be prevented from introducing retail offers for bandwidths higher than 2 Mbps, which would deprive the consumers of these companies from access to offers with higher bandwidth, cannot be accepted.

For the reasons outlined above, ICP-ANACOM saw, and continues to see, no justification for opposing the introduction, on 19 May, of the conditions of the “PT ADSL Network” wholesale offer announced on 19 April 2005 by PT Comunicações, S.A. Without prejudice to the introduction of the offer, it is however considered that certain aspects of the “PT ADSL Network” wholesale offer should be changed, in order to ensure coherence with other offers and the appropriate incentives for investment.

### **III. DETERMINATION**

Whereas:

- (a) The objectives of the regulations provided for in Article 5 of Law no. 5/2004 of 10 February, are designed to promote competition in electronic communications networks and service offers, to ensure maximum benefits for the user in terms of choice, price and quality, to encourage efficient investment in infrastructure, and to promote innovation,
- (b) by its Determination of 9 May 2005, the Board of Directors of ICP-ANACOM decided to conduct a prior hearing of interested parties for the proposed draft

determination, heard and analysed comments, and justified the decision relating to the Report on the Prior Hearing of Interested Parties for the Proposed Draft Determination on Alterations to the “PT ADSL Network” Wholesale Offer, which is an integral part of the present determination;

the Board of Directors of ICP-ANACOM, under the scope of its jurisdiction provided for in Article 6, Sections b), e) and f) of its articles of association, passed by Decree Law no. 309/2001 of 7 December, and pursuant to Article 68, Item 3, Section a) of Law no. 5/2004 and of Article 9, Sections b) and g) of its articles of association, determines:

1. that PT Comunicações, S.A. make the following changes to its “PT ADSL Network” wholesale offer within 10 working days:
  - (a) the maximum price of local access over aggregated ATM shall be set at €7.05 per month, regardless of the class;
  - (b) the exemption from charge to which ISPs are entitled for requests for alterations to bandwidth under the 2 Mbps, 4 Mbps and 8 Mbps classes shall be extended to all changes to bandwidth, independent of the backbone technology and regardless of whether the alteration involves a change of service provider (moving from one provider to another), to go into effect for a period of 6 months after the date on which the offer is altered subsequent to the final Deliberation.
2. under the terms of Articles 100 and 101 of the Code of Administrative Procedure, to submit the following to a prior hearing of interested parties, providing a maximum of 10 working days to allow those interested, if so inclined, to provide their opinion in writing:
  - (a) Order PT Comunicações, S.A. to make changes within 10 working days to its “PT ADSL Network” wholesale offer, in order to eliminate the condition that prevents PT Comunicações, S.A. from implementing migration until it has received a request for the termination of contract with the provider from which the end user is migrating; PT Comunicações, S.A. must initiate the migration process on its reception of the request for provision from the provider to which the end user is migrating.

Notice of termination must be submitted by the end user to the provider to which the user wishes to migrate, at the moment the user expresses his/her wish to enter into an agreement with the provider. This provider should, in turn, pass the notice of termination to the provider from which the user is migrating.