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Determination of 25.7.2007

DETERMINATION

Imposition of specific obligations upon PT Comunicações, S.A. and Telemilénio - Telecomunicações, Sociedade Unipessoal, Lda. (Tele2) within the scope of pre-selection

I – Facts

1. After becoming aware of several complaints from operators, namely Tele2, relatively to an alleged misconduct of PT Comunicações (PTC) as regards pre-selection (PS) termination procedures on the part of pre-selected customers, and following a monitoring exercise, which consisted of a set of demarches concerning that company and PTC, ANACOM adopted determination of 8/3/2007, on *Undue terminations by PT Comunicações of pre-selection services*.
2. In this decision, ANACOM determined on PTC that: (i) the company ceased immediately any PS deactivation which was not based on a request submitted by the pre-selected provider (PSP), following a request for contract alteration or termination made by the subscriber to this provider, so as to comply with the PS deactivation procedure provided for in article 10 of the Selection and Pre-Selection Regulation (SPR); and that (ii) the company removed from its website [Customer Support (FAQ)/Services/“pre-selection”], within at the most 5 working days, the information on PS termination procedure, as provided for therein, and to make it available in compliance with article 10 of the referred Regulation.
3. In the scope of this determination, ANACOM restated that according to the PS deactivation procedure, provided for in paragraph 1 of article 10 of the Regulation, the alteration or termination of the indirect access contract must take place following a direct contact between the subscriber and the PSP, namely ruling out any intermediate action of the direct access provider (DAP), following which the PSP must convey to the DAP the respective deactivation request¹.
4. As from 3/4/2007, ANACOM received several letters from PTC², in which this provider informs that “*it has been made aware of behaviours on the part of Tele2*”

¹ See point II – Grounds of determination of 8/3/2007.

² E19178/2007, E19423/2007, E19547/2007, E20109/2007, E20264/2007, E20585/2007, E20916/2007, E21187/2007, E21435/2007, E21773/2007, E22155/2007, E22252/2007, E22564/2007, E22887/2007, E23092/2007, E23414/2007, E23738/2007, E23995/2007, E24331/2007, E24829/2007, E24723/2007, E25225/2007.

which are not compatible with the smooth operation of the pre-selection deactivation regulatory procedure”.

5. In this series of communications, PTC states it had been made aware of a large number of Tele2 customers who requested the deactivation of the PS service, explicitly expressing their wish to terminate Tele2’s PS service, and yet PTC, being the DAP, had not received from Tele2 any deactivation request. As evidence in support of its claims, PTC attached to each of the referred letters documents in electronic format with lists and examples of PS deactivation requests from customers of Tele2.
6. According to PTC, these behaviours on the part of Tele2 *“clearly harm the interests of customers of the mentioned company, ignoring their wishes, and harming also the interests of consumers in general”*, and thus requests that this Authority takes *“all necessary steps to ensure the respect for pre-selection deactivation procedures”* and that it compels Tele2 to comply with the Regulation, *“conveying to PTC all pre-selection termination requests it receives, and determining it ceases immediately the illegal conduct it has adopted”*.
7. On 2/4/2007, ANACOM’s monitoring services undertook a set of monitoring exercises to assess compliance of some PSP (Onitelecom, Vodafone and Tele2) with determination of 8/3/2007.

According to the report of such monitoring exercises, dated 3/5/2007:

- PTC had deactivated a number of FTS which were not listed in deactivation request files of PSP;
 - In addition, Tele2 informed that (i) PTC still accepts PS deactivation requests submitted by Tele2’s pre-selected customers, in situations where the customer addresses PTC and formally writes down its wish to terminate the respective PS contract; (ii) having received such termination requests, PTC forwards them to Tele2; (iii) Tele2 does not deem customer requests submitted to PTC to be valid, thus refusing to handle them.
8. On the other hand, taking into account that, in the above-mentioned letters, PTC referred being aware of 14746 Tele2 customers, who between 14/3/2007 and 11/4/2007, requested PS deactivation, ANACOM monitoring services undertook, between 19/4/2007 and 23/4/2007, new monitoring demarches at Tele2’s premises.

According to the report mentioned in the preceding point and as regards Tele2 customers who have made deactivation requests to PTC, Tele2 restated the information already provided in the course of the above-mentioned monitoring exercise of 9/4/2007³.

In the light of the above, on 10/5/2007, the Board of Directors of ANACOM approved a draft decision determining that:

³ As is clear from this report, this monitoring exercise indicates other facts concerning Tele2’s behaviour as regards the procedure for deactivation of customers who had submitted their requests directly, which shall be dealt with in the appropriate framework.

- PTC must refrain from accepting any requests for alteration or termination of PS contracts, or for PS deactivation, from PSP subscribers, in compliance with deactivation procedures laid down in the Selection and Pre-selection Regulation;
- Tele2 must contact, within at the most 10 working days from the notification of the final decision, all subscribers whose pre-selection deactivation requests had been submitted by PTC, to assess their genuine wishes as far as the alteration or termination of the respective pre-selection contracts is concerned. Where there are grounds to believe that a customer does not wish to terminate pre-selection, Tele2 would be released from the obligation provided for in paragraph 1 of article 10 of Regulation 1/2006.

This determination was submitted to the prior hearing of interested parties, under the terms of articles 100 and 101 of the Code of Administrative Procedure, for which a period of 10 working days was set for Tele2 and PTC to make their responses in writing.

Contributions received, as well as ANACOM's views thereon, and grounds for the Regulatory Authority's options have been included in the **Prior Hearing Report, attached hereto and deemed an integral part hereof.**

As no new de facto or de jure grounds have been established to alter ANACOM's position on this matter, the issued determination is maintained in the same sense as it was notified.

II – Grounds

As explained in determination of 8/3/2007, the PS deactivation procedure provided for in article 10 of the SPS Regulation (Regulation no. 1/2006, of 9 January) imposes that the alteration or termination of the indirect access contract takes place, always, and in every case, with the PSP, which is bound to convey to the DAP, the subsequent PS deactivation request.

As the determination also refers, the inclusion of the word “exclusively” in paragraph 1 of article 10 aimed to clarify that, in a situation of a mere PS deactivation, that is, where the contract with the DAP remains in force, the PS may only address the PSP. This procedural provision allows only a direct contact between the customer and the PSP, ruling out any possibility of the DAP acting as an intermediary, in any form whatsoever of such an intermediate action.

Even after determination of 8/3/2007, PTC's behaviour has proved to fail to comply with this view; this Regulatory Authority deems for this reason that it must intervene again, either with a regulatory measure or by introducing in the PSP Regulation, to be approved on the same date, an obligation upon the DAP not to accept nor to handle requests for alteration or termination of indirect access contracts, which must be submitted directly to the PSP, as well as to inform subscribers who address the company for this purpose.

The Regulatory Authority is also bound to weight the explicit wishes of thousands of subscribers, who, often misled by PTC itself⁴, have submitted PS deactivation requests to this company, and yet their wishes have not been met by the PSP.

Regardless of whether the procedure followed was the most appropriate, subscriber wishes are not irrelevant.

Pursuant to paragraph 1 of article 10 of the Selection and Pre-Selection Regulation, the PSP *is bound to convey electronically to the DAP, to a single contact point, the respective deactivation request, within two working days at the most.*

In the specific case of subscribers of Tele2, the situation is very serious, on account of the large number of subscribers involved, whose interests must be safeguarded.

In view of this reality, and being incumbent upon ANACOM to ensure the protection of consumer interests [in view of the assignment provided for in point h) of paragraph 1 of article 6 of its Statutes and the regulation objective in point c) of paragraph 1 and point c) of paragraph 4, both of article 5 of Law no. 5/2004, of 10 February], the Regulator deems it must determine upon Tele2 to contact all subscribers whose pre-selection deactivation requests have been submitted by PTC to assess their genuine wishes as far as the alteration or termination of the respective pre-selection contracts is concerned.

Where there are grounds to believe that a customer does not wish to terminate pre-selection, Tele2 is released from the obligation provided for in paragraph 1 of article 10 of Regulation no.1/2006.

III – Decision

Therefore,

The Board of Directors of ICP-ANACOM, in the scope of assignments provided for in points b), f), h) and n) of paragraph 1 of article 6, pursuant to point g) of article 9, all of its Statutes, approved by Decree-Law no. 309/2001, of 7 December, and according to paragraph 4 of article 84 of Law no. 5/2004, of 10 February, and to article 10 of Regulation no. 1/2006, of 9 January, and in the pursue of regulation objectives provided for in points a) and c) of paragraph 1, in point b) of paragraph 2 and in point b) of paragraph 4 of article 5 of the mentioned Law, hereby **decides**:

1. **To determine that PTC** must refrain from accepting any requests for alteration or termination of PS contracts, or for pre-selection deactivation, from PSP subscribers, in compliance with deactivation procedures laid down in the Selection and Pre-selection Regulation;
2. **To determine that Tele2**, within at the most 10 working days from the notification of this decision, must contact all subscribers whose pre-selection deactivation requests have been submitted by PTC, without deactivation having been made effective, to assess their genuine wishes as far as the alteration or termination of the respective contracts is concerned. Where there are grounds to

⁴ See point I – Facts of determination of 8/3/2007.

believe that a customer does not wish to terminate pre-selection, Tele2 is released from the obligation provided for in paragraph 1 of article 10 of Regulation no.1/2006.

3. ICP-ANACOM shall monitor compliance by PTC of provisions in paragraph 1 above, and after expiry of the time limit established in point 2 above, it shall assess whether Tele2 has brought the breach of obligations to an end, submitting to the DAP the deactivation requests that correspond to all PS contract terminations, presented by any means, except for those where it can be shown that such terminations do not correspond to subscriber' genuine wishes.