

**Decision to repeal the right of use for frequencies ICP - ANACOM No 10/2006  
held by WTS - Redes e Serviços de Telecomunicações, S. A.**

## **1. The request**

By letter received at ICP - ANACOM on 16 December 2011, WTS – Redes e Serviços de Telecomunicações, S. A. (WTS) briefly explains and notifies the following:

- WTS holds right of use for frequencies ICP - ANACOM No 10/2006, corresponding to frequencies 28.0945 GHz-28.2696 GHz, 29.1025 GHz and 29.2775 GHz, for geographic zones 1 and 2;
- The allocated spectrum was the support of a far-reaching project, which included the development of an operator in Portugal, but most of all implied the development of an I&D project and of an industrial project which are the foundations for the development of a unique technology in the world and outstanding in the Portuguese business sector;
- The company was aware since the beginning that it would face barriers at the level of the lack of technologies that dealt with these frequencies in an efficient, competitive and replicable manner, as well as at market level, which is a highly hegemonic one and heavily dependent on a single operator;
- The first challenge was met by means of a committed team and a very great deal of investment. Not the second, however.

In conclusion, WTS requests the repeal of its right of use, with effect from 31 December 2011, as well as of public radio network license - fixed service - PMP links No 504400 associated to that right of use.

## **2. Framework**

### **2.1. The right of use for frequencies held by WTS**

By Order of the Minister for Social Equipment (MEPAT) of 19 November 1999, issued pursuant to paragraph 2 of article 17 of the Regulation in annex to Administrative Rule No 465-B/99, of 25 June, and further to a public tender for the award of licences, of a national scope, for the use of frequencies for operation of Fixed Wireless Access (FWA) systems, launched by Order of MEPAT of 28 June 1999, WTS – Redes e Serviços de Telecomunicações, S. A. was awarded Licence No ICP - 10/99-FWA.

Subsequently, Administrative Rule No 1062/2004, of 25 August, approved the amendment of the model of operation of FWA systems, introducing a coverage model according to zones, the permission to use frequencies in the transmission network and the overhaul of the radio fee system.

According to the mentioned administrative rule, it was incumbent on ICP - ANACOM to define the model per zones of awarded FWA frequency bands, as well as the adjustment of the respective qualifying documents.

Law number 5/2004, of 10 February, (Electronic Communications Law - ECL) also determined, in its article 121, that companies would maintain the rights of use for frequencies awarded prior to its publication, up to the expiry of the period established in the respective qualifying document, and that all obligations undertaken by companies licensed in tenders prior to its publication would also remain applicable, as well as the respective tender instruments in the relevant part thereof.

Nevertheless, it was incumbent on ICP - ANACOM to promote the necessary amendments and adjustments to licenses issued under Decree-Law number 381-A/97, of 30 December, thus on 23 November 2006, ICP - ANACOM issued a document recasting the right of use for frequencies for operation of fixed wireless access (FWA) systems which had been awarded to WTS.

Consequently, by virtue of the right of use for frequencies ICP - ANACOM No 10/2006 - FWA, WTS maintained its right of use of a block of 2x175 MHz, corresponding to frequencies 28.0945 GHz - 28.2695 GHz and 29.1025 GHz - 29.2775 GHz, for geographic zones 1, 2, 3, 4, 5, 6, 7, 8 and 9, under the conditions explained therein and until 1 January 2015.

On 21 August 2007, by endorsement, the referred right of use was amended, and WTS held the right to use a block of 2x175 MHz, corresponding to frequencies 28.0945 GHz - 28.2695 GHz and 29.1025 GHz - 29.2775 GHz, for operation of FWA system in geographic zones 1, 2, 3 and 7. The clause according to which WTS undertook to maintain a minimum number of installed central stations was also amended.

By determination of 14 April 2008, taken further to WRS's request for amendment, of 28 December 2007, the mentioned right of use for frequencies ICP - ANACOM No 10/2006 was again amended, the operation of the FWA system being reduced to geographic zones 1 and 2.

WTS is also the holder of radio licence No 504400, for use of a public radio network license - fixed service - point-multi-point links, valid until 20 August 2016.

WTS's communication of 16 December 2011 thus represents a request to repeal the award of the right of use for frequencies ICP - ANACOM No 10/2006, as well as the award of radio license No 504400, that is, the repeal of valid administrative acts.

## **2.2. Repeal of valid administrative acts - ICP - ANACOM's power to repeal and interested parties**

It is in fact in the light of the regime of the repeal of valid administrative acts, provided for in the Administrative Procedure Code (APC), that this request must be analysed. It consists of an *"administrative decision to end the effects of a previous administrative decision, as such effects are deemed not to be convenient, not to represent an appropriate way of pursuing the public interest concerned (...)"*<sup>1</sup>.

The APC states, in its article 140, that administrative acts may be freely repealed, except where i) their irrevocability results from a binding legal provision, ii) they create rights or iii) they impose legal obligations or fundamental rights on the administration. In case acts create rights, as here, they can only be repealed in the part where they affect the interests of their addressees or where all interested parties agree with the repeal of the act and inalienable rights or interests are not at issue.

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<sup>1</sup> In *Código do Procedimento Administrativo comentado*, 2<sup>nd</sup> edition, Mário Esteves de Oliveira, Pedro Costa Gonçalves and J. Pacheco de Amorim, Section IV, II, pg. 667.

First of all, it is necessary to ascertain the competent body to repeal the act.

Pursuant to paragraph 1 of article 142 of the APC, in the absence of a special provision empowering another body for the purpose, the author of the act is competent to repeal it.

In the current legal framework<sup>2</sup>, it is incumbent on ICP - ANACOM to grant rights of use for frequencies (vd. article 19, paragraph 3 of ECL), as well as to renew them (cfr. article 33 of ECL).

As such, ICP - ANACOM is empowered to renew rights of use for frequencies, even when this award is preceded by selection procedures, namely tender, where the award rules are determined by the member of the Government in charge of the communications area. Thus, ICP - ANACOM is also entitled to repeal the act awarding that right.

In the scope of the regime governing the licensing of radiocommunications networks and stations, laid down by Decree-Law number 151-A/2000, of 20 July, as amended and republished by Decree-Law number 264/2009, of 28 September, it is also incumbent on ICP - ANACOM to grant (article 5), alter (article 16) and cancel (article 17) the corresponding radio licenses, and in this last case, the procedure may be launched by the license holder.

The law acknowledged the repealing power of the author of the administrative act based on the idea that such power is a mere development of the operative or primary competence. It can thus be concluded that the power to repeal the act lies with ICP - ANACOM.

In this case, the request for repeal was triggered by WTS, the sole interested party in the implied sense of article 140 of the APC, that is, the holder of legally protected rights or interests whose agreement is required to repeal the act.

In this framework, it must be also taken into account that the acts the repeal of which is under consideration here (the award of rights of use for frequencies and radio licenses) are included in the so-called category of favourable acts. In fact, this concerns mainly the granting of an advantage, involving the allocation of a right to operate a given resource, which is intended to be used in the interest of a private party, for the development of an economic activity.

Having been faced with a request to repeal an act which grants an advantage to a private party - a request which is obviously based on the interest and motives of the respective holder - ICP - ANACOM must assess whether the public interest, the pursuit of which was also associated to the favourable act, is harmed in case the private party's request is granted.

### **3. Assessment of the request**

Within the electronic communications sector, the Electronic Communications Law, transposing the framework defined at Community level, lays down the "freedom to provide electronic communications networks and services" (article 19, paragraph 1).

From this regime does not follow the obligation to remain in the market (to provide electronic communications networks and services) by whoever wishes to exit it, without prejudice, obviously, to compliance with obligations to safeguard, in particular, the interests of consumers or of other economic agents, which on this issue, the Law or the Regulator may impose.

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<sup>2</sup> Law number 5/2004, of 10 February (ECL) has been recently amended and republished by Law number 51/2011, of 13 September.

In another words - and without prejudice to legal provisions imposing conditions of access and use, due to the scarcity of resources involved or the nature of the service, namely an universal service -, the current legal framework does not impose an obligation to stay in the market, which would ultimately constitute a denial of the concept of freedom of private initiative.

In the case under consideration, it cannot but be considered that WTS is free not to wish to perform the activity for which the right of use for frequencies had been granted, given, as explained earlier, that the act at issue - the award of rights of use for frequencies - is included in the so-called category of favourable administrative acts. Nevertheless, the applicable conditions must be assessed on a case-by-case basis, given the intention of abandoning the activity concerned.

Taking these facts into account, having been analysed WTS's request, ICP - ANACOM concludes that, from a spectrum-management perspective, especially the principle of an effective and efficient use of spectrum, there is nothing to prevent the repeal of the right of use for frequencies No 10/2006 held by the company.

Although in its request WTS fails to refer the date on which it ceased effectively its activity, as well as if it provided its service users with prior information on that fact (as required under article 39, paragraph 1 c) of ECL), it must be taken into account here that WTS does not have retail customers and, integrating the Grupo SGC, it only operated the local access wireless infrastructure which supported triple play offer made by AR Telecom (a company also held 100% by that Group), which in the meantime also ceased to be provided by this company.

Therefore, in the light of the above and considering that the assumptions which justify the repeal of the act awarding to WTS the right of use for frequencies already existed at the date of the request, it is deemed that the decision to repeal the rights of use for frequencies No ICP - ANACOM 10/2006 may take effect as of 31 December 2011, as requested by WTS.

At radio licensing level, ICP - ANACOM also takes the view, also in observance of the principle of an effective and efficient use of spectrum, there is nothing to prevent the request for cancellation of radio license No 504400 held by WTS, this situation being covered by paragraph 1 b) of article 17 of Decree-Law number 151-A/2000, of 20 July.

The repeal of the right of use for frequencies ICP - ANACOM No 10/2006 and of radio license No 504400 shall be taken into consideration in the process of the calculation and settlement of fees due to ICP - ANACOM, as provided for under Administrative Rule number 1473-B/2008, of 17 December, as amended and republished by Administrative Rule number 291-A/2011, of 4 November.

Bearing in mind the provision in paragraph 7 of article 21 of ECL, according to which undertakings that cease the provision of electronic communication networks or services are required to inform the National Regulatory Authority about it at least 15 days in advance, ICP - ANACOM will promote, pursuant to article 21-A, the cancellation of WTS's entry in the register of undertakings providing electronic communications networks and services, which this Authority maintains and publishes in its website pursuant to paragraph 1 e) of article 120 of the ECL.

Lastly, and given that in the light of information available at ICP - ANACOM, WTS did not have any retail customers, its activity consisting in renting the TMAX network and fibre optic to AR Telecom, which used this network as a support to services provided, namely its residential segment, to which in the meantime it ceased to provide its triple play services, ICP - ANACOM

deems that this repeal of the right of use for frequencies does not have a relevant impact in the market which, as such, would impose the promotion of a general consultation procedure, as set out in article 8 of ECL.

Considering also that the elements in the procedure lead to a decision which is favourable to WTS and which meets the request made by the latter, it is also considered that the prior hearing of WTS may be dispense with, by virtue of paragraph 2 b) of article 103 of the Administrative Procedure Code.

#### **4. Determination**

In the light of the above, the **Management Board of ICP - ANACOM**, in the scope of powers provided for in article 6, paragraph 1 c) of its Statutes, published in annex to Decree-Law number 309/2001, of 7 December, and in the pursue of regulatory objectives set out in article 5, paragraph 1 a) and paragraph 2 d), and under articles 15, 19, paragraph 3 and 33, all of ECL<sup>3</sup>, in the exercise of competencies assigned under article 26 l) of the referred Statutes, as well as article 140, paragraph 2b), of the APC, **hereby determines**:

1. To repeal the right of use for frequencies for operation of fixed wireless access (FWA) systems held by WTS – Redes e Serviços de Telecomunicações, S. A., and consequently, of the document in which the granted right of use had been drawn up (ICP - ANACOM No 10/2006 - FWA), with effect as from 31 December 2011.
2. To repeal radio license No 504400 held by WTS – Redes e Serviços de Telecomunicações, S. A., pursuant to and for the purposes of paragraph 1b) of article 17 of Decree-Law number 151-A/2000, of 20 July.
3. To dispense with the prior hearing of WTS – Redes e Serviços de Telecomunicações, S. A., by virtue of paragraph 2 b) of article 103 of the Administrative Procedure Code.

Lisbon, 09 February 2012.

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<sup>3</sup> As amended by Law number 51/2011, of 13 September.