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Determination of 30.1.2008

Decision on the evaluation of net costs incurred through the provision of Universal Service

Whereas:

- (a) Pursuant to article 12 of Decree-Law no. 458/99, of 5 November¹, which in the meantime was repealed by Law no. 5/2004, of 10 February - Electronic Communications Law (ECL)², providers of the telecommunications universal service³ must be compensated for any negative margins resulting from this service provision, being incumbent on providers to demonstrate such margins and to submit them to ICP-ANACOM for approval. This approval must be preceded by an audit carried out by this Authority or by an independent body it appoints. In this respect, it should be noted that paragraph 1 of article 5 of Directive 97/33/EC of 30 June 1997, transposed by Decree-Law no. 458/99, made the establishment of a mechanism for sharing the universal service provision net costs (USNC) subject to the existence of an *unfair burden* on the universal service provider. According to article 14 of the same statutory instrument, for that purpose and “where justified”, a single means to finance these costs was provided for, namely a compensation fund, which would receive contributions from bodies operating public telecommunications networks and providers of the fixed (FTS) and mobile (MTS) telephone service.
- (b) PT Comunicações, S.A. (PTC) submitted to ICP-ANACOM (on 13.02.2001 and 19.02.2003) USNC estimates as well as mandatory provisions not comprised in the scope of the universal service⁴ for the period between 1996 and 1999 and for 2000, and requested the corresponding financing under article 12 of Decree-Law no. 458/99. Estimates were as follows, respectively: **[start confidential information]**⁵

Year	FTS US costs	Other provisions	Total
1996			
1997			
1998			
1999			
2000			
Total			

[end confidential information]⁶ figures in EUR millions

Source: PTC letters dated 13.02.2001 and 19.02.2003

¹ See <http://www.anacom.pt/template20.jsp?categoryId=5158&contentId=16708>

² See <http://www.anacom.pt/template20.jsp?categoryId=105319&contentId=180332>

³ Hereinafter referred to as “Universal Service”.

⁴ Maritime mobile service, telex service and television broadcasting service.

⁵ Hereinafter referred to as **[SCI]**.

⁶ Hereinafter referred to as **[ECI]**.

- (c) By determination of 21.08.2003⁷, ANACOM determined not to apply any compensation mechanisms for the period prior to the full and effective liberalization of the telecommunications market, which took place on 1 January 2001, and informed the operator that it was entitled to submit a reasoned demonstration of any net costs incurred after 01.01.2001. PTC contested ICP-ANACOM's decision, and these proceedings are still pending. However, the determination is in force, in view of the fact that the challenge had no suspensive effect.
- (d) In the meantime, the ECL replaced Decree-Law no. 458/99, namely as regards the calculation and financing of USNC, concepts which were provided for therein specifically in articles 95 to 98.
- (e) According to the regulatory framework currently in force, ICP-ANACOM must calculate the USNC where it deems that this provision represents an *unfair burden* on the respective providers. Under the same article, ICP-ANACOM must also define the concept of "*unfair burden*", as well as the terms governing its determination.
- (f) PTC submitted to ICP-ANACOM on 29.06.2004, USNC estimates for 2001 and 2002, also in the scope of Decree-Law no. 458/99, which amounted to: [SCI] [ECI] EUR millions and [SCI] [ECI] EUR millions, respectively.
- (g) By determination of 26.08.2004, ICP-ANACOM decided:
 - (i) To reject estimates submitted by PTC, which were deemed to be "*incomplete, incoherent and unsupported*";
 - (ii) To inform PTC that it was entitled to submit appropriate, supported, detailed and auditable USNC estimates, under Decree-Law no. 458/99, adding a few remarks which aimed at enabling the presentation of estimates that could be analysed, and
 - (iii) To make it clear to PTC that pursuant to Decree-Law no. 458/99, any negative margins of compulsory obligations not comprised within the US scope were not subject to compensation.

When PTC was notified of the determination adopted by ICP-ANACOM, the US provider was also informed that the Authority would analyse, audit and assess under Decree-Law no. 458/99 any USNC estimates it presented, without prejudice to "*the possibility of ruling at an appropriate time on whether there is an unfair burden on PTC as a result of the universal service provision*".

- (h) PTC submitted to ICP-ANACOM on 12.10.2006 USNC estimates for 2003 and reviewed estimates for 2001 and 2002, amounting to figures presented in the following

⁷ See <http://www.anacom.pt/template31.jsp?categoryId=214692>

table, stating that the company had acknowledged some of the remarks made in determination of 26.08.04.

Table 1. PTC estimates of costs and indirect benefits of the universal service provision (EUR millions) [SCI]

	2001	2002	2003
FTS subscriber modality			
- unprofitable areas			
- unprofitable customers			
Public pay phones			
Directories and directory enquiry services ⁽¹⁾			
Total costs			
Indirect benefits			

[ECI] Source: PTC letter dated 12.10.2006, with reference ANACOM-E55185/2006.

⁽¹⁾ [SCI] [ECI]

- (i) On 05.07.2007, PTC requested of ICP-ANACOM that the Authority defined the meaning of “*unfair burden*”, as well as the way to determine it, so that PTC could ascertain USNC for the period between 2004 and 2006.
- (j) On 27.07.2007, PTC reaffirmed, in compliance with article 12 of Decree-Law no. 458/99, that ICP-ANACOM should provide an opinion on the request concerning compensation for negative margins resulting from the provision of the universal service in 2001, 2002 and 2003, and that the Authority should approve estimates submitted in 12.10.2006.
- (k) Having assessed these estimates, ICP-ANACOM concluded that they still lack an appropriate justification and fail to comply in full with guidelines conveyed earlier, specifically in determination of 26.08.2004, as explained in detail in the annex hereto.
- (l) The interaction procedure developed so far has proved to be ineffective, in a methodological perspective, to reach a calculation of USNC based on which ICP-ANACOM may issue a final decision on the matter, under the law.
- (m) This calculation process and possible financing of USNC may only be concluded after the concept of “*unfair burden*” has been defined, pursuant to the ECL.
- (n) The assessment of USNC and any compensation due by companies operating in the telecommunications market is likely to have a significant impact on such companies, thus the consultation procedure provided for in the ECL must be adopted in order to conclude the procedure.
- (o) By determination of 2007.12.05, the Board of Directors of ICP-ANACOM decided to hear PTC on items 1 and 2 of the draft determination to be adopted. Comments

received, the respective assessment and grounds for the decision are comprised in the “Report of the prior hearing on the draft decision concerning the evaluation of net costs incurred through the provision of universal service”, which is an integral part hereof.

Therefore, taking into account grounds stated in the prior hearing report, the Board of Directors of ICP-ANACOM, in the pursue of powers conferred under points b), d), h) of article 6 of its Statutes, approved by Decree-Law no. 309/2001, of 7 December, and under articles 95 and 96 of the ECL, hereby determines:

1. To consider that there are no conditions for accepting USNC estimates for 2003 and reviewed estimates for 2001 and 2002, submitted in PTC’s letter dated 12.10.2006, with reference 19755429.
2. To launch a detailed specification process on the method to calculate USNC and to define the conditions for determining whether its provision is likely to represent an unreasonable burden for the respective provider, a situation which would justify a compensation mechanism. This process, which will be developed taking into account the information already provided by PTC to ANACOM, as well as further data to be provided in the scope of the process, will take into account, among other aspects, the information available on this subject-matter, namely as far as bench-marking is concerned, as well as specific features of the Portuguese FTS market and of the universal service provider designation process.
3. To submit its findings on aspects identified in the preceding point to a general consultation procedure, provided for in article 8 of the ECL, within at the most 90 days from the date this determination is approved, taking into account that the conclusion of this process is quite urgent.

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