
Determination of 15.12.2005

Restrictive measures against action undertaken by companies of the PT group designed to win back pre-selected customers

Draft decision

I. Framework

On 17 July 2003, the Board of Directors of ICP-ANACOM determined the following:

1. To bind the companies of the PT Group providing fixed telephone service in direct access, within the scope of the Pre-Selection Specification, to the compliance with a 6-month withdrawal period, following the pre-selection activation, during which such companies would be prevented from undertaking any action, namely through individual contact, designed to win back clients;
2. PTC, being an entity with SMP in the market of fixed telephone networks and/or fixed telephone service, must comply with the confidentiality of information made available in the scope of the pre-selection and may not convey this information to subsidiaries or associated companies nor to its own services, namely commercial services, and thus, such data must not be accessed by such entities, by any means, namely through a database.
3. For the purposes of the previous paragraph, any data which enables PTC's commercial services, subsidiaries or associated companies to establish a connection between its clients and the pre-selection data must be eliminated from its information systems.
4. ANACOM shall monitor and supervise the implementation of the withdrawal period now imposed, with a view to reassess, within 1 year at the most, the need to maintain it.

In November 2004, ICP-ANACOM submitted a questionnaire on this matter to the European Regulators, through an IRG contact list.

In the scope of the determination on the imposition of obligations in narrowband retail markets, approved on 14 December 2004, it was concluded, in view of the market assessment carried out, that, in the short/medium term, the barriers to the development of an effective competition in markets of narrowband retail services had a tendency to remain active, a situation which demanded a proportional regulatory intervention and the imposition of corrective measures through an *ex-ante* regulatory control. In this context, in parallel with the imposition of other

obligations, the measures established by the Determination of ICP-ANACOM of 17 July 2003 were maintained, as well as other determinations in the pre-selection field, the possibility of a reassessment having been put forward, nonetheless, having regard to the evolution of the market conditions.

According to the determination of 14 December 2004, these measures related to the win-back matter were also maintained in the Draft Selection and Pre-Selection Regulation (SPSR), which was submitted to a consultation on 26 July 2005.

In view of the fact that this consultation would bring about contributions on the win-back matter, among others, ICP-ANACOM deemed this would provide a good opportunity to carry out a more comprehensive analysis of the situation, having regard to the reassessment provided for in the determination of 14 December 2004.

With this purpose, specific questionnaires were submitted to national operators as well as to European regulators, in order to collect additional information deemed relevant on this issue. The last questionnaire aimed at updating information received in reply to a similar questionnaire submitted to European regulators in November 2004.

Questionnaires for operators were sent on 5 September 2005, and on 22 September 2005, it was requested of European regulators that information was updated.

For the reasons indicated in the consultation report of the selection and pre-selection regulation, ICP-ANACOM decided to withdraw therefrom the win-back obligations, initially provided for in article 7 of the correspondent draft regulation, and to approve a specific draft decision on this matter, to be submitted to the necessary consultation procedures.

Notwithstanding, while approval is not granted to the final decision subsequent to such consultation, those obligations shall remain in force in the terms established in the referred determinations of ICP-ANACOM, of 17 July 2003 and 14 December 2004.

II. Analysis and conclusions

The document comprising the summary of replies to both questionnaires carried out in September 2005, as well as the analysis made and conclusions reached by ICP-ANACOM on this matter may be consulted at <http://www.anacom.pt/template15.jsp?categoryId=141408>

The replies submitted to ICP-ANACOM proved to be useful to the analysis, which is presented in annex hereto and which substantiates the draft decision set forth in III.

In fact, the following particulars were particularly relevant to this analysis:

- Market analysis on narrowband retail markets concluded by ICP-ANACOM in December 2004, complemented by elements on the evolution registered since then at competitive level;

- Analysis of complaints on this matter received at ICP-ANACOM;
- Benchmark established by ICP-ANACOM on the matter under discussion;
- Replies submitted to ICP-ANACOM by providers, especially information made available by respondents on:
 - Contents of complaints received on win-back issues;
 - Six-monthly evolution, since the end of 2002, of the percentage of departures of pre-selected customers¹, calculated relatively to the total number of pre-selected customers;
 - Six-monthly evolution, since the end of 2002, of the percentage of new pre-selected customers, calculated relatively to the total number of pre-selected customers²;
 - Six-monthly evolution, since the end of 2002, of the percentage of departures of pre-selected equivalent accesses, calculated relatively to the total number of pre-selected equivalent accesses of the provider³;
 - Six-monthly evolution, since the end of 2002, of the percentage of providers' new pre-selected equivalent accesses, calculated relatively to the total number of the pre-selected equivalent accesses of the provider⁴;
- Pay-back and longevity evolution concerning pre-selected customers;
- Suggestions towards an increased effectiveness of measures in force.

Without prejudice to the relevance of information made available by providers, the period of time granted to reply to the questionnaire presented by this Authority on 5 September was short, in view of the fact that some of the elements explicitly requested are not easily gathered. Thus most respondents did not submit comprehensive quantitative information on some relevant elements for the analysis, namely as regards:

- Grounds for some of the views stated, specially in terms of length of win-back period;
- Impact of win-back impositions (as regards retention of customers, of company revenues/margins, etc.), cleansing the effects related to the variation of marketing costs and/or to user learning economies in view of the pre-selection product⁵;
- Six-monthly evolution, since the end of 2002, of the percentage of pre-selected customers who maintained a pre-selection contract with the provider for longer than six months;
- Evolution since the period prior to the determination of July 2003 of the number of complaints on win-back action (whether or not launched during the established withdrawal period).

Moreover, there is a wide variation as regards some of the elements deemed equally relevant in this analysis, such as the acquisition costs of customers in pre-selection regime⁶, a situation which may result from the fact that the elements taken into consideration by each respondent in the respective calculation do now

always coincide nor is it explained whether the value presented corresponds to “residential” or “non-residential” customers.

III. Decision

Whereas:

1. The factors which justified the imposition and subsequent maintenance, respectively through ICP-ANACOM determinations dated 17.07.2003 and 14.12.2004, of restrictive measures currently in force against action designed to win-back pre-selected customers essentially remain, namely:

1.1. a low level of market competition and the resulting privileged access of PT Comunicações, SA (PTC) to information on data concerning pre-selection contracts;

1.2. apparently, following the determination of 17 July 2003, although the number of complaints on win-back action undertaken by companies of the PT Group on pre-selected customers was, as expected, significantly low, ICP-ANACOM has continuously received some complaints on practises of that nature; however, such practises took place in general following the elapse of the withdrawal period or between the period of time between the presentation of the request made by the PSP to the DAP as regards the pre-selection and the activation of the facility; so far, nonetheless, the abusive use of pre-selection data by companies of the PT Group has not been established in any situation; also, providers who replied to the questionnaire declared they were aware of win-back action launched by companies of the PT Group to their customers, following the determination of ICP-ANACOM of 17 July 2003; in most cases, however, respondents referred they were unable to quantify accurately such actions, and some companies refer in addition that this type of complaints are normally made verbally, customers being reluctant to submit them in writing;

1.3. the establishment of a withdrawal period, during which the companies of the PT Group are prevented from undertaking any win-back action aimed at pre-selected customers, remains an appropriate means to allow the client a free and informed choice of the service intended, trying it out and remaining free to continue being a client or to release himself from the contract, without being under any external pressure; in fact, the evolution verified following the mentioned Determinations of ICP-ANACOM, of 17 July 2003 and 14 December 2004, was not such as to alter this understanding, given that the conditions which favour the resume of win-back practises still remain, in view of points 1.1. and 1.2., a situation which may prevent the customer from effectively testing the engaged service for a sufficient period of time; on the other hand, since the approval of the mentioned determination, restrictions have not been made inhibiting customers from searching, on their own initiative, for new fixed telephone service offers or providers; the existence of a withdrawal period does not prevent customers, during that period, from becoming customers once again of the incumbent operator, in case of dissatisfaction with the service; moreover, the companies of the PT Group, given their economic/financial dimension and capacity, still enjoy the best conditions to take forward the means of information at the disposal of users, even if they are unable to undertake win-back action, during a withdrawal period, on customers of alternative providers; in fact, the withdrawal period does not prevent providers of the PT Group telephone service from taking advertising action, in the course of that period, namely advertizing based on media bodies; as to providers of the telephone service providing access in pre-selection, they have been generally unable, so far, to make users aware of this facility, as according to the results of an inquiry on consumption of electronic communications carried out in

January/February 2004 by ICP-ANACOM, 60% of subscribers of the fixed telephone service inquired declared they did not know the means of operator pre-selection; this inquiry having been repeated in June this year, the preliminary results point towards very similar results, establishing that, at a concrete level, as regards pre-selection offers, the degree of awareness of consumers is still low; on the other hand, according to the information submitted by providers, the percentage of departures of pre-selection customers for each of these companies not comprised in the PT Group is generally higher than that registered for the providers within the Group of the incumbent.

2. In conclusion, ICP-ANACOM ANACOM takes the view that there are no grounds to cease the obligation to comply with a withdrawal period, imposed under the determinations dated 17 July 2003 and 14 December, without prejudice to the need to introduce a few adjustments as regards its execution.

3. The reduction of the length of the withdrawal period is deemed justified, namely having regard to the fact that:

3.1. although the dominance of the PT Group in the market of telephone services at a fixed location has remained high (the companies thereof enjoying in particular a competitive advantage in terms of access to information on pre-selected customers, in view of the fact that, by the end of the third quarter of 2005, the PT Group had around 91% in terms of main telephone accesses), at the level of telephone traffic at a fixed location the competitive situation is clearly better (between the first quarter of 2003 and the end of the third quarter of 2005, the market share of the PT Group, measured in minutes of telephone voice traffic at a fixed location, shrunk from 84% to 74%). This improvement results essentially from an increase from 13% to 20% of the weight of indirect access traffic (in which the market share of the companies of the PT Group remains a clear minority) in the total value of telephone voice traffic at a fixed location;

3.2. in addition to the preventive win-back actions established in July 2003, new instruments, such as the SLRO (already at an implementation stage) and the extension of eligible traffic in pre-selection regime (provided for in the new selection and pre-selection regulation), shall constitute an additional encouragement to the verification, in the short/medium term, of:

- reinforcement of competition in retail markets of telephone service at a fixed location, through an increasing resort to pre-selection on the part of users;

- the reduction of the churn rate itself which providers not comprised in the PT Group register in the scope of this facility; in fact, being PTC prevented from billing customers, the bills cease to be used as a means to contact customers in the scope of a win-back action; moreover, the tendency towards a single bill issued by these indirect access providers not comprised in the PT Group may encourage customers to maintain the pre-selection contract.

3.3. More than two years after the decision of 17 July 2003, in the scope of which the establishment of a 6-month withdrawal period was deemed appropriate to grant the customer sufficient time to fully enjoy the service of the pre-selected providers, there is currently a wider base of customers who are familiar with the pre-selection facility;

3.4. The regulatory decisions taken by each NRA on the imposition and length of the withdrawal period concerning win-back actions may not be distinguished from the particular conditions of each country, with attention to the respective

competitive and regulatory context; nevertheless, it is deemed that the four-month withdrawal period imposed in Spain, currently under consultation procedure, may represent a reference for the purpose of a decision to be adopted in Portugal in this matter (in Ireland, the only European country, apart from Spain, which has adopted this type of measure, there is a three-month withdrawal period, however it presents very different contours, namely being extensive to the unbundled local loop and comprising not only companies within the group of the incumbent but to every single provider who has lost a customer); in fact, although it is not possible to establish a linear comparison between Portugal and Spain, namely at a competitive level, in Portugal the current shares of the companies of the group of the incumbent are similar, as far as main accesses and fixed telephone traffic are concerned, to the correspondent shares registered in Spain in 2002, when CMT extended the withdrawal period from two to four months and broadened the eligible traffic in pre-selection.

4. Although the reduction of the withdrawal period from 6 to 4 months is deemed justified, ANACOM considers that the effectiveness of this measure should be reinforced by introducing the following additional alterations to its current formulation:

4.1. Inclusion, in the withdrawal period during which the companies of the Pt Group are not allowed to undertake win-back actions on pre-selected customers, of an additional period between the period of time between the presentation of the request made by the PSP to the DAP as regards the pre-selection and the date of effective activation of the facility. In fact, complaints have been reported to ICP-ANACOM on win-back actions on the part of providers of the fixed telephone service comprised in the PT Group, launched in the scope of that period of time. This type of complaints suggest an undue use of pre-selection information to which these companies have, as referred above, a privileged access.

4.2. Article 65 of Law no. 5/2004, of 10 February establishes the obligation on companies to respect the confidentiality of information made available in the scope of access or interconnection arrangements, and to use that information solely for the purpose for which it was supplied, and such information must not be passed on to any other party, in particular other departments, subsidiaries or partners, for whom such information could provide a competitive advantage. Without prejudice, ANACOM deems justified the wish of some providers who have replied to the Authority's questionnaire, who declare the need that the companies of the PT Group ensure that their lists of customers to be contacted in the scope of promotional campaigns do not include pre-selected customers, in the course of the withdrawal period. Thus, with that exclusive objective, these companies may provide their services, namely the commercial services, as well as the remaining companies of the PT group, the indication of the customers with a pre-selection activated by other providers.

In the scope of assignments provided for in points b), f) and h) of article 6 of the Statutes of ICP-ANACOM, approved by Decree-Law no. 309/2001, of 7 December, and taking into account the regulation objectives established under points a) and c) of paragraph 1 and point b) of paragraph 2 of article 5 of Law no. 5/2004, of 10 February, the Board of Directors of ICP-ANACOM, pursuant to point g) of article 9 of the referred Statutes, and in order to give effect to the determination of the Board of Directors of ICP-ANACOM of 14 December 2004 on the imposition of obligations in narrowband retail markets, hereby determines:

I. To establish a four-month withdrawal period, following the presentation of the pre-selection request by the pre-selected provider (PSP), 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;

II. Without prejudice to the respect for the confidentiality of information made available in the scope of pre-selection, the companies of the PT Group, in case they undertake commercial action not specifically aimed at their subscribers who are pre-selected customers of other companies, may provide their services, namely the commercial services, as well as the remaining companies of the PT Group, with information on customers in a pre-selection regime. This information, however, may be only used in order to avoid that, during the withdrawal period, these customers are contacted for commercial purposes (ex: in the scope of campaigns to launch new offers or promotional campaigns), by companies of the PT Group acting in narrowband markets of access to the public telephone network at a fixed location and/or markets of telephone services available to the public at a fixed location. No other additional information on pre-selected customers, namely on the pre-selected providers customers are in contact with, the type of pre-selected traffic or the date of the pre-selection request, may be conveyed.

III. The final determination which ICP-ANACOM approves on this matter shall enter into force within a 10- working-day time limit after the respective notification to companies of the PT Group, and shall apply to pre-selection requests submitted after this date to companies of the PT Group who provide access to the public telephone network at a fixed location.

IV. To submit the present draft decision to the prior hearing of interested parties, under articles 100 and 101 of the Code of Administrative Procedure, as well as to the general consultation procedure, pursuant to article 8 of Law no. 5/2004, of 10 February, a deadline of 30 working days at the latest being established for the assessment of the matter by interested parties.

V. To request the Instituto do Consumidor (Consumer Institute), DECO, FENACOOOP, UGC and ACOP to assess in writing the provisions of this determination, within the time-limit established in the preceding point, as it concerns issues of interest to consumers.

¹ "Number of departures of pre-selected customers for the period N / Total number of pre-selected customers by the end of the period N".

Customer: user with a contractual relationship with the national FTS provider, who has been granted the right to originate and/or route traffic.

² "Number of new pre-selected customers for the period N / Total number of pre-selected customers by the end of the period N".

³ "Number of departures of pre-selected equivalent accesses for the period N / Total number of pre-selected equivalent accesses by the end of the period N".

Note: the number of pre-selected equivalent accesses corresponds to the number of lines used through pre-selection by customers pre-selected by the provider; in case of basic ISDN accesses, the total number of equivalent accesses is as follows: 2, for each basic ISDN access and 30 for each primary ISDN access.

⁴ "Number of new pre-selected equivalent accesses for the period N / Total number of the pre-selected equivalent accesses by the end of the period N".

⁵ "Marketing costs" means the set of expenses which regard all necessary activities to make the user aware of the "pre-selection" service, namely those related to call centres, mailing, advertising and market surveys.

"User learning economies" in view of the pre-selection product mean the effect of the increasing familiarisation of users with this facility.

⁶ Acquisition costs of customers ("residential" and/or "non residential") in pre-selection regime: marketing costs connected to the stage of the life cycle of the product customer which correspond to the acquisition of the customer, as well as expenses with the conclusion of the contract and the pre-selection procedure itself (commission, forms, exchange of information with the direct access provider, processing of customer information, communication with the customer in the scope of the procedure, activation costs, etc.)

Note: Residential customers shall be understood as those customers who do not use the service under consideration mostly as intermediate consumption of the economic activity performed. As proxy, the classification resulting from the TIN – Tax Information Number may be resorted to (customers with no TIN or TIN starting with 1 or 2 are not business customers). Other equivalent criteria may be used, and in this case, information thereon shall be duly provided.

Non-residential customer shall be understood as those customers who use the service under consideration mostly as intermediate consumption of the economic activity performed. As proxy, the classification resulting from the TIN – Tax Information Number may be resorted to (customers with TIN not starting with 1 or 2 are business customers). Other equivalent criteria may be used.