

ANEXO 2

Comentários recebidos da
Comissão Europeia de 14 de Julho de 2011

**GPERI**

Gabinete de Planeamento Estratégico e Relações Internacionais

Ministério da Economia e do Emprego

Telecópia ref^a:		Nº de páginas: 1+2
PARA:		
Exm ^o . Senhor Prof. Doutor José Amado da Silva Presidente do ICP-ANACOM – Autoridade Nacional de Comunicações		
DE:		
Prof. Doutor José Passos Director do Gabinete de Planeamento Estratégico e Relações Internacionais		
ASSUNTO: Queixa efectuada no âmbito do projecto-piloto relativa ao leilão de espectro para a atribuição de direitos de utilização das frequências nas faixas dos 450 MHz, 800 MHz, 900 MHz, 1800 MHz, 2.1 GHz e 2.6 GHz (EU PILOT 2275/11/INSO).		

Reportando-me à matéria em epígrafe, transmitida à ANACOM pelo fax da DGAE/MME com a referência JUR/NºS04094/2011, de 19.07.2011, solicita-se o envio da resposta no prazo indicado, a saber, **até dia 1 de Setembro**, em formato Word para o e-mail do GAERE, gaere@mail.telepac.pt uma vez que a mesma terá que ser inserida numa base de dados do âmbito deste projecto-piloto.

Com os melhores cumprimentos

O DIRECTOR

José Passos

ANACOM	CA	Destinatário
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European Commission
EU Pilot

18/07/2011

File ref n°:	2275/11/INSO
Member State:	PT
Commission service:	INSO
Issue area:	Information Society and Media/Electronic communications
File nature:	Own Initiative / Commission

Responsible Filehandler Member State:

- 18/07/2011: File submitted to Member State in EU PILOT database - Information Society / GERARD Philippe

- File status: Awaiting acceptance by Member State
- MS: Target Date: 26/09/2011 = 70 day(s) left

- Esclarecimentos em relação ao leilão de espectro para a atribuição de direitos de utilização das frequências nas faixas dos 450 MHz, 800 MHz, 900 MHz, 1800 MHz, 2.1GHz e 2.6GHz

- **Commission service language:** The Commission services are seeking for clarification on the spectrum auction for the allocation of rights of use for frequencies in the 450 MHz, 800 MHz, 900 MHz, 1800 MHz, 2.1 GHz and 2.6 GHz bands to be launched shortly in Portugal by ANACOM. In particular, the Commission services would like to know if the Portuguese authorities will ensure that the forthcoming spectrum assignment would enhance the development of competition and facilitate market entry and if they are in line with the revised regulatory framework, and in particular, Article 7(1) (e) of the Authorisation Directive requires that Member States, when considering whether to limit the number of rights of use to be granted, shall inter alia give due weight to the need to maximise benefits for users and to facilitate the development of competition. Furthermore, ANACOM shall clarify if the objectives of the auction process are also consistent with the Memorandum of Understanding on specific economic policy conditionality signed on 17 May 2011 by the Portuguese Government, the European Union, the International Monetary Fund and the European Central Bank, which states that "[t]he Government will facilitate market-entry by awarding new players the right to use 'new' radio frequencies (i.e. auction of spectrum) for broadband wireless access".

The Commission's services concerns are with regard to the spectrum caps established by ANACOM, notably, the frequencies below 1 GHz, which are essential to rolling-out a nationwide broadband mobile network and it seems that the 800 MHz and 900 MHz bands will be auctioned in separate categories, and that individual spectrum caps have been established: a cap of 2x10 MHz in the 800

MHz band on all bidders, and a cap of 2x5 MHz in the 900 MHz band on each mobile network operator already providing services in that band.

As per the above the Commission services would like mainly to be informed how the current auction regulation is going to foster more competition in the market, to facilitate market entry by new market players and to avoid the hoarding of spectrum by one or two operators.

- Member State language:** Os serviços da Comissão gostariam de obter alguns esclarecimentos em relação ao leilão de espectro para a atribuição de direitos de utilização das frequências nas faixas dos 450 MHz, 800 MHz, 900 MHz, 1800 MHz, 2.1GHz e 2.6GHz a ser lançado em breve, em Portugal, pela ANACOM. Os serviços da Comissão gostariam de saber, em concreto, se as Autoridades Portuguesas pretendem garantir que a atribuição de espectro que se aproxima venha a promover o desenvolvimento de concorrência e facilitar a entrada no mercado e se estes objectivos estão de uma forma geral, de acordo com o quadro regulamentar das comunicações electrónicas da União Europeia revisado e, nomeadamente, com os termos do artigo 7.º, n.º 1 alínea a) da Directiva "Autorização" o qual determina que caso um Estado-Membro considere a hipótese de limitar o número de direitos de utilização de radiofrequências a conceder, deve inter alia ter em devida conta a necessidade de maximizar os benefícios para os utilizadores e facilitar o desenvolvimento da concorrência. Cumpre referir que a ANACOM devesse ainda clarificar se os objectivos deste leilão estão igualmente de acordo com o Memorando de Entendimento sobre os condicionalismos específicos da política económica, celebrado entre o Governo Português, a União Europeia, o Fundo Monetário Internacional e o Banco Central Europeu, a 17 de Maio de 2011, no qual se estabelece que "[t]he Government will facilitate market-entry by awarding new players the right to use 'new' radio frequencies (i.e. auction of spectrum) for broadband wireless access".

A preocupação dos serviços da Comissão reside nos limites à atribuição de espectro definidos pela ANACOM, designadamente, no que respeita às frequências abaixo de 1 GHz, as quais são fundamentais para o lançamento de uma rede de banda larga móvel em todo o país, a Comissão entendeu que as faixas de 800 MHz e 900 MHz serão leiloadas em categorias diferentes e que os limites à atribuição individual de espectro foram definidos: um limite de 2x10 MHz na faixa dos 800 MHz para todos os licitantes e um limite de 2x5 MHz na faixa dos 900 MHz para cada prestador de Serviço Móvel Terrestre que já detenha direitos de utilização de frequências nessa faixa.

Face ao supra exposto, os serviços da Comissão gostariam sobretudo de saber como é que o presente regulamento do leilão vai promover o desenvolvimento de uma maior concorrência no mercado, facilitar a entrada no mercado de novos operadores e evitar o açambarcamento de espectro por um ou dois operadores.



COMISSÃO EUROPEIA

Direcção-Geral Sociedade da Informação e Media

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Bruxelas,
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/Transmitido via o sistema EU Pilot; processo 2275/11/INFSO/

Exmo. Senhor Presidente,

Escrevo-lhe no contexto do leilão de espectro para a atribuição de direitos de utilização das frequências nas faixas dos 450 MHz, 800 MHz, 900 MHz, 1800 MHz, 2.1GHz e 2.6GHz a ser lançado em breve, em Portugal, pela ANACOM.

A Comissão Europeia congratula-se com a abordagem holística da ANACOM tomada em relação à atribuição de espectro ao mesmo tempo, nas várias frequências de bandas. Contudo, de acordo com a informação constante no documento da ANACOM submetido a consulta¹, a Comissão tem algumas preocupações que gostaria de partilhar com V. Exa. e gostaria que V. Exa. prestasse alguns esclarecimentos a este respeito.

De acordo com o documento submetido a consulta pública, o principal objectivo da ANACOM é promover o desenvolvimento de uma maior concorrência no mercado, facilitar a entrada no mercado de novos operadores e evitar o açambarcamento de espectro por um ou dois operadores.

¹ Projecto de regulamento do Leilão para a atribuição de direitos de utilização de frequências nas faixas dos 450 MHz, 800 MHz, 900 MHz, 1800 MHz, 2,1 GHz e 2,6 GHz e o Projecto de Decisão sobre a Limitação do Número de Direitos de utilização de frequências nas faixas dos 450MHz, 800 MHz, 900 MHz, 1800 MHz, 2,1 GHz e 2,6 GHz e definição do respectivo procedimento de atribuição

Estes objectivos aparentam estar, de uma forma geral, claramente de acordo com o quadro regulamentar das comunicações electrónicas da União Europeia revisto e, nomeadamente, com os termos do artigo 7.º, n.º 1 alínea a) da Directiva "Autorização"² o qual determina que caso um Estado-Membro considere a hipótese de limitar o número de direitos de utilização de radiofrequências a conceder, deve *inter alia* ter em devida conta a necessidade de maximizar os benefícios para os utilizadores e facilitar o desenvolvimento da concorrência. Os objectivos deste leilão estão igualmente de acordo com o Memorando de Entendimento sobre os condicionalismos específicos da política económica, celebrado entre o Governo Português, a União Europeia, o Fundo Monetário Internacional e o Banco Central Europeu, a 17 de Maio de 2011, no qual se estabelece que "[t]he Government will facilitate market-entry by awarding new players the right to use 'new' radio frequencies (i.e. auction of spectrum) for broadband wireless access".

Contudo, não resulta claro para a Comissão de que modo estes objectivos podem ser alcançados nos termos do actual projecto de regulamento do leilão em consideração. No que respeita às frequências abaixo de 1 GHz, as quais são fundamentais para o lançamento de uma rede de banda larga móvel em todo o país, a Comissão entendeu que as faixas de 800 MHz e 900 MHz serão leiloadas em categorias diferentes e que os limites à atribuição individual de espectro foram definidos: um limite de 2x10 MHz na faixa dos 800 MHz para todos os licitantes e um limite de 2x5 MHz na faixa dos 900 MHz para cada prestador de Serviço Móvel Terrestre que já detenha direitos de utilização de frequências nessa faixa.

Se o entendimento da Comissão em relação às medidas propostas estiver correcto, parece resultar que existe um risco sério de um potencial novo operador poder ficar impedido de ter acesso a espectro suficiente para permitir a criação de uma rede nacional de banda larga móvel. Apesar de ser impossível prever o resultado final do leilão, não pode ser excluído o facto de os três operadores existentes virem a adquirir todo o espectro disponível na faixa dos 800 MHz. Se tal ocorrer, um potencial novo operador terá que ter espectro suficiente (i.e. no mínimo 2x10 MHz) na faixa dos 900 MHz para lançar uma rede de banda larga móvel em todo o país. Contudo, isto seria impossível se qualquer dos operadores existentes obtivesse igualmente 2x5 MHz nessa faixa de espectro.

Atendendo ao *supra* exposto e de acordo com as normas da Directiva GSM³ modificada, gostaria que me informasse como é que o espectro existente já atribuído na faixa dos 900 MHz irá ser tido em consideração neste processo de atribuição de espectro. Mais gostaria que me informasse se os limites cumulativos à atribuição de espectro na faixa dos 800 MHz e dos 900 MHz foram tidos em consideração. A Comissão gostaria ainda de solicitar a V. Exa. esclarecimentos adicionais em relação à questão de, como é que as Autoridades Portuguesas pretendem garantir que a atribuição de espectro que se aproxima venha a promover o desenvolvimento de concorrência e facilitar a entrada no mercado.

² Directiva 2002/20/CE do Parlamento Europeu e do Conselho de 7 de Março de 2002, relativa à autorização de redes e serviços de comunicações electrónicas, alterada pela Directiva 2009/140/CE

³ Directiva 87/372/CEE do Conselho sobre as bandas de frequências a atribuir para a introdução coordenada de comunicações móveis terrestres digitais celulares públicas pan-europeias na Comunidade alterada pela Directiva 2009/114/CE DO Parlamento Europeu e do Conselho de 16 de Setembro de 2009.

O sistema *EU Pilot*, no qual Portugal participa voluntariamente, visa gerir pedidos de informações e queixas, assim como esclarecer questões que a Comissão deseja suscitar junto de um Estado-Membro. Se for caso disso, estas trocas de informações darão origem a processos de infracção. Face ao impacto que esta medida pode exercer no mercado, gostaria de receber a sua resposta no prazo de dez semanas a contar da data de recepção do presente ofício através do sistema *EU Pilot*.

Queira aceitar, Exmo. Senhor Presidente, a expressão da minha mais elevada consideração,

Robert Madelin

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Comentários recebidos da
Comissão Europeia de 29 de Julho de 2011

Spectrum Auction – Remarks on ANACOM rules under public consultation

Following our productive discussion yesterday, 28 July, and as agreed, the following are the main remarks of the Commission services, in agreement with the IMF and the ECB, concerning the planned spectrum auction in the context of the Memorandum of Understanding.

Firstly, to recap some of the context, the Commission welcomes the fact that the planned auction makes available a significant amount of spectrum at the same time, as this provides greater flexibility and choice to operators, thus favouring technological and service innovation and more competitive mobile markets.

It is also useful reassuring that, while the commitment of the Portuguese authorities goes beyond the strict obligations of EU law related to this sector, no steps are being considered that could be perceived as breaching the principles of the regulatory framework, including the need for proportionate, transparent and non-discriminatory measures.

As stressed in the meeting of 28 July, the measure in the MoU aims at improving the functioning of the market and increasing competition by fostering entry. Therefore the revenue raising aspect of the auction should not jeopardize or take priority over this objective.

Given the large amount of spectrum being made available, the outcome of the auction may well determine the structure of the market for the next decades. Therefore it is crucial that the spectrum award achieves the goal of facilitating entry and increase competition. However, while recognising the significant efforts by the Portuguese authorities to construct a proportionate and effective assignment process, it is the view of the Commission services that this might not be fully achieved under the revised draft auction rules. Our main concerns as expressed in the meeting are related to the following issues:

1) Analysis of the potential distortions arising in the mobile markets

As the current auction includes parts of the 900 MHz spectrum band, and as all the bands to be auctioned will be used to service the same mobile markets, Anacom should carry out an assessment as to whether the existing licence holdings in the 900 MHz band are likely to distort competition in that mobile market. Such an assessment is an obligation imposed by Article 1 (2) of the amended GSM Directive (Directive 87/372/EC as amended by Directive 2009/114/EC). While the obligation to carry out such an assessment arose already when the refarming of the 900 MHz band took place in Portugal in 2010, an effective assessment of potential distortions will be even more necessary in light of the present auction. While it is up to the national regulator to decide if the assessment is carried out before or after the auction, an ex-post assessment may be the appropriate choice in the present situation and in light of the adjustments that may be required in relation both to the application of spectrum caps and the implementation of access obligations referred to below.

In this way, in light of the results of the competitive assessment and where justified and proportionate the regulator should address any competitive distortions in accordance with Article 14 of the Authorisation Directive. Given that there would therefore exist a possibility of ex-post measures to redress any anticompetitive situation resulting from refarming and the present auction, it would be important to signal in the tender that there will be such an ex-post assessment and that remedies to redress a resulting situation considered anti-competitive

could possibly be taken. While the application of such an assessment of possible distortions to all the bands to be auctioned can be considered as best practise arising from the GSM Directive, it is the view of the Commission services that this is in any event an obligation under the GSM Directive as regards the existing 900 MHz holdings and their implications for the mobile market, including their impact in combination with other holdings that have been acquired, including those in the 800 MHz band and the associated 1800 MHz, 2 GHz and 2.6 GHz bands

2) Spectrum caps

The frequencies below 1GHz appear to be essential for rolling-out a nationwide broadband mobile network at a reasonable infrastructure cost and with the technical characteristics necessary to cover remote areas and to provide sufficient penetration within buildings. Without sufficient holding in this spectrum range a new entrant would have a severe competitive disadvantage in terms both of service quality and network costs.

As far as the 800 MHz and the 900 MHz bands are concerned, the Commission services consider that the spectrum caps as currently proposed do not appear to guarantee that a potential new entrant can obtain spectrum in this strategically important spectrum band, and thus to be able to make an effective entry into the market. Existing mobile operators will always have a stronger incentive to outbid new entrants in order to consolidate their holdings, and to obtain a serviceable block of 800 MHz spectrum. If this were to be the case, and while the outcome of the auction cannot be predicted with certainty, then under the existing proposals a new entrant can only be sure of gaining access to spectrum in the 1800 MHz band.

The Commission services therefore urge the Portuguese authorities to introduce a cumulative spectrum cap on the 800 and 900 MHz band of a maximum of 2x20 MHz per operator as a combined total spectrum holding in the two bands.

It has to be stressed that such a cumulative spectrum cap is not equivalent to expressly reserving specific spectrum blocks for new entrants. The latter option could raise competition issues, is less technology neutral, and moreover could give rise to inefficient market entry. Appropriate spectrum caps (and especially a cumulative spectrum cap) are more appropriate for ensuring a balance between enabling market entry for new operators while allowing adequate choice for existing operators who could balance their holdings in the 800 MHz and 900 MHz bands in an orderly and proportionate manner (including the possibility of giving back spectrum in order to comply with the spectrum caps.). However the obligation to respect the cap will have to be clearly inserted as part of the assignment conditions for the spectrum to be awarded under the auction process, as it will most likely require modification or possible surrender of the revised 900 MHz rights of use issued only last year.

In this context - as already mentioned during the meeting - the Commission services also suggests designing the cumulative spectrum cap in a way that gives sufficient time for the existing licence holders to migrate into the 800 MHz band when it becomes available in 2015 if they are opting for that choice (i.e. that have won 800 MHz spectrum). This could be achieved by a later surrender date for the holdings that exceed the spectrum cap. The licence holders could be also encouraged to engage in spectrum trading to achieve the desired result.

3) Access obligations (National roaming / MNVO access)

As already discussed during the meeting the Commission understands fully the rationale for requiring that, in order to have access to national roaming, the new operator has to achieve at least 50% coverage in terms of population, as this encourages new entrants to invest in a rapid network roll-out and at the same time avoids capacity problems in densely populated areas. The Commission would however welcome the proposal to guarantee access to national roaming to new entrants also before they achieve the 50% threshold provided that they can demonstrate a strong commitment to a fast roll-out of its network to achieve that 50% coverage. Such early access to national roaming would place the new entrant in a better position to develop market share and fund its ongoing network construction costs.

However, the condition according to which licence holders are not required to offer national roaming to an operator that holds rights of use of frequencies for more than a total of 2x5 MHz in the 800 MHz and 900 MHz bands does not appear to be justified or proportionate. Given market developments, and in particular the growth of (broadband) mobile data as an essential element in any service offering, any new entrant would by necessity have to buy more than 2x5 MHz (at least 2x10 MHz) in the 800 or 900 MHz bands to roll-out an efficient network. Therefore, this condition would appear effectively to nullify any potential benefit of the roaming obligation. Given the time it will take any new entrant to build out a network, there is no justification for limiting it in regards to spectrum capacity. In order to enter the market it is essential to a new operator to be able to provide nationwide coverage to their clients from the beginning, and even if a new entrant obtains 2x10 MHz in the 800 and 900 MHz bands it will take considerable time to roll-out a network with nationwide coverage. Therefore in the first period a new entrant cannot compete on the mobile market without having access to national roaming. Access to national roaming for new entrants for a given period of time – that enables them to build out their nationwide network in the meantime – would strike an effective balance between safeguarding the interests of current licence holders and new entrants.

The Commission stresses that without an appropriate enforcement mechanism and the possibility for ANACOM to intervene if necessary – while respecting the autonomy of the contracting parties – the MNVO access and national roaming obligations might not be effective. While the auction rules contain certain provisions regarding this issue (especially Article 34 (3) and (7)), the Commission would encourage the Portuguese authorities to indicate a strong commitment in the MoU to operating an adequate monitoring and enforcement mechanism for the national roaming and MNVO access obligations ensuring timely access and reasonable prices.

4) Spectrum auctioned in the 900 MHz band and the associated discount for new entrants

The spectrum blocks available in the 900 MHz band will be adjacent to the GSM-R system to be used by railway operators, with the result that they will have to respect more stringent technical limitations so as not to interfere with, and to avoid being interfered by, the railway system. Therefore these blocks might be less adequate for offering high speed mobile broadband services because of the necessary coordination obligations and the more limited power level in certain areas along railway lines and around railway stations in towns and cities. This has a direct effect on the value of the 2x10 MHz block, and the Commission services would suggest that the reserve price of these blocks should properly reflect the reduced value of these spectrum blocks. In order to facilitate market entry, a reduction of the reserve price of this band should be considered. This is especially the case as, according to Article 25 (4) of the auction rules, even if the 20% discount is applied the final price paid by

the new entrant cannot be lower than the reserve price. Alternatively, therefore, due consideration should be given to reevaluating whether the existing discount is sufficient in view of creating a level playing field.

5) Reserve prices

As mentioned, the Commission services encourage low reserve prices as they facilitate market entry and can contribute to the development of a more competitive mobile market.

As far as the reserve prices are concerned it is useful to have a look at the similar auctions in other Member States. While Germany obtained a higher price for the 800 MHz band than the reserve price proposed for Portugal, the initial reserve price was much lower, while the final price paid in Sweden was considerably lower. In any event, comparisons in that field should be based on the existing industry standard, the €/MHz/population ratio. Portugal should therefore consider following the example of Sweden, or the proposed reserve prices in Spain which, once again, are lower than those proposed in Portugal.

The Commission services will gladly provide further clarification if needed.

Comentários recebidos da
Comissão Europeia de 9 de Setembro de 2011

The Commission services have carefully analyzed ANACOM's answer to the concerns expressed by the EC related to the upcoming auction [document "Spectrum Auction: ANACOM's position regarding EC remarks on rules under consultation"]. The Commission welcomes the fact that ANACOM considers addressing several concerns expressed by the Commission services (e.g. related to the analysis of potential competitive distortions and access obligations). However it has to be noted that in view of measures 5.17 and 5.18 of the Memorandum of Understanding and the concerns already expressed at the meeting of 28 July and submitted to ANACOM also in written form, there are still some points where ANACOM and the Commission represent different points of view and where the Commission services consider that the auction rules might have to be reviewed.

It has to be noted that the objectives set in the Telecommunications and postal services chapter in MoU are the following:

- increase competition in the market by lowering entry barriers
- guarantee access to network/infrastructure

5.17 of the Memorandum of Understanding includes the measure to facilitate market-entry "by assigning further radio frequencies (i.e. auction of spectrum) for broadband wireless access". This paragraph also states that *"In designing the spectrum auction rules, the government will ensure that they adhere to the legal principles of the EU framework and will ensure that potential new entrants are not placed at a competitive disadvantage."* Furthermore, 5.17 and 5.18 of the MoU contain several specific requirements with that the auction rules have to comply.

"5.17. [...]In particular:

- i. announce the commitment to an ex-post assessment, to be carried out by the regulator, of possible competitive distortions, covering the electronic communications mobile markets for which the spectrum is to be used as well as the commitment to, where justified and proportionate, the implementation of remedies to redress any resulting situation considered anti-competitive.*
- ii. include appropriate caps for strategic spectrum bands (under 1 GHz) which, while respecting the technological neutrality principle, facilitates an effective entry into the market avoiding that potential new entrants will face competitive disadvantages in terms of service quality and network costs.*
- iii. as a contribution to the enhancement of market competition, conditions for potential new operators to have access to national roaming will strike an effective balance between safeguarding the interests of current operators and those of potential new entrants. The regulator will adopt the necessary measures in order to enable potential new entrants to benefit from a level playing field as to the provision of high quality mobile broadband services. This will be achieved namely by ensuring operators' obligation to negotiate fair and reasonable national roaming access, unless otherwise justified and proportionate.*

iv. Auction pricing rules such as reserve prices and potential new entrant price discounts will take full account of the objective of facilitating market entry by creating a level playing field.

5.18. The Government will ensure the existence of an adequate monitoring and enforcement mechanism to guarantee the effective implementation of the obligations to negotiate fair and reasonable access to national roaming and mobile virtual network operator (MVNO) agreements, ensuring timely access and reasonable prices. Such mechanism will be announced in the auction tender [Q4-2011]"

Taking these measures into account and also with regard to the concerns already expressed by the EC the present document summarizes the views of the Commission services and proposals for improvement related to ANACOM's position regarding EC remarks on rules under public consultation.

1) Analysis of the potential competitive distortions arising in the mobile markets

The Commission services welcome ANACOM's reply that the final version of the auction regulation will foresee an "ex-post" market assessment and possible intervention by the NRA in order to guarantee a level playing field between operators. This is necessary in order to comply with point i) of measure 5.17 of the MoU.

2) Spectrum Caps

According to point ii) of 5.17 of the MoU the auction tender has to "include appropriate caps for strategic spectrum bands (under 1 GHz) which, while respecting technological neutrality principle, facilitates an effective entry into the market avoiding that potential new entrants will face competitive disadvantages in terms of service quality and network costs."

The Commission services consider that the separate spectrum caps for the 800 MHz and 900 MHz bands as proposed by ANACOM might lead to a scenario where all available spectrum in this spectrum range will be divided between the incumbents and potential new entrants will not be able to obtain spectrum in these strategically important spectrum bands. (While this is only one of the possible scenarios, it is clear that the proposed caps do not represent an appropriate measure to avoid this situation.) With regard to point ii) of 5.17 of the MoU, the auction rules have to contain appropriate spectrum caps to avoid this scenario. The current separate spectrum caps do not guarantee this.

In contrast, a cumulative 2x20 MHz spectrum cap combined with other mechanisms that increase flexibility (e.g. mechanisms that make it possible for incumbents to give spectrum back from their current spectrum holdings) could ensure that a potential new entrant can obtain spectrum in these spectrum range and at the same time safeguard the rights of incumbents and give them more flexibility to balance their spectrum holdings, e.g. in order to obtain a larger contiguous block that is more effective for broadband deployment.

Therefore the Commission services maintain their proposal to introduce 2x20 MHz cumulative caps for the 800MHz and 900MHz combined with appropriate mechanisms that increase flexibility.

In this context it has to be noted that the possibility to gain spectrum in the bands below 1GH is crucial for facilitating effective market entry. While access to national roaming and MVNO access are vital for new entrants (see point 3) they can not be seen as an adequate substitute for the purposes of ensuring market entry and a more competitive mobile market if the whole auctioned spectrum below 1GH is granted only to the incumbents. Spectrum rights leading to building new infrastructure and increasing overall network capacity lead to other business models and opportunities and more sustainable competition than renting/sharing spectrum capacity, which introduce commercial dependencies on contractual terms and quality of wholesale service.

3) Access obligations

The Commission services welcome the fact that ANACOM shares our views related to access obligations and is ready to improve the auction rules in order to create a level playing field for incumbents and new entrants and facilitate market entry. As already mentioned the EC considers that adequate access to national roaming and MNVO access are crucial for potential new entrants.

a) The Commission services consider that guaranteeing access to national roaming to new entrants before they achieve the 50% threshold provided that they can demonstrate a strong commitment to fast roll-out of its network to achieve the 50% coverage is of vital importance. Therefore we strongly encourage ANACOM to find a way of introduce this change into the auction rules.

b) Similarly the Commission services welcome ANACOM's proposal to address the Commission's concern related to limiting the right to access to national roaming by spectrum capacity. As the Commission services have pointed it out the rule according to which license holders are not required to offer national roaming to an operator that holds right of use more than a total of 2x5 MHz in the 800 MHz and 900 MHz bands effectively nullify any benefit from the roaming obligation for new entrants. As a new entrant cannot compete on the mobile market without having access to national roaming in the first period, access to national roaming should be guaranteed for them for this first period independently from the amount of spectrum awarded to them through the auction.

c) As far as enforcement of the national roaming and MNVO access obligations are concerned measure 5.18 of the MoU states explicitly that "*The Government will ensure the existence of an adequate monitoring and enforcement mechanism to guarantee the effective implementation of the obligations to negotiate fair and reasonable access to national roaming and mobile virtual network operator (MVNO) agreements, ensuring timely access and reasonable prices. Such mechanism will be announced in the auction tender [Q4-2011]*"

The Commission services welcome ANACOM's commitment to study possible enforcement mechanisms that could be introduced and emphasizes that according to measure 5.18 of the MoU such mechanisms have to be already announced in the auction tender. As access to national roaming and MVNO access are crucial for new entrants the Commission services encourage ANACOM to develop and introduce an enforcement mechanism ensuring timely access and reasonable prices. Close monitoring of the implementation and effective intervention mechanisms are also of vital importance, therefore ANACOM's commitment in this regard is essential.

4) Spectrum Auctioned in the 900 MHz band and the associated discount for new entrants

The Commission services welcome that ANACOM is considering reviewing the regulation related to the 20% discount for new entrants (applicable to the auctioned lots in the 900 MHz band) based on the proposal of the Commission to soften the constraint that the discounted price can not be lower than the reserve price. Abolishing this requirement could contribute to more pro-competitive auction rules that could facilitate market entry. We consider that – also in view of iv) of measure 2.17 of the MoU – the discount should be applied even if it leads to an end price that is 20% lower than the reserve price. This change should be made independently from a revision and a potential reduction of reserve prices (See point 5). Also, the Commission services would also welcome if ANACOM would review with due care whether the existing discount is sufficient in view of creating a level playing field or if the discount should be increased.

5) Reserve Prices

According to measure 5.17 iv) of the MoU *"the auction pricing rules such as reserve prices [...] will take full account of the objective of facilitating market entry by creating a level playing field."* Therefore - as already stated previously - the Commission services encourage proportionately low reserve prices as they facilitate market entry and can contribute to the development of a more competitive mobile market. We would encourage ANACOM to review and lower the reserve prices especially in the 800 MHz and 900 MHz bands.

In this context it has to be emphasized that while comparisons with previous auctions in other EU countries based on the €/MHz/population ratio certainly constitute a frame of reference, nevertheless such comparisons have their limitations and can not be applied without considering the specific market conditions at the time of the auction in the specific country. It also has to be noted that setting the reserve prices in the current auction has to take full account of the objective of facilitating market entry as set down in 5.17 iv), while the compared countries did not necessarily have such an express and firm obligation when setting the reserve prices. The Commission services therefore invite ANACOM to review the reserve prices and establish them on the basis of an analysis of the current market conditions in Portugal and taking into account the obligation to facilitate market entry instead of setting the reserve prices based on benchmarking the

reserve prices set in other countries where the market conditions are very different. Nevertheless, we also would like to submit some observations related to the comparisons used by ANACOM in its answer.

As far as the 800 MHz band is concerned the reserve price set by ANACOM exceeds all reserve prices set in this band in the auctions mentioned as comparison by ANACOM. The Commission services do not find the argument convincing that the set reserve price should follow a presumed trend that reserve prices for this band increased with the time. The German auction took place in April/May 2010 and the difference in the set reserve price for the 800 MHz band compared to the reserve price set by ANACOM is very dramatic – in the €/MHz/pop comparison on a basis of 2x5 MHz (paired) the price set by ANACOM is about 136 times higher than the reserve price set in Germany over a period of less than 1.5 years. This difference can not be explained by value increase over time, given the relatively short time interval. But the set reserved price is also high compared to the reserve price set in Spain for an auction that is so recent that the time factor cannot explain the difference. In this comparison it also has to be mentioned that both Germany and Spain are significantly bigger markets in terms of population, GDP; market volume; that often result in higher €/MHz/pop values compared to smaller markets. Also, the set reserve price should not be compared to final prices that the auctions resulted in as reserve prices have a different function. Especially given the commitment in paragraph 5.17 iv) – an obligation that makes the current case different from the auctions in the compared countries – ANACOM should not set the reserve price for this strategically important band higher than it was set in the any other previous auction in the comparison. Therefore the Commission services would encourage that ANACOM reviews and proportionately sets reserve prices for the 800 MHz band.

ANACOM mentions in its answer that in the current financial situation it is likely that final prices will not differ much from the reserve prices. This suggests that the reserve prices are too high in the context of the objective of facilitating market entry. If reserve prices are close to the expected final prices this could make it impossible for new entrants to obtain spectrum through the auction considering that their resources are usually more limited compared to the incumbents. Additionally, a high reserve price could also lead to the result that not all bands are attributed in the auction as it happened in recent Spanish auction for the 900 MHz. This would be counterproductive for both to the objective of facilitating market entry of obtaining maximum benefit in the auction.

The reduction of the reserve price for the auctioned 900 MHz band should be also considered in order to facilitate market entry. As new entrants are encouraged to bid for this band – also because of the 20% discount – the set reserve price should be low enough to enable market entry for a new entrant. While according to ANACOM's comparison the set reserve price is below the reserve prices set in Spain, they are above the reserve price set in Switzerland. In any instance, Spain is in this case not a good comparison, because - as already mentioned, the reserve price set in Spain for the 900 MHz band turned out to be too high and lead to the result that one of the available lots of this strategically important band was not awarded in the auction (the other auctioned lot in the 900 MHz band the successful bid was equal to the reserve price). This scenario is exactly that

should be avoided. Given the express commitment that the setting of reserve prices have to take full account of the objective of facilitating market entry the Commission considers that the set reserve price should be lowered also for this band.

Ofício recebido do
Gabinete do Secretário de Estado das Obras Públicas,
Transportes e Comunicações,
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17-10-2011

MINISTÉRIO DA ECONOMIA E DO EMPREGO

Gabinete do Secretário de Estado das Obras Públicas, Transportes e Comunicações

Exmo. Senhor
Professor Doutor
José Amado da Silva
Presidente do Conselho de
Administração do ICP-ANACOM
Av. José Malhoa, 12
1099-017 Lisboa

S/referência ANACOM
S081035/2011

S/comunicação de 17.10.2011

N/referência
Proc.
Reg.

Assunto: Leilão multifaixas

Exmo. Senhor,

Em resposta ao ofício do ICP-ANACOM com a referência acima identificada, nos termos do qual é solicitada ao Governo posição sobre os preços de reserva do leilão multifaixas, importa referir o seguinte:

Tal como mencionado pelo ICP-ANACOM, o espectro que irá ser colocado em leilão corresponde a um recurso escasso que integra o domínio público do Estado, devendo os respectivos preços de reserva obedecer ao princípio da gestão efectiva e eficiente das frequências, tendo em consideração o diferente valor económico das faixas sobre as quais irá incidir o leilão.

A receita decorrente do leilão é de uma importância crucial para o cumprimento das metas relativas ao défice orçamental previstas no Memorando de Entendimento sobre as Condicionalidades de Política Económica, assinado em 17 de Maio de 2011 e objecto de alteração em 1 de Setembro de 2011 ("Memorando"), em particular da meta prevista para 2011.

Ao mesmo tempo, o Governo é sensível à necessidade de promover a concorrência, nomeadamente evitando que o nível dos preços de reserva no âmbito do leilão constitua uma barreira à entrada no mercado, num quadro de respeito pelos princípios da não discriminação e da proporcionalidade e em linha com o estipulado no ponto 5.17. (iv) do Memorando.

Em face do exposto, é entendimento do Governo que deverão ser mantidos os preços de reserva constantes do projecto de regulamento do leilão lançado em consulta em 15 de Julho de 2011, conferindo-se no entanto às entidades a quem forem atribuídos direitos de utilização de frequências nas faixas dos 800MHz e/ou 900MHz a possibilidade de optarem



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por uma das seguintes modalidades de pagamento, com igual valor actualizado de pagamentos na óptica do Estado:

- (a) Pagamento de dois terços do preço do espectro adquirido nas faixas em questão logo após o acto atributivo dos direitos de utilização de frequências, nos termos previstos no projecto de regulamento lançado em consulta, sendo o remanescente pago por tranches ao longo de um período máximo de cinco anos;
- (b) Pagamento integral do preço do espectro adquirido nas faixas em questão logo após o acto atributivo dos direitos de utilização de frequências, nos termos previstos no projecto de regulamento, sendo neste caso aplicada uma taxa de actualização que reflita as condições macroeconómicas de longo prazo.

A previsão desta dupla modalidade de pagamento justifica-se relativamente ao preço a pagar nas faixas dos 800MHz e 900MHz, por serem essas as faixas que dispõem de preços de reserva mais elevados, procurando assim mitigar-se o impacto da corrente situação económica e financeira na capacidade de investimento e condições de acesso ao financiamento por parte dos interessados na aquisição de espectro.

A possibilidade prevista na alínea (a) supra deverá ser conferida contra a prestação de adequada caução por parte das entidades que pretendam fazer uso da mesma, por forma a assegurar o pagamento do valor total do espectro adquirido nas faixas em questão.

Finalmente, considera o Governo que os prazos estabelecidos no projecto de regulamento submetido a consulta devem ser ajustados, de modo a garantir que o encaixe da receita do leilão produza efeitos ainda em 2011 (sem prejuízo da possibilidade de pagamento prevista na alínea (a) supra). Trata-se de um imperativo de interesse público que não pode deixar de ser prosseguido, de modo a assegurar o cumprimento da meta relativa ao défice orçamental prevista no Memorando para 2011. O ajustamento em questão deverá limitar-se ao mínimo necessário para assegurar que o referido encaixe se torne efectivo no ano corrente.

Com os melhores cumprimentos,

O Secretário de Estado

Sérgio Silva Monteiro