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Determination of 12.9.2002

Draft Decision to be adopted regarding the Net Costs of the Obligation to Provide a Universal Service

Background:

1. Decree-Law no. 458/99, transposing Directive 98/10 of 26/02 and Directive 97/33 of 30/06, similar to what has happened in the remaining Member-States (and notwithstanding an evolution of the scope, in order to follow-up technology progression, market development and changes in user demand) lists the universal service provisions, as follows:
 - a) Connection to the fixed telephone network, at a fixed location, and access to the fixed telephone service to all users who request it;
 - b) Offer of public pay phones, in sufficient number, in public lanes and in public areas;
 - c) Availability of telephone directories and telephone directory enquiry service, including the telephone numbers of fixed telephone service subscribers and mobile telephone service subscribers;
2. Pursuant to the provisions contained in article 23, paragraph 3 of Decree-Law no. 458/99, the services included in the Concession Agreement and not foreseen in Decree-Law no. 458/99 will be maintained as compulsory provisions of the concessionaire.
3. PT Comunicações (PTC), the entity that, pursuant to Decree-Law no. 219/00 of 09/09, succeeds to Portugal Telecom as concessionaire, is designated, pursuant to article 23 of Decree-Law no. 458/99, as universal telecommunication service provider, during the enforcement of the public telecommunication service concession agreement.
4. In the current context, it is the responsibility of the universal telecommunication service providers to demonstrate the negative margins and to submit them to the approval of ANACOM, which must previously be subject to an audit to be carried out by ANACOM or by an independent authority appointed by the latter (Decree-Law no. 458/99, article 12).
5. As far as financing is concerned, Decree-Law no. 458/99 establishes that, when justified, a compensation fund for the universal telecommunication service may be created, to which the entities that run public telecommunication networks and fixed and mobile telephone service providers contribute.
6. Pursuant to Directive 97/33 of 30/06, in order to effectively implement such a mechanism of distribution of the net cost of the universal service obligations, it is necessary that the Member-State determines that those obligations represent an unfair overburden to the universal service provider.

7. Considering that the sentence of 30/11/00 given by the European Court of Justice in case C-384/99 is hereby underlined opposing the European Commission to the Belgium Kingdom, namely as to the inclusion of tangible benefits in the calculation of the universal service cost and as to the inclusion of costs related to additional services.
8. Considering that the sentence of 06/12/01 given by the European Court of Justice in case C-146/00 is also underlined opposing the European Commission to the French Republic, regarding the consideration of the universal service costs during the period before liberalization, the inclusion of tangible and intangible benefits related to the universal service provision and the calculation method of the universal service costs.
9. In this context, it is also important to mention the European Commission Communication (COM 96 (608)) of 27/11 on “national regimes evaluation criteria for calculation of costs and financing of universal service in the telecommunication sector and guidelines to the Member-States on the operation of these regimes”, which contributes with specific recommendations in this domain, for instance, concerning the adoption of efficiency criteria in the calculation of the universal service costs.
10. Portugal Telecom, and later PTC, submitted two letters to Autoridade Nacional de Comunicações (ANACOM) including estimates and updates of estimates of the net costs incurred with the universal service obligations respectively for the time periods 1996-1997 (except for the 1996 fixed telephone service) and 1996-1999, regarding which this entity would like to be compensated.

Therefore and considering that:

11. It is not considered justified, namely taking into account the competition level that existed at that time, the implementation of a financing system of the universal service net costs that would require the distribution of these costs during the time period before liberalization – a position compatible with the decision of 06/12/01 made by the European Court of Justice related to the case C-146/00 (opposing the European Commission to the French Republic);
12. In 2000, there were not local and regional call offers under the regime of indirect access in the universal service provider network and up till now no call offer was made available under the regime of indirect access from pre-paid phones pertaining to the universal service provider;
13. The cost of the universal service obligations is calculated as the difference between the net costs, for an organization, associated with the universal service obligations and without those obligations (Decree-Law no. 458/99, article no. 13, no. 2) and that (pursuant to the decision of

06/12/01 given by the European Court of Justice related to the case C-149/00 opposing the European Commission to the French Republic) in the calculation of those costs, only accurate costs arising specifically and directly from the universal service provision can be considered, and allocation of inaccurate values to the different items of the universal service net cost is not allowed;

14. In the calculation of net costs, revenue and other tangible and intangible benefits arising out of the universal service provision should be considered (Decree-Law no. 458/99, article 13, no. 6), pursuant also to the above-mentioned sentence;
15. Calculation of the universal service net costs, according to the European Commission (COM 96 (608)), will have to consider the avoidable costs supported by an efficient operator. Therefore, calculation of the universal service net costs will have to consider efficiency parameters in the performance of the service in order to ensure that costs arising out of inefficient and redundant investments made in the past will not be considered as universal service costs;
16. Calculation of the cost arising out of the universal service obligations must be carried out based on prospective costs and proceeds pursuant to Directive 97/33 and also in accordance with the decision of 06/12/01 given by the European Court of Justice in case C-149/00;
17. It is important to apply a coherent timeframe throughout the whole study in order to ensure the necessary analytical accurateness avoiding, namely, the contrast between a short-term approach associated with the consideration of the existing network in the identification of the “unprofitable activities” (valued in accordance with the historic cost of assets) and a long-term timeframe for calculation of “avoidable costs” (to which would be implicit certain optimisation and efficiency patterns), such as in studies submitted to ANACOM before;
18. Allocation of common costs and part of joint costs in the calculation of the universal service net costs will have to be absolutely well-founded and the universal service provider must supply data that will allow to clearly calculate the savings arising out of the distribution of costs by the services included in the universal service provision and not included in the universal service provision obligations;
19. A clear and well-founded identification of the following must exist:
 - 19.1) profitable areas and non-profitable areas;
 - 19.2) profitable customers in non-profitable areas and,
 - 19.3) non-profitable customers in profitable areas;
 - 19.4) the profitability threshold of a customer below which a customer is considered as non-profitable;
 - 19.5) costs considered avoidable with non-profitable customers;

- 19.6) the criteria to be adopted in the consideration of a non-profitable area.
20. Certain areas, categories of consumers or public pay-phones may be considered profitable provided that exploitation of the same is expected to be economical at short/medium term;
21. A sensitivity analysis must be carried out taking into account alternative scenarios, including among others, tariff changes, efficiency gains and penetration of other services (i.e. mobile service, cable television) referring the possible effects both at the level of net costs and amount of customers/areas classified as “non-profitable” and that – provided that there are no obstacles to the tariff rebalancing – the possible “access deficit” cannot be considered in the universal service net costs;
22. Impact in revenue of changes in demand with the possible termination of the obligation to provide the universal service will have to be weighed, as well as the traffic replacement effects, construed as the percentage of originated and terminated calls in “non-profitable activities/customers” that, with the cessation of the obligations associated with the universal service provision, would still be made through other telephone lines;
23. The universal service net costs depend on the “acceptable average remuneration rate of used capital” and the rate used in the estimate of the submitted costs must be clearly identified. In addition, the capital remuneration method according to the accounting value method must be privileged, in accordance with current regulatory practice;
24. As far as the modernization of the network is concerned:
- 24.1) the European Commission (COM(96) 608) expressly refers that the costs associated with the normal network modernization should not be considered as universal service costs;
- 24.2) the depreciation policy and criteria, with repercussions in the costs of services, included in the universal service obligations, must be clearly identified;
25. The above-mentioned recitals were prepared without prejudice of any possible future disclosure, by the European Commission, of specific guidelines related to the universal service net costs calculation methodology.

The Board of Directors of ANACOM decides to carry out the prior hearing of the interested parties pursuant to articles 100 and 101 of the Rules of Administrative Procedure, determining a 10-day deadline for those parties to submit their views in writing about the Determination to be adopted with the following content:

- 1º - Not to accept compensation mechanisms applied to the time period before the full liberalization of the telecommunication market.

2° - To ask PTC to submit a well-founded demonstration of possible net costs associated with the universal telecommunication service provision.