

ALTERATION OF THE “PT ADSL NETWORK” WHOLESALE OFFER

I – Background and Current Situation

On 21 March 2005, PT Comunicações notified ICP – ANACOM and providers of a set of alterations to the “PT ADSL Network” offer¹, with emphasis on the following:

- (a) launching of two new classes of access at 4Mbps / 256 kbps (class 12) and 8 Mbps / 384 kbps (class 14), with a maximum contention of 1:50 e with local access prices, respectively, of €19 and €25²;
- (b) reduction of the price for class 11 at 2Mbps / 512 kbps (from €22 to €17) and of the respective upstream bandwidth (that changes to 128 kbps);
- (c) discontinuation, on account of migration, of class 0 (512 kbps) and of class 10 (1Mbps), to class 11 at 2 Mbps / 128 kbps.

ICP – ANACOM, noticing with satisfaction the introduction of new classes of local access with higher bandwidths, informed PT Comunicações, on 29 March, that:

- (a) this Authority agreed with the pursue of migrations, free of charge to operators, in case they were carried out following an option of the operator and never on a compulsory basis;
- (b) any class of local access introduced in the IP aggregation mode should also be made available in the ATM aggregation mode;
- (c) the introduction of new classes of access should not imply the discontinuation of existing classes, as it would reduce end-users’ chances to choose and could pose competitive obstacles to the market,

¹ Notified to interested providers, according to PT Comunicações, on the same date.

² According to PT Comunicações, these offers were available for IP aggregation only.

and determined that that entity should alter the wholesale offer in accordance with the comments presented.

On the same occasion, ICP – ANACOM ordered PT Comunicações to submit information on prices of retail offers the PT Group intended to introduce, in order to assess the existence of competitive conditions, this information having been submitted by PT Comunicações on 30 March.

Subsequently, on 5 April, following an initial analysis, and deeming there were strong evidence of crushed margins, in view of available data, ICP – ANACOM determined PT Comunicações to suspend the introduction of notified conditions for the “PT ADSL Network” offer until the existence of appropriate competitive conditions was ensured and confirmed. On the same date, this Authority solicited additional information on the expected consumption for these new offers, to enable a better assessment of provider margins.

PT Comunicações submitted the requested information on 7 April, reporting the preliminary results concerning the achieved consumption verified in client migration between classes, in a pilot project carried out at 4 Mbps.

In parallel, and following comments submitted by providers to ICP – ANACOM, this Authority promoted a set of meetings with providers, including PT Comunicações, in order to enquire in detail as to the concerns of providers and to improve the decision process.

In general, providers expressed concerns as regards:

- (a) the level of wholesale prices of the new offers notified by PT Comunicações and the respective margin as far as retail prices are concerned;
- (b) the price of aggregated access, and the fact that it presents a structure which may bring about competitive disadvantage to smaller providers;
- (c) the discontinuation of classes 0 and 10;
- (d) the migration period for the migration to class 11, in case classes 0 and 10 are discontinued;
- (e) the absence of detailed procedures for the migration of clients to class 11.

On 19 April, PT Comunicações redefined and notified ICP – ANACOM and providers of the conditions of the offer initially submitted, namely having:

- (a) reduced the local access price of:
 - a. Class 0 (512 kbps / 128 kbps) from €16 to €14,25;
 - b. Class 11 (2 Mbps / 128 kbps) from €17 to €14,5;
 - c. Class 12 (4 Mbps / 256 kbps) from €19 to €16,5;
 - d. Class 14 (8 Mbps / 384 kbps) from €25 to €24.
- (b) reduced the monthly price per Mbps of the aggregated access from an amount that varied between €359,14 and €251,39 to €160;
- (c) made available the new classes in the ATM aggregation mode;

- (d) reduced the retail prices per Mbps of ATM aggregation accesses in around 12%;
- (e) adjusted upstream bandwidth of class 11 (2Mbps / 512 kbps) to 128 kbps;
- (f) provided for the discontinuation, on account of migration, from class 10 at 1Mbps, being integrated in class 11 with no bandwidth alteration charges for providers;
- (g) provided for the supply, up to 29 April, of a “Plan for the gradual meeting of requests for the provision and alteration to the 2 Mbps, 4 Mbps and 8 Mbps classes”;
- (h) suggested that bandwidth alteration requests, to the 2 Mbps, 4 Mbps and 8 Mbps classes, be met free of charge for providers, within a 6-month period from the date of entry into force of the new offer conditions.

On the same date, PT Comunicações made known that it was willing to participate in bilateral meetings with interested providers, in order to analyse and discuss the process implementation, having due regard to the complexity nature thereof.

On 29 April, according to the communication of 19 April, PT Comunicações made available its “Plan for the gradual meeting of requests for the provision and alteration to the 2 Mbps, 4 Mbps and 8 Mbps classes”, indicating for each access the expected week for migration and the maximum bandwidth up to which the migration may be carried out (see point 4 below).

Trough fax dated 26 April and letter dated 29 April, OniTelecom and Sonaecom, respectively, expressed their opinion on the offer conditions notified by PT Comunicações on 19 April.

Those undertakings showed some surprise with the public communication made by the PT Group that the new offer had been allegedly previously agreed with ICP – ANACOM, OniTelecom deeming it “fundamental that ANACOM informed whether (or not) it agreed with the provisions of the new version of the Offer”.

As regards the offer conditions, both undertakings acknowledged that it presented a significant improvement in view of the version of the offer of 21 March, Sonaecom having referred that:

- (a) “the offer of 512 kbps enables a profitability that ensures (...) a period of 7 months to recover acquisition costs”;
- (b) “as regards the offer of 2 Mbps, it should be noted that the profitability is already positive, in line with the prior product of 512 kbps”, although the company considers that profitability to be insufficient.

OniTelecom and Sonaecom deem it necessary to define a retail minus rule (applicable to local access and to aggregated access), extensive to classes 11, 12 and 14, and consider it is compulsory to carry out a margin squeeze test to any broadband retail offer made by the PT Group.

Moreover, OniTelecom suggests that the time limit for the entry into force of the retail offers of the PT Group be extended, Sonaecom having proposed that ICP – ANACOM

determined PT Comunicações not to provide any retail offer with a capacity over 2Mbps within a one-year period or until its market share reaches 50%.

OniTelecom further proposes that prices defined for local access and aggregated access be applied retroactively, at the least, as from the beginning of 2005, suggesting that the monthly price per Mbps of the total bandwidth of IP aggregated accesses be reduced at least to €100.

Sonaecom considers that the offer presents issues of concern as far as the conditions for competition in the broadband market are concerned, namely:

- (a) the 6-month free-of-charge period for the migration to classes 11, 12 and 14, deeming that undertaking that this fact represents abuse of dominant position;
- (b) the withdrawal of classes 10 and 13, and the reduction of the upstream bandwidth associated to class 11, however no explanation is provided for these considerations;

Sonaecom proposes that ICP – ANACOM determines:

- (a) the exemption from the wholesale cost as regards client migration from the 512 kbps and 1 Mbps accesses to the new bandwidths (2Mbps, 4Mbps and 8 Mbps), regardless of the ISP chosen by the client or of the wholesale service wherein the access is supported (PT ADSL Network – IP or ATM – or RUO);
- (b) that the process of alteration of the ISP providing the broadband access service be modified, deeming this undertaking that it is fundamental that, when a request for ADSL activation is made by a client who is provided the service by another IP, PT Comunicações should implement the service nonetheless, even though the ceasing ISP has not yet cancelled the access concerning that client.

II – ASSESSMENT OF THE CONDITIONS OF THE OFFER OF 19 APRIL

1. WHOLESALE PRICES AND DIFFERENCE REGARDING RETAIL PRICE

To calculate the difference between retail prices practised by undertakings of PT Group and wholesale costs incurred by operators and service providers (OSP), it is important to estimate the average traffic consumption on the part of end-users when the change to new offers is carried out. That is, the alteration of end-user behaviour regarding the bandwidth increase associated to the 2 Mbps, 4 Mbps and 8 Mbps offers.

PT Comunicações and Sonaecom, in addition to assuming different current consumptions, present estimates based respectively on (i) preliminary results regarding consumption verified in migrations of clients between classes, on a pilot test carried out at 4 Mbps, and (ii) actual observations on a sample of around 5 thousand clients of the access service at 2 Mbps (supported on the LLU). Client migration at 512 kbps to 2 Mbps would lead to a consumption increase of around 50% and 100%, according to PT

Comunicações and Sonaecom, respectively. Note that OniTelecom has not presented so far any data on estimates for traffic increase.

ICP – ANACOM deems, in particular as regards the offer at 2 Mbps:

- (a) The estimate of PT Comunicações to be underestimated, as the actual data pointed out by that undertaking regarding the offer at 1 Mbps indicate significantly higher consumptions, although they concern national traffic unlimited at retail level and estimated data, as PT Comunicações has indicated, are preliminary, the conditions and communication manner for the performed pilot test not being known;
- (b) The estimate of Sonaecom to be overstated, in view of the observations registered in accesses supported in the unbundled access to the local loop and the fact that traffic limits practised at retail level seem to be less restrictive, as far as the limits that the PT Group intends to introduce in the new offers are concerned.

In this context and taking into account that ICP – ANACOM is not provided with better information that could contribute to the demonstration of a future use, which may be conditioned by retail offer parameters, namely additional traffic prices, this Authority adopts a value that goes half-way between those two estimates, for the purpose of an estimate of the difference between retail prices practised by the undertakings of the PT Group and wholesale prices of OSP. This is without prejudice to the monitoring of developments in the consumption of new offers.

For classes at 4 Mbps and 8 Mbps, ICP – ANACOM considers a proportional increase of consumption, that is, the migration of a class of local access with 2 Mbps to a class of local access with 8 Mbps, would also imply a 75% increase of traffic consumption.

Another important factor in the assessment of the wholesale cost of aggregated access for OSP is the contention rate, which in practise limits client bandwidth when there are several clients competing for a common and limited resource (the available bandwidth). The maximum contention ensured by PT Comunicações, over its own network, for the 512 kbps offer and for new offers, is of 1:50, this being the starting scenario for margin estimates. It should be also taken into account the contention that, according to Sonaecom, is in fact being observed by that entity, which is around 1:25.

The consumption increase estimated by ICP – ANACOM and the consumption (in kbps) by reference to the considered contention rate, are presented below in the following table:

Migration from:	512 kbps		512 kbps to 2 Mbps		2 Mbps to 4 Mbps		4 Mbps to 8 Mbps	
	1:50	1:25	1:50	1:25	1:50	1:25	1:50	1:25
Consumption increase:	-		1,750		1,375		1,375	
Consumption (kbps)	10	20	18	36	25	49	34	68

Taking due regard to the assumptions above, it is possible to present the following estimates for the difference between retail prices of the PT Group and wholesale costs of OSP, by reference to the considered consumptions:

Table 1. Consumption of 1/50 (13 thousand clients)³

	512 kbps		2 Mbps		4 Mbps		8 Mbps	
	Amount	%	Amount	%	Amount	%	Amount	%
Previous offer	€9,5	32%	-	-	-	-	-	-
19 April Offer	€12,9	44%	€10,7	36%				

Table 2. Consumption of 1/25 (13 thousand clients)

	512 kbps		2 Mbps		4 Mbps		8 Mbps	
	Amount	%	Amount	%	Amount	%	Amount	%
Previous offer	€6,4	22%	-	-	-	-	-	-
19 April Offer	€10,7	36%	€7,4	25%				

It may thus be concluded that the difference estimated between the retail prices of the PT Group and the wholesale costs of OSP, for the offer notified on 19 April, is significantly higher than the previous difference for the 512 kbps offer, which ensures the existence of competitive conditions.

In particular, the difference estimated between the retail prices of the PT Group and the wholesale costs of OSP for the offer at 2 Mbps, which is deemed as the offer with the largest client proportion, is around 20% higher than the margin providers obtained for the 512 kbps offer, considering both consumption hypotheses analysed.

It is important to define a single monthly price per Mbps for aggregated access, which is an alteration that benefits smaller providers and reduces barriers to the entry in the broadband market.

Having regard to available information and without prejudice to future alterations, namely those resulting from the monitoring of developments in traffic consumption in the aggregated IP access on the part of OSP, ANACOM deems justified that the monthly price per Mbps of aggregated access is set out at €160, as this amount ensures competitive conditions for OSP and coherence with other existing wholesale offers, promoting appropriate investment incentives.

³ The difference between retail prices of the PT Group and wholesale costs and OSP for the 512 kbps and 2 Mbps is not deemed confidential as retail prices considered by ICP – ANACOM are currently practised in the retail market for the 512 kbps offer (since the PT Group has made public that it intends to quadruplicate available bandwidth for the 512 kbps offer, in a free of charge and automatic manner, for its clients).

2. AVAILABILITY OF NEW CLASSES IN THE ATM AGGREGATION MODE AND REDUCTION OF RETAIL PRICES PER MBPS OF ATM AGGREGATION ACCESSES

PT Comunicações has made available new offers in the ATM aggregation mode and has reduced retail prices per Mbps of ATM aggregation accesses in around 12%.

As regards the monthly payment of local accesses with ATM aggregation, it should be referred that in the assessment attached to the draft determination on the “(“PT ADSL Network” – offer with ATM aggregation, of 26 August 2004, ICP – ANACOM mentioned the possibility of adapting the respective price following the review of the RUO implementation price.

Thus, in view of the recent reduction of the RUO implementation price⁴, and aiming at maintaining the coherence between different offers and the appropriate investment incentives, it is necessary to adjust the referred monthly payment of local access with ATM aggregation.

To this extent, the maximum monthly payment of local access with ATM aggregation should be altered to €7,05, which corresponds the current monthly payment (€9,5), from which is subtracted the difference between the implementation price of the local loop prior to the determination of 13 April 1005 (€96,26, which includes eligibility), and the price determined in the referred determination (€38), with a two-year repercussion.

3. ADJUSTMENT OF CLASS 11 UPSTREAM BANDWIDTH (2MBPS / 512 KBPS) TO 128 KBPS, DISCONTINUATION OF CLASSES 10 AND 13 AND PLAN FOR ACCESSES MIGRATIONS

According to more recent data, concerning the first quarter of 2005, competitive providers had around a hundred clients for class 11 (2Mbps / 512 kbps) and around eight hundred clients for class 10 (1 Mbps / 256 kbps), class 13 not having entered into force⁵.

The offer of 19 April provides for the reduction of upstream bandwidth from 512 kbps to 128 kbps for class 11 and the discontinuation of class 10 and 13, on account of an automatic migration of the former to class 11⁶, being also established that all migrations to classes 11, 12 and 14 carried out within 6 months from the entry into force of the offer shall be free of charge.

As referred above, PT Comunicações made available to OSP, on 29 April a “Plan for the gradual meeting of requests for the provision and alteration to the 2 Mbps, 4 Mbps and 8

⁴ See determination of ICP – ANACOM of 13 April 2005.

⁵ Entry into force on 9 May.

⁶ OSP being entitled to choose to migrate to a different class.

Mbps classes” indicating for each access the expected week for the migration and the maximum bandwidth up to which the migration may be carried out (see point 4 below).

The adjustment of upstream bandwidth of class 11 to 128 kbps and the discontinuation of class 10 and of class 13, did not seem to concern significantly providers in general. Providers that assessed this issue mentioned the need to be acquainted with the detailed process of client migration and to be given a time limit of 60 days, at the least, to begin the migration, bearing in mind that they must send a prior notice to clients and prepare the respective process. Two providers also referred that the maintaining of class 10 (1 Mbps / 256 kbps) could provide some commercial interest, in the framework of price reduction of aggregated access.

Note that Sonaecom presents, in the communication of 19 April, some concerns which were not mentioned in its prior communication of 8 April 2004. In that letter, the concerns and suggestions submitted to ICP – ANACOM were focused in the costs of the “PT ADSL Network” wholesale offer and in the presentation of detailed procedures for the migration of clients to class 11. Nevertheless, those concerns are also put forward in the present document.

Reduction of class 11’s upstream bandwidth

ICP – ANACOM verifies that the reduction of the class 11’s upstream bandwidth implies that all local accesses with a 512 kbps upstream bandwidth cease to be available.

Notwithstanding, taking into account:

- (a) the few accesses currently existent with that bandwidth for alternative providers (according to data for the first quarter of 2005: one access for one of the OSP, around 10 accesses for another, around 20 accesses for a third provider, and around one hundred accesses for a fourth one);
- (b) the absence of comments showing relevant concerns on this issue, except for the alternative operator with the most accesses in the current class 11;
- (c) the absence of known offers, based on the unbundling of local loop, except for the recent offer of Clix of 16 Mbps, with a 512 kbps upstream bandwidth;

ICP – ANACOM, without prejudice to the possibility of identifying in the future the need to consider in the offer a 512 kbps upstream bandwidth, does not deem the class 11’s upstream bandwidth reduction to harm market interests at present.

Discontinuation of Classes 10 and 13

As regards the discontinuation of class 10, ICP – ANACOM verifies that there is a new class that, with a lower local access price, enables the provision of a downstream bandwidth four times higher and an identical upstream bandwidth. Thus, no market problems seem to arise from the discontinuation of class 10.

Before			After		
Class 10			Class 12		
1024 kbps	256 kbps	€ 20	4096 kbps	256 kbps	€16,5

ICP – ANACOM deems that the discontinuation of class 13 does not raise any concerns as this class would only enter into force on 9 May⁷, and except for Sonaecom, that fails to present any grounds for stated misgivings, no comment were made on the discontinuation of that class on the part of OSP.

Migration costs

Sonaecom considers that the migration of 512 kbps and 1 Mbps clients to new bandwidths (2 Mbps, 4 Mbps and 8 Mbps), regardless of the ISP chosen by the client or the wholesale service wherein the access is supported (PT ADSL Network – IP or ATM – or RUO), should be performed free of charge.

As referred in the fax of 29 March 2005 conveyed to PT Comunicações, ICP – ANACOM agrees with the migration between clients of the 512 kbps and 1 Mbps classes to new bandwidths (2 Mbps, 4 Mbps and 8 Mbps), free of charge to providers.

However, it is important to ensure the coherence with other offers. Thus, the pursue free of charge for providers of the bandwidth alteration to the 2 Mbps, 4 Mbps and 8 Mbps classes, should be extended to any bandwidth alteration, regardless of the aggregation mode and of the fact that the alteration concerns the service provider (transfer between providers).

Having regard to the comments presented by OSP as regards the concerns as to migration between ISP, ICP – ANACOM shall carry out an analysis of procedures on this type of migration. If justified, this Authority shall alter the current migration procedure, introducing increased simplicity, efficiency and swiftness thereto.

4. PLAN FOR THE GRADUAL MEETING OF REQUESTS FOR THE PROVISION AND ALTERATION TO THE 2 MBPS, 4 MBPS AND 8 MBPS CLASSES

PT Comunicações made available on 29 April its “Plan for the gradual meeting of requests for the provision and alteration to the 2 Mbps, 4 Mbps and 8 Mbps classes”, making it known that it was willing to participate in bilateral meetings with interested providers, in order to analyse and discuss the process implementation.

⁷ According to a communication of PTC to ICP – ANACOM and to providers of 2 March 2005.

In an analysis of the migration plan provided to ISP, it stands out that some automatic migrations of clients occurred, currently in class 10, in the week of 23 May, this fact preventing ISP, in some cases, from contacting the client in order to find out if it wishes to alter its class of service to other than the 2 Mbps class.

Thus ICP – ANACOM deems it important to monitor with the utmost attention the implementation of the new offer conditions, having a special regard to the migration process, which should not be discriminatory, and should give OSP the opportunity to contact clients to identify the class of service they wish to be migrated to.

5. ENTRY INTO FORCE OF THE OFFER CONDITIONS

The alterations carried out to prices of local access and of IP and ATM aggregated access in the “PT ADSL Network” wholesale offer resulted from the recent introduction of classes 12 and 14 and from the alteration of upstream and downstream bandwidths associated to class 11 and the consequent analysis of the effects of such introduction. To this extent, there are no grounds that justify the consideration of retroactivity of the conditions of the offer’s current version.

ICP – ANACOM deems that, in this situation, a 30-day-notice for the entry into force of the conditions for the “PT ADSL Network” wholesale offer is enough.

It should be specified that the regulatory action intends to create structural conditions in the market that enable a sound competition, with similar initial possibilities among providers, so that they compete aiming at achieving efficiency and, above all, the fulfilment of consumer interest. The regulatory action shall never be pursued to promote conditions that artificially benefit or harm an operator, with drawbacks for the clients of that operator or of other operators.

To this extent, there is no factual support for the proposal made by Sonaecom, preventing the undertakings of the PT Group from providing retail offers with bandwidths above 2 Mbps, and thus depriving consumers of such undertakings from the possibility of opting for offers with a higher bandwidth.

III – Conclusion and Determination

In the light of the above, ICP – ANACOM deems there are no reasons to oppose to the entry into force, on 19 May, of the conditions of the “PT ADSL Network” wholesale offer, notified on 19 April 2005 by PT Comunicações, S.A. Without prejudice, there are some aspects of the “PT ADSL Network” wholesale offer which, despite not harming the entry into force of the offer on 19 May, should be altered to ensure the coherence between different offers and the appropriate investment incentives.

Therefore, considering the regulation objectives provided for in article 5 of Law no. 5/2004, of 10 February, namely to promote competition in the provision of electronic communications networks and services, to ensure that users derive maximum benefit in

terms of choice, price, and quality and to encourage efficient investment in infrastructure, and to promote innovation, the Board of Directors of ICP – ANACOM, in the scope of the assignments provided for in points b), e) and f) of article 6 of the Statutes thereof, approved by Decree-Law no. 309/2001, of 7 December, and under point e) of paragraph 2 of article 122 of Law no. 5/2004, and points b) and g) of article 9 of the Statutes, hereby determines to submit the following to the prior hearing of interested parties, pursuant to articles 100 and 101 of the Code of Administrative Procedure, establishing a maximum time-limit of 10 working days for the assessment in writing of the issue:

1. PT Comunicações, S.A shall alter the “PT ADSL Network” wholesale offer, within a 10-day time limit, to the extent that:
 - (a) The maximum price for local access with ATM aggregation is set out at €7,05 per month, regardless of the class;
 - (b) The pursue free of charge for providers of the bandwidth alteration to the 2 Mbps, 4 Mbps and 8 Mbps classes, is extended to any bandwidth alteration, regardless of the aggregation mode and of the fact that the alteration concerns the service provider (transfer between providers), to be in force for a 6-month period from the date of alteration of the offer resulting from the final Determination.