

Decision

to issue unified titles of rights of use of frequencies for terrestrial electronic communication services, subsequent to auction

1. Background

By determination of 6 January 2012, ICP-Autoridade Nacional de Comunicações (ICP-ANACOM) approved the final report of the auction for the allocation of rights of use of frequencies in the 450 MHz, 800 MHz, 900 MHz, 1800 MHz, 2.1 GHz and 2.6 GHz bands (multi-band auction), which includes the decision on the allocation of rights of use of frequencies.

In this context, the following allocations were made:

a) Optimus - Comunicações, S.A. (Optimus) was allocated rights of use of frequencies corresponding to the nine lots won by this company, as follows:

- i) 2 x 10 MHz in the of 800 MHz frequency band (790-862 MHz);
- ii) 2 x 14 MHz in the 1800 MHz frequency band (1710-1785 MHz / 1805-1880 MHz);
- iii) 2 x 20 MHz in the 2.6 GHz frequency band (2500-2690 MHz).

b) TMN - Telecomunicações Móveis Nacionais, S.A. (TMN) was allocated rights of use of frequencies corresponding to the nine lots won by this company, as follows:

- i) 2 x 10 MHz in the 800 MHz frequency band (790-862 MHz);
- ii) 2 x 14 MHz in the 1800 MHz frequency band (1710-1785 MHz / 1805-1880 MHz);
- iii) 2 x 20 MHz in the 2.6 GHz frequency band (2500-2690 MHz).

c) Vodafone Portugal - Comunicações Pessoais, S.A. (Vodafone) was allocated rights of use of frequencies corresponding to the eleven lots won by this company, as follows:

- i) 2 x 10 MHz in the 800 MHz frequency band (790-862 MHz);
- ii) 2 x 5 MHz in the 900 MHz frequency band (880-890 MHz / 925-935 MHz);
- iii) 2 x 14 MHz in the 1800 MHz frequency band (1710-1785 MHz / 1805-1880 MHz);
- iv) 2 x 20 MHz in the 2.6 GHz frequency band (2500-2690 MHz);
- v) 25 MHz in the 2.6 GHz frequency band (2500-2690 MHz).

Pursuant to the provisions of article 32 of the Auction Regulation (ICP-ANACOM Regulation no. 560-A/2011 of 19 October) the titles governing the allocation of rights of use of frequencies are to be issued by ICP-ANACOM upon fulfilment of the deposit obligation provided for in article 30 of this Regulation.

To this purpose, and after the operators deposited the amounts as required by the Auction Regulation, by determination of ICP-ANACOM's Management Board of 3 February 2012, approval was given to the decision on the unified titles of the rights of use of frequencies for terrestrial electronic communications services. This decision was previously submitted to the prior hearing of Optimus, TMN and Vodafone, in accordance with Article 100 et seq. of the CPA - *Código do Procedimento Administrativo* (Code of Administrative Procedure) and to the general consultation procedure under article 20, paragraph 3 of Law no. 5/2004 of 10 February, as amended by Law no. 51/2011 of 13 September (LCE - *Lei das Comunicações Eletrónicas* (Electronic Communications Law), hereinafter), whereby it was decided as follows:

1. To unify, in a single title, the conditions applicable to the rights of use of frequencies as granted to Optimus, TMN and Vodafone for the provision of publicly available terrestrial electronic communications services, in accordance with the drafts which are in annex to the present determination and which are an integral part hereof.

2. To maintain application, pending approval of the separate decision on the provision of information referred to in the title drafts in annex hereto, of the obligation by which holders of rights of use of frequencies are bound to send such information as is specified in ICP-ANACOM determination of 17 November 2011 on "*Questionnaires on information related to the coverage, quality of service and means of implementing site sharing, to be sent to ICP-ANACOM by undertakings providing the land mobile service (GSM/UMTS) / Annual declaration to be presented by TMN - Telecomunicações Móveis Nacionais, S.A. and Vodafone - Comunicações Pessoais, S.A on total coverage provided in the provision of voice and data services up to 9600 bps, as per location with over 10,000 inhabitants and by municipality, "*.

Whereas interested parties were given a period of 20 working days to comment, under both consultation procedures, which period ended on 2 March 2012, timely responses were received from the following undertakings:

- ONITELECOM - Infocomunicações, S.A. (ONI);
- Optimus
- TMN
- Vodafone
- Miguel Couto

The report drawn up with basis in this consultation process forms an integral part of the present decision and includes a summary of views expressed and ICP-ANACOM's position thereon.

2. Assignment process for the 1800 MHz band

Pursuant to Article 31 of the Auction Regulation, and following the provision of the referenced deposit, the Management Board of ICP-ANACOM is called on to define the exact location of the spectrum to be assigned in the 1800 MHz band, as well as spectrum already assigned in this band in respect of rights of use of frequencies allocated to the date of entry into force of this Regulation, taking into account the principles set out in paragraph 2 of said article 31.

For this purpose, and under the terms of article 31 of paragraph 3 of the Auction Regulation, the undertakings which, upon conclusion of the auction, successfully obtained lots in the 1800 MHz band, were given a period of 30 days from the date of notification of the act alluded to in article 29, paragraph 2, of the Regulation, to make agreement among themselves as to the exact location of the spectrum in this frequency band.

The three operators (Optimus, TMN and Vodafone) reported the agreement to ICP-ANACOM, as reached at a meeting held on 9 January 2012 and concluded on 17 February 2012, in which the exact location of the spectrum in the 1800 MHz band was determined among themselves, which agreement is approved by ICP-ANACOM on the same date in a separate decision.

3. Single Title - Terrestrial electronic communications services

By determination of 8 July 2010, ICP-ANACOM decided, in the specific context of *refarming* of the spectrum in the 900 MHz and 1800 MHz frequency bands, to unify into a single title the conditions governing the exercise of the rights of use of frequency granted to Optimus, TMN and Vodafone to provide the land mobile service (LMS), according to UMTS (2.1 GHz band) and GSM/UMTS technologies in the 900MHz and 1800 MHz bands.

In this context, ICP-ANACOM considered it timely and appropriate to bring together, into a single title, the conditions governing the exercise of the right of use of frequencies, eliminating, wherever admissible and justifiable, the distinction between technologies and frequency bands used for the provision of LMS, thereby enhancing the effective application of the principle of technological neutrality.

ICP-ANACOM took the view that, since the GSM Directive and Decision 2009/766/EC¹ gave LMS operators the right to use systems other than GSM in the 900 MHz and 1800 MHz frequency bands, it was not fitting to continue to assess the obligations of operators, in particular with regard to coverage obligations, while ignoring this new reality.

¹ Currently as amended by Decision 2011/251/EU.

Otherwise, ICP-ANACOM considered that it would be exacerbating inefficient use of the radio spectrum, insofar as this would mean disregarding voice coverage (measured under the 900 MHz and 1800 MHz licenses) when achieved through the use of frequencies at 2.1 GHz, and data coverage (measured in the 2.1 GHz license) when achieved through the use of frequencies at 900 MHz and 1800 MHz.

In the context of the multi-band auction, the rights of use of frequencies were allocated by ICP-ANACOM for the provision of publicly available terrestrial electronic communications services, whereby this Authority ensured, under its spectrum management responsibilities, the principles of neutrality in these frequency bands in terms of services and technology, subject to compliance with the obligations identified in the Radio Regulations of the International Telecommunication Union (ITU) and the National Table of Frequency Allocations (NTFA) - see article 1, paragraph 2 of the Auction Regulation.

In this context, ICP-ANACOM considers that neutrality should cover the rights of use of frequencies already assigned (before the auction) to the three mobile operators (Optimus, TMN and Vodafone), not restricting provision of services to the LMS, to the extent that, from a perspective of service neutrality, there is no impediment to use of these services for the provision of publicly available terrestrial electronic communications services.

On the other hand, from a standpoint of technological neutrality, compliance is achieved with the implementation of Decision 200/766/EC, as amended by Decision 2011/251/EU in the case of the 900 MHz and 1800 MHz bands ².

This new reality justifies incorporation of the rights of use allocated under the auction process into a single title together with the previously allocated rights, maintaining a unit which guarantees harmonisation of the terms and conditions applicable to the various rights of use of frequencies which have been allocated and which also guarantees efficiency in the accomplishment of the coverage obligations imposed, in strict compliance with the principles governing the management of the radio spectrum which ICP-ANACOM is charged with ensuring.

² In this regard, note is made that a Community Decision is currently undergoing approval on the 2.1 GHz band that will allow the deployment of other technologies in addition to UMTS.

This incorporation into a single title does not eliminate, nor can it eliminate, the existence of different rights of use of frequencies, which is also clear from the nomenclature proposed for the title, whereby express provision is made for the conditions associated with each right of use, and likewise for the different coverage obligations, the different periods of validity or specific access obligations.

ICP-ANACOM considers this aspect to be essential, as ensuring appropriate levels of legal security and certainty in the treatment of events that may occur throughout the continuance of such rights of use.

As such, ICP-ANACOM has opted to issue the titles in a unified manner, setting out the different rights of use allocated under the auction process, as well as rights of use allocated previously, in furtherance of the objective of increasing efficiency in the use of the radio spectrum, implementing the principles of neutrality of service and technology and increasing efficiency in the accomplishment of coverage.

On this occasion, ICP-ANACOM has opted to adapt the current obligations set out in the rights of use issued to the three mobile operators on 8 July 2010 to the legal regime resulting from the amendments made to Law no. 5/2004 of 10 February, as stem from Law no. 51/2011 of 13 September (*Lei das Comunicações Eletrónicas* (Electronic Communications Law)), in particular as regards the general conditions.

In the context set out above, the proposed unified title is structured as follows:

- a) A general section whose provisions are applicable to all rights of use of frequencies therein (Section I);
- b) A section setting out the general conditions as provided for in article 27 of the *Lei das Comunicações Eletrónicas* (Electronic Communications Law) (Section II); and
- c) A final section divided into chapters, each of which sets out the specific conditions associated with each different right of use of frequencies allocated, in accordance with the provisions of article 32 of the same law (Section III).

4. Titles relating to the rights of use of frequencies allocated in the 1800 MHz band

It is recalled that under the terms set out in the determination of 3 February 2012, ICP-ANACOM made clear that, by adopting the same conceptual line as regards the rights of use of frequencies granted in the 1800 MHz band, as set forth with regard to the remaining rights of use, this Authority would issue such rights of use by incorporating them into the unified titles. Specifically, this will entail the addition of a chapter in Section III with specific conditions associated with said rights of use.

Since such addendum does not bring about any substantive change in the conditions submitted to public consultation by the decision of 3 February 2012, ICP-ANACOM considered that it unnecessary to subject it to the general consultation procedure, submitting it only to the prior hearing of interested parties in accordance with Article 100 et seq. of the CPA.

Nevertheless, upon conclusion of the public consultation and prior hearing on the unified titles (governing rights of use allocated in the remaining bands pursuant to the auction and the rights of use of frequencies granted prior to the auction) and following analysis of the comments submitted, ICP-ANACOM concludes, as detailed and reasoned in the respective report, that, besides the consideration that the decision at hand is a decision deemed favourable to the interested parties, said parties have already had occasion to comment on the procedure with regard to all the issues that have bearing on the decision.

ICP-ANACOM, therefore, considers that point a) and also point b), both of paragraph 2 of article 103 of the CPA, are fully applicable; as such this Authority is of the view that it is fitting to waive the prior hearing requirement regarding this specific decision as to the incorporation and implementation of conditions applicable to the rights of use of 1800 MHz in the unified title.

5. Decision

Therefore, in accordance with articles 15, 16-A, 20, 27, and 32, all of Law no. 5/2004 of 10 February, as amended by Law no. 51/2011 of 13 September, and in accordance with articles 32 et seq. of Regulation no. 560-A/2011 of 19 October, and also pursuant to point I) of article 26 of ICP-ANACOM's Statutes, as approved in annex to Decree-Law no. 309/2001 of 7 December, the Management Board of ICP-ANACOM determines to approve the following decision:

1. To issue the unified titles, setting out the conditions applicable to the rights of use of frequencies allocated to Optimus, TMN and Vodafone for the provision of publicly available terrestrial electronic communications services, subsequent to the auction, which are copied in annex hereto, forming an integral of the present determination.
2. To approve the "Report of the consultation procedures on the decision on the unified titles of rights of use of frequencies for electronic communications services", which constitutes an integral part of the present decision.
3. To waive the requirement to conduct a prior hearing of Optimus, TMN and Vodafone under the terms of paragraph 2 of article 103 of the *Código do Procedimento Administrativo* (Administrative Proceeding Code), as regards the approval of the respective conditions associated with the rights of use of frequencies of the 1800 MHz band .
4. To maintain application, pending approval of the separate decision on the provision of information referred to in the titles in annex hereto, of the obligation by which holders of rights of use of frequencies are bound to send such information as is specified in ICP-ANACOM determination of 17 November 2011 on "*Questionnaires on information related to the coverage, quality of service and means of implementing site sharing, to be sent to ICP-ANACOM by companies providing the land mobile service (GSM/UMTS) / Annual declaration to be presented by TMN - Telecomunicações Móveis Nacionais, S.A. and Vodafone - Comunicações Pessoais, S.A on total coverage provided in the*

provision of voice and data services up to 9600 bps, per location with over 10,000 inhabitants and by municipality".

5. To amend the current National Table of Frequency Allocations (NTFA) to reflect the determination accordingly.

6. To determine that said unification of titles is without prejudice to any breach procedure arising as a result of any failure to comply with the obligations set forth in the unified titles in force.

Lisbon, 9 March 2012