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Determination of 28.2.2007

**DECISION ON THE PROPOSAL CONCERNING THE RESIDENTIAL
TARIFF FOR UNIVERSAL SERVICE FIXED TELEPHONE SERVICES,
SUBMITTED BY PT COMUNICAÇÕES, S.A., ON 28/08/06 AND AMENDED
ON 20/12/06**

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FOR UNIVERSAL SERVICE FIXED TELEPHONE SERVICES, SUBMITTED BY PT
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I. FRAMEWORK

1. On 28/08/06, PT Comunicações, S.A. (PTC) submitted to ICP-ANACOM a proposal concerning the residential tariff for the fixed telephone service (FTS), in the scope of the universal service (US), the expected date of entry into force being 01/12/06. The most relevant issues of the proposal respected the free telephone traffic during the NIGHTS period, and an increase of the monthly subscription charge by 3.8%.
2. By determination of 28/09/06¹, ICP-ANACOM approved a draft decision (DD), declaring not to oppose such a proposal insofar as a set of cumulative conditions were fully met.
3. These conditions flow from concerns regarding consumer protection and the need for fair competition in the electronic communications market, and especially in the scope of fixed communications.
4. In the approved DD, ICP-ANACOM considered that the proposal seemed to establish a tied sales mechanism, thus ordering the implementation of an alternative tariff. Moreover, the proposal arose a set of competition concerns, namely as regards its replicability on the part of OSP, justifying the imposition of conditions concerning the tariff's entry into force and the alteration of interconnection prices.
5. Under the law, the DD was submitted to a public consultation and to the opinion of the Advisory Council. In the course of this procedure, PTC submitted on 20/12/06 an amendment to the proposal under consultation. ICP-ANACOM deems that the procedure was not interrupted, in view of the fact that the document formerly discussed was merely subject to an alteration.
6. The main amendment to the US tariff included by PTC in the new proposal concerns the removal of the increase of the FTS monthly subscription charge and the provision to users of an option as to whether or not they wish to benefit

¹ See...

from free traffic. These alterations are in line with some of the concerns conveyed to ICP-ANACOM in the scope of the referred public consultation. This Authority is now able to decide thereon, the issued DD being now turned into a final decision, with the appropriate amendments.

7. However, the need to specify the necessary amendments as regards interconnection – a need which was generally pointed out in replies to the public Consultation – implies that ICP-ANACOM must not decide on the proposal as a whole, as the Authority is bound to hear PTC and other interested parties again; this was carried out through the DD dated 18/01/07².

II. ASSESSMENT OF THE PROPOSAL CONCERNING THE RESIDENTIAL TARIFF FOR UNIVERSAL SERVICE FIXED TELEPHONE SERVICES, SUBMITTED BY PT COMUNICAÇÕES, S.A., ON 28/08/06 AND AMENDED ON 20/12/06

II.A INTRODUCTION

8. On 28/08/06, PT Comunicações, S.A. (PTC) submitted to ICP-ANACOM a proposal concerning the amendment of the US tariff, as follows:
 - a. Increase of the monthly subscription charge by 3.8%;
 - b. Introduction of the option for free calls made on working days, from 21h to 09h (NIGHTS period);
 - c. Maintenance of current traffic prices for the remaining periods (WD – Working Days from 09h to 21h and WE - Week-Ends and National Holidays from 0h to 24h).
9. ICP-ANACOM provided its opinion on the proposal dated 28/09/06, having submitted the DD to the public consultation procedure and to the Advisory Council, under the law. On 20/12/06, PTC submitted to ICP-ANACOM an amendment to the US tariff proposal, which would come into force on 01/02/07, mainly removing the increase of the monthly subscription charge formerly proposed, and maintaining the free-of-charge nature calls made during the NIGHTS period. The table below summarizes the proposed amendment to the US tariff.

Table 1. PTC US tariff proposal submitted on 20/12/06.

Figures in euros	Initial price	Time credit	Price per minute after time credit has elapsed
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² See...

	WD	NIGHTS	WE	WD	NIGHTS	WE	WD	NIGHTS	WE
Local	0.0700	-	0.0700	60.00	-	60.00	0.0261	-	0.0084
Regional	0.0700	-	0.0700	60.00	-	60.00	0.0261	-	0.0084
National	0.0700	-	0.0700	30.00	-	60.00	0.0496	-	0.0084
Installation	71.83								
Subscription	12.66								

Source: PTC, letter dated 20/12/06 with reference ANACOM-E70808/2006.

10. PTC refers also in the amended proposal that in order to remove any source of complexity and uncertainty, which could arise from tariff readability problems, the referred proposal would include a single US tariff, contrary to the position ICP-ANACOM had taken in the scope of the DD. Without prejudice, PTC proposes a new option for customers who do not wish to benefit from free calls during the NIGHTS period, who would be applied a €0.50 discount, VAT included (around €0,41, VAT not included) in the bill, and who would pay calls made during that period at the price currently in force.
11. According to PTC, the proposal represents a -2.09% one-off variation in the US price basket. PTC does not present the corresponding annual average variation (which is used to assess compliance with the applicable price-cap), as (i) traffic parameters for 2006 are not yet available; (ii) the annual average variation for 2007 may only be measured accurately by the end of that year and (iii) the retail price regulation for 2007 is not yet defined, namely as regards the inflation rate and the price-cap mechanism itself.
12. PTC also states that, for 2006, as the residential base tariff was not amended, the basket annual average variation would be -1.46%, thus complying with the price-cap of CPI -2.75%.

II.B ASSESSMENT

13. As ICP-ANACOM declared in the DD, it is now necessary to assess whether the proposal under consideration is consistent with the principles of consumer protection and fair competition (particularly, as regards this last issue, within a context in which, following determination of ICP-ANACOM of 14/12/05, the offers of the PT Group companies bundling network and traffic line in a single price depend on the fulfilment of certain conditions that include the effective and efficient SLRO provision, which has not yet been acknowledged by ICP-ANACOM). These principles, which could seem contradictory in the short-term (decrease of prices being favourable to consumers and adverse to PTC rivals), are in fact in line with a sustainable environment, as they avoid benefits which are merely immediate, and that, by eliminating competition, would leave consumers dependent on one or a few suppliers. It is thus necessary to render these two principles compatible in the short-term, with due regard to the legal rules that govern the US tariff assessment. It is also

important to ensure, in the scope of the regulatory assessment, and particularly, of obligations applicable to narrowband retail markets, the compliance with the price-cap in force.

14. As regards the protection of consumer interests, it is important to guarantee that the purchase of a service is not made subject to the purchase of another which is not desired - tied sales -, by providing customers with choices, so that they are not forced to pay for a service they do not wish to use (or are not able to do so), and ensuring that suitable emphasis is placed on such choices.
15. Competition protection implies preventing that paradigm changes in the way universal service is charged have an unsustainable impact in the economy of PTC rivals, who have developed their business plans according to a framework which should evolve, but which should also pay due attention to disruptive shifts. In particular, account should be taken of whether replicability conditions are maintained, and especially which alterations should be defined in terms of interconnection prices, so that significant alterations in the competitive framework may be introduced, particularly where they take place upon proposal of the operator with SMP.
16. In the scope of the assessment of the US tariff amendment proposal, ICP-ANACOM has taken due regard to amendments proposed by PTC, the DD report of 18/01/07 (in Annex A hereto, which is an integral part hereof) and the results of the public consultation to which the prior DD was subject (which are assessed in detail in Annex B hereto, which is an integral part hereof).

II.B.1. Compliance with the applicable price-cap

17. By determination of 14/02/04³, approval was granted to obligations applicable on narrowband retail markets, to companies of the PT Group, who were identified as holders of significant market power (SMP) in each of the markets, namely: (i) to ensure transparency by publishing tariffs, levels of quality of service and other offer conditions; (ii) not to show undue favour to any specific end-user; (iii) to guarantee the cost-orientation of prices; (iv) to maintain a cost accounting system; (v) to provide for accounting separation and (vi) to maintain accessible prices.
18. In particular, to ensure that prices remain affordable, a specific price-cap was adopted for the residential market, in order to progressively provide for the cost-orientation of prices and to transfer effectiveness gains to customers.

³ See...

19. In the scope of the referred determination, it was referred that the specific particulars concerning the proposed price control operation, namely the price cap, would be defined in an autonomous document, and would pay especial attention to the specific conditions of the relevant market, and the affordability of services under consideration. Until these particulars had been established, the cap provided for in the Universal Service Price Convention⁴ for the subscriber mode, CPI -2.75%, would apply to offers formerly provided for in that document, that is, installation of analogue network line, subscription of analogue network line and telephone communications throughout the country⁵.

II.B.1.1 Verification of compliance with the price-cap for 2006

20. For 2006, the applicable CPI is 2.3%, as established in the State Budget for that year, thus the applicable price-cap is -0.45%.
21. The compliance with the price-cap for 2006 is verified by means of the assessment of the FTS basket average annual variation (which includes components such as the network line installation and monthly charge, as well as local/regional and national telephone services) for 2005.
22. As PTC refers, in 2006, the FTS residential base tariff was not altered. In 2005, a tariff alteration was introduced on 01/07/05, thus annual average charges indicated in the following table result from a proper consideration, in terms of duration, of average prices resulting from tariffs in force for each period⁶.

Table 2. Average annual prices and respective variation, for the period 2005-2006. [SCI]

	2005	2006	Variation 2005-2006
Installation			0.0%
Monthly charge			0.0%
			Average call charge

⁴ The Price Convention for the Telecommunications Universal Service, signed on 30/12/02 between the Direcção-Geral do Comércio e da Concorrência (DGCC) - The Directorate-General for Commerce and Competition, ICP-ANACOM and PTC, established the price regime applicable to provisions of the Universal Service: (a) FTS in the subscriber mode: installation of the analogue network line, subscription of the analogue network line and telephone communications within the country; (b) FTS in the public pay telephone mode - telephone communications within the country; and (c) telephone directories and information service, establishing that US offer prices should take into account the progressive cost-orientation of prices, and the guarantee of affordability to all users -

⁵ See prior hearing report -

⁶ The traffic parameters used in this assessment took under consideration data submitted by PTC on 28/08/06 (PTC letter dated 28/08/06, with reference ANACOM-E45722/06).

	WD	Off-Peak (NIGHTS + WE)	Average Charge	WD	Off-Peak (NIGHTS + WE)	Average Charge	WD	Off-Peak (NIGHTS + WE)	Average Charge
Local/Regional ⁷							-5.90%	-6.93%	-6.23%
National							-0.30%	-38.85%	-15.92%

Source: Calculations ICP-ANACOM. [ECI]

23. The basket has not registered any one-off variations, as PTC refers, due to the maintenance in 2006 of tariffs in force by the end of 2005; it is thus estimated that the basket annual average variation is around -1.51%⁸, using revenue weighting information provided by PTC on 28/08/06, and indicated on the following table.

Table 3. Revenue weighting information provided by PTC [SCI]

FIXED OFFERS	
Installation	
Subscription	
Total fixed offers	
COMMUNICATIONS	
Local/Regional	
National	
Total communications	
TOTAL	

Source: PTC, letter dated 28/08/06 with reference ANACOM- E45722/06. [ECI]

24. In summary, based on available information, PTC has complied with the applicable price-cap for 2006.

II.B.1.2. Verification of compliance with the price-cap for 2007

25. For 2007, according to the value established in the State Budget⁹ for that year, the applicable CPI is 2.1%, thus the applicable price-cap is -0.65%.

⁷ As the tariff in force until 30/06/05 presented different prices for local and regional categories, these figures result from weighted values obtained by traffic for each category, according to information of PTC management indicators, for the first quarter of 2006.

⁸ According to PTC estimates, the basket average annual variation for 2006 is -1.46%, whereas ICP-ANACOM's estimates stand at -1.51%. In the absence of weighting data applied by PTC, it is not possible to identify unambiguously the causes for the differences found. Nevertheless, it is deemed that the difference between ICP-ANACOM's estimates and those of PTC may be related to average pricing weighing of Local and Regional categories resulting from the tariff in force by early 2005. Without prejudice, the conclusions drawn from the assessment are valid for both estimates.

⁹ See...

26. For both tariff options, the assessment of price-cap compliance was based on the consideration of the date of entry into force notified by PTC, that is, 01/02/07, which is not feasible. Without prejudice, the conclusions on the price-cap compliance apply for the expected period of entry into force of the tariff, for both available options.

II.B.1.2.1. Verification of compliance with the price-cap for 2007 for the option of free traffic during the NIGHTS period

27. The following table identifies the one-off variation for the basket and each component. Estimates of ICP-ANACOM coincide with those indicated by PTC.

Table 4. Basket one-off variation for the period 2006-2007.

FIXED OFFERS	
	ICP-ANACOM
Installation	0.0%
Subscription	0.0%
COMMUNICATION	
Local/Regional	-11.2%
National	-10.8%
TOTAL BASKET	-2.09%

Source: PTC, letter dated 28/08/06 with reference ANACOM- E45722/06.

28. As regards the assessment of the compliance with the applicable price-cap based on the basket average annual variation, it is deemed that, according to arguments put forward by PTC, such assessment is likely subject to additional tariff amendments during 2007 and to the update of traffic parameters and basket structure. Without prejudice, based on data currently available, regarding traffic and revenue weighing information, it was decided to carry out an assessment of a hypothetical scenario that maintained the tariff proposed for the period between 01/02/07 and the end of 2007. The results concerning basket components average prices are identified in the table below.

Table 5. Average annual prices and respective variation for the period between 2006-2007. [SCI]

	2006			2007			Variation 2006-2007		
Installation LR									0.0%
Monthly charge LR									0.0%
	Average call charges			Average call charges			Average call charges		
	WD	Off-Peak (NIGHTS + WE)	Average Charge	WD	Off-Peak (NIGHTS + WE)	Average Charge	WD	Off-Peak (NIGHTS + WE)	Average Charge
Local/Regional							0.00%	-32.31%	-10.25%
National							0.00%	-33.43%	-9.86%

Source: Calculations ICP-ANACOM. [ECI]

29. Based on the figures above, it is estimated that the basket average annual variation is around -1.9%, and thus the presented proposal complies with the applicable price-cap.

II.B.1.2.2. Verification of compliance with the price-cap for 2007 for the option related to the maintenance of the current tariff and to the application of a €0.50 subscription discount

30. The following table identifies a one-off variation as regards the basket and each component¹⁰.

Table 6. Basket one-off variation for the period 2006-2007.

FIXED OFFERS	
	ICP-ANACOM
Installation	0.0%
Subscription	-3.2%
COMMUNICATIONS	
Local/Regional	0%
National	0%
TOTAL BASKET	0%

Source: PTC, letter dated 28/08/06 with reference ANACOM-E45722/06.

31. As regards the assessment of the compliance with the applicable price-cap based on the basket average annual variation, based on data currently available, regarding traffic and revenue weighing information, it was decided to carry out an assessment of a hypothetical scenario that maintained the tariff proposed for the period between 01/02/07 and the end of 2007. The results concerning basket components average prices are identified in the following table.

Table 7. Average annual prices and respective variation for the period between 2006-2007. [SCI]

	2006			2007			Variation 2006-2007		
Installation LR							0.0%		
Monthly charge LR							-3.0%		
	Average call charges			Average call charges			Average call charges		
	WD	Off-Peak (NIGHTS + WE)	Average Charge	WD	Off-Peak (NIGHTS + WE)	Average Charge	WD	Off-Peak (NIGHTS + WE)	Average Charge
Local/Regional							0%	0%	0%
National							0%	0%	0%

Source: Calculations ICP-ANACOM. [ECI]

32. Based on the figures above, it is estimated that the basket average annual variation is around -2.32%, and thus the presented proposal complies with the

¹⁰ In order to assess compliance with the applicable price-cap, it was considered that the €0.50 discount (VAT included) applies to the subscription charge.

applicable price-cap. In case the subscription discount was higher than €0,50 (VAT included) the price-cap would obviously be complied with as well.

II.B.2. Verification of the obligation for cost-orientation of prices

33. To correctly assess costs associated to the provision of FTS tariffs, particularly as regards cost for the provision of free traffic during the NIGHTS period, it is vital to consider the appropriate consumption profile.
34. PTC stated in its reply to the DD prior hearing of 28/09/06 that the use of a consumption profile for a user of the “PT Nights” plan, as ICP-ANACOM suggests in that DD, would not be appropriate, referring that this plan represents less than 10% of all customers with active plans comprising that time period. The profile of such customers would also be an inappropriate reference to assess the consumption of an offer that shall likely comprise the whole range of customers, being expected that the free-phone effect fades out and that customer consumption stabilizes slightly above the current level, suggesting a flexibility of around 80% relatively to the current use.
35. ICP-ANACOM deems that, as there are two tariff options, it is likely that consumers who make few phone calls during the NIGHTS period will opt for the tariff currently in force. Relatively to the current consumption of a residential customer of the NIGHTS period, according to statistical data submitted by PTC¹¹, the average monthly consumption, per residential customer, for the NIGHTS period, is around [SCI] [ECI] minutes. The following table summarizes the average use for 2005, for each tariff period, according to data submitted by PTC.

Table 8. Average use, per residential customer, per tariff period. [SCI]

	Use (minutes)	Nº residential customers	Annual use per customer	Monthly use per customer
Peak Hours	[SCI]	[SCI]	[SCI]	[SCI]
NIGHTS	[SCI]	[SCI]	[SCI]	[SCI]
WE	[SCI]	[SCI]	[SCI]	[SCI]
TOTAL	[SCI]	[SCI]	[SCI]	[SCI]

Source: PTC (fax PTC dated 08/09/06 and PTC quarterly statistical data) [ECI]

36. In this context, it is important to note that on 29/12/06, PTC informed ICP-ANACOM that the average monthly consumption of voice telephone traffic for the whole range of customers was [SCI] [ECI] minutes per month, based on invoicing values for August 2006, which should be considered taking into

¹¹ Traffic information for 2005 (PTC fax dated 08/09/06, with reference ANACOM-E47818/2006) and data on the number of PTC residential customers, according to PTC quarterly statistical data (data for 2005 has been adapted to as to obtain an average use with comparable data).

account that August may not be a typical month as far as consumption is concerned, without prejudice to this consumption being around 19% higher than the average monthly use of a residential customer during the NIGHTS period in 2005.

37. It could be considered that the consumption of a user of the “PT Nights” plan (average consumption significantly above 50 minutes per month, from December 2005 to September 2006) overrates the likely average use of the free traffic offer during the NIGHTS period, in the scope of the FTS tariff, as customers who have subscribed the “PT Nights” plan are likely to present a higher level of consumption than customers who have subscribed the “subscription + traffic” option, as it is likely they’ll make more calls during that period, thus placing value on the “package” monthly charge.
38. In this context, attention should be drawn to the evolution of the “PT Nights” offer, in terms of number of users and average monthly use (see following graphics). Note that, while the number of subscribers of the plan has increased since January 2006, the average monthly use has decreased, which becomes particularly evident as from May 2006.

Graphic 1. Evolution of the “PT Nights” offer, in terms of number of customers and average monthly use for 2006 [SCI].

Source: Calculations ICP-ANACOM. [ECI]

39. In the light of the above, it is deemed that the average monthly use of a US customer and the average monthly use of a user of the “PT Nights” plan could provide an appropriate interval as regards the average monthly use. Without prejudice, and taking into account the likely dilution of the average use among FTS customers in the US scope, it is acceptable to conclude that the average use is closer to the current use of a US customer, yet it is likely that this value is quite flexible, in view of the introduction of free calls for this period, thus preventing a significant degree of alteration of the average use.
40. Thus, taking into account that: (a) the 25 minutes use for the NIGHTS period, which represents a flexibility close to 50% relatively to the average consumption for 2005, considered in the DD, may underestimate (as some OSP have referred) the impact of the introduction of free calls for that period; (b) PTC itself referred, in its reply to the DD prior hearing of 28/09/06, that a flexibility of around 80% was likely to occur, it is deemed appropriate to consider an average consumption, per customer, during the NIGHTS period, of 29 minutes per month. This value reflects the adoption of a flexibility rate close to 80%, as referred by PTC, given the average consumption for 2005.
41. As regards other traffic parameters (average call duration and classification of traffic according to categories), it is considered that data relative to the “PT

Nights” plan would be appropriate, given that the features of the latter are similar to PTC’s proposal.

42. Given that the proposed tariff bundles together the subscription and the NIGHTS traffic, the assessment of cost-orientation of prices must take place considering the difference between gains (€12,66) and relevant costs for the full monthly charge of access and average monthly traffic of a residential customer for the NIGHTS period.
43. As regards costs deemed relevant, according to the European Commission¹², prices lower than the average variable cost should always be considered abusive, having regard to the fact that their sole economic purpose is to prevent competition, as each unit produced and sold is a loss for the company. When prices are defined below the average total cost, but are higher than the average variable cost, they are deemed abusive only if there is evidence of a plan to prevent competition. Thus, as it is acknowledged that the cost accounting system of PTC was not designed to determine variable costs, it is deemed that the direct and joint costs of the cost accounting system may be roughly taken as proxy for variable costs.
44. Thus, to estimate the relevant direct and joint costs, the following method was used:
 - a. The expected 29-minutes average monthly use per user was considered, as it is deemed to represent appropriately the likely consumption evolution, as stated above;
 - b. As regards the costs considered, based on results of PTC’s cost accounting system for 2005, estimates were produced for 2007 for specific costs of each traffic category (local, regional and national) and for the analogue access monthly charge, having been considered for this purpose an average annual decrease of direct and joint costs by 5%¹³, relative to efficiency gains. Based on values thus obtained for each component, a global traffic average cost was calculated, weighting costs associated to each category¹⁴ relatively to the correspondent amount of

¹² See, for example, the glossary of the European Commission’s Directorate-General for Competition.

¹³ According to the results of the PTC’s cost accounting system, between 2000 and 2005, the average variation of traffic direct and joint unit costs (global value for local, regional and national categories) was around [SCI] [ECI]. As regards the analogue access monthly charge, the average variation of direct and joint unit costs for the same period was around [SCI] [ECI]. Nevertheless, it is deemed that the value used in the assessment (-5%) appropriately represents the annual decrease of unit costs resulting from the activity of an efficient operator, enabling also the consideration of a likely increase of traffic resulting from a more intense use of FTS during the NIGHTS period, as calls are free (which may lead to a likely reduction of unit costs).

¹⁴ The sum of direct and joint costs is estimated at [SCI] [ECI] and [SCI] [ECI] euro cents, respectively for local/regional and national categories.

traffic¹⁵. Thus global direct and joint costs were estimated for: (i) analogue access monthly charge, of [SCI] [ECI]; (ii) traffic, of around [SCI] [ECI] euro cents, per minute.

45. As regards traffic, a monthly average cost of around [SCI] [ECI] was considered, which was obtained by multiplying direct and joint costs estimated for 2007, per minute, by the average amount of traffic during the NIGHTS period (29 minutes), thus obtaining a monthly cost for the “subscription + traffic” bundle of [SCI] [ECI].
46. The following graphic summarizes estimated values for average monthly gains and costs associated to the “subscription + traffic” bundle, having regard to the expected average monthly use for 2007.

Graphic 2. Comparison of average monthly direct and joint costs estimated for the “subscription + traffic” bundle, for 2007, with the proposed retail price. [SCI]

Source: Calculations ICP-ANACOM. [ECI]

47. In the light of the above, given the considered average use, it is concluded that PTC’s proposal for the “subscription + traffic” bundle covers not only direct and joint costs concerning the free provision of traffic during the NIGHTS period, but also common costs, with a considerable margin.
48. Attention must be drawn to the fact that, in any case, from the verification of the obligation for cost-orientation of prices does not necessarily follow the compliance with obligation for non-discrimination, which is analyzed below.

II.B.3. Verification of the obligation for non-discrimination

49. Most contributions from OSPs received in the scope of the prior hearing and public consultation (except for PTC) confirmed the position stated by ICP-ANACOM in the DD, that it was necessary to alter interconnection prices, in case it was decided to allow for free calls during the NIGHTS period, as PTC had proposed. The main criticism levelled by the public consultation to the previous DD was the need for a duly quantification of the alteration, which is understandable.

¹⁵ According to data on the “PT Nights” plan of August 2006, [SCI] [ECI] of total traffic takes place in the Local/Regional categories, and the remaining [SCI] [ECI] in the National category. Where the traffic data breakdown concerning “PT Nights” plan did not enable its application, the data for the 3rd quarter of 2006, concerning the classification of traffic according to traffic categories (total traffic) was used.

50. Received contributions supported two different lines of action in the scope of interconnection:
- a. Adoption of free interconnection traffic during the NIGHTS period, and
 - b. Interconnection alteration, in a distributed way, thus increasing the freedom of OSPs to replicate PTC's offer.
51. In this regard, ICP-ANACOM deems that the adoption of free interconnection during the NIGHTS period is not appropriate, as far as the adjustment of interconnection prices to the new retail reality is concerned, as it would likely imply an inefficient use of resources and be biased against the original objectives of the alteration of interconnection prices.
52. It follows from the above that the interconnection alteration, rendering neutral, in this scope, the impact of the alteration under consideration in the US tariff, seems to be the best option as regards the allocation of resources and the maintenance of freedom on the part of OSP to compete with the new offer made by PTC.
53. In this line of thought, it is necessary to quantify the necessary alteration of interconnection prices to meet this neutrality objective. For this purpose, it is necessary to calculate the reduction of interconnection input prices PTC's wholesale area would need to carry out as regards its retail area, so that the latter is able to implement the offer, relatively to reasons attributable to these costs. This value shall be used as proxy for the necessary interconnection alteration that OSPs need to compete with this offer, notwithstanding the fact that these are different traffic structures, which could benefit or have detrimental consequences to same OSP, in relative terms. Nevertheless, the need to maintain a low level of complexity in the interconnection tariff forces this simplification.
54. Thus, the interconnection global average cost which retail PTC would incur was estimated by weighting average unit costs associated to each tariff period¹⁶ according to the likely use during each period¹⁷, as the table below

¹⁶ Based on data submitted by PTC on 08/09/06 (PTC fax with reference ANACOM-E47818/2006), interconnection average prices were estimated at around [SCI] [ECI] euro cents for the period between 09h and 19h during working days, [SCI] [ECI] euro cents for week-ends and holidays, and [SCI] [ECI] euro cents for working days between 19h and 21h, given the average duration of calls and the distribution of traffic by the different categories for each specific period (WD, WE and NIGHTS).

¹⁷ The expected average use for each tariff period was estimated based on traffic information submitted by PTC (PTC fax with reference ANACOM-E47818/2006) and data on the number of residential customers (according to quarterly statistical information submitted by PTC), as shown in the table below. [SCI]

highlights. As regards data in the following table, given that the interconnection tariff structure is different from the retail one (namely, at interconnection level, the NIGHTS period runs from 19h to 09h, and at retail level, it runs from 21h to 09h), it was decided that the period between 19h and 21h should stand out on its own, as it is billed as part of the NIGHTS period for interconnection purposes, but it is not subject to the reduction of prices from PTC's wholesale area to its retail area.

Table 9. Average interconnection prices, per minute, associated to each tariff period. [SCI]

	Use		Tariff Interconnection Unit Prices	
	Nº of minutes used in the course of a month	%	Traffic Interconnection Prices, per minute (euro cents)	Traffic Interconnection Prices (representative for the interconnection price per global minute – euro cents)
Peak hours				
NIGHTS 19-21h				
NIGHTS 21-09h				
WE				
Global Average value				

Source: Calculations ICP-ANACOM. [ECI]

55. In the light of the above, it is concluded that, in terms of the interconnection global estimated price per minute (weighted average of all periods), the wholesale area of PTC provides the retail area with a reduction of around 23%, which represents 23 euros cents per month, per residential customer¹⁸.
56. In order to calculate the reduction of interconnection total prices, it is necessary to weight this value according to the ratio of residential and business customers. According to the most recent available data, submitted by PTC on 05/02/07, revenues of residential local and national traffic correspond, given

	Use (minutes)	Nº residential customers	Annual use per customer	Monthly use per customer
WD				
NIGHTS				
WE				
TOTAL				

[ECI]

The average use for the period between 19h and 21h was estimated based on information submitted by PTC on 05/02/2007, according to which the residential segment in the total number of customers, for the period between 19h and 21h, corresponds to [SCI] [ECI].

¹⁸ The calculation is based on the following formula: "Traffic Interconnection Prices (representative for the interconnection price per global minute) in the NIGHTS period 21-09h / Global interconnection average price".

total traffic revenues (including business, fixed-mobile and international traffic) to around [SCI] [ECI], thus reaching a global reduction of 10% in the interconnection price, that applies to all types of traffic¹⁹.

57. This reduction must apply to each component of time-based interconnection (activation price and price per minute), comprising also the capacity-based interconnection, given that maximum prices per capacity basic unit are determined by multiplying the minutes associated to that unit by the average interconnection price per minute at the considered interconnection level, Local, Transit (Simple or Double), which is set in RIO for the time-based interconnection²⁰. Thus, if the reduction comprised only the time-based interconnection price, a disincentive would be created as regards the use of the flat tariff, which would create a negative impact on the market.
58. This reduction, which is justified by the paradigm change of the residential US FTS tariff, with significant alterations on the market operation, does not imply the adoption of a “retail minus” approach as regards interconnection prices, which was not deemed appropriate, within the context of the imposition of obligations in wholesale markets of call origination and termination in the fixed public telephone network, without prejudice to the prevention and resolution of margin compression problems.
59. It should be stressed that this reduction on interconnection shall occur without prejudice to the normal and periodic RIO price review.
60. Finally, values regarding the 10% discount on interconnection prices shall be clearly identified in PTC’s cost accounting system results and shall not be considered in the scope of the US net costs, as they are not due to a commercial option on the part of PTC.

II.B.4 Perspective of the final user as regards available tariff options

61. It is noted that the proposal presented by PTC on 20/12/06 shows the following features: (i) maintenance of the monthly subscription charge currently in force (€12,66, no VAT included); (ii) free calls on working days, from 21h to 09h (NIGHTS period); (iii) maintenance of traffic prices currently in force for the remaining periods (WD – Working days from 09h to 21h and WE – Week-ends and Holidays, from 0h to 24h); establishment of a tariff option for customers who do not wish to benefit from free calls during the NIGHTS period, who would be applied a €0.50 discount, VAT included (around €0,41, no VAT included).

¹⁹ By multiplying the discount value in the residential market (23%) by the rate of residential local and national traffic, given the total traffic [SCI] [ECI].

²⁰ In compliance with Determination ICP-ANACOM dated 08/06/06.

62. As the option presented by PTC results in a discount applied on the bill (which could ultimately result in a discount on the NIGHTS traffic, or on WE traffic or on peak-hours traffic), the right of option enjoyed by end-users is not ensured in a situation where they may have a subscription with no attached traffic. Thus, the option must consist not of a discount applied on the bill but of a discount applied on the subscription.
63. Given the alteration of the expected consumption to 29 minutes, per customer, for the NIGHTS period, is it deemed that the reduction value proposed by PTC for residential customers who did not opt to subscribe the free traffic during the NIGHTS period must be reviewed. Thus, PTC must provide users who choose not to make free calls during the NIGHTS period a €0,60 discount (VAT included), which is consistent with the use values that integrate a flexibility level close to 80% resulting from free-of-charge nature of calls made during the NIGHTS period.
69. Replies received in the scope of the public consultation of the DD dated 28/09/06 and the hearing on the DD dated 18/01/07 showed doubts as regards the tariff option which should be implemented: or the monthly charge with free NIGHTS traffic, and no discount, or the monthly charge with discount and no free NIGHTS traffic. ICP-ANACOM, based on the current traffic distribution, deems that the number of customers who will choose the solution “monthly charge with no discount and with free traffic during the NIGHTS period” shall exceed the number of those who will choose the other solution, and thus this solution should apply by default.
70. Moreover, according to data on the “*Electronic Communications Consumer Survey – December 2006*” and to the “*Telecommunications Barometer – Marktest*”: (a) around 20% of customers who changed, or intend to change, the fixed operator referred that the underlying reason for this was the uncharged subscription offered by the new operator and (b) a very significant rate of enquired persons who wanted to terminate the contract with the fixed network operator pointed to the subscription price as the reason. This suggests that a very significant rate of users would rather benefit, by default, of a tariff bundling the monthly charge and traffic.

II.B.5. Current EU practises

II.B.5.1. Existing offers

66. As the DD of 28/09/06 refers, according to available data²¹, at the level of incumbent operators, there are offers that bundle together the analogue access

²¹ Data from websites of incumbent operators, on June 2006.

monthly charge and traffic in Germany, Belgium, Denmark, Slovakia, Ireland, Italy, Malta and the United Kingdom.

67. The amount of national traffic included is not the same in the offers provided by incumbent operators of the European Union who bundle traffic and analogue access together. Moreover, in Ireland and the United Kingdom, the duration of calls must not exceed one hour, and any additional traffic minutes are charged.
68. Offers bundling traffic and analogue access monthly charge provided in Slovakia, Ireland and the United Kingdom comprise discounts for calls that are not included in the offers, namely mobile or international calls. In Slovakia, Italy and Malta, offers which only include the subscription and do not bundle traffic and analogue access monthly charge are not provided.

II.B.5.2 Regulatory approach

69. Following requests submitted by pre-selected providers, OFCOM²² decided to open anticompetitive proceedings against British Telecom (BT)²³, following the provision of the offers *Together option 1*²⁴, *Together option 2*²⁵ e *Together option 3*²⁶. In this context, it assessed the likely existence of margin squeeze and predatory prices, and the bundle of exchange line and traffic discounts, and on 12/07/04, it concluded that there were no grounds that justified action against BT²⁷. In its document “Addressing the local call disadvantage”²⁸, dated 30/07/04, OFCOM referred also that the provision of a WLR (wholesale line rental) should be considered in the scope of offers that bundled traffic and subscription together, as beneficiaries would be able to replicate offers under consideration.
70. On 20/07/05, OFCOM published the document “The replicability of BT’s regulated retail business services”²⁹, assessing the replicability of retail services (retail business calls, exchange lines and leased lines products) in which BT was found to have to have SMP, identifying measures that BT must implement to ensure the replicability of services under consideration. These measures include a process for determining whether WLR is fit for purpose (“the ‘fit-for-purpose’ test”), which consists of the assessment: (i) as to whether the WLR product, as delivered, is consistent with the functional

²² Office of Communications, UK’s NRA.

²³ The United Kingdom’s incumbent operator.

²⁴ Offer that provides separate access and traffic.

²⁵ Offer that bundles analogue access and unlimited traffic during off-peak hours.

²⁶ Offer that bundles analogue access and unlimited traffic for all time periods.

²⁷ See

http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw007/cw_760_dec/cw_760_dec.pdf

²⁸ See http://www.ofcom.org.uk/consult/condocs/cps_option/cps_statement/cps_stmnt.pdf

²⁹ See http://www.ofcom.org.uk/consult/condocs/bt_retail/bt_retail.pdf

specification, (ii) as to whether the WLR product has been implemented in an effective manner that minimises barriers to effective competition and (iii) of the actual market impact of the WLR product.

71. In the document “Lower limit tariff regulation of KPN’s end-user services”³⁰, dated 30/10/02, OPTA³¹ assessed, among other aspects, the provision by KPN³², the holder of SMP in narrowband retail markets, of offers that bundled several services, referring it that that entity should be prevented from abusing its position of power. Particularly, OPTA considered that the bundling of several services should not be allowed where they disrupt the development of competition, establish barriers to entry and promote cross subsidizing between certain user groups. In this context, OPTA would only allow these offers if (i) KPN did not provide or ceased to provide separately services in which it held SMP; (ii) applicable prices were not abusive, which would require they did not lead to a margin squeeze; and (iii) competitors were able to replicate offers under consideration without incurring losses.
72. In the document “Bundling – The economic theory and a framework for regulatory ex-ante assessment”³³, dated 09/04, OPTA referred also that NRAs should weight the likely positive and negative effects of offers under consideration. OPTA listed some positive effects: (i) to reduce costs borne by service providers; (ii) to reduce transaction costs incurred by consumers; (iii) to reduce price inefficiencies; and (iv) to improve quality of service levels and control. That NRA referred also that if the service provider did not hold SMP, there would be no negative effects, but in case it did, there could be predatory pricing and leveraging of market power.
73. OPTA’s position on offers bundling services is shared by ComReg³⁴, as can be seen from the document “Regulatory approach to bundling and temporary discounts”³⁵. ComReg³⁶ states that, in case the service provider holds SMP, the following obligations would bring benefits about: (i) the dominant operator must objectively justify the bundle to the NRA prior to the introduction of a bundled product; (ii) the NRA must impose requirements to ensure product transparency; (iii) wholesale elements that enable the provision of any retail bundle must be made available to non-dominant operators, as well as unbundled wholesale elements; (iv) prices applicable to bundles must be cost-orientated; and (v) bundling of (a) a product in which the provider holds a dominant position with a product from a competitive market and (b) bundling of electronic communications services with other services, must be prohibited.

³⁰ See http://www.opta.nl/download/codo_tariffregkpn.pdf

³¹ *Onafhankelijke Post en Telecommunicatie Autoriteit*, the Netherlands NRA.

³² The Netherlands incumbent operator.

³³ See <http://www.opta.nl/download/EPN04.pdf>

³⁴ Commission for Communications Regulation, Ireland’s NRA.

³⁵ See http://www.comreg.ie/_fileupload/publications/ComReg03120.pdf

³⁶ Commission for Communications Regulation, Ireland’s NRA.

74. This position was restated by ComReg in the scope of the market analysis of fixed public telephone network access³⁷ and publicly available local and/or national fixed telephone services³⁸. In this scope, ComReg referred it would not be reasonable for a SMP service provider to provide offers that bundled several services, and failed to provide them separately at retail and wholesale level.
75. On 17/10/05, BIPT³⁹ analyzed the market impact and compliance of the offer *Happy time*⁴⁰ with applicable regulatory principles, namely cost-orientation of prices, replicability by competitors of Belgacom⁴¹, transparency, non-discrimination and breakdown of prices. Having taken into account the positions of interested parties and general objectives of the regulatory framework as regards the promotion of competition, economic effectiveness and consumer protection, BIPT concluded that: (i) prices stated in the offer that applied to calls terminating in networks of other operators should reflect the respective termination costs; (ii) Belgacom should submit to BIPT every month the average consumption profile associated to the offer, for the purpose of the regular assessment of the compliance of the offer with the principle of cost orientation of prices; and (iii) the decision should be notified to the Competition Council, to contribute towards the outcome of that entity's proceedings on that offer.

III. CONCLUSIONS AND DETERMINATION

76. In the light of the above, and whereas:
- (i) The proposal submitted by PTC constitutes an offer that bundles in a single price the network line (analogue access monthly charge) and traffic;
 - (ii) This bundling falls into the category of tied sales, in case end users are not offered an alternative option, and it is crucial that the interests of end-users are protected, especially those who are not able or do not wish to make calls during the NIGHTS period;
 - (iii) The tied sales concept does not concern only the relationship between the increase of prices of the analogue line monthly charge that compensates for the free traffic, as it is possible to establish this

³⁷ See http://www.comreg.ie/_fileupload/publications/ComReg0525.pdf

³⁸ See http://www.comreg.ie/_fileupload/publications/ComReg0526.pdf

³⁹ Belgian Institute for Postal services and Telecommunications, Belgium's NRA.

⁴⁰ Offer that bundles analogue access with unlimited traffic during off-peak hours.

⁴¹ Belgium's incumbent operator.

relationship in situations where users would rather enjoy monthly charge discounts than be granted discounts for traffic they do not make use of;

- (iv) Thus, it is necessary to ensure the users' right to choose, through the choice for a reduction of the analogue access monthly charge, which must be equivalent to the decrease of the average price associated to the free traffic, thus ceasing the tied sales situation;
- (v) Taking into consideration the information of traffic profiles and results of the "*Electronic Communications Consumer Survey – December 2006*" and of the "*Telecommunications Barometer – Marktest*", it is likely that most US users choose the modality where the analogue line monthly charge allows free traffic during the NIGHTS period, and thus there are grounds to apply this option by default;
- (vi) PTC must make US users fully aware of the right to choose to which they are entitled, as regards the analogue line monthly charge and traffic during the NIGHTS period, by including for this purpose an advertising space in the bill of each FTS residential customer, comprising: (a) a factual and relevant description, deemed appropriate for each of the available options; (b) an indication of the tariff option that applies in case the customer does not express any contrary intention and that such a decision shall not imply any costs to the customer; and (c) contacts available in case the customer wishes to change his tariff option;
- (vii) The referred advertisement shall comply with the limitations set out in determination issued by ANACOM on 25/06/06, on restrictive measures against action designed to win back pre-selected customers, which establishes a four-month withdrawal period, following the presentation of the pre-selection request by the pre-selected provider, to be complied with by the companies of the PT Group, as holders of SMP in retail markets of access to the public telephone network at a fixed location, regardless of whether the direct access provider complies or not with the 5-working day time limit, from the date of presentation of the electronic request by the pre-selected provider, established for the pre-selection activation, relatively to customers who selected or pre-selected other operators, so that this advertisement does not to constitute a win-back action;
- (viii) ICP-ANACOM determined on 14/12/05 that offers that bundle, in a single price, network line and traffic depend on a set of cumulative conditions that include the effective and efficient SLRO provision. So far, ICP-ANACOM does not deem it may acknowledge that the conditions for the provision by companies of the PT Group of offers

bundling, in a single price, network line and traffic (as set out in determination of 14/12/05) have been effectively met, although significant developments have taken place, and it seems likely that in the near future the conditions for the SLRO implementation will be met as provided for in the mentioned determination;

- (ix) There has been a long discussion on the entry into force of these types of offers, and OSPs are well aware of it, thus there is no need for an additional period before its entry into force, after conditions referred above are met;
- (x) The adoption of free interconnection during the NIGHTS period is not appropriate, as far as the adjustment of interconnection prices to the new retail reality is concerned, as it would likely imply an inefficient use of resources and be biased against the pursued objectives;
- (xi) The reduction of interconnection prices is fully justified by the paradigm change of the residential US FTS tariff, with significant alterations on the market operation, yet it does not imply the adoption of a “retail minus” approach as regards interconnection prices - which was not deemed appropriate, within the context of the imposition of obligations in wholesale markets of call origination and termination in the fixed public telephone network, without prejudice to the prevention and resolution of margin compression problems;
- (xii) The expected consumption per US average customer who chooses the tariff option with free traffic during the NIGHTS period is likely to be 29 minutes, which is a retail revenue consistent with the €0,60 discount (VAT included) provided by PTC to users who choose not to make free calls during the NIGHTS period. At the level of interconnection, this use represents a revenue of €0.23 revenue, which represents a rate of around [SCI] [ECI] of PTC’s interconnection revenues, admitting a rate of revenues of PTC residential local and national traffic given total traffic revenues of [SCI] [ECI] (according to PTC data submitted on 05/02/07);
- (xiii) It is deemed that the quarterly alteration of interconnection prices according to the update of PTC’s traffic profiles would lead to an unjustified complexity, and would not be consistent with the desirable predictability of market operations and with short and medium term plans of OSP. Anyway, in case ICP-ANACOM deems that the evolution of PTC traffic profiles advises the review of interconnection prices, the latter may take place together with the next RIO cap price review.

Pursuant to the assignments provided for in points b), d), f and h) of paragraph 1 of article 6 of the Statutes in annex to Decree-Law no. 309/2001, of 7 December, and according to paragraph 3 of article 86, to paragraph 1 of article 93 of Law no. 5/2004, of 10 February, and in the scope of regulation objectives set out in points a) and c) of paragraph 1, point a) and b) of paragraph 2 and point a) of paragraph 4, all of article 5 of that Law, the Board of Directors, pursuant to point l) of article 26 of the Statutes of ICP-ANACOM, determines not to oppose the proposal of FTS residential tariff, in the scope of the US, presented by PTC in 28/08/06, and modified on 20/12/06, provided that the following cumulative conditions are fully met:

- a. The tariff to be implemented shall comprise two options for the analogue access monthly charge: i) one that corresponds to the monthly charge currently in force, which provides free calls during the NIGHTS period and ii) another, which is optional, at a price of 60 cents (VAT included) below the monthly charge referred in i), to which applies the current NIGHTS period tariff;
- b. This tariff shall only come into force after a determination of ICP-ANACOM confirming that the companies of the PT Group have met the conditions attached to the provision of packages bundling in a single price the network line and traffic, as set out in the determination dated 14/12/05;
- c. The right to choose between these two tariff options shall be given expression, without prejudice to paragraph 3 of article 48 of the ECL, through the inclusion by PTC of an advertising space in the bill of each FTS residential customer, comprising: (a) a factual and relevant description, deemed appropriate for each of the available options; (b) an indication of the tariff option that applies in case the customer does not express any contrary intention and that such a decision shall not imply any costs to the customer; and (c) contacts available in case the customer wishes to change his tariff option;
- d. The referred advertisement shall comply with the limitations set out in determination issued by ANACOM on 25/06/06, on restrictive measures against action designed to win back pre-selected customers, which establishes a four-month withdrawal period, following the presentation of the pre-selection request by the pre-selected provider, to be complied with by the companies of the PT Group, as holders of SMP in retail markets of access to the public telephone network at a fixed location, regardless of whether the direct access provider complies or not with the 5-working day time limit, from the date of presentation of the electronic request by the pre-selected provider, established for the pre-selection activation, relatively to customers who selected or pre-selected other operators, so that this advertisement does not to constitute a win-back action;

- e. PTC must also grant (without prejudice to the normal and periodic review of RIO prices), a reduction by 10% on each component of the time-based interconnection model (activation price and price per minute), comprising call origination and termination (PTC – indirect access operator). Prices thus reduced apply for the calculation and setting of the capacity-based interconnection prices;
- f. Insofar as these conditions have been met, PTC is granted a 15-day deadline, from the date of this determination, to notify ICP-ANACOM whether that company intends to implement the tariff proposed on 20 December 2006, and to indicate the planned date of commencement of application of that tariff. To ensure the certainty of the market operation, the activities of other operators not being made subject to alterations in the internal transactions between PTC's wholesale and retail areas, with implications at the level of strategic and commercial options, that date must be set at the most within three months from this determination

ANNEXES