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Determination of 7.2.2008

## Determination

The Board of Directors has learned that PT Comunicações, S.A. lodged at the Lisbon Administrative Court an application to suspend the operation and challenge the ruling set out in paragraph 2 of point III of Determination of 3 October 2007 of the Board of Directors, on the method for a margin squeeze assessment of broadband offers provided by PT Group - 1:50 contention offers.

Both in the application for suspension of operation (articles 137 et seq) and for special administrative action (articles 199 et seq) PT Comunicações, S.A. alleged that the ruling under consideration lacked sufficient reasoning.

Acknowledging that underlying grounds for the ruling should be clarified, the Board of Directors hereby determines, under article 137, paragraph 2, article 141, paragraph 2 and article 145, paragraph 2, of the Code of Administrative Procedure, to add the following grounds to the referred ruling:

*The application of rules developed to assess margin squeezes of broadband offers provided by PT Group - 1:50 contention offers is complex, mainly because it is difficult to weight their impact on the market. Unintentionally, such rules may be poorly executed.*

*The analysis of the compliance of these offers with applicable rules is quite complex, especially where sales promotion programmes are at stake, precisely because it is difficult to weight the respective market impact.*

*Nevertheless, it is necessary to ensure the referred compliance, and thus retail offers must be analysed by this Authority before they are launched.*

*If such offers were analysed after they had been launched, a number of disadvantages would arise, which, in the case of offers with market impact, would surpass the charge it represents to PT Comunicações, S.A. to inform the offer conditions in advance.*

*In fact, the communication and subscription on the part of some users to offers that do not guarantee minimum competition conditions, and which are subject to a withdrawal from the market or a redrafting, would lead to obvious injury to such users, as well as to those who consider the subscription.*

*OSP would also be unduly harmed by the subscription on the part of some users to illegitimate offers and by the uncertainty felt by their customers or potential customers following the suspension of offers already launched.*

*The PT Group company itself, where its offer is withdrawn or redrafted, bears costs, and probably significant ones.*

*Lastly, the market image would also be affected, on account of the insecurity conveyed to users.*

*The above-mentioned disadvantages would occur every time offers had an impact on the market, although they could be irrelevant where offers of a limited scope are concerned. In this situation, the previous analysis could be exempted, if it was possible to distinguish one situation from the other in advance, for the purpose of establishing the obligation.*

*It is not possible to «a priori» quantify the benefits, disadvantages and costs this measure will bring to the market, given the different impact that several offers and sales programmes may have, on account of the market segment they are aimed at, the initial subscription thereto or the period of time during which they are marketed prior to being suspended.*

*To the same effect, the ERG (European Regulators Group), in the Common Position on the approach to appropriate remedies in the ECNS regulatory framework<sup>1</sup> adopted in May 2006 (thus, following the imposition of obligations resulting from the assessment of wholesale broadband access market in June 2005) supports the idea that to ensure effective operation of a margin squeeze test, which may be necessary to guarantee an effective regulation, NRAs should consider the need to impose on operators holding significant market power the obligation to provide advance notification of retail prices.*

*It should be stressed that companies of the PT Group have provided ICP-ANACOM, in most cases, with advance notification of their retail offers, even as from Determination of 24 June 2005, which did not establish such an obligation. Since that date, the redrafting of broadband Internet access retail offers was determined in three cases (the first was the offer notified by PT.COM on 16 August 2006, which was to be launched on 28 August 2006; the second, the offers notified, also by PT.COM, on 13 October 2006, which were intended to come into force as from 6 November 2006; and the third concerned offers referred by TV Cabo to ICP-ANACOM on 18 October 2006, which were intended to enter into force as from 6 November 2006), which serves to prove that it is convenient that offers are made known to this Authority before they are made publicly available.*

*It is considered that 10 working days appears to be the most appropriate deadline, as it is the minimum amount of time necessary to analyse the conformity of retail offer conditions to be marketed by companies of the PT Group, which may be very complex and which is fundamental (as referred above) to competition, innovation and interests of end-users. This deadline thus represents the appropriate balance between the demands of an effective protection of competition and the need to grant to companies of the PT Group the possibility to make available on the market timely innovative offers that conform to obligations to which they are subject as holders of significant market power.*

*Moreover, this deadline does not prevent the necessary flexibility of companies of the PT Group in the sense that they need to prepare a reply to competition offers, particularly as these companies may make the Regulatory Authority aware of such offers at an initial stage of the launching process, and keep this process going in the course of the 10 days during which ICP-ANACOM will carry out the analysis.*

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<sup>1</sup> See [http://erg.eu.int/doc/meeting/erg\\_06\\_33\\_remedies\\_common\\_position\\_june\\_06.pdf](http://erg.eu.int/doc/meeting/erg_06_33_remedies_common_position_june_06.pdf) (page 120).

*Therefore, companies of the PT Group must inform ICP-ANACOM of conditions practised at retail level, including any sales programmes, 10 (ten) days in advance of the day on which they intend these conditions to come into force, together with reasoning that support compliance with this Determination.*