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UNIVERSAL SERVICE CONSULTATION

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I. CONSULTATION BACKGROUND

The **Universal Service (US)** is defined as a minimum set of services, as defined in the present law, of specified quality which is available to all users regardless of their geographical location and at an affordable price.

Title V of Law no 5/2004 of 10 February (LCE) - Universal service and additional mandatory services – establishes a set of rules governing the US. It is in this respect that the legislator defines, specifically, the concept and scope of the US, determines the obligation of the US providers to adopt specific measures for disabled users, stipulates the obligation to offer a determined quality of service and affordability, and presents provisions with regard to financing and to the mechanism for designating the undertaking(s) responsible for said provision.

Paragraph 2 of article 8 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 (Universal Service Directive)¹ sets out that Member States shall use an efficient, objective, transparent and non-discriminatory designation mechanism, whereby no undertaking is a priori excluded from being

¹ Directive 2002/22/EC of the European Parliament and of the Council, of 7 March 2002 - on universal service and users' rights relating to electronic communications networks and services. Available at <http://www.anacom.pt/template20.jsp?categoryId=58695&contentId=93331>.

designated to ensure the provision of the universal service. In line with this provision, article 99 of the LCE determines that:

- The universal service may be provided by more than one undertaking, differentiated by the provisions included or by geographical area, without prejudice to provision throughout national territory;
- The process for designating providers “...*shall be efficient, objective, transparent and non-discriminatory, ensuring that no undertaking is excluded a priori from being designated*”;
- It is incumbent upon the Government, by resolution of the Council of Ministers, to designate the undertaking(s) responsible for the provision of the universal service following a tender, the regulation of which shall be approved by administrative regulation of the members of the Government with responsibility for areas of finance and electronic communications;
- The terms of said tender shall ensure that the universal service is provided in a cost-effective manner, and may be used as a means of determining the net cost of the universal service obligation.

The US encompasses various services and various undertakings may be charged with its provision, while it is incumbent upon the Government to determine the holding of a tender and to approve the rules governing the undertaking or undertakings upon which the obligation of ensuring these provision is conferred.

It is within this framework that the process of designating the provider of the US should be set out.

1. *The proceedings for failure to fulfil community obligations*

The **provision of the US is currently ensured by PT Comunicações, S.A. (PTC)** under the terms of the concession contract, in force until 2025, whose bases were approved by Decree-Law no 31/2003 of 17 February².

Considering that there was a failure to ensure fulfilment of the obligations set out in the US Directive designed to guarantee the provision of US using the most efficient and suitable approach, respecting the principles of objectivity, transparency, non-discriminatory and proportionality and seeking to reduce market distortions to a minimum, and which, as stated, aims to ensure that the designation of US providers is done using an efficient, objective, transparent and non-discriminatory designation mechanism, whereby no undertaking is a priori excluded from being designated, the European Commission (EC) concluded that Portugal did not apply, in respect of this matter, said Directive.

The EC accordingly instigated **proceedings for failure to fulfil community obligations**, which is in the pre-litigation phase and in which respect, the designation of the current provider – PTC – until 2025 is essentially put in question.

² <http://www.anacom.pt/template20.jsp?categoryId=97281&contentId=89968>.

It was the position of the Government that, prior to embarking on the procedure of designating the provider(s) of US, it is important to gauge the position of the market with respect to a set of options faced by those charged with identifying the most efficient and appropriate solution for ensuring the performance of the provisions encompassed by that service and selecting the undertaking(s) responsible for its provision.

Within the framework of this consultation various agents of the market will be sounded out as to their possible interest in being designated as providers of the US. Accordingly, although the aspects which may be relevant for the interested parties to ascertain have not all been finalised, such does not prevent that expressions of interest in the provision of this service be now compiled.

2. The community context

The present consultation comes at a time at which, in the **community context**, the EC, as it is charged periodically to do, is performing a reassessment of the functioning of the directives that make up the legislative package governing electronic communications.

The **process of reviewing the US Directive** was therefore begun **(i)** in 2005 with a debate on the scope of the US and **(ii)** continues with the process, known as the “2006 Review”, of assessing the current regulatory framework.

(i) On 24 May 2005, the European Commission (EC) published, for public consultation, a Communication on the “*Review of the scope of universal service in accordance with Article 15 of Directive 2002/22/EC*”³.

In addition to the assessment of a possible extension of the scope of the US to mobile communications services and to broadband internet access, the Communication launched a debate on the US provision, in view of the review of the Regulatory Framework for electronic communications scheduled for 2006.

Thus, in the first part of the Communication, the EC examines and assesses, as required by article 15 of Directive 2002/22/EC, the scope of the US, aiming at a possible change or redefinition in the light of technological, social and economic developments, particularly taking into account mobility and data rates. In this context, the EC concludes that neither mobile services nor broadband services fulfil the conditions for inclusion in the scope of US, there being, therefore, no justification for altering legislation in force on these obligations.

³COM(2005)203

http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/communic_reports/universal_service/com_2005_203_pt.pdf

Working Document SEC(2005)660

http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/commiss_serv_doc/sec_2005_660_staff_working_document.pdf

In the second part of the Communication, the Commission presents a set of “longer-term issues”, weighting a possible adoption of future alterations to the legal framework of the US. Such issues regard, in the context of the US, the definition of broadband internet access and of mobile communications as a future model of US provision, above the current model of network access from a fixed location for voice related and basic internet services (an issue closely related to the adoption of new technologies such as the transmission of voice over Internet (VoIP), the decisions to be taken concerning the maintenance of public pay phones and directories and directory enquiry services, the need for harmonized measures as far as users with disabilities are concerned and, also, the US’s own model of financing.

Following the public consultation, the EC published its results in April 2006 in a new communication on the Review of the Scope of Universal Service⁴, in which it concluded that there was no need, at that time, to proceed with any alteration to the scope of the US.

Accordingly, no new reasons were identified for altering its position that neither mobile communications nor broadband communications fulfil the conditions set forth in the US Directive.

⁴http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/communic_reports/universal_service/com_2006_163_final_pt.pdf and Commission staff working document: http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/commiss_serv_doc/sec_2006_445.pdf

In response to the public consultation of the Commission and taking into account the various most relevant possibilities being assessed, the Portuguese Government, in respect of the evolution of the US, assumed the following positions:

a) Inclusion of ISDN accesses and broadband access within the scope of the US

Besides the greater bandwidth available, ISDN accesses provide a range of functionalities not available in the case of analogue access because they allow:

- simultaneous access to the Internet and to voice communications;
- a larger number of supplementary services (e.g. digital selection services and DDI-Direct Dialling In);
- the use of more modern PABX;
- point-multipoint type configurations, namely, configurations which allow more than one piece of equipment to be connected to the access. With this type configuration up to 8 independent pieces of ISDN equipment can be simultaneously connected, such as PCs with ISDN cards, telephones, faxes, videophones, routers, telephone switchboards etc., although only one (using 2 channels) or two pieces of equipment (using one channel each) may make calls simultaneously.

The majority of residential customers use analogue access to the public telephone network at a fixed location to make and/or receive telephone calls and associated services, including for Internet access – a fact corroborated by information sent by the operators. At the end of 2006 around 98% of residential accesses were analogue, with basic rate ISDN accesses making up the remaining 2%. It should be noted that the primary rate ISDN accesses are essentially directed at large corporations (residential consumers do not acquire primary rate ISDN accesses).

With respect to technologies, the majority of residential customers use analogue accesses supported by copper pair, while those that intend to bundle various services such as telephone access, Internet access and access to television may opt for ADSL (voice and data) or for Cable (voice and data).

It should also be pointed out that in terms of broadband access, according to the OECD, at the end of the fourth quarter of 2006, broadband penetration in the EU(15) was 18.6 per 100 inhabitants, whereas in Portugal this value was 13.8, allowing the conclusion that European consumers using broadband service still do not make up the broad majority. Therefore, it is considered that the criteria is not fulfilled in respect of the alteration of the scope of the US, as set out in Annex V and Recital 25 of the US Directive, which in short states: *“A minority of consumers would be excluded from society by not being able to afford specific services that are both available to and used by the majority”*.

In the conditions described, it is considered that the concept of “functional Internet access” should continue to be taken as the equivalent of “*dial-up*” access to the Internet, whereby it is neither necessary nor appropriate to broaden the scope of US to cover ISDN accesses. Taking into account, further, that rates of penetration and use of broadband services in Portugal are very similar to the community average, the position is taken, in accordance with the analysis and the position of EC, not to include broadband access within the scope of the US.

b) Inclusion of mobile communication services

The high level of mobile network competition already allows the majority of end-users to access mobile communications at competitive prices.

It is noted that the penetration rate of mobile services in Portugal, in the 1st quarter of 2007, reached 117.1 per cent, above the EU average of 107.3 per cent. The level of penetration of mobile services shows that the competitive provision allows costs for consumers to be reduced, resulting in relatively affordable prices.

The affordable pre-paid packages enable lower income consumers to obtain a basic connection to the network, with 78.3 per cent of the total of 12,418,000 subscribers to the mobile service in Portugal holding pre-paid cards in the 2nd quarter of 2007. In terms of mobile service prices, it is seen, in accordance with the data published in EC’s 12th Implementation Report (SEC2007) 403 of 29.03.2007, that the prices practised in Portugal are in line with the EU25 average (€13.84, €29.01 and €48.61,

respectively for “*low usage basket*”, “*medium usage basket*” and “*high usage basket*”) – OECD concepts clarified on page 45 of Annex 2 of this Report.

In view of this data, it is concluded that most Portuguese consumers already access mobile communications according to reasonable conditions (coverage and affordability), whereby, and in line with the analysis and positions of the EC, there are no grounds for including mobile services within the scope of the US.

The Communication states, however, that in the light of the evolution of technologies and markets and in the context of the review of the regulatory framework for electronic communications beginning in 2006, consideration should be made of the debate on the future of US provision with a view to ensuring that the overall objectives remain in line with the Lisbon objectives as indicated in the Communication “*i2010 - A European Information Society for growth and employment*”.

(ii) The revision of the scope of the US is not to be confused with the revision of the US Directive itself, constituting an independent process of evaluation.

Accordingly, between 25 November 2005 and 31 January 2006, the EC launched a call for input, seeking contributions from all interested parties on possible amendments to the Directives and to the recommendation on relevant markets⁵.

⁵http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consult/review/comments/511_25_call_for_input_comp.pdf

Following the call for input, the EC launched a new public consultation in June 2006, which closed on 27 October, on the following document and its annexes:

- a) Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Review of the EU Regulatory Framework for electronic communications networks and services⁶: launches a public consultation on the future of the regulatory framework for electronic communications, explaining how the framework has delivered on its objectives, and identifying areas for change. Annexes:
- b) Commission Staff Working Document - Proposed Changes⁷: Presents and analyses the changes to the regulatory framework suggested by the EC.
- c) Commission Staff Working Document – Impact Assessment⁸: Describes the wide range of options considered for the Review of the regulatory framework and provides background for the changes proposed by the EC.

⁶ COM (2006) 334 final:

http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/communic_reports/review/pocom_2006_334_reexam_ecomm_en_acte1_clean.pdf

⁷http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consult/review/staffworkingdocument_final.pdf

⁸http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consult/review/impactassessment_final.pdf

With this exercise, the EC intended to ascertain to what degree the current regulatory framework achieved its objectives and to identify the areas where changes would be necessary, taking into consideration the evolution of the markets and technologies. One of the areas identified by the EC as needing study and possible amendment was that referring to consumer protection and the US.

In the consultation document, the EC concluded that there was a need for a fundamental review of the role and concept of the US in the 21st century, considering that the solutions would go beyond the review of the legal framework of electronic communications involving instead an approximation to the horizontal rules for protecting consumers and, in particular, users with special needs. The EC further questioned the validity of shifting the onus of supporting obligations of a social nature to commercial companies and the feasibility of the one-size-fits-all approach for the 25 Member States of the EU.

Besides this more general reflection, the EC proposed two alterations: separating network access from the provision of services and removing the obligation of providing a comprehensive telephone directory and directory enquiry service from the list of US obligations.

The proposals presented by the Commission in November 2007⁹, make no changes to the scope and provided services of the US. The proposals for change presented in the Directive focus, fundamentally, on improving the transparency and publication

⁹ See http://ec.europa.eu/information_society/policy/ecommm/tomorrow/reform/index_en.htm.

of information for end-users, facilitating the use of electronic communications by disabled users, making it easier for consumers to change provider, ensuring a minimum level of service quality and connectivity and removing redundant or obsolete provisions from the directives that remain in force.

Finally, the EC announced¹⁰ its intention to publish a **Green Paper on US** in mid 2008, proposing a fundamental reflection on the role and concept of the US in the 21st century, addressing questions on the balance between sector specific and horizontal rules for protecting consumers, and the feasibility of a one-size-fits-all approach to universal service in a Union of 25 Member States, whereby possible community legislative proposals will only be presented at the end of 2008/beginning of 2009.

3. The national context

3.1. In the national context, this Government initiative also comes at a particular moment.

¹⁰Communication of the Commission (COM(2006)334 of 29 June 2006) on the Review of the EU Regulatory Framework for electronic communications networks and services, page 10:

http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consult/review/com334_pt.pdf

Following the collapse of Sonaecom's takeover bid of PT, SGPS, SA and PT Multimédia, SGPS, SA, Portugal telecom, as announced, recently completed the spin-off of PT Multimédia.

As a consequence of the spin-off process, it is expected that current market conditions will see significant alteration, in particular in respect of the separation of copper and cable networks, with an expected increase in levels of competition in the markets.

3.2. Furthermore, in the national sphere, there are certain particularities which inevitably influence the present public consultation and which should be taken into account.

Accordingly, in the current framework, the issue of the US and its provider cannot be disassociated from the existence of a **concession contract made between the State and PTC** whose object goes beyond the US, The concession covers a broad range of provisions – telex services, fixed switched data transmission services, broadcasting services and the distribution service of telecommunications broadcast signals, telegraph services -, as well as the development and operation of infrastructures which integrate the telecommunications basic network and the establishment, management and operation of the transport and broadcasting infrastructures of the telecommunications broadcast signal.

It is important in this context to note the special affectation of the basic network to concession services and especially the US.

These specifications pose questions, which go beyond the process, *stricto sensu*, of designating the US provider, but which are of great relevancy to deliberations and decisions on the conditions associated with this designation process.

Meanwhile, it should be made clear that the launch of this consultation has no bearing, in itself, on the current concession contract and that the relationship between the State-concessioner and the concessionaire company will be appraised separately.

4. The special relevance of US in guaranteeing the effective exercise of the basic rights of citizenship

The promotion of the well-being and quality of life of the population constitutes one of the fundamental tasks of the State which, as such, is enshrined in the constitution – article 9, point d) of the Constitution of the Portuguese Republic (CRP).

In the Programme which it submitted to the Assembly of the Republic, while it is recognised that in the last fifteen years the Communications sector has seen enormous development in Portugal and that the liberalisation of markets and the introduction of new technologies has allowed the entry of new operators and new platforms, multiplying the number of networks and means by which services can be accessed, with evident consumer benefit, the XVII Constitutional Government is putting forward the need to furnish the Country with more advanced communications, with innovative services and with modalities which allow universal access by families and companies, in order to reach high degrees of quality while combating info-exclusion.

“Mobility and Communication” were accordingly chosen as one of five decisive areas for sustainable development and in this area it has been signalled that the US model needs to be the object of careful review in order to instil coverage and flexibility in the modes of provision, with attention to the conditions of effective competition and the balanced functioning of the market.

Both through the Programme of the Government, and as a consequence of the regime conferred upon it by law, in transposition of community law, the US has a special relevancy in guaranteeing the effective exercise of the basic rights of citizenship in current society and in the promotion of balanced social-economic development, enabling, in this respect, the rectification of regional imbalances.

II – EUROPEAN COMPARISONS

In order to better analyse the issue of US, it is considered relevant to present, in respect of the present consultation, a summary of information about how various Member States have dealt with this matter.

In the conditions described, and as a result of research carried out with reference to the websites of the regulators, published reports (particularly those of the European Commission) and the information obtained through the European Regulators Group (ERG) and Independent Regulators Group (IRG), information was sought on aspects including the following:

- Whether there is designation of a US provider (USP);
- Procedures for designating the USP and the entity responsible for designation;
- Period of designation.

The information obtained is presented below:

1. Designation of the US provider

Table 1– Synoptic table on the designation of providers of US at an EU level

	Connection to the Public telephone network at a fixed location and access to services	Telephone directory and directory enquiries service	Provision of public payphones	No of US providers	Facilities/services for people with special needs
Germany	No	No	No	0	
Austria	Yes	Telephone directory only	yes	1 - Incumbent	
Belgium	Yes	Yes	yes	1 - Incumbent	Yes – all telecommunications operators
Bulgaria	Yes	Yes	yes	1 - Incumbent	
Cyprus	Yes	Yes	yes	1 - Incumbent	yes
Denmark	Yes	Yes	yes	1 - Incumbent	
Slovenia	Yes	No	No	1 - Incumbent	Yes - Incumbent
Spain	Yes	Telephone directory only	yes	1 - Incumbent	Yes - Incumbent
Estonia	Yes	No	No	1 – OSP	
Finland	Designation process currently in progress				
Greece	Yes	Yes	yes	1 - Incumbent	
Holland	Yes	Yes	yes	1 - Incumbent	
Hungary	Yes	Yes	yes	5	
Ireland	Yes	No	yes	1 - Incumbent	
Italy	Connection to voice transmission in real time and narrow band data transmission	Telephone directory only	yes	1 - Incumbent	
Latvia	Yes	Yes	yes	1 - Incumbent	
Lithuania	Connection to voice transmission in real time and narrow band data transmission	Telephone directory only	yes	1 - Incumbent	
Luxemburg	No	No	No	0	

Poland	Yes	Yes	yes	1 - Incumbent	
United Kingdom				Incumbent for UK except Hull area and 1 OSP for Hull area	
Czech Republic	No (fixed access)	Yes	yes	1 - Incumbent	Yes – 3 (Incumbents and 2 mobile operators)
Slovak Republic	Yes	Yes	yes	1 - Incumbent	
Sweden	Only for access to the public telephone network	No	No	1 - Incumbent	

Source: 12th EC Implementation Report, ERG, websites of the National Regulatory Authorities

It is noted that Germany and Luxembourg chose not to designate a USP provider with the view that the market is capable of commercially offering the services/provisions encompassed by the scope of the US at affordable prices and to the specified quality. It is also noted that in Finland, while the designation process is currently underway, the obligation to provide the US falls on the undertaking which has been declared as having significant market power in respect of fixed telephone networks.

2. Procedures for designating the USP and the body responsible for designation

The procedures used for designating the USP, as well as the body charged with this designation, are given in the table below:

Table 2 – Procedures for designating the PSU and the body responsible for designation

Country	Designation Procedures		Body responsible for designation	
	Public consultation/Expression of Interest	Selection procedure	Government	NRA
Cyprus		X		
Denmark				X
Slovenia		X		
Slovakia	X			X
Spain	X		X	
Estonia		X		
Holland		X		
Hungary		X	X	
Ireland	X			X
Poland		X		X
Czech Republic		X		X
United Kingdom	X			X

3. Designation period

As shown in the table below, the period of designation of the USP differs among the various Member States, ranging from between 1 and 5 years.

Table 3

Period of designation of USP

Country	Duration
Cyprus	3 years
Slovenia	5 years
Spain ¹¹	3 and 5 years
Estonia	5 years
Holland	5 years
Hungary	4 years
Ireland	4 years
Latvia	1 year
Poland	4.5 years
Czech Republic	3 years
Romania	3 years

¹¹ The period of 3 years was fixed for the provision of the service in respect of the provision of a comprehensive telephone directory and full directory enquiry service and 5 years from the remaining services of the US.

In Italy, Slovakia, Lithuania, Norway and the United Kingdom no period is specified, although in the United Kingdom, the designation of the USP is subject to periodic reviews.

III. ISSUES REGARDING THE PROCESS OF DESIGNATING THE US PROVIDER

With the present public consultation, the intention is to: (i) collect the opinion of various market stakeholders on the issues underlying the process for designating the provider(s) of US in Portugal; and (ii) collecting expressions of interest by various market participants as to the provision and mode of provision of this service, whereas the Government shall not be bound to adopt any particular solution, even where reference to solutions may be made in the formulated questions.

The results of the public consultation will be published, while it is guaranteed that comments which respondents expressly consider confidential will be withheld. ICP-ANACOM will also prepare a document containing recommendations to the Government with a view to conducting the tender to select the provider(s) of the universal service.

Observations and comments should be presented by 02 April 2008, in writing, to ICP-ANACOM or sent electronically to prestadorsu@anacom.pt.

1. The need to proceed with the designation of the provider(s) of US

Point 3 of article 86 of the LCE stipulates that: *“It is incumbent upon the Government or the NRA, in the pursuit of their respective assignments: a) To determine the most efficient and appropriate solutions for ensuring the implementation of the universal service, whilst respecting the principles of objectivity, transparency, non-discrimination and proportionality; b) To minimise market distortions, in particular the provision of services made at prices or under other terms and conditions which depart from normal commercial conditions, whilst safeguarding the public interest”*.

It is noted that this article results from the provisions of paragraph 2 of article 3 of the US Directive and, in this context, Member States do not have to designate a provider

of the US for part or all of the US, if they consider that the US objectives, specifically with regard to affordability and the offer of a determined minimum level of quality, are met by the market.

Currently only two Member States, Germany and Luxemburg, have so far decided not to designate a provider for the entire US, whereas, in such situations and as stressed by the European Commission¹², the provision of these services require strict supervision.

Furthermore, in accordance with the information obtained, certain EU countries have opted not to designate a US provider for some of the services included in the minimum set of services (see the information presented in section II with regard to European comparisons).

It is important to note that the option of whether or not to designate a provider for all or part of the US and for the entire national territory or for some geographical areas, should take account of the following:

- a)** The existence of conditions in the market which allow its various agents to ensure, for the whole or part of the US, the offer of a minimum set of services according to currently defined conditions (especially in terms of affordability and appropriate quality).

¹² See page 61 of Volume 1 of the 12th Report of the European Commission on “*European electronic communications regulation and markets*” of 29.03.2007 available at http://ec.europa.eu/information_society/policy/ecomms/doc/implementation_enforcement/annualreports/12threport/sec_2007_403.pdf.

- Connection to the public telephone network at a fixed location and access to publically available telephone services at a fixed location;
 - Provision of a comprehensive telephone directory and a comprehensive telephone directory enquiry service;
 - Adequate provision of public pay telephones; and
 - Provision of facilities and services for people with specific social needs.
- b)** Verification, especially, with respect to the analysis of relevant markets, of sufficient determined obligations or of the need to impose or alter such obligations in order to ensure the provision of part or all of said minimum set of services (issue analysed in other points in the present document).
- c)** Assessment, where the scope of the US is broadened, of the existence and of the sufficiency of conditions on the part of market participants in the guarantee of the offer of the set of designated services (issue analysed in other points in the present document).
- a)** *Assessment of the existence of conditions in the market which allow the continuity, in current circumstances, of the offer of a minimum set of services and the availability of facilities and services for disabled users*

Article 87 of the LCE defines the minimum set of services which shall be available according to the scope of the US:

- Connection at a fixed location to the public telephone network and access to publicly available telephone services at a fixed location

In accordance with the provisions of paragraph 1 of article 88 of the LCE, connection at a fixed location to the public telephone network and access to publicly available telephone services at a fixed location should allow end-users to make and receive local, national and international telephone calls, facsimile communications and data communications, at data rates that are sufficient to permit functional Internet access.

It is seen that at an EU level the majority of Member States have designated one or more providers for this service.

Taking into account that in Portugal, direct access essentially covers the urban zones and that the level of competition in the other regions is incipient, whereby there is no guarantee that these services would continue to be provided in currently defined conditions, it is considered that it is necessary to proceed with the designation of a provider or providers of the US in respect of said services.

- *Provision of a comprehensive directory and of a comprehensive telephone directory enquiry service*

Several directory and other information services have appeared on the market, through an increasingly diversified range of offers, supported by new technological platforms (Internet, IP solutions and 3rd generation mobile communications solutions)

However, these offers have limited scope, basically providing the personal details of subscribers, not therefore satisfying the need for a comprehensive directory and for a comprehensive telephone directory enquiry service, with a view to guaranteeing the appropriate use of communication services.

At an EU level, in accordance with the information given in table 1, six countries have considered it unnecessary to proceed with the designation of a provider or provider(s) of US for the provision of a comprehensive directory and for a comprehensive telephone directory enquiry service.

While, at an EU level, there is an apparent trend not to designate a provider of US for these services, in Portugal there is no product in competition to the “brancas” (White) telephone directory. In light of the past need for ICP-ANACOM to intervene in order to guarantee that directory services include information on all the subscribers to the publically available telephone services, not designating a provider for these services in respect of the US would probably not ensure the interests of users and would possibly give rise to conflicts between operators. Accordingly, in the current context and given the lack of other comprehensive solutions, it is considered relevant that designation is made of a provider or providers of US to ensure the production and provision of the directory and enquiry services within the scope of the US.

- Adequate provision of public pay telephones

The growing offer of terminal equipment and of fixed and mobile services at affordable prices, as well as the proliferation of public locations with Internet access, minimises the need to designate a provider or providers of US in respect of the provision of public pay telephones throughout the national territory and may even make such designation unnecessary.

It has there become necessary that the obligation for the “adequate provision of public pay telephones” reflect this, in order that its maintenance in strictu sensu does not give rise to an increase in the cost of these services resulting from the decline in its use and so that it does not, in itself, hold back the development of other solutions. Not designating a US provider for this service does not appear, in the current Portuguese context, to be the best solution, given the certainty that the scope of this US obligation is to be reduced, at the very least, to the maintenance of public pay telephones in specific locations such as hospitals, prisons, emergency phones on motorways, areas not covered by the mobile network and places where the use of mobile services is prohibited.

The public payphone service continues to be considered as having special relevance for populations which find themselves away from their place of residence (such as tourists and workers) and further for more elderly citizens, citizens with lower incomes and citizens with lower educational level. In this context, it is worth recalling the determinations of ICP-ANACOM in this area,

specifically: (i) the determination of 14.12.2004¹³ on the imposition of obligations on narrowband retail markets which maintains the obligation of: having a relation of 1 to 3 in price between calls originated from public pay telephones and from subscriber telephones and, (ii) determination of 15.07.2004¹⁴ which establishes the following:

- The obligation of the US provider to guarantee that public pay telephones allow access, free of charge, to the different emergency systems, using the single European emergency call number “112” and other emergency and helpline numbers defined in the National Numbering Plan, without the use of coins, cards or other means of payment and which allow access to a comprehensive directory enquiry services according to the terms defined in point c) of paragraph 1 of article 89 of the LCE;
- The obligation for the disclosure of the procedure concerning the return of change in all public pay phones, or at a nearby location where this is not possible;
- A declaration on the development strategy for the public pay phone park;
- When a new public pay phone is installed, that the US provider sets off the installation in terms of universal access and dynamises the implementation of facilities adapted for users with special needs;

¹³ <http://www.anacom.pt/template31.jsp?categoryId=216105>.

¹⁴ <http://www.anacom.pt/template31.jsp?categoryId=224562>.

- Where the US provider intends to withdraw public pay phones, it shall display a visible notice regarding such withdrawal, at the public pay phones to be withdrawn or, where this is not possible, at a location close thereto, and at the least one month ahead of the date of withdrawal;
- The recommendation that prior to possible action that may result in the withdrawal of all public pay phones installed at a given location, the US provider hears the users who are potentially affected, consulting for this purpose, namely, the respective local authorities or, where a location of a special social interest is concerned, the respective responsible entities.

the position is taken that the designation of a provider or providers of US for the installation and operation of public pay telephones within the scope of the US and the obligations described above continue to have relevancy.

It is noted that said position is further reinforced by the fact that a reduced level of competition is being seen in the provision of these services and that there is a need to ensure the accomplishment of the objectives of the US, specifically in respect of affordability and the offer of determined minimum quality.

- Availability of facilities and services for disabled users

Besides the minimum set of services set out in article 87 of the LCE, in accordance with article 91 of the LCE, the US provider shall make available specific provisions in order to ensure that end-users with disabilities enjoy access that is equivalent to that enjoyed by other end-users.

It should also be noted that paragraph 2 of article 91 of the LCE gives as examples of specific provisions: the provision of telephones and/or public text telephones or equivalent measures for people who are deaf or who have speech-impairment; the provision of services such as directory enquiry services or equivalent measures free of charge for blind or visually impaired people; provision of itemised bills in alternative formats upon the request of a blind or visually impaired person.

The provider of the US currently provides a diverse offer to customers with special needs, including for example: 112 service for deaf or speech-impaired citizens, *PT118 Braille* service, *PT Decibel* (for customers with hearing difficulties), *PTVoz Activa +*, *PTVoz Activa Zoom*, *Factura Braille* (Braille billing), Lines to fixed subscriber numbers, *Programa Aladim*, *PTMinha Voz – Grid*, *Telefone de Texto Q90* (text phone), *PTMinha Voz IntelliTalk II*, *PTAmplificador Portátil* and *PT TeleAula*. Also on this point, it should be pointed out that the determination of ICP-ANACOM of 14.02.2004 on the imposition of obligations in retail markets maintains the obligation of the US provider to make available microphone amplifier equipment and call warning lights, free of charge, for the use of customers with special needs.

Taking into account that this specific segment has not been actively targeted by the market and that it will be difficult to provide conditions of normal commercial operation, it is considered necessary to continue to designate a provider or provider(s) of the US in order to guarantee the minimum provision of current facilities and services to persons with specific social needs.

In light of the above and in respect of the minimum set of services and the facilities and services available to persons with specific social needs, it is considered that the designation of a provider or provider(s) of the US is necessary throughout the national territory and not merely in determined geographical areas.

Without prejudice, there may be determined areas considered “economic areas” (e.g. large cities) and other “non-economic areas” (e.g. rural areas in the interior of the Country and certain areas of the Autonomous Regions of the Azores and Madeira), while at the moment and in respect of the preliminary conclusions set out above, it is seen as fundamental to proceed with the designation of a provider or providers of US throughout the national territory, whereas such designation may be disaggregated by geographical zone, with analysis later in this document.

Accordingly the following questions are put:

- Question 1 – Do you consider it necessary to proceed with the designation of a provider or providers of the US in the current Portuguese context?
- Question 2 – Do you agree with the preliminary position that it is necessary to continue with the designation of a provider or providers of the US for the minimum set of services: connection at a fixed location to the public telephone network and access to publicly available telephone services at a fixed location; provision of a comprehensive directory and of a comprehensive telephone directory enquiry service; adequate provision of public pay telephones? If you disagree, please indicate which service or services you consider do not require designation, giving reasons.
- Question 3 – Do you consider that it is necessary to designate a provider or providers of US for the entire national territory or just certain geographical areas? If you consider that designation should only cover certain geographical areas, which areas should be covered?
- Question 4 – Do you consider it necessary to review the set of facilities and services made available by the provider of US to disabled users?

2. Designation of one or more providers of US

Paragraph 1 of article 99 of the LCE stipulates that: *“The universal service may be provided by more than one undertaking, differentiated by the provisions included or by geographical area, without prejudice to provision throughout national territory”*.

Meanwhile in the EU, most Member States have designated a single provider of US, with the incumbent operators of the telephone service at a fixed location being designated in the majority of cases.

The decision to designate one or more US providers must be based on the analysis of the advantages and disadvantages of each one of these options, given that the option of designating a single provider of US presupposes no disaggregation by service, geographic zone or class of user.

It is noted that the main advantages of designating a single provider of US are a greater economy of scale and range and a consumer perception and message that is more straightforward in respect of the services offered (a single agent).

On the other hand, the designation of more than one provider of US requires disaggregation by service and/or geographic zone and/or class of users in the provision of the US.

Accordingly, there has to be an analysis of whether or not there are advantages in proceeding with disaggregation by service and/or geographic zone and/or type of users in the provision of the US.

a) Disaggregation by service

In this respect, an assessment is made as to whether the designation of the provider of US should be made for the totality of the minimum set of services or disaggregated by services (connection at a fixed location to the public telephone network and access to publicly available telephone services at a fixed location; provision of a comprehensive directory and of a comprehensive telephone directory enquiry service; adequate provision of public pay telephones).

While it is certain that the act of disaggregation of services would encourage, from the beginning, a greater number of interested parties and therefore greater competition in the proposals to be presented, on the other hand, and with regard to the criteria of overall efficiency of the market, this might not be the best option, given that, in general, the provision of the services by a single company will be more efficient than were each service to be provided in isolation by different companies.

Taking into account that there are clear economies of scale in the joint provision of the services of connection at a fixed location to the public telephone network and access to publicly available telephone services at a fixed location and in the adequate provision of public pay telephone, in particular as a result of distributing costs arising from the extension of the network to less profitable areas (such as rural areas or areas of low subscriber density), it is considered that it would be advantageous for these two services to be provided by the same company.

As far as the provision of a comprehensive directory and of a comprehensive telephone directory enquiry service is concerned, these constitute two forms of providing a single information service to users which have the same subscriber database in common. Accordingly and depending on the complexity of the development and costs associated with building a database, whether for one service or the other, there may or may not be economies of scale in the operational development of these two services, whereby it is reasonable to allow from the outset that there is a possibility of these two services being provided either by distinct undertakings or by a single undertaking.

In the event that, in the designation of the provider(s) of US, disaggregation by service is adopted, it is considered that the possibility be set out of not restricting access to the tender for the designation of the undertaking(s) responsible for the provision of a comprehensive directory and of a comprehensive telephone directory enquiry service within the scope of US to providers of electronic communication services. It is noted, however, that such is in line with the position expressed by ICP-ANACOM in the draft decision on the allocation of rights to use numbers in the "18xy" range, paragraph one of which provides for the possibility that these rights may be allocated to all companies providing electronic communications networks and services, as well as to those who use such networks and services.

b) Disaggregation by geographic zone

It is noted that disaggregation by geographic zone can be applied only to determined services or set of services of the US, given that from the outset it is not seen that any advantage or usefulness may be derived to its application in respect of the provision of a comprehensive directory and of a comprehensive telephone directory enquiry service.

It is further noted that in accordance with the information compiled at an EU level, the provision of the US has been allocated on a national basis with the exception of Hungary where 5 geographic zones were determined.

b) Disaggregation by type of user

The designation of the providers of US may also be made by type of user, whereby exclusivity might be given to a determined provider in the provision of US services to determined types of user (e.g. only to people with incomes up to a determined amount; only to retired people and pensioners, etc).

However, it is considered that this disaggregation could complicate the relationship of the provider with users, while at the same time perhaps reducing efficiency in the computation of the US.

- Question 5 – Do you consider that a single provider of the US should be designated for the entirety of national territory?
- Question 6 – In the event that there is a possibility of designating more than one US provider: (a) Do you consider it appropriate that designation be made by type of service? And with what level of disaggregation? (b) Do you consider it appropriate that designation be made by geographical areas? If so, should this apply to all US services or only some of them? What geographical criteria should be followed? (c) Do you consider it appropriate that designation be made by type of user? What criteria should be followed?
- Question 7 – Do you accept the possibility of extending the provision of the telephone directory service to other companies which do not offer electronic communication networks or services?

3. Period of designation of the provider(s) of US

From the information compiled and presented in section II of the present consultation (European comparisons), it can be seen that the designation of the providers of US was made for periods of between one and five years.

In the definition of the period for which the designation of the provider of the US is made, consideration should be made, on the one hand, to the determination of a period that is of significant duration to be attractive to those potentially interested in the provision of the US and, on the other, not so long, in order that “accommodation” might be avoided and that there is no long term restriction on the possible entry of a new provider or providers of US.

→ Question 8 – What period do you consider to be best aligned with the interests of the various market stakeholders, including operators and consumers?

→ Question 9 – In the event that designation of the provider(s) of the US is disaggregated by service and/or geographic zone and/or type of user, do you consider that different periods of duration should be set? If so, please specify the periods to be defined and the reasons for the differences.

4. The possibility of mandatory designation of the provider(s) of US

Paragraph 2 of article 99 of the LCE sets out that the process of designating the provider(s) of US shall be efficient, objective, transparent and non-discriminatory, ensuring that no undertaking is excluded a priori from being designated. As established in paragraph 3 of the same article designation shall occur following a tender, the terms of which shall ensure that the universal service is provided in a cost-effective manner.

These provisions transpose paragraph 2 of article 8 of the US Directive, in which it is recognised that *“in accordance with the principle of subsidiarity, it is for Member States to decide on the basis of objective criteria which undertakings have universal service obligations (...) taking into account the ability and the willingness of undertakings to accept all or part of the universal service obligations.”* – see Whereas (14).

Accordingly, the Directive does not tie Member States to a specific process of designation but determines that States use “... *an efficient, objective, transparent and non-discriminatory designation mechanism, whereby no undertaking is a priori excluded from being designated.*”

As evidenced in Whereas (14) of the US Directive, the “...*development of greater competition and choice provide more possibilities for all or part of the universal service obligations to be provided by undertakings other than those with significant market power. Therefore, universal service obligations could in some cases be allocated to operators demonstrating the most cost-effective means of delivering access and services, including by competitive or comparative selection procedures. Corresponding obligations could be included as conditions in authorisations to provide publicly available services.*”

Given this framework, the designation of the provider(s) of US through a tender was the mechanism chosen by the national legislator from the various options which were available under the US Directive.

But what would happen if the tender received no response or if, on its completion, none of the proposals presented had the potential to satisfy the minimum demands to which the designation of the provider(s) of US was subject, according to the regulation of the tender?

The Government could not refrain from exercising its powers in order to ensure the implementation of the US.

The LCE does not, in express form, provide for any solution to this situation, while it does leave the Government some room for manoeuvre, within the framework of its remit, to adopt the most efficient and appropriate solutions in order to ensure the implementation of US (article 86 of the LCE).

With respect to this framework, might it be possible for the government to make a “mandatory” designation of the undertaking responsible for the provision of the US? Under the terms of the Directive – Whereas (14) – Member States have the power to decide which undertakings have US obligations “*where appropriate taking into account the ability and the willingness of undertakings to accept all or part of the*

universal service obligations" (now underlined). To this purpose, see the compilation of the experiences in other Member States, set out above.

The solution to be adopted by the Government with respect to this matter will be that which results from the balance between the need to ensure the provision of a determined set of minimum services to all users at an affordable price and the enshrined freedom to offer electronic communications services and networks, or at a broader level, the freedom of private economic initiative which is enshrined in the constitution.

It is considered that in these situations direct designation should be made of the operator holding significant market power in the markets of access to the public telephone network, that is, one (or various) companies of Grupo PT.

The possibility of making mandatory designation of the US should be clarified in the tender regulation, which shall be approved by administrative regulation of the members of the Government with responsibility for areas of finance and electronic communications (paragraph 3 of article 99 of the LCE).

In this light, the following question is put:

- Question 10 – Should provision be made for the possibility of mandatory designation of the US provider? Based on what criteria?
- Question 11 – If you do not accept the “mandatory” designation of the US provider, under what terms and in what form do you envisage that the provision included in that service might be guaranteed, in the event that no undertaking responds to the tender or that the proposals do received not comply with the terms established in the regulation of said tender?

5. On the admissibility of a pre-qualification in respect of the tender of designation of the provider(s) of US

It is set out in paragraph 4 of article 99 of the LCE that the terms of the tender of the provider of the US shall ensure that the universal service is provided in a cost-effective manner.

The services to be provided within the scope of the US obey a set of demands, without which the pursuit of the objectives to be achieved through the implementation of the US is put in jeopardy.

Such motives can provide justification for the sounding out, in respect of designation as provider of US, undertakings, which by their characteristics – size, technical means and structure – are capable of guaranteeing the provisions of this service in accordance with the determined quality and availability and with affordability.

The development of greater competition would provide more possibilities for all or part of the US obligations to be provided by a greater number of undertakings, whereas the Government cannot but ensure that this service is provided efficiently, ensuring that the needs of the respective users are satisfied and preventing inefficiency costs, which, through the compensation mechanisms set out in article 97 of the LCE, might be supported by public funds or have repercussions for other bodies.

Furthermore, in the same respect, the US Directive states, that it is important that the US obligations are fulfilled in the most efficient fashion so that users generally pay prices that correspond to efficient cost provision (see Whereas 14)

With such grounds it can be argued that companies should only be allowed to tender where they demonstrate compliance with a set of pre-requisites considered essential to ensure the provisions encompassed by the US in accordance with legally defined demands.

However, it might also be argued to the contrary that paragraph 2 of the US Directive and paragraph 2 of article 99 of the LCE forbids that any undertaking is excluded a priori from being designated as US provider. Moreover, in support of the idea of

enacting a tender pre-qualification, it can be argued that the verification of pre-requisites for the qualification of companies which seek to tender, represents, in reality, a preliminary selection phase.

Accordingly the following question is put:

→ Question 12 – Should there be, in respect of the tender for selecting the undertaking responsible for the provision of the US, a phase of pre-qualification demanded of the companies? What type of requisites should be demanded?

6. Concerning the juridical-administrative relationship to be established between the provider(s) of the US and the State

Sectoral law does not make any pronouncement on the act which should govern the administrative relationship between the State and the designated provider(s) of the US, while the LCE merely sets out that the designation of the provider(s) be made by resolution of the Council of Ministers, thereby leaving the Government free to opt for the form that it considers most appropriate for the establishment of this administrative relationship.

From the perspective of Community Law, the US Directive presupposes that in choosing the undertaking responsible for the provision of this service the state shall, where appropriate, take into account “...*the ability and the willingness of undertakings...*” to accept the US obligations. However, it does not set out any type of specific act for this relationship, even though it is set out in Whereas (14) that “*Corresponding obligations could be included as conditions in authorisations to provide publicly available services.*”

As the administrative approach shows “*there are effectively cases in which the Administration enters into relationships with individuals through the mechanism of unilateral act, following acceptance of the individual; but there are other cases where, instead, the juridical relationship between the Administration and the individual is born from a voluntary agreement, from a true contract*”. Diogo Freitas do Amaral, in *Direito Administrativo*, volume III, Lisbon, 1989, page 424).

Currently the US is ensured by PTC pursuant to an administrative contract – concession – which sets out the various services which the concessionaire company is responsible for providing, the recognition of rights, the various mechanisms for adapting the concession, inspection and the penalties incurred as a result of non-compliance with the terms of the concession.

The US is only one of the various services which are encompassed by the concession contract, as mentioned above.

The concession currently in force (already the object of amendment) results from a decision taken by the legislator in Law no 88/89 of 11 September, which law approved the Bases of the establishment, management and operation of telecommunications infrastructure and services in force upon the date the contract was made. In the execution of the provisions of this Law, Decree-Law 40/95 of 15 February gave approval to the bases of the concession of the public telecommunications service to be agreed with Portugal telecom, later amended by Decree-Law no 31/2003 of 17 February, subsequent to the deassignment of the basic network and its dismissal.

Likewise in the LCE there is no stipulation in respect of the type of juridical-administrative relationship which shall be established between the State and the provider(s) of the US and as such there is support that this is based on an administrative act *stricto sensu* or on an administrative contract. Despite their differences, both forms envisage the volitional element presupposed in the process of tendering for the designation of the provider(s) of the US.

At issue is the choice between a unilateral act, such as the administrative act *stricto sensu* or a bilateral act involving a negotiation resulting in the fulfilment of objectives as far as each one of its clauses is concerned. This second path makes it possible that the State and the provider(s) of the US harmonise, reciprocally, the interests which each one has in the actual situation at issue, with such implying the possibility of obtaining considerations from the provider(s) of the US which could not be demanded through other means, or to provide it or them with that which might not be granted through an administrative act.

The choice between one or other solution will arise from the specifics of the regimes inherent in each and from the identification of the solution that is more conducive to the pursuit of the objectives. In such reflection it is important to take account of the particularities of the regime of one or other mode, keeping in further consideration, not only the expected entry into force, within a relatively short time-frame, of a new Public Contracts Code, but also the possible measures which may be adopted as a consequence of any legislative intervention by the European Union in respect of private-public concessions and partnerships.

Also with relevance to the choice of solution to be adopted might be a decision of the Government to make use of the designation process which it intends to launch to award the provision of additional obligatory services under the terms of the provisions of article 100 of the LCE.

Whichever solution is advocated, the process of designating the provider(s) of US cannot fail to follow the rules set forth by article 99 of the LSE and if it is the position of the State to opt for the contractualisation of this relationship, such act shall also be subject to the rules of public contracting, whereby there must be harmonisation between the regime of the tender regulation and the regime of public contracting which is then in force.

The demands of objectivity, transparency and non-discrimination presuppose that it is known, from the outset, in what situations and with basis in which presumptions the designation of the provider(s) of the US might occur under these terms.

In light of this framework, it is important to reflect on the possible solutions and in this context the question is put:

→ Question 13 – What type of juridical-administrative relationship should be established between the provider of the US and the State? Administrative contract? Or should designation be made by administrative act?

7. Establishment of the guarantees for ensuring the permanence and continuance of the service and special clauses on issues such as the abnormal alteration of circumstances, reposition of balance, power of inspection and direction, and unilateral modification.

As previously stated, the provision of the US is bound by the rules which are currently defined in the LCE and in the bases of the concession in annex to Decree-Law no 31/2003 of 17 February. The provisions of the LCE fundamentally govern the minimum set of services which shall be available within the scope of the US, defining the terms by which the obligations of the provider(s) of US should be fulfilled. Both pieces of legislation, although with different perspectives, set out mechanisms for sanctioning situations of non-compliance with the obligations to which the provider(s) of the US is/are subject.

In the concession contract various mechanisms are set out for reacting to failures to comply with the objectives therein, under the terms of which, articles 28, 30 and 35 of the bases in annex to Decree-Law no 31/2003 set out that breach of the contract may give rise to fines under the contract (by decision of ICP-ANACOM), to seizure of the concession, in which case the State could take responsibility for the development of the activities and provision of the services encompassed by the concession or to rescission of the concession, only applicable in the event of a serious, ongoing and irredeemable breach of the obligation of the concessionaire.

Further to the provisions of the concession contract currently in force, the provisions of the LCE permit ICP-ANACOM to intervene in respect of the provider(s) of US in order to guarantee the services, the provision of which, in this respect, is the responsibility of the provider(s), with observance of the stipulation of price, quality and availability as set out in the law.

For such purpose, any failure to comply with the obligations binding upon the provider(s) of US in respect of access to the network and telephone service at a fixed location, in respect of directories and enquiry services, of public payphones, of measures for users with disabilities and in respect of the quality of service constitutes a breach. Specifically in respect of the quality of service, paragraph 5 of article 92 of the LCE provides that ICP-ANACOM, following the general consultation procedure, may set performance objectives applicable to the different obligations of the universal service.

In terms of supervision and inspection, the LCE establishes, in articles 110, 111 and 116, a range of mechanisms for resolving and redeeming breach situations, while in this regard ICP-ANACOM may apply mandatory pecuniary sanctions in respect of failure to observe its decisions which order the adoption of determined measures.

It may be questioned as to whether these mechanisms, in conjunction with the provisions of the Code of Administrative Procedure (CPA) are appropriate and sufficient for ensuring access to and the permanence and continuance of the services encompassed by US and for equipping the regulator with the means necessary to appropriately inspect and direct the designated provider(s).

Are there grounds for the adoption of measures which guarantee such provision with immediacy when the designated provider or providers fail to comply with their obligations? Should there be provision for or imposition of specific guarantees in order to ensure the permanence and continuance of the service?

Might additional measures be envisaged which could achieve these results, which, in accordance with the principles of objectivity and transparency which govern the designation of the provider(s) of US, should be explained from the outset of the selection process?

The same occurs in respect of the provision of mechanisms for adaption in situations which stem from an abnormal alteration of circumstances or which demand the rebalancing of the positions – of the State and of the designated provider(s) -, present at the time of the designation of the provider(s) of US.

For such cases, the concession bases in force set out mechanisms of modification and termination of the contract when circumstances arise, which, by their importance and effects shall be considered as abnormal alteration of circumstances under the terms of article 436 of the Civil Code. The concession contract sets out that in the eventually that, during its continuance, facts arise which by their importance and effects shall be considered as abnormal alteration of circumstances, the parties undertake to carry out a revision of the contract in accordance with the principles of good faith and fairness. Whereas, where due to lack of agreement, such revision is not feasible, the contract provides for recourse to an arbitration court.

In the LCE there is not mechanism of a nature identical to that set out in article 33 of the concession bases, whereby it may be argued that there are grounds for one to be included.

Reflecting on the measures which, at this level, there are grounds to adopt, consideration must be made of the type of administrative relationship to be established between the State and the provider(s) of US, as well as the specific mechanisms for adapting this relationship, which mechanisms might be included in the contracts and administrative acts – see, for example the particularities of the regime enacted by the CPA for the alteration of the administrative act and administrative contract, or for the forced execution of provisions.

Within this framework, the following question is put:

→ Question 14 – What type of guarantees should there be for ensuring the permanence and continuance of the service? And does it make sense to include special clauses on issues such as the abnormal alteration of circumstances, repositioning of balance, power of inspection and direction, unilateral modification, etc?

8. Functional access to the Internet

As established in paragraph 1 of article 86 of the LCE, the US consists of a minimum set of services, as defined in the law, of specified quality which is available to all users regardless of their geographical location and at an affordable price.

The minimum set of services which are currently included within the scope of the US is set out by article 87 of the LCE - Connection at a fixed location to the public telephone network and access to publicly available telephone services at a fixed location; Provision of a comprehensive directory and of a comprehensive telephone directory enquiry service and the adequate provision of public pay telephones.

Of this minimum set, paragraph 2 of article 88 of the LCE specifies in the terms of connection to the public telephone network that such “(...) *shall allow end-users to make and receive local, national and international telephone calls, facsimile communications and data communications, at data rates that are sufficient to permit functional Internet access, taking into account prevailing technologies used by the majority of subscribers and technological feasibility*”.

It is further noted that Whereas 8 of the US Directive states that this connection is limited to a single narrowband network connection, the provision of which may be restricted by Member States to the end-user's primary location/residence, and does not extend to the Integrated Services Digital Network (ISDN). It is further stated in the same Whereas that: “*The speed of Internet access experienced by a given user may depend on a number of factors including the provider(s) of Internet connectivity as well as the given application for which a connection is being used. The data rate that can be supported by a single narrowband connection to the public telephone network depends on the capabilities of the subscriber's terminal equipment as well as the connection. For this reason it is not appropriate to mandate a specific data or bit rate at Community level.*”

It therefore falls to each Member State to define the concept of “*functional Internet access*”, whereby the majority of countries, including Portugal, have considered such as being the equivalent to “dial-up” Internet access. Exceptions to the rule are the

cases of Denmark, Estonia, Slovenia, Hungary, Ireland, United Kingdom, Romania and Sweden which have determined the reasonable minimum data rate as: 128 kbit/s (DK), 56 kbit/s (EE), 33 Kbit/s (RO), 28.8 kbit/s (SL, IRL and UK), 20 kbit/s (S), 9.6 kbit/s (HU). It is further noted that in Spain, the minimum connection speed has to be equivalent to the speed of connection already offered to the users of telephone services at a fixed location to the network over copper pair or modem.

It is noted that setting a definite data rate value may place a restriction on possible applications to the provision of US, especially by excluding, from the outset, the use of wireless technologies (particularly mobile networks), whereby this issue should be placed in consultation.

Accordingly the question is put:

→ Question 15 – Do you agree with the preliminary position with regard to the concept of “functional Internet access”? Do you consider the fixing of a definite data rate to be relevant?

9. The way in which the terms of the tender should safeguard the evolution of the scope of US

The scope of the US may be varied, implying its extension or reduction. Such eventualities cannot be excluded from consideration in respect of the present consultation.

As far as the financing of the costs of the US is concerned, it is noted that any alteration to the scope of obligation of the US may be reflected in the financing of its net cost, in respect of which, under the terms of the US Directive – compensation may only be made from public funds or through the sharing of the cost between other undertakings which provide publically available electronic communications networks and services in the national territory – see article 13 of the US Directive and its transposition in article 97 of the LCE.

Member States are not authorised to impose financial contributions on market participants in respect of measures which do not form part of the obligations of the US, while special measures may be imposed (outside the scope of the obligations of the US) – obligatory additional services – which shall be financed in accordance with community law, but not through financial contributions of market participants – see article 100 of the LCE and article 32 of the US Directive.

With regard to the award of new US provisions, there are several possibilities that might be enacted, whereby there are grounds for reflection on the arguments for and against each one, in order that a conclusion might be reached as to what the effects of a revision of the scope of these services might have on the designation of the undertaking(s) designated to provide the remaining services. Under these terms and according to these limits, there are grounds for awarding the new services to said undertaking(s) or embarking on a separate designation process.

As far as the exclusion of provisions from the scope of the US is concerned, there needs to be reflection as to the effects that such exclusion would have on the beneficiary users of this service and on the relationship between the State and the undertaking(s) designated to provide it.

Accordingly the question is put:

- Question 16 – In what manner should the terms of the tender safeguard the evolution of the scope of the US?
- Question 17 – What do you consider to be the necessary consequences of an alteration to the scope of the US in respect of the act of designation of the undertaking(s) responsible for its provision? Should such determine the modification (expansion or reduction) of the act of designation of the provider(s) of US or should it imply its cancellation? With what grounds in fact or law should such modification or cancellation be based?

→ In what situation do you consider that the alteration of the scope of the US should determine the opening of a new process of designation of the undertaking(s) responsible for its provision?

10. Affordability

As set out in the LCE (art 93), affordability of the US shall be guaranteed by ICP-ANACOM, which Authority shall evaluate and decide on the most suitable means by which affordability may be guaranteed, whereby it may determine: (i) the availability of tariff options or packages other than those offered under normal commercial conditions; (ii) the imposition of price caps and the application of common tariffs, including the geographical uniformity of prices throughout the national territory; or (iii) other similar schemes, ensuring, in the event that any of the said measures are imposed, that the conditions practised are totally transparent and published and are applied in accordance with the principle of non discrimination.

The same article further sets out that, besides the measures mentioned above, other measures may be introduced, alternatively or cumulatively, to support consumers identified as having low income or special social needs.

In determination of 14.12.2004 on the imposition of obligations on the narrowband retail market, ICP-ANACOM considered the application of a price control mechanism of the “price-cap” type as being appropriate to the nature of the market (especially the circumstance of such being in a mature phase, special relevancy being given to cost efficiency), enabling the guarantee of affordability and avoiding excessively intrusive or bureaucratic regulation.

In accordance with the “price-cap” mechanism, usually set for multi-year periods, the company may not raise prices more than by the rate of inflation less a determined percentage per year. In this respect, ICP-ANACOM considered that in general, regulation by price cap $CPI - X\%$ offers clear incentives to the operator to minimise its costs, noting that where the company manages to reduce costs below the levels

forecast when the percentage cap was fixed, it would be able to retain the additional profits, at least until such time as the cap is revised.

Accordingly, ICP-ANACOM imposed on the companies of Grupo PT, as an undertaking with significant market power (SMP) in the narrowband retail markets, distinct measures whereby consideration was made of intra-PTC network calls, calls from the PTC network to other FTS providers or calls from the PTC network to mobile operators.

In respect of calls originated and terminated on the network of PTC (intra-network), it was the position of ICP-ANACOM that the imposition of a specific “price-cap” for the residential market, as a form of providing for the cost orientation of prices and maintaining affordability, was considered appropriate. Accordingly, the regulatory line practised in the meantime (the price setting rules of the Convention of Prices established the regime of prices applicable to the services of the US of telecommunications, in respect of the telephone service at a fixed location (FTS) in the subscriber mode, for the installation of an analogue network line, subscription to an analogue network line and telephone communications in the Country) it was considered that a “price-cap” encompassing the installation, monthly charge and local, regional and national and calls would provide a guarantee of affordability with appropriate tariff flexibility.

ICP-ANACOM further indicated that, until such time as the specific operational components are defined, the cap of CPI – 2.75%, set out in the Convention of Prices for the US for subscriber mode, would remain applicable to the services previously set out in the same document, that is the installation of an analogue network line, subscription to an analogue network line and telephone communications in the country.

With respect to FTS calls that are PTC – Other FTS providers, it is the position of this Authority that with the intention of ensuring the development of conditions of effective competition in the market, with a view to defending the final interest of the users, there were grounds for maintaining the obligations to which PTC is subject, pursuant to the previous regulatory framework. Such obligations consist of the

imposition of a rule which governs prices of calls originated on the network of PTC and terminated on the network of other FTS providers which shall be identical to the prices of calls that are both originated and terminated on the network of PTC, whereby the price can be corrected by the difference, justified from the quantity point of view, between the termination of calls on the PTC network and the termination of calls on the network on each FTS provider. That is to say, differences between the prices of calls to different operators may be allowed, provided that said differences result from the relevant termination price values.

With respect to calls originated on the fixed network to the mobile networks, it was considered that the imposition of an obligation for the cost orientation of prices and to maintain affordability must be implemented differently, in light of there being two types of distinct factors which influence this price: (i) prices of termination on the mobile networks; and (ii) the retention values of the Grupo PT companies in the supply of this type of telephone services. It was the position of ICP-ANACOM that the retention values practised by the companies of Grupo PT shall be within reasonable levels (cost orientated), in order to ensure that the final prices charged to users are also reasonable. Accordingly the companies of Grupo PTC, as an operator designated with SMP in the market being analysed, shall present reasoned grounds for the value of retention, which shall have basis in economically efficient costs, whereas the fixed-mobile tariff shall be subject to the validation of this Authority.

ICP-ANACOM further considered that, given the expectation that the level of competition in non-residential markets would have a tendency to be greater than that seen in residential markets, the application of a price control mechanism of the “price-cap” type in respect of non-residential markets would not be necessary. Meanwhile, this Authority indicated that it would follow the trends in the prices in these markets and intervene where necessary to resolve problems with excessive prices.

To guarantee that prices are affordable for consumers on low income or with special social needs, so that such consumers are not hindered from accessing or using the telephone service (in accordance with paragraph 2 of point (a) of article 93 of the

LCE) and in consideration of the provisions of paragraph 1 of the same article, in particular with reference to the competence of ICP-ANACOM to take all necessary steps to ensure that affordability of access to US is guaranteed, having regard in particular to national consumer prices and national income, ICP-ANACOM determined by determination of 17.05.2007, among other measures, that:

- (i) PTC provide, in the scope of the universal service, to reformed persons and pensioners who are subscribers of a single analogue line and whose household income does not exceed the national minimum wage, a discount by 50% on the subscription on the value of the network line resale (by reference to the base tariff of the universal service that applies by default). PTC is also entitled to make available, at its own commercial choice, an additional discount by 10% on the analogue access monthly charge and a traffic credit of an amount not exceeding €2.3 (VAT excluded);
- (ii) A discount of 50% on the value of the network line resale be reflected on SLRO (subscriber line resale offer) accesses that support services provided to retired persons and pensioners who are subscribers of a single analogue line, whose household income does not exceed the national minimum wage, in the same terms as those provided at present;

Given the characteristics of the market, especially its degree of maturity and level of competition, and taking account of the need to guarantee transparency and protect the interests of end-users, it is considered that said measures constitute the minimum indispensable for the good functioning of the market and for its sustainable development, whereas it is currently not expected that market conditions will alter significantly so as to justify the lifting of these obligations.

→ Question 18 – In respect of the measures to guarantee affordability for end-users, do you consider that the obligation imposed by ICP-ANCOM (currently in force) constitutes a proportional and appropriate measure which it is essential to maintain?

→ Question 19 – Do you consider that additional measures are need in this area?

11. Quality of service

The annex to the LCE presents the parameters of quality of service, respective definitions and measurement methods which the providers of US are obliged to provide to end-users, while the possibility is further set out, pursuant to the provisions of article 92 of the same law, that the Regulator:

- specify additional rules in respect of quality of service in order to assess the performance of universal service providers as regards the provision of services to end-users and consumers with disabilities, where relevant parameters have been defined;
- specify the content, form and manner in respect of which the information referred to in the preceding paragraphs shall be provided, in order to ensure that end-users and consumers have access to clear, comprehensive and comparable information.
- set performance objectives applicable to the different obligations of the universal service (following the general consultation procedure laid down in article 8)
- order independent audits or mechanisms by which the performance of the universal service providers may be verified, which shall be at the expense of such providers and which shall have the aim of ensuring the accuracy and comparability of the data made available by providers.

Accordingly and by determination of 30.03.2006, ICP-ANACOM established the parameters and levels of quality of service applicable to the provider of the US and governing the telephone service at a fixed location.

Taking into account the principle of technological neutrality and the possibility that the future provider(s) of US might use supports that are technologically different from “traditional” copper networks (e.g. cable, UMTS/GSM, Wi-Fi or, prospectively NGN),

it has become necessary, in this new context, to address the suitability of the current levels of quality of the defined services.

Accordingly the question is put:

→ Question 20 – How do you consider that the current parameters and levels of quality of service governing the USP should be adapted, following the principle of technological neutrality? Do you agree with the current parameters and levels of quality of service?

12. Emergency communications and network security

One of the concerns of the community legislative framework is access to the emergency services, raised also in the US Directive and other directives of the current regulatory framework. ETSI has published a report on this issue, ETSI SR 002 299 V1.1.1 (2004-04), entitled: *“Emergency Communications: Collection of European Regulatory Principles”*.

In view of the content of the present consultation, some of the measures and references contained in the US Directive are set out below:

Whereas (12) of the US Directive affirms that it is importance for “there to be adequate provision of public pay telephones, and for users to be able to call emergency telephone numbers and, in particular, the single European emergency call number (“112”) free of charge from any telephone, including public pay telephones, without the use of any means of payment...”.

Along the same lines, Whereas (13) adds that *“Specific measures may also need to be taken to enable disabled users and users with special social needs to access emergency services “112” and to give them a similar possibility to choose between different operators or service providers as other consumers”*. Among the possible measures the following are indicated:

- making available accessible public telephones, public text telephones or equivalent measures for deaf or speech-impaired people;
- providing services such as directory enquiry services or equivalent measures free of charge for blind or partially sighted people
- providing itemised bills in alternative format on request for blind or partially sighted people

On the same issue, Whereas (36) clarifies that “*Member States should have already made the necessary organisational arrangements best suited to the national organisation of the emergency systems.*” In this respect the Council of Ministers adopted a resolution¹⁵ “*which approves the fundamental options in respect of reorganising the model of functioning of single emergency number 112*”

The same Whereas in respect of localisation details states: “*Caller location information, to be made available to the emergency services, will improve the level of protection and the security of users of "112" services and assist the emergency services, to the extent technically feasible, in the discharge of their duties, provided that the transfer of calls and associated data to the emergency services concerned is guaranteed.*”

In the chapter on the scope and objectives of the US, point c) of article 2 sets out the definition of **Publicly available telephone service**: “*a service available to the public*”

¹⁵ Resolution of the Council of Ministers no 164/2007, published in 1st Series of *Diário da República* no 197 of 12 October 2007.

*for originating and receiving national and international calls and **access to emergency services through a number or numbers in a national or international telephone numbering plan**, and in addition may, where relevant, include one or more of the following services: the provision of operator assistance, directory enquiry services, directories, provision of public pay phones, provision of service under special terms, provision of special facilities for customers with disabilities or with special social needs and/or the provision of non-geographic services.”*

In chapter II of the Directive, the “*Universal service obligations including social obligations*” are indicated. On this aspect paragraph 1 of article 3 on the “**Availability of universal service**” indicates that: “*Member States shall ensure that the services set out in this Chapter are made available at the quality specified to all end-users in their territory, independently of geographical location, and, in the light of specific national conditions, at an affordable price.*” This chapter does not set out any specific obligation exclusively set within the framework of access to the emergency services.

The obligations set out by the Directive in the chapter on the interests and rights of end-users (chapter IV) are diverse.

In this chapter, article 23 on the **Integrity of the network** indicates that “*Member States shall take all necessary steps to ensure the integrity of the public telephone network at fixed locations and, in the event of catastrophic network breakdown or in cases of force majeure, the availability of the public telephone network and publicly available telephone services at fixed locations. Member States shall ensure that undertakings providing publicly available telephone services at fixed locations take all reasonable steps to ensure uninterrupted access to emergency services.*”

In article 26 the Directive confers the obligation on Member States to ensure that “*...in addition to any other national emergency call numbers specified by the national regulatory authorities, all end-users of publicly available telephone services, including users of public pay telephones, are able to call the emergency services free of charge, by using the single European emergency call number 112.*”.

Paragraph 3 of this article makes it incumbent on Member States to ensure that *“...undertakings which operate public telephone networks make caller location information available to authorities handling emergencies, to the extent technically feasible, for all calls to the single European emergency call number”*.

In respect of the Portuguese judicial system, the obligations designed to ensure access to the single European emergency call number are not associated with the provision of the US, being rather enshrined by the rules governing the operation of undertakings which offer publically available telephone services and networks.

Accordingly, the LCE, in paragraph 3 of article 49 indicates that: *“Undertakings providing publicly available telephone services shall ensure uninterrupted access to emergency services”*.

The provider of the US is responsible for ensuring, especially to citizens with special needs, access to the emergency services under the terms set out in the law, whereby there may be grounds for special reflection on the terms by which the obligations of the provider of the US should be set out.

Currently connection to the network and access to telephone services at a fixed location, as well as public payphones, is ensured by PTC upon whom, by contract, the provision of the US is incumbent. PTC holds possession and owns the basic telephone network which it uses to ensure the provision of concession services.

This fact does not, in itself, constitute any obstacle to the designation of provider of the US to an undertaking other than the current concessionaire, upon whom, in other respects, special obligations may be imposed that are necessary and appropriate to ensure access to the emergency services, using the single European emergency number.

From a different perspective it is also important to consider issues of security as set out within the scope of the concession.

In this respect, article 2 of the concession contract establishes, as part of the concession, *“the development and operation of infrastructures which integrate the telecommunications basic network, in articulation ... with the needs of citizens regarding of security and civil protection*¹⁶.”

Point i) of article 6 of this contract confers the general obligation on the concessionaire *“to guarantee, in a suitable and proper way, the functioning of telecommunication services during crisis, emergency or war situations*¹⁷.”

The relevance of this subject justified it being established in article 32 of the Concession Bases that *“in case of war or crisis, the granting authority, through the member of the Government responsible for the area of communications, has the power to manage and operate the services the concession aims for”* and that during such period *“the time limit for the concession stipulated in the contract is suspended, regarding all the aims of the concession”*.

Electronic communications perform an important role in guaranteeing security and public order, given that the political institutions of the country, the essential public services and, in determined situations, the safety of its inhabitants, may be dependent upon them. This role of safeguarding the provision of electronic

¹⁶ Whose Law of Bases was approved by Law no 27/2006 of 3 July.

¹⁷ See C.R.P. and other legislation applicable to emergency rule, state of emergency, situation of crisis or state of war.

communication services in case of crisis is further recognised by the Commission and by the Court of Justice of the European Communities.

It is according to this framework that it might be questioned as whether it is useful and opportune for the Portuguese State to submit, simultaneously to or independently from the tender to designate the provider(s) of US, the award, under the terms of the provision of article 100 of the LCE, of additional obligatory services that may be necessary for the operation of the emergency services – covering specifically, communications between the various emergency services and between these services and citizens.

To this purpose it is recalled that Whereas (46) of the US Directive states that: *“Where a Member State seeks to ensure the provision of other specific services throughout its national territory, such obligations should be implemented on a cost efficient basis and outside the scope of universal service obligations. Accordingly, Member States may undertake additional measures (such as facilitating the development of infrastructure or services in circumstances where the market does not satisfactorily address the requirements of end-users or consumers), in conformity with Community law”*.

Such obligations are not associated with the provision of the US, but in respect of the obligations conferred on the undertaking(s) responsible for its provision, the alterations to the concession contract currently in force need to be the object of consideration in respect of the process of designation, with the aim of assessing the need for the establishment of a set of specific obligations for ensuring emergency communications, the needs of citizens regarding security and social protection and the guarantee, in a suitable and proper way, of the functioning of telecommunication services during crisis, emergency or war situations.

Accordingly, the question is put:

→ Question 21 – Do emergency communications merit special consideration in the context of the US? How?

- Question 22 – Are the current obligations conferred upon the provider(s) of US in respect of emergency communications appropriate and sufficient? Please specify.
- Question 23 – Do you see a need for the provider(s) of US to make additional services available under the terms of article 100 of the LCE, in order that emergency communications may be guaranteed? Please specify.
- Question 24 – What are the terms and conditions of the offers to be made available by the provider(s) of US regarding specific measures for users with disabilities, in respect of access to emergency services?
- Question 25 – Do issues of security merit special consideration in the context of the US? How?

13. Net cost of the Universal Service

ICP-ANACOM, in the event that it considers that the provision of the US constitutes an excessive burden for the respective providers, shall calculate the net costs of the obligations of US in accordance with the procedures defined in the LCE (specifically in articles 95 and 96).

It is noted that the provision of the US brings added costs as well as benefits arising from its provision (material and non material), whereby it is considered, in view of the current context of the opening of the tender, that this issue shall be analysed in accordance with the cost estimates that are presented by interested parties. Therefore the question is put:

- Question 26 – Do you agree that the cost estimates presented by the interested parties in respect of the tender should be used for determining the net cost of US?

14. Classification criteria of applicant provider(s) of US

As already stated in this document and pursuant specifically to paragraph 4 of article 99 of the LCE: *“The terms of said tender shall ensure that the universal service is provided in a **cost-effective** manner, and may be used as a means of determining the net cost of the universal service obligation.”*

Therefore, the criteria which will be used for those companies that fulfil the minimum requisites defined for the tender in the classification of the applicant provider(s) of US have to be established, as well as their degree of importance in such classification.

Accordingly, it is considered that the classification of applicant provider(s) of US may be made in accordance with the following criteria in order of importance:

- Proposal presenting least costs for the sector;
- Proposal presenting the best quality/price relation for consumers;
- Proposal which includes the provision of all the services included within the scope of the US.

Alternative methods of selection which include and combine the following may also be set out:

- For the level of price and quality of the current service, what level of compensation is required by the operator? The winning proposal will be that which proposes the least compensation;
- For a level of zero compensation, what is the price of the diverse components of the US proposed by the applicant, maintaining the quality level of the current service?
- As above, the applicant could propose price and quality of service, for zero compensation.

- Question 27 – What methodology do you consider should be followed? Regarding the first, do you agree with the classification criteria presented and with their order of priority? And in relation to the second, do you agree with the alternatives presented?
- Question 28 – Do you consider it relevant to take other criteria into account in the classification of the proposals presented? Please identify.

15. Concerning interest in being designated as provider of US

In line with the position of the European Commission, the Government intends to initiate the process aimed at guaranteeing that all possible parties having an interest in being designated as providers of the US, have a real opportunity to be designated by way of a process that is objective, transparent and non-discriminatory.

The lack of expressions of interest in taking on the provision of US by other operators would constitute a strong indication that a tender to select the provider(s) of that service will not receive a response and as such the need to proceed with the launch of tender that has no usefulness may be questioned.

From this perspective, it might make sense to proceed with the mandatory designation of the US provider(s).

It is in this respect that it is considered that, with appropriate regularity, the market should be sounded out in order to assess the existence of new parties interested in the provision of the US and in the event that such parties exist, they should be given the opportunity to be designated by way of a process that is objective, transparent and non-discriminatory.

Despite the fact that it is not yet possible to finalise a range of issues on the terms by which the tender will be launched, which issues will be defined following analysis of the positions put forward in respect of this consultation, it is considered essential

that, as of now, operators are expressly questioned as to their potential interest in being designated as providers of the US.

In this context, it is considered that the potential interest of the operators in being designated as provider of the Universal Service might depend on a range of factors which, where relevant, should be specified in the respective responses.

Therefore the question is put:

→ Question 29 – Do you have interest from the outset in being designated as provider of the Universal Service?

Please indicate how such interest would be dependent on:

(a) Designation occurring for the entire national territory or only for certain geographical areas;

(b) Designation being made by type of service, indicating the service(s) which in such case you would be interested in providing;

(c) The way in which the net cost of the universal service is to be determined;

(d) The circumstance of the potential net cost of the US being compensated through the legally provided mechanisms;

(e) The eventual evolution of the scope of the universal service;

(f) Any other conditions, indicating which.

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With the present public consultation, the intention is to collect the opinion of various market stakeholders on the issues underlying the process for designating the provider(s) of US in Portugal, whereas the Government shall not be bound to adopt any particular solution, even where reference to solutions may be made in the formulated questions.

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- (d) The circumstance of the potential net cost of the US being compensated through the legally provided mechanisms;
- (e) The eventual evolution of the scope of the universal service;
- (f) Any other conditions, indicating which.