

DECISION ON THE APPLICATION FOR ACTION

submitted by Vodafone on the dispute over the ownership or right to manage infrastructures suitable for the accommodation of communication networks

1. By letter of 16.09.2014, Vodafone Portugal - Comunicações Pessoais, S.A. (hereinafter Vodafone), invoking articles 53 and 84 of the Administrative Procedure Code¹ (hereinafter APC), article 5, paragraph 1 a) and c) and paragraph 2 a) and b), as well as article 63, paragraph 1, both of the Electronic Communications Law², and article 9, paragraph 1 b), c) and g) of the Statutes of the then ICP-ANACOM³, applied to this Authority so that it ordered interim measures intended to protect public interests affected by the uncertainty as to the ownership of infrastructures suitable for the accommodation of electronic communication networks, until the SIC implementation procedure was concluded.

Vodafone specifically requires ANACOM **to order** PT Comunicações, S.A., now MEO – Serviços de Comunicações e Multimédia, S.A., Estradas de Portugal, E.P., at present Infraestruturas de Portugal, S.A., as well as municipalities, or, **in the alternative, to recommend** holders of ducts, or bodies claiming the ownership of ducts, as follows:

«a) To identify in a pro-active manner any disputes with other bodies over the ownership of specific infrastructures, as well as to quickly adopt all measures required to settle such disputes, so as to prevent factual situations of violation of rights of electronic communications companies to infrastructure access by means of cost-oriented remuneration conditions, detrimental to consumers and to the electronic communications market.

b) To refrain from preventing or ceasing the access, by any means, to infrastructures disputed by electronic communication companies, insofar as these companies have complied with procedures established by one of the disputing bodies and have met the remuneration consideration required by this body for such access, in particular in the scope of the respective reference offer, or (...) have deposited such consideration for

¹ Approved by Decree-Law No. 442/91, of 15 November.

² Law No. 5/2004, of 10 February, as it stands.

³ Published in annex to Decree-Law No. 309/2001, of 7 December, repealed in the meantime by Decree-Law No. 39/2015, of 16 March, which approves the Statutes of *Autoridade Nacional de Comunicações* (ANACOM).

consignment at the lowest amount required by one of the disputing bodies or, in case of infrastructures covered by RDAO, at the amount due under that reference offer.

c) Not to apply self-protection procedures by forcibly removing components of electronic communications networks accommodated in infrastructures which they consider to own, restricting themselves (...) in the absence of an agreement with electronic communication companies owner of such networks, to promote the referred removal through the appropriate legal channels»⁴.

2. Having carried out a preliminary analysis of the application, ANACOM issued, on 05.05.2016, the following Draft Decision (DD):

«... Not to adopt the interim measures applied to by Vodafone, intended to protect public interests affected by the uncertainty regarding the ownership of infrastructures suitable for the accommodation of electronic communication networks, up to the conclusion of the SIC implementation procedure, or any of the recommendations to the extent desired by that company».

The DD is supported on the grounds summarized below:

- It follows from APC that the adoption of interim measures may only be ordered by the body with powers to issue the final decision, however *«... the law does not grant ANACOM with powers that allow the Authority to order bodies holding infrastructures (...) to adopt the steps required to settle disputes over the ownership or right to manage infrastructures, or to cease applying mechanisms provided for in the law to self-protect their rights»;*
- Although the SIC (*Sistema de Informação Centralizado* - the centralized information system) *«...is able to contribute to the identification of infrastructures whose ownership or right to manage is disputed over, it is not enough, on its own, to overcome deadlock situations stemming from such disputes»*, reason for which the interim measures applied to do not fall under the SIC's implementation or standard procedures;
- Bearing in mind the principles of legality and speciality by which ANACOM's action must abide, this Authority is not entitled to issue any decision to the extent applied to;

⁴ By letter dated 23.12.2015, Vodafone restated the application made on 16.08.2014. By letter of 28.03.2016, Vodafone informed ANACOM of communications received from MEO (requesting it to *«... immediately stop using some infrastructures (...) for alleged unauthorized occupation...»*), as well as responses Vodafone had sent.

–On the other hand, although the Statutes entitle ANACOM to make recommendations, it does not seem that a recommendation could have the scope of the application submitted, and it is highly unlikely that such action would achieve the intended effects, taking into account the relevance of infrastructures and ANACOM's lack of powers to impose a solution.

3. Under article 101 of APC, approved by Decree-Law No. 442/91, of 15 November, which applies to the case *ex vi* article 8 of Decree-Law No. 4/2015, of 7 January, Vodafone was notified to comment on the DD mentioned above, if the company so wished, having been given ten working days for the purpose.

Having received the notification letter⁵ on 09.05.2016, Vodafone addressed the matter in time, by fax received by ANACOM on 23.05.2016.

In its comments, Vodafone used arguments already put forward in the application for action that it had submitted, supporting that ANACOM is entitled to take action under the terms applied to.

In the light of the absence, in Vodafone's response, of new grounds in fact and in law, that justify the amendment of the DD adopted by ANACOM on 05.05.2016 - in its comments, Vodafone simply describes situations that do not differ substantially from those claimed before -, the following points focus only on arguments presented in the meantime by the company, whereby ANACOM believes it is necessary to clarify the position taken in the DD on the matter at issue.

In this context, it must be highlighted:

3.1. As regards ANACOM's alleged powers to order the requested measures

Vodafone comments

Vodafone invokes article 6, paragraph 1, article 8, paragraph 1 a), b), g) and h), article 9, paragraph 1 a), b) and n) and paragraph 2 b), all of ANACOM's Statutes, approved by Decree-Law No. 39/2015, of 16 March⁶, article 5, paragraph 1 a), paragraph 2 a)

⁵ ANACOM-S031917/2016, of 06.05.

⁶ It is noted that the provisions now invoked by Vodafone in its comments are laid down in ANACOM's Statutes approved by Decree-Law No. 39/2015, of 16 March, which do not correspond entirely to the legal framework in force at the date of the application for action submitted in 2014. Nevertheless, as explained further below, provisions of Statutes that are now invoked do not lead to a different decision on the application for action.

and b) and paragraph 6 of the Electronic Communications Law, and article 16, paragraph 1 of Decree-Law No. 123/2009, of 21 May, as it stands, to claim that this Authority has the power *«... to adopt reasonable, proportional and necessary measures - that may specifically take the form of orders, instructions and determinations - as well as to make recommendations, when disputes that interfere with competition in the provision of networks and services or with the establishment of rights for access to networks, infrastructures, resources and services, are at stake»*.

The company further stresses that *«the law, by including the power/duty to make recommendations in the range of powers granted to ANACOM, for the development of assignments that are legally conferred on the Authority, does not make (...) the issue of such recommendations dependant on any judgement in relation to the measurement of effects likely to be achieved by the recommendation. In any event, it still remains to be shown that the effects of a recommendation [by this Authority] would have the lack of effectiveness referred [by ANACOM] which, however, is not substantiated»*.

ANACOM's position

In line with the grounds that substantiate the DD, it is hereby clarified:

First of all, at no time does ANACOM deny that the sector legal framework in force, namely provisions invoked by Vodafone, entitle the Authority to issue instructions and to make recommendations in the exercise of powers that are legally assigned to it. However, the possibility to issue instructions and to make recommendations only exists to the extent and within the limits of ANACOM's action as provided for in the law by the substantive regime. In this context, it is rather surprising that Vodafone invokes duties and powers conferred on ANACOM by the Statutes, but fails to refer that both must be always exercised *«according to applicable law⁷»* - that is, substantive legislation.

As such, it is not enough, or appropriate, in order to substantiate ANACOM's action, to only invoke a provision of its Statutes that confers on the Authority the power to issue instructions and to make recommendations; in fact, such powers for action must necessarily be articulated with the assignments - powers - provided for in the applicable

⁷ Vide body of paragraph 1 of article 8 and of paragraph 1 of article 9 of ANACOM's Statutes, approved by Decree-Law No. 39/2015, of 16 March.

substantive regime, and, at all times, further to an assessment, on the part of ANACOM, of whether action is required and appropriate. Moreover, the issue of recommendations is not a power which ANACOM is bound to exercise. The Authority is entitled to decide how and when such power is to be exercised. As such, while the possibility of issuing a recommendation in the scope identified by Vodafone is not ruled out, ANACOM is not constrained to do so in the precise terms desired by that company.

As such, notwithstanding the fact that ANACOM shares Vodafone's concern (which is common to all other operators) as to the urgent need for alternative mechanisms able to quickly address situations where disputes over the ownership of infrastructures suitable for the accommodation of electronic communications networks prevent the normal application of the regime provided for in Decree-Law No. 123/2009, of 21 May (hereinafter Decree-Law No. 123/2009), ANACOM's action cannot but operate on the principles of legality and speciality.

By virtue of the first of these principles, the law is the assumption, reason and limit of its action (as supremely reflected in the wording of paragraph 1 of article 8 and paragraph 1 of article 9 of the Statutes). It follows from the second principle that ANACOM «*shall not engage in any activities or use its powers falling outside the scope of its assignments, or allocate its resources to purposes other than those incumbent upon it*»⁸, a limitation which Vodafone fails to take into account in the list of provisions invoked to justify ANACOM's action. However, this principle, which prevents ANACOM from acting outside the scope of its assignments, was crucial to the draft decision issued on 05.05.2016.

There is not a single provision of sector legislation that qualifies ANACOM to adopt measures as intended by Vodafone, the aim of which is to compel addressees to adopt behaviours and a way of acting that is based on a waiver or, at least, a constrain of their rights to use or manage infrastructures they hold. In fact, the law does not confer on ANACOM any powers to inhibit holders of infrastructures from the exercise of their rights to use and enjoy such infrastructures, and for this reason, this Authority is not entitled to prevent such bodies from using the powers such rights confer on them. Vodafone must in fact have been aware of this absence of a legal provision in the

⁸ Cfr. article 6, paragraph 2, of ANACOM's Statutes.

scope of the substantive framework, given that to support its application the company invokes only article 16 of Decree-Law No. 123/2009.

On the other hand, as ANACOM referred earlier, the law does not qualify it with the necessary powers to decide on disputes related to the ownership or the right to manage assets at stake. Although Vodafone claims that it does not intend for ANACOM to settle the identified disputes, the scope of its application represents an action that constrains the way how each of the disputing bodies exercises the referred rights, and this action is outside the powers conferred on ANACOM by the legal framework in force.

In fact, in the scope of Decree-Law No. 123/2009, which is the applicable substantive regime, the possibilities of ANACOM's action are specifically listed and restricted to situations provided for in articles 11, 16, 19, 21, 22, 23, 24, 25, 26 and in articles 87 to 91. Action as intended by Vodafone is not in line with any of these provisions, thus they fall outside the powers legally conferred on this Authority.

As specifically regards article 16, paragraph 1, of Decree-Law No. 123/2009, the sole provision of the substantive regime which Vodafone invokes to support its application for action, it must be stressed that the identified provision confers (and confines) ANACOM's power to act in a situation of refusal of access to infrastructures. In this case, upon request of any of the parties, it falls on ANACOM to assess the possibility of using infrastructures under consideration to accommodate electronic communications networks (cfr. paragraph 2 of article 16). However, this is clearly not the purpose of Vodafone's application, thus the company cannot base its request on the referred provision.

On the other hand, the adoption of a determination as intended by Vodafone would imply that, by determination of ANACOM, the rights for use or management of holders of infrastructures would be restricted (the possible holder of the asset would be deprived from the remuneration associated to its exploitation, or would renounce upholding it), while such action would confer such rights on another body, just because it was contacted first. The law does not provide ANACOM with the power to act to such an extent.

In other words, and so that there are no doubts, while the statutory instrument defines the scope of ANACOM's action as regards the limitation of rights of ownership or management over suitable infrastructures, action such as intended collides with the full

exercise of the right of ownership beyond what Decree-Law No. 123/2009 provides for and allows.

In fact, and as results from communications from Vodafone to ANACOM, in a context of dispute on the jurisdiction over infrastructures, disputing parties use all means at their disposal considered to be legal to defend their rights, while arguments are adduced as regards the legitimacy of the respective ownership and its source. Situations for which Vodafone applies to ANACOM's action stem from the uncertainty over who owns or holds the infrastructure.

Finally, still in this context, it is stressed that Vodafone is aware of and acknowledges the absence of a legal regime that safeguards the full exercise of the right to access in situations of disputes over the ownership of infrastructures, as results from its recent comment to the public consultation on the draft amendment to Decree-Law No. 123/2009, in which the company declares as follows:

«While it is acknowledged that it is necessary to ensure that such disputes [as regards the ownership of infrastructures] are settled in the appropriate forum (that is, in court), the statutory instrument must nevertheless provide for a solution that guarantees the right of access of operators, regardless of whether the conflict of jurisdiction is settled»^{9 10} (emphasis added).

In the light of the above, and having the legal vacuum been acknowledged, it is surprising that Vodafone again applies to ANACOM for action in the same terms as in its initial application.

3.2. As regards the satisfaction of requirements for ordering interim measures

Vodafone comments

Vodafone believes, in summary, that requirements established by law for ordering interim measures, provided for in article 84, paragraph 1, of the APC, have been satisfied, given that:

⁹ It is stressed that, faced with a positive conflict of jurisdiction - as several bodies claim they are the legitimate owners/managers of suitable infrastructures intended to be accessed -, Vodafone does not clearly demonstrate that its right to access has been violated. The problem is that such right is not ensured as provided for in Decree-Law No. 123/2009, given that the Applicant is forced to make several payments for the same infrastructure, for reasons/justifications which the sector statutory instrument does not cover and which is not up to this Authority to settle.

¹⁰Cfr. pg.12 of Vodafone's response to the public consultation on the draft amendment to Decree-Law No. 123/2009.

(i) the administrative procedure leading to the implementation of the SIC, or «...*at least the [procedure] launched by Vodafone...*» is already under way, by means of the application of 16 September 2014, ANACOM's Management Board being entitled to settle the matter; and

(ii) the Applicant has demonstrated, by describing several situations of disputes between bodies as to the ownership of suitable infrastructures, that measures are required, as there is a fair concern that, without such measures, public interests at stake are seriously affected or are difficult to repair.

ANACOM's position

In this scope it must be stressed that, although Vodafone, in its initial application, based the measures requested in the SIC implementation process, the company acknowledges, in its subsequent comments, that such system does not break the deadlock caused by disputes over the ownership of infrastructures, nor does it achieve the effect intended with the measures applied to.

The acknowledgement that the SIC does not break the deadlock caused by disputes over the ownership of infrastructures proves that the action applied to cannot be regarded as an interim measure in the scope of that process.

As regards the application presented by Vodafone on 16 September 2014, reference is made to ANACOM's position laid down in point 3.1. above, from which it follows that, as ANACOM lacks legal capacity to determine the adopted measures, it is not for the Authority to assess whether requirements laid down in the law for their adoption have been met. Reference is made also to the position taken in the DD, the contents of which is replicated, given that claims made by the Applicant add nothing to arguments formerly presented.

3.3. As regards the continued violation of Vodafone's right to access and increased constraints resulting from dispute situations

Vodafone comments

- In summary, Vodafone reports the continued violation of the right to access suitable infrastructures, «...*in breach of a legal framework (...) which grants electronic communication companies [the above-mentioned right] under equal, transparent and non-discriminatory conditions, by means of cost-oriented*

remuneration conditions, and which specifically lists the situations where such access may be denied...».

- Constraints described in the initial application not only subsist but have in fact deteriorated over time.

By way of example, Vodafone reports new situations it has been faced with in the meantime.

ANACOM's position

Assuming that Vodafone refers to article 15 of Decree-Law No. 123/2009, where the company refers to the specific list of situations where access may be denied (the company's comments identify article 13) and to the fact that such list does not include situations the company have currently experienced, it must be stressed that, in most cases now described, Vodafone does not face a refusal of access, but disputes over the identification of the body entitled to manage infrastructures which Vodafone intends to access. As such, situations presented may not be settled via article 15 of Decree-Law No. 123/2009.

With regard to additional situations specifically listed by Vodafone in its comments, it must be referred they do not constitute, in principle, new facts with relevance for the situation under consideration, nor would the granting of the application settle the matter. In fact, although one of the situations presented could be considered as a refusal of access to infrastructures suitable for the accommodation of electronic communications networks, in breach of Decree-Law No. 123/2009, the fact that Vodafone does not request that ANACOM specifically takes action in that situation seems to show that the company believes that the situation does not justify it.

As such, explicitly referring to situations described by Vodafone:

- a) The first situation [Beginning of Confidential Information, BCI] ... [End of Confidential Information, ECI] only concerns the identification of the body [BCI]...[ECI] to whom the right to manage infrastructures was concessioned by the municipality.
- b) The second situation [BCI] ... [ECI] shows that Vodafone approached the body to whom the infrastructure suitable for the accommodation of electronic communications networks was concessioned. However, the concession concluded with the holder of infrastructures makes the provision of such

infrastructures, for purposes other than those for which the contract was concluded, subject to an agreement between the licensor and concession holder as to the value of compensation due to the former. Moreover, the absence of an application for action on the part of ANACOM under paragraph 1 of article 16 of Decree-Law No. 123/2009, makes this likely to be a transitional situation.

- c) The third situation [BCI] ... [ECI] seems to concern the identification of the body responsible for the management of infrastructures.

In addition, Vodafone's claim according to which «*as currently set up, the SIC does not allow the identification of infrastructures*» must be disputed. In fact, the SIC includes a field that allows the holder of the registered object (vide pg.84 of the specifications¹¹) to be identified. As such, the issue over the identification of the holder of infrastructures does not concern the setup of a "tool" (the SIC) on its own, but the specific and full identification of the body that owns infrastructures and who is responsible for their management (which could be the same body, or not), which is a matter that goes beyond the scope of that tool.

4. CONCLUSION AND DECISION

In line with the DD, it follows from the above analysis that:

- There is not a single provision of sector legislation that qualifies ANACOM to adopt measures as intended by Vodafone, thus the adoption of interim measures or a recommendation to the specific purpose applied to goes beyond this Authority's scope of action;
- The absence of a legal regime that safeguards the full exercise of the right of access in situations of dispute over the ownership of infrastructures in fact acknowledged by Vodafone in its response to the public consultation on the draft amendment to Decree-Law No. 123/2009;
- Although this Authority shares Vodafone's concern (which is common to all other operators) as to the urgent need for alternative mechanisms able to quickly address situations where disputes over the ownership of infrastructures suitable for the accommodation of electronic communications networks prevent the normal application of

¹¹ http://www.anacom.pt/streaming/CadernoEncargos_SIC2014.pdf?contentId=1189486&field=ATTACHED_FILE.

the regime provided for in Decree-Law No. 123/2009, ANACOM's action must abide by the principles of legality and speciality;

- In the light of the above, and having the legal vacuum been acknowledged, ANACOM is not entitled to take action as desired by Vodafone, given that the means desired by the applicant may not be used contrary to the legal framework in force (or in the absence thereof);
- In any event, ANACOM does not rule out the possibility of issuing a recommendation, in the framework of the law and in the exercise of powers conferred by it, so that efforts are developed to overcome disputes related to doubts and conflicts concerning the right to exploit infrastructures suitable to the accommodation of electronic communications networks, in case it takes the view, on the basis of its analysis, that a measure to that effect is necessary, appropriate and timely.

In this context, bearing in mind that new elements have not been provided in comments made by Vodafone, so as to justify the amendment of the draft decision notified on 06.05.2016, ANACOM's Management Board, in the light of the principles of legality and speciality provided for, respectively, in article 3 of the Administrative Procedure Code, approved by Decree-Law No. 442/91, of 15 November, which applies to the case *ex vi* article 8 of Decree-Law No. 4/2015, of 7 January, and in article 6 of ANACOM's Statutes, approved by Decree-Law No. 39/2015, of 16 March, and pursuant to paragraph 1 q) of article 26, also of the Statutes, hereby determines:

1. To maintain the notified draft decision, interim measures applied to by Vodafone intended to protect public interests affected by the uncertainty as to the ownership of infrastructures suitable for the accommodation of electronic communication networks, or any recommendation to the specific extent desired by that company, not being adopted.
2. To notify Vodafone Portugal – Comunicações Pessoais, S.A., of this decision.

Lisbon, 22 June 2017