

Determination of 25.6.2003

ANACOM'S DETERMINATION REGARDING THE PT COMUNICAÇÕES "REDE ADSL PT" WHOLESALE OFFER

1. THE OFFER

By end of 2000, PT Comunicações has initiated the "Rede ADSL PT" - "PT ADSL Network" service, appointed for telecommunications service providers and operators, allowing these, to offer broadband Internet solutions destined the customers of Fixed Telephone Service of PT Comunicações.

This product presents connectivity for transportation of IP traffic between terminal points of network access and points of traffic aggregation. It is supported by a platform with ADSL technology for access to end customer, and IP/ATM technology, for aggregate access.

As for tariffs, "PT ADSL Network" is constituted by the following elements:

TABLE 1. FORESEEN TARIFFS ON OFFER "PT ADSL NETWORK"

PRICES OF LOCAL ACCESS	PRICES (EUROS)
A. Installation Price of Local Access	
i. Modality A – Provision process with splitter installation	99,76
ii. Modality B - Provision process without splitter installation	70,00
B. Monthly Prices of Local Access	
i. Class 0 – 512 kbps/128 kbps Contention 1:50	21,90
ii. Class 1 – 256 kbps/128 kbps Contention 1:20	29,93
iii. Class 2 – 768 kbps/128 kbps Contention 1:20	52,37
iv. Class 3 – 1024 kbps/256 kbps Contention 1:20	74,82
PRICES OF AGGREGATE ACCESS	PRICES (EUROS)
A. Installation Price of Aggregate Access	
i. E3 (34 Mbps)	6.484,37
ii. STM-1 (155 Mbps)	13.218,14
B. Monthly Price of Aggregate Access	
i. E3 (34 Mbps)	3.740,98
ii. STM-1 (155 Mbps)	9.352,46
C. Monthly Price per Mbps of Total Debit on Aggregate Access	
i. Total Debit of 2 Mbps at 34 Mbps	448,92 (1 at 34 Mbps)
ii. Total Debit of 36 Mbps at 100 Mbps	404,03 (35 at 100 Mbps)
iii. Total Debit of 102 Mbps at 154 Mbps	359,13 (101 at 155 Mbps)
iv. Total Debit higher than 154 Mbps	314,24 (more than 155 Mbps)

The offer foresees the rendering of complementary services, namely alteration of class, functionality of fixed IP, traffic guiding and displacement.

The application of discounts has been thought as well. Indeed, according to the rules of "PT ADSL Network" offer, the discounts on the monthly fees of local and aggregate accesses,

presented in Table 2, are function of equivalent park of local accesses at end of the concerned year. The discounts are attributed monthly, which are adjusted at end of the year, bearing in mind the equivalent park of local accesses, at that time. Still it is established that, to benefit from the discount, the operator must celebrate a contract of service providing on “PT ADSL Network” valid for one year or superior.

TABLE 2. APPLICABLE MONTHLY DISCOUNTS ON LOCAL AND AGGREGATE ACCESS

MONTHLY PARK EQUIVALENT OF LOCAL ACCESS		TERM OF CONTRACT				
		1 year	2 years	3 years	4 years	5 years
0	2.500	0.0%	0.0%	0.0%	0.0%	0.0%
2.501	5.000	0.0%	0.0%	2.5%	5.0%	7.5%
5.001	10.000	0.0%	2.5%	5.0%	7.5%	10.0%
10.001	25.000	2.5%	5.0%	7.5%	10.0%	12.5%
25.001	60.000	5.0%	7.5%	10.0%	12.5%	17.5%
> 60.000		7.5%	10%	12.5%	17.5%	25.0%

The equivalent park of Local Accesses is decided based on the following expression: no. of Local Accesses Class 0 + no. of Local Accesses Class 1 + 3 x no. of Local Accesses Class 2 + 4 x no. of Local Accesses Class 3. The equivalent monthly park of a determined month corresponds to the equivalent park of that month's end.

2. DECLARED PREOCCUPATIONS

Some broadband service providers have requested the intervention of ANACOM in this matter, in particular as for the discounts foreseen in the wholesale offer and to the relationship between the wholesale prices and the retailer prices, considering that the conditions currently in force, limit the growth of a competitive market.

On 28 August 2002, OniTelecom requested the intervention of ANACOM in order to determine the suspension of the regimen of adjustments at end of each year for the discount levels applied in the scope of offer “PT ADSL Network”, keeping its application in a monthly basis taking into account the dimension of the installed park. It still referred that this disagreement hinders the celebration of an agreement with the PT Comunicações.

Having requested explanations to PT Comunicações, in particular on the application by the end of each year, of adjustments concerning the discount levels attributed monthly, that entity did not present adequate grounding and questioned the necessity of intervention on the part of ANACOM. Since that would be a negotiation of commercial nature, would not exist any distortion in competitive conditions, nor would be in cause barriers to the access to the activity.

Novis Telecom, in turn, in a meeting of 11 December 2002, besides pointing out the asymmetrical effect of the discounts that significantly benefits Telepac, a subsidiary of Portugal Telecom, SGPS, considers that the current differential between the retail prices offered by Telepac and the associate costs of service providing (wholesale offer prices and operational costs) is negative for a number of customers inferior to 100.000. This way, with a view to the promotion of a competitive market, it defends that should be imposed a solution “*retail-minus*” for the prices of “PT ADSL Network” offer.

3. ANALYSIS

3.1. Principle of cost orientation

Considering the results of the cost accounting system of PT Comunicações, supported by historical costs, totally distributed, the global service providing “PT ADSL Network” presents a deficit margin for 2001 and 1st semester of 2002 exercises.

Without prejudice to other considerations, namely concerning the supplies of companies of the group, whose prices necessarily are not costs oriented, could not be in another way, since the investments profitability, must be evaluated at medium term, after the product launching phase be concluded. It is noticed that nowadays the growth rates of the number of accesses ADSL are close to 100% per trimester.

The cost accounting system of PT Comunicações does not allow, thus, surveying the costs of “PT ADSL Network” offer.

As regards to international comparisons, which have always been an important reference in the verification of principle of the cost orientation, it is not possible to make direct comparisons of prices in ADSL offers supplied in other Member States. Indeed, the known offers reflect the existence of diverse technical solutions, with resource to technologies, protocols and distinct network equipment, and providing a set of points of access in some levels of the network, that allow designing of retailer offers with differentiated price structures.

3.2. Operators Margin

Taking into account, the data related to 31 March 2003, nine companies have adhered to wholesale offer “PT ADSL Network”. According to same data, Telepac, a subsidiary of Portugal Telecom, SGPS, detained about 80% of the supplied accesses, being thus in position to benefit from significant savings coming from wholesale offer, in particular from the application of volume discounting and, probably, maximum discounts due to loyalty. Telepac, thus, can supply the retail market, with access offers to Internet with prices hardly contestable by the competing companies.

This situation causes concerns of ruling nature, for, it compromises, at medium and long term, the development of a competitive market and, consequently, does not guarantee supported benefits for the consumers, though, in short term, can result in, eventual benefits for the end users

Although four classes of offers exist, it is observed that the preponderant offer is of class 0, with maximum speed of 512 kbps in descending direction and 128 kbps in the ascending direction, representing more than 80% of the total park, being Novis, Oni and Telepac responsible for almost the totality of these accesses.

Based on the practised monthly fees, the profit margins gained by the various ISPs, after cost deduction, resulting from “PT ADSL Network” offer, was evaluated. Due to the proliferation of offers and their complexity, on Table 3 are mentioned only the most representative service providers.

TABLE 3. COMPARISON BETWEEN MONTHLY FEES OF WHOLESALE AND RETAIL OFFERS

	Local Access with speeds of 512kbps / 128Kbps (monthly figures per access/costumer)							
	WHOLESALE OFFER (EXCL. DISCOUNTS)		RETAIL OFFER			RETAIL - WHOLESALE		
	Access Local	Access Aggregate ^{a)}	SAPO ADSL.PT	CLIX TURBO	ONINET SPEED	SAPO ADSL.PT	CLIX TURBO	ONINET SPEED
MONTHLY FEE -per access/costumer	21,9	4,5	29,4	31,0	29,3	3,5	5,1	3,4
TRAFFIC INCLUDED (GB per access/costumer)			20 nat. 2 internat.	3	2			
FEE REMAING TRAFFIC (per 100MB)			0,08 nat. 1,26 internat.	2,5	1,26			

NOTES:

Figures in Euros (no IVA), per access/costumer and per month.

For the calculation of monthly fee, per costumer, of aggregate access (i) it has been estimated based on data relating to 31.03.2003, the access park of each ISP, (ii) it has been admitted that costumers would make a permanent use of the offer speed debit and (iii) rates of contention were taken into account.

Discounts on monthly fees were not considered.

^{a)} The monthly fee, per costumer, of aggregate access was calculated taking into account the number of costumers which maximizes the use of 1 E3 and 1 STM1.

The retail offers provided by the ISPs include a volume of limited traffic, being applicable to the additional traffic a specific price, which allows generating additional income. There are still ranges of services, as Fixed IP functionality, extension of the aggregate access and traffic guiding that allows the service providers to get additional income.

ADSL retail offers, besides the costs resulting from wholesale offer, have associated other costs, namely network costs, maintenance, operation and relationship with the customer. In this context, it is considered to be an adequate profit margin, a fee of € 8 /month / costumer, namely taking into account the resources optimization and the ISP's hired capacity

Being attentive to Portugal Telecom, SGPS offer and based on estimates, one verifies that, in the case of offers with speed debit of 512 kbps/128 kbps, the difference between retail prices and the costs resulting from wholesale offer, excluding discounts, does not allow the compensation of the global costs from service providing in the retail market.

Thus, according to Table 3 and the global costs of the access service providing to Internet in broadband, the difficulties in competitive in broadband retail market as alleged by the operators, are confirmed. It is, thus, necessary to guarantee, as far as the offers of the companies of the Portugal Telecom group are concerned, the existence of enough profit margins between the wholesale and retail prices.

3.3. Discounts

Based on data relating to 31 March 2003 and according to evolution of the offer, Telepac detained an equivalent park of local accesses which would allow it to benefit from a maximum discount of 25%, in case of celebrating a 5 year contract, which is reasonable, as it has less incentives than the remaining operators to look for alternatives to "PT ADSL Network" offer, namely the desegregation of the local loop.

Novis and Oni detained each one, at that date, between 5.000 and 10.000 local accesses, not benefiting of any discount, except if they would celebrate a contract of, at the very least, 2 years. In case of opting for a contract of maximum period, the discount would rise to 10%. The remaining adherent companies to “PT ADSL Network” offer, excepting the other subsidiary company of Portugal Telecom, SGPS, have a monthly equivalent park lower than 2,500 local accesses therefore, they were not allowed to have access to any discount.

Thus, and being foreseeable that the situation relating to discounts have not changed, the company with the biggest number of accesses, being, simultaneously, subsidiary of Portugal Telecom, SGPS, will benefit, on principle, from a much higher level of discount, becoming important competitive advantages.

Generally and in theory, it is considered that the attribution of discounts, may be justified when (i) it is attributable by differences, due to the costs incurred into product or service offer, and the discounts founded, namely, according to the principles of cost orientation, transparency and non-discrimination, (ii) it does not affect negatively the market competition and (iii) resulting in an efficiency improvement and social wellbeing.

ANACOM is particularly worried about the effects that the discounting practice might have in the development of commercial offers of ADSL services in an environment that is intended to be competitive, in which Telepac, a subsidiary of Portugal Telecom, SGPS, has a significantly superior presence than its competitors and benefits from a much higher discount.

Admitting the existence of the scale economies associated to the exploration of “PT ADSL Network” offer, these must be revealed in the monthly fees of the local and aggregate accesses considering the total access park and not the contribution of each company for that park. Only by doing this, is guaranteed the respect for the principle of non-discrimination.

Without identified basis for the discounts and being unusual practice at European level the discounts offer in this wholesale service, it is understood as a reasonable solution, the price cutback of the same size of the discount that PT Comunicações was predisposed to grant. For that purpose, it was calculated the weighed average of the discounts that PT Comunicações would practise in 2003, if the structure of discounts were kept.

The weighed average of the discounts that PT Comunicações would practise in 2003, is 20% from the income, bearing in mind the following presupposed:

- a) The contract periods associated to the subsidiaries of Portugal Telecom, SGPS and to the remaining companies are, respectively, the maximum period of five years and the minimum period of one year, foreseen in the structure of discounts currently available in “PT ADSL Network” offer,
- b) The equivalent park of contracted local accesses in the scope of “PT ADSL Network”, by the end of 2003, will be superior than 60,000 equivalent accesses and
- c) The ratio of accesses of the beneficiary companies of “PT ADSL Network” regarding the total contracted accesses in the scope of the offer remains steady.

Furthermore, according to the Community jurisprudence, the attribution of loyalty discounts from a dominant company is not acceptable, even if the competitive companies have obtained a market share increase.

Thus, PT Comunicações considers that reductions might exist in the attributable price, to economies of capacity utilization, so it is understood that the prices must be reduced through the incorporation of the estimated average discount.

4. DECISION

According to afore-mentioned and considering, namely, that:

- a) It has been requested, pursuant to Regulations for the Operation of the Fixed Telephone Service (ROFTS) approved by Decree-Law no. 474/99, of 8 November, the formal intervention of ANACOM in the scope of “PT ADSL Network” offer;
- b) The offer “PT ADSL Network” fits in the regime of special access to the network, and for that reason the rules constant in the article 33 of REFTS, are applicable;
- c) in accordance with the article 1 of the preamble Decree-Law which approves the ROFTS, the rules of the Regulations for the Operation of Public Telecommunications Networks (ROPTN), are also applicable to the fixed telephone network offer, and as such, namely those mentioned on its Chapter III;
- d) The article 33 of the ROFTS establishes that ANACOM can, on its own initiative and at any time, and must, by request of any of the parts, to intervene in the celebration of special access agreements to networks when justified to guarantee an effective competition and or the interoperability of the services, determining, namely, not discriminatory, equitable and reasonable conditions and which are the most advantageous for all users;
- e) It is an objective, at national and Community level, the development promotion of broadband services, for which ADSL services will contribute, certainly, in significant way;
- f) Portugal Telecom, SGPS, detains a share higher than 80% in the diverse forms of access to end customers for broadband service providing, being necessary to prevent the conditions that make impracticable the supported development of a competitive market;
- g) The discounts foreseen in “PT ADSL Network” offer, clearly deviate the competitive conditions;
- h) The cost accounting system of PT Comunicações is not adequate for the evaluation of “PT ADSL Network” costs offer, in this phase of its launching;
- i) With a view to assure the competition in the retail market of broad band services, it is necessary to intervene in order to guarantee that the wholesale price allows the existence of an adequate profit margin;
- j) The economies of costs, associated to the exploration of “PT ADSL Network” offer result from the total park of ADSL accesses, as they must be reasonably distributed by all the accesses, according to what is foreseen in the scope of the interconnection;

- k) The weighed average of discounts that PT Comunicações predisposed to practise in 2003 establishes a reasonable approach to these economies of costs, taking into account the currently available information;

The Board of Directors of ICP-ANACOM, having heard the interested parties, pursuant to articles 100 and 101 of the Code of Administrative Procedure, under the cover of no. 4 of article 33 of the ROFTS, deliberates:

To determine PT Comunicações, to modify as from 01 July 2003, its “PT ADSL Network” offer, in the sense of:

- (1) Removing the discounts on the local and aggregate monthly fees foreseen in “PT ADSL Network” offer; and
- (2) Reducing in 20% the current local accesses monthly fees of the diverse classes, and the aggregate accesses;
- (3) Additionally, for ADSL service with a speed debit of 512kbps/128 kbps, to establish that the monthly price of wholesale offer cannot be higher than the lesser monthly retail price for this debit, practiced by the subsidiary companies of Portugal Telecom, SGPS deducted of 40%.

ANACOM will reappraise this matter taking into account the evolution of ADSL accesses park and the conditions of market.