
Determination of 29.8.2007

Determination

I – Framework

1. On 21.06.2005, Optimus requested, under article 78 of the General Tax Law (GTL), an ex officio review of payments made concerning fees due for the use of spectrum during the periods that correspond to the 1st and 2nd semesters of 2001, based on an error on the number of subscribers reported by the company.
2. On 07.12.2005, the Board of Directors of ICP-ANACOM determined to reject the request, as conditions for the application of article 78 of the GTL had not been met. The Authority determined also that *“given the general principle of prohibition of unjust enrichment ... the Authority [would] weight the need to issue credit notes to Optimus ... in case there [was] evidence, namely by means of an external audit, that this company had overpaid sums due for fees for the use of spectrum during the periods that correspond to the 1st and 2nd semesters of 2001”*.
3. On 02.10.2006, Optimus requested of ICP-ANACOM that the audit to statistical elements of the land mobile service (LMS) operators, which was in course at the time and that comprised the period 2002-2004, *“included the period between 1998 and 2004”*.

ICP-ANACOM deemed there were no grounds to grant the request and thus restated the views previously expressed, referring that *“the burden of proof rested with Optimus”*.

Optimus informed ICP-ANACOM that it would *“contact KPMG... at its own expense”* to audit the period between 1998 and 2001.

4. On 18.07.2007, Optimus submitted to ICP-ANACOM the report of the audit it had promoted and which KPMG had carried out.

In the letter to which the referred report was attached, Optimus claimed the repayment of € (...), an amount which corresponded to the difference between the sum deemed to have been overpaid during 1998-2001 and the amount paid following the audit promoted by ICP-ANACOM concerning the period 2002-2004, which at the time was due (and which had been paid in the meantime).

5. However, the amounts referred in the letter did not correspond to the calculations ICP-ANACOM had made, and on 07.08.2007, Optimus corrected figures under consideration, in addition to the request submitted on 16.07.2007.

Optimus thus claims the repayment of € (...), an amount which corresponds to sums overpaid concerning fees for the use of radio spectrum during the period between 1998 and 2001.

II. Report of the audit to statistical elements of Optimus for the period 1998/2001

6. From the document submitted by Optimus, it was possible to verify that the audit strategy was similar to the one approved previously by ICP-ANACOM in the scope of the audit it had promoted for the period 2002-2004 (except for issues resulting from different views on the definition of subscriber in force for the period 1998/2001), and that the information provided allows for the calculation of the number of subscribers according to criteria and options taken by ICP-ANACOM in the course of the prior audit.

Notwithstanding, the purpose of this audit was not the same. The auditor refers that the audit requested by Optimus aimed to “*recalculate the number of subscribers for the period between 1998 and 2001*” (page 2 of the Report) whereas the purpose of the audit promoted by ICP-ANACOM was to “*assess whether reported figures were correct*”.

Having contacted the auditor, it referred that the different purposes did not affect the methods nor the results of the audit (except for a situation detected by ICP-ANACOM concerning card offers which resulted in additional tests).

7. The present report, its comparison with prior reports and contacts established with KPMG did not enable ICP-ANACOM to identify other material errors or incoherencies, nor any non-conformances with criteria for accounting for the number of subscribers.

The audit now performed presents the same limitations of the previous ones: it is based on information of information systems (rate plans, business rules attached to the state of cards and other data comprised in Optimus' information systems), and examines the coherence of information of different systems.

III. Decision

8. Whereas:

- a) as regards the establishment of any amounts overpaid by Optimus for fees for the use of spectrum relatively to the period between 1998 and 2001, ICP-ANACOM determined that there were no grounds which forced this Authority to promote such action and that “*the burden of proof rested with Optimus*”;
- b) according to available data, the LMS subscriber list resulting from the audit promoted by Optimus did not present any material errors or incoherencies, thus enabling the establishment of the number of subscribers of this company between 1998 and 2001, according to criteria defined by ICP-ANACOM;
- c) The number of subscribers of Optimus for the referred period, as established by the audit it had promoted (..) is lower than the one reported by the company to ICP-ANACOM (...) and it thus follows that this company has overpaid €(...) for the use of radio spectrum, in the period of 1998-2001, inclusive;
- d) As the Board of Directors acknowledged by Determination of 7.12.2005, article 473 of the Civil Code, which applies to legal-tax relations by virtue of article 1, paragraph 1, article 2, point d) and article 3, paragraph 2, of the General Tax Law, prohibits unjust enrichment, a situation which would take place where Optimus was not repaid sums overpaid;
- e) Optimus declared that the additional payment made on 15 March 2007 was correct, both on a formal and material level, and accepted the underlying criteria for accounting for subscribers, as well as the way they were interpreted and applied, and also that it understood that sums overpaid between the first semester of 1998 and the second semester of 2001 would be fully returned by means of a repayment of € (...), no other amount being due, on whatever grounds, for payments made for fees for the use of radio spectrum between the first semester of 1998 and the second semester of 2004,

the Board of Directors of ICP-ANACOM, duly empowered by point g) of article 26 of the respective Statutes, approved by Decree-Law no. 309/2001, of 7 December, given the recitals of the present draft decision, hereby authorizes the repayment to Optimus – Telecomunicações, S.A. of € (...), which corresponds to the sum of the following overpaid amounts:

2 nd semester of 1998	€ (...)
1 st semester of 1999	€ (...)
2 nd semester of 1999	€ (...)
1 st semester of 2000	€ (...)
2 nd semester of 2000	€ (...)
1 st semester of 2001	€ (...)
2 nd semester of 2001	€ (...)