

Regulation

Regulation laying down the rules and setting out the procedures to be followed by companies providing public electronic communications networks and publicly available electronic communications services at a fixed location for the calculation, payment and delivery of the municipal fee for rights of way to municipalities (TMDP Regulation)

The Electronic Communications Law (hereinafter ECL), approved as an annex to Law No 16/2022 of 16 August, establishes in paragraph 2 of article 169 that «[t]he rights and charges related to the deployment, passage and crossing of public and private municipal domains by systems, equipment and other resources of companies providing public electronic communications networks and publicly available electronic communications services at a fixed location may give rise to the establishment of a municipal fee for rights of way (TMDP) and remuneration for the use of infrastructures suitable for accommodating electronic communications networks that belong to the public or private domain of local authorities, as provided for in Decree-Law No 123/2009, of 21 May».

The legislator's aim with the TMDP was that the State and the Autonomous Regions should not charge «(...) companies providing public electronic communications networks and publicly available electronic communications services fees or any other charges for the deployment, passage or crossing of the public and private domains of the State and the autonomous regions, on the surface or underground, for systems, equipment and other physical resources required for their activity» (cfr. paragraph 5 of article 169 of the ECL).

In the same line, paragraph 1 of article 12 of Decree-Law No 123/2009, of 21 May, sets out that «[a TMDP] is due (...) for the use and exploitation of assets in the public and private domain, involving the construction or installation of appropriate infrastructure, by companies providing publicly available electronic communications networks and services», in which case no other fees, charges or remuneration may be levied for the rights of way, so as to avoid duplication of charges for the same fact.

In addition, the fees for rights of way must reflect the need to ensure the optimal use of resources and must be objectively justified, proportionate, transparent and non-discriminatory, taking also into account the general objectives provided for in article 5 of the ECL, namely the need to promote competition in the provision of electronic communications networks,

electronic communications services, associated facilities and associated services, and efficient infrastructure competition.

The TMDP was created in 2004, with the publication of the first Electronic Communications Law (Law No 5/2004, of 10 February). The amendments introduced by Law No 82-B/2014, of 31 December, approving the State budget for 2015, added - in paragraph 2 of article 106 of Law No 5/2004, of 10 February - a reference to the remuneration provided for in Decree-Law No 123/2009, of 21 May, for the use of infrastructure suitable for accommodating electronic communications networks that belong to the public or private domain of local authorities. Subsequently, with the amendments introduced by Law No 127/2015, of 3 September, to the aforementioned article 106 of Law No 5/2004 of 10 February, the value of the TMDP can no longer be passed on in the invoices to end users of electronic communications available to the public at a fixed location.

As such, in municipalities where the collection of the TMDP has been approved, the percentage of the total invoicing issued by companies providing publicly available electronic communications networks and services at a fixed location is established on an annual basis, by the end of December of the previous year to which the fee is to be applied, with a maximum limit of 0.25%, for all end customers in the municipality concerned, and these companies are responsible for paying the TMDP.

Under paragraph 6 of article 169 of the ECL, it is incumbent on Autoridade Nacional de Comunicações (hereinafter ANACOM) to approve the regulation defining the rules and procedures to be adopted by companies providing public electronic communications networks and publicly available electronic communications services, at a fixed location, for the calculation, payment and delivery of the TMDP to municipalities (TMDP Regulation), which replaces Regulation No 38/2004, of 29 September, published in No 230, Series II of the Official Gazette, of 29 September (hereinafter, Regulation No 38/2004), which sets out the procedures to be followed by companies providing electronic communications networks and services available to the public at a fixed location for the monthly collection and delivery to municipalities of revenues from the application of the TMDP, which has never been amended.

In this context, ANACOM's Board of Directors decided, by determination of 28 March 2023, to launch the procedure for drawing up the regulation and to publish it in accordance with paragraph 1 of article 98 of the Administrative Procedure Code (APC).

Following the deadline for interested parties to submit comments and suggestions which they considered should be taken into account in the context of this regulatory procedure, contributions were received from some interested parties by 21 April 2023.

After analysing and considering the contributions received, ANACOM, in accordance with article 10 of its Statutes and articles 98 *et seq.* of the APC, prepared the draft TMDP Regulation, which was submitted to the corresponding regulatory consultation procedure, which lasted for 30 working days, by publication on its institutional website and in Series II of the Official Gazette - Notice No 17010/2023, on 6 September..

At the end of the regulatory consultation, in accordance with paragraph 4 of article 10 of its statutes, ANACOM analysed and considered the contributions made by the interested parties, and its assessment is included in the report on which the approval of this regulation is based, which is published on its website, together with the responses received, excluding the elements duly identified as confidential.

In the light of the comments received, and in order to avoid any doubt that this Regulation is to be interpreted in a different way from Regulation No 38/2004, the definition of “end customer” and the list of examples in paragraph 2 of article 3 of Regulation No 38/2004 are reintroduced in this Regulation. For the same reasons, the exclusion currently contained in paragraph 3 of article 3 of Regulation No 38/2004 relating to public payphone services and virtual calling cards is also reintroduced.

Although paragraph 2 of article 3 of the draft regulation already excludes wholesale services from the scope of the TMDP, it has been decided to introduce an explicit reference to these services in paragraph 4 of article 3 of this regulation.

Without prejudice to article 56 of the Legal Framework for Local Authorities, approved by Law No 75/2013, of 12 September, in its current version, regarding the publication of resolutions, ANACOM is aware that there are several difficulties for companies subject to the TMDP to know the actual percentage set by each municipality, as defined in article 169 of the ECL, when the information is not available on the website of the respective municipalities and/or ANACOM.

This regulation therefore stipulates that the municipality must publish the percentage to be set on its website, with due prominence, and must send ANACOM, within 30 days, a copy of the

decision of the municipal body responsible for approving it, so that this Authority can publish the TMDP percentages applicable in each municipality.

However, the regulation also stipulates that the failure of municipalities, or ANACOM, to publish the percentage of the TMDP with due prominence does not exempt companies from paying the TMDP.

Regulation 38/2004 provides that companies subject to the TMDP pay this fee to the municipalities, either by cheque or bank transfer, on the basis of the amounts invoiced and by the end of the month following the month in which the invoice was issued.

The frequency of TMDP payments to municipalities has also been criticised by companies, who claim that the cost of making the monthly payment is sometimes greater than the amount of TMDP they have to pay.

In order to minimise this situation, it was decided in this Regulation to provide for the payment to the municipalities of the amount of the TMDP calculated by the end of the month following the end of each calendar half to which it relates.

Finally, although the obligation to carry out audits is necessary for ANACOM to be able to fully exercise its supervisory powers - in particular to verify that the procedures adopted comply with the ECL and the Regulation - the experience of almost 20 years of practical application of Regulation No 38/2004 has shown that the obligation for ANACOM to accept the independent body chosen to carry out these audits can be dispensed with in this Regulation, with a view to reducing the administrative burden on electronic communications companies and promoting the speed of the procedure.

In this context, the regulation also stipulates that the audits must include, for each municipality, at least a certain amount of information directly related to the exercise of the activity during the previous calendar year, and that the results must be made available by the companies to ANACOM and to the municipalities, in the part that concerns them, at their request.

The results of these audits are to be submitted to ANACOM by the last quarter of the calendar year following the calendar year to which they relate.

Furthermore, taking into account, on the one hand, the evolution of the electronic communications market and the characteristics of the companies currently operating and, on the other hand, the conditions of the audit procedure, it is considered appropriate to establish

a simplified regime for companies whose total amount of TMDP payable to municipalities in the previous calendar year is considered to be of little relevance.

Thus, as an alternative to an audit by an independent body, companies whose total TMDP payable in the previous calendar year in all the municipalities in which they are subject to this fee is equal to or less than EUR 25,000 may fulfil the information requirement laid down in this draft regulation by submitting this information to ANACOM and to the municipalities, in the part that concerns them, at their request, accompanied by a sworn declaration as to its accuracy.

In addition, in order to clarify the legal regime applicable in the event of non-compliance with the obligations and duties set out in the ECL and in this draft regulation in this respect, the articles refer to the possible administrative offence applicable in the event of non-compliance with the rules and procedures set out in this draft regulation in relation to the carrying out of audits within the scope of the TMDP and the provision of information resulting therefrom to the NRA, in accordance with paragraph 2 vv) of article 178 of the ECL.

In this context, considering the contents of the explanatory note to the draft regulation and bearing in mind the grounds explained in the report of the aforementioned procedure, within the scope of the powers provided for in paragraph 1 b) and u) of article 8, and in the exercise of the regulatory power provided for in paragraph 2 a) of article 9, both of ANACOM's Statutes, approved by Decree-Law No 39/2015 of 16 March, in pursuit of the general objectives set out in paragraph 1b) of article 5 of the ECL, and in compliance with paragraph 6 of article 169 of the ECL, the Board of Directors, pursuant to paragraph 1 b) of article 26 of ANACOM's Statutes, approved, by determination of 16 January 2024, the regulation laying the rules and setting out the procedures to be adopted by companies providing public electronic communications networks and publicly available electronic communications services, at a fixed location, for the calculation, payment and delivery of the municipal right of way fee to municipalities:

Regulation laying down the rules and setting out the procedures to be followed by companies providing public electronic communications networks and publicly available electronic communications services at a fixed location for the calculation, payment and delivery of the municipal fee for rights of way to municipalities (TMDP Regulation)

Article 1

Subject-Matter

This regulation lays down the rules and sets out the procedures to be followed by companies providing public electronic communications networks and publicly available electronic communications services at a fixed location for the calculation, payment and delivery of the municipal fee for rights of way (TMDP) to municipalities, in compliance with paragraph 6 of article 169 of the Electronic Communications Law, approved in annex to Law No 16/2022, of 16 August (ECL).

Article 2

Definitions

1 — For the purposes of this regulation, the definitions provided for in the ECL and Decree-Law No 123/2009, of 21 May, which establishes the legal framework for the construction, access to and installation of electronic communications networks and infrastructures, as amended, shall apply.

2 — For the purposes of this Regulation, “end customer” shall mean any residential or business customer on the retail market.

Article 3

Determination and publication of the percentage of the municipal fee for rights of way

1 — The TMDP shall be determined on the basis of a percentage applied to the total monthly invoice, excluding VAT, issued by companies providing publicly available electronic communications networks and services, at a fixed location, to all end customers in the municipality concerned.

2 — For the purposes of the preceding paragraph, the value of services which, although included on the invoice, do not constitute electronic communications services within the meaning of the law, such as the sale or rental of equipment, the provision of consultancy and technical assistance services, the configuration of terminal equipment, the creation of websites or web pages, telephone directory enquiry services or audiotext services, shall not be taken into account.

3 — Public payphones and virtual calling cards are not subject to the TMDP.

4 — Electronic communications services that are not provided directly to end customers, commonly referred to as wholesale services, are excluded from the scope of this Regulation.

5 — The percentage of the TMDP shall be approved every year by each municipality, under the terms and limits set out in paragraph 3 of article 169 of the ECL.

6 — Without prejudice to the provisions of the Legal Framework for Local Authorities, approved by Law No 75/2013, of 12 September, in its current version, the municipality shall publish the percentage referred to in the previous paragraph with due prominence on its website within 30 days of its approval and, within the same period, shall send ANACOM the useful part of the decision of the municipal body responsible for its approval.

7 — Failure by Municipalities and ANACOM to publish the TMDP percentage in accordance with the previous paragraph shall not exempt companies from the obligation to pay the TMDP.

Article 4

Notifying the start of operation in the municipality

1 — Companies providing publicly available electronic communications networks and services at a fixed location shall notify to the respective municipality of the date from which they will be subject to the TMDP when they start operating in the municipality.

2 — The notifications referred to in the previous paragraph shall be made within 15 working days of the start of the operation.

Article 5

Company information systems

1 — The invoicing database of companies subject to the TMDP shall make it possible, by means of an appropriate information system, to produce the information required to determine, by municipality, the value of the basis of assessment of the relevant percentage and to calculate the amount of fees, in a transparent and auditable manner, in accordance with article 7.

2 — For the purposes of the preceding paragraph, the address of each end customer's place of installation shall be taken into account, which shall include an indication of the end customer's municipality in accordance with paragraph 1 of article 3.

3 — In order to ensure the application of the previous paragraphs, the municipalities shall provide the companies subject to the TMDP with a list of the postcodes of the municipality to be taken into account for invoicing purposes and ensure that it is constantly updated.

4 — In cases where it is not possible to allocate an invoiced amount to the different locations of end users, namely in the case of dedicated capacity access services, the invoicing or collection address may be taken into account.

Article 6

TMDP payment to municipalities

1 — Companies subject to the TMDP shall pay the TMDP to municipalities by cheque or bank transfer by the end of the month following the end of each six-month period.

2 — On receipt of the payment referred to in the previous paragraph, municipalities shall issue the relevant discharge receipt and send it to companies.

3 — Financial settlements, whether favourable or unfavourable to municipalities, resulting from corrections and generally giving rise to the issue of debit and credit notes, may be added to or deducted from the payment provided for in paragraph 1 in the month following that in which such situations are established, as the case may be.

Article 7

Audits

1 — Companies subject to the TMDP shall carry out annual audits, performed by independent bodies, to demonstrate that the procedures adopted comply with the ECL and this Regulation and to ensure that the information directly related to the exercise of the activity during the previous calendar year is validated.

2 — For the purposes of the previous paragraph, the audits shall include the following information for each municipality:

- a) information showing that the procedures for calculating and paying the TMDP comply with the ECL and this Regulation;
- b) a description of the basis of assessment and all its assumptions, in particular the date on which the operation started according to the municipality;
- c) Calculation formula applied to the eligible basis of assessment, indicating the specific rate applied;
- d) the amount of TMDP paid to the municipalities and the adjustments made.

3 — The results of the audits, in particular with regard to the points referred to in paragraph 2, shall be made available by companies to the municipalities in which they provide publicly available electronic communications networks and services, at a fixed location, in the part that concerns them and at their request, and to ANACOM, by the end of the last quarter of the calendar year following the calendar year to which they relate.

4 — Companies whose total TMDP payable in the previous calendar year in all the municipalities in which they are subject to this fee is equal to or less than EUR 25,000 shall be exempt from the obligation referred to in point 1.

5 – In the cases referred to in the previous paragraph, companies shall send the information referred to in paragraph 2 to municipalities, in the part that concerns them, at their request, and to ANACOM, by the end of the last quarter of the calendar year following the calendar year to which it relates, accompanied by a sworn declaration as to its accuracy, signed by the person(s) authorised to bind the company and recognised as such in that capacity.

Article 8

Applicable penalty regime

Failure to comply with the rules and procedures laid down by ANACOM in this Regulation with regard to the performance of TMDP audits and the provision of information resulting therefrom to the NRA shall constitute an administrative offence punishable under the terms of paragraph 2 vv) of article 178 of the ECL.

Article 9

Transitional provisions

1 — The provision provided for in paragraph 1 of article 6 shall enter into force on 1 July 2024.

2 — The provisions set out in paragraphs 4 and 5 of article 7 shall apply to the exercise of the activity for the calendar year 2023.

3 — The exemption provided for in paragraph 4 of article 7 of this Regulation shall apply to companies which, although subject to the provisions of this Regulation, have already obtained the approval of ANACOM of the independent body designated to carry out the audit in

accordance with Regulation No 38/2004 of 29 September, and are not required to maintain such designation.

Article 10

Repeal

Without prejudice to the previous article, Regulation No 38/2004 of 29 September is hereby repealed.

Article 11

Entry into force

This Regulation shall enter into force on the first working day following its publication..

17 January 2024. - The Chair of the Board of Directors,