

DECISION

Repeal of the right of use for frequencies and radio license granted to Optimus – Comunicações, S. A. for FWA operation

1. The request

By letter received at ICP-ANACOM on 25 September 2012, Optimus – Comunicações, S. A. (hereinafter Optimus) briefly explains and notifies the following:

- The company has endeavoured to adjust its offer and supporting network in order to adequately meet its clients' need, including significant investment in the development of fibre optic access networks that allow the provision to end-clients of services with a much higher bandwidth, lower cost per bit transport and better levels of quality of service than FWA point-to-multipoint networks;
- The FWA network is unsuited to meet the current needs of services required by clients, for the most part IP networks with high transfer speeds, and also affords no advantages in the scope of the connectivity and capacity of Optimus' transport network (mobile backhauling). Moreover, modernizing the FWA network would require heavy investment, that would not be justified by the enhanced performance of fibre optic networks and investment targeted to their development;
- The company has gradually migrated offers supported on the FWA system to alternative technologies while still satisfying clients' requirements, and for this reason the number of clients whose services are supported on FWA has declined successively. As a result, a very low number of clients still uses these services;
- In a close collaboration with its end-clients, Optimus wishes to conclude the migration of clients supported on FWA to alternative solutions by the end of 2012.

On these premises, Optimus declares that, after 31 December 2012, it does not wish to use frequencies the right of use of which was granted to it for FWA operation, thus the company:

- Renounces, **with effect from 31 December 2012**, rights of use for frequencies concerning:
 - a. The block of 2x56 MHz corresponding to frequencies 24,773 GHz - 24,829 GHz and 25,781 GHz - 25,837 GHz (**geographic zones 1 and 2**);
 - b. The block of 2x28 MHz corresponding to frequencies 24,801 GHz - 24,829 GHz and 25,809 GHz - 25,837 GHz (**geographic zone 3**).
- Consequently requests, with effect from 31 December 2012, and without any condition - other than the taking of effect of repealing actions only on 31 December 2012 - the repeal of:
 - a. The act granting the right of use for frequencies for FWA operation held by Optimus;
 - b. The document in which that right of use has been drawn up (RUF ICP-ANACOM No 08/2006);

c. Radio license No 504240 allocated to Optimus.

- Informs, for the purpose of article 21, paragraph 7, of Law No 5/2004, of 10 February, as amended by Law No 51/2011, of 13 September, that the company will terminate its activity as FWA operator until 31 December 2012.

2. Framework

2.1. Licenses allocated to Optimus for FWA operation

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 allocation 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, the then Novis Telecom was allocated Licences No ICP - 02/99-FWA and ICP - 04/99.

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 geographic 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 No 381-A/97, of 30 December, thus on **23 November 2006**, ICP-ANACOM issued a document recasting the right of use for frequencies for FWA operation which had been allocated to Novis Telecom.

Consequently, by virtue of the **right of use for frequencies ICP-ANACOM No 08/2006** - FWA, Novis Telecom maintained its right of use of a block of 2 x 56 MHz, corresponding to frequencies 24,773 GHz - 24,829 GHz and 25,781 GHz - 25,837 GHz, for geographic zones 1 and 2, a block of 2 x 28 MHz, corresponding to frequencies 24,801 GHz - 24,829 GHz and 25,809 GHz - 25,837 GHz, for geographic zone 3, and a block of 2 x 28 MHz, corresponding to frequencies 3633 MHz – 3661 MHz and 3733 MHz – 3761 MHz, for geographic zones 1, 2, 3, 4 and 7. This right of use for frequencies remains valid until 1 January 2015.

On 26 March 2008, by means of an endorsement, the referred right of use for frequencies was amended due to the change of the company's corporate name to Sonaecom – Serviços de Comunicações, S. A.

By determination of **7 January 2009**, taken further to Optimus' request for amendment, right of use for frequencies ICP-ANACOM No 08/2006 was again amended, in the light of the repeal of the right of use for a 2x28 MHz block, corresponding to frequencies 3633–3661 MHz and 3733–3761 MHz, for geographic zones 1, 2, 3, 4 and 7.

Optimus is also the holder of radio licence No 504240, for use of a fixed service public radio network - point-to-multipoint links, valid until 10 August 2016.

Optimus' request under examination thus represents a request to repeal the award of right of use for frequencies ICP-ANACOM No 08/2006, as well as the allocation of radio license No 504240, 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 (...)”*¹.

APC lays down, 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 negatively affect the interests of their addressees or where all interested parties agree on the repeal of the act and inalienable rights or interests are not at issue.

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

Pursuant to paragraph 1 of article 142 of 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 framework², 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 a 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 radio networks and stations, laid down by Decree-Law No 151-A/2000, of 20 July, as amended and republished by Decree-Law No 264/2009, of 28 September, it is also incumbent on ICP-ANACOM to grant (article 5), to alter (article 16) and to cancel (article 17) the corresponding radio licenses, and in this last case, the procedure may be launched by the license holder.

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

² Deriving from Law No 5/2004, of 10 February (ECL), as amended and republished by Law No 51/2011, of 13 September.

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 Optimus, the sole interested party in the implied sense of article 140 of APC, that is, the holder of legally protected rights or interests whose agreement is required for the repeal of 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

As is well known, within the electronic communications sector, ELC lays down the "freedom to provide electronic communications networks and services" (article 19, paragraph 1), transposing the framework defined at Community level.

It does not follow from this regime 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.

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

As specifically refers to the termination of the provision of the FWA service, account must be taken of the report on the evolution of the fixed service, as well as of spectrum needs, approved last March by the Working Group Spectrum Engineering (WGSE) of CEPT.

In this report, and particularly as regards the 24,5-26,5 GHz band, the Group concluded that the use of the band has generally not shown a significant increase, comparatively to other frequency bands, and it has been more relevant for point-to-point links than for point-to-multipoint links (FWA systems).

At international level, investments in point-to-multipoint links have also not developed in the proportion as point-to-point links, and a clear disinvestment at the level of technologies and services provided by this type of application may be observed.

As such, further to these difficulties at the level of technologies/services and required investment to maintain an operational network, it seems natural that Optimus seeks for technological alternatives for services provided via FWA.

In the light of the above, it is deemed that, from a spectrum-management perspective, especially the principle of an effective and efficient use of spectrum, there is nothing to prevent the company's wishes.

It is considered also that there is nothing to prevent the request for cancellation of radio license No 504240 held by Optimus, given that under paragraph 1 b) of article 17 of Decree-Law No 151-A/2000, of 20 July, licenses may be cancelled upon request of the respective holder.

On the other hand, according to available information, the number of FWA subscribers reported by Optimus has been steadily decreasing, and inversely, the company's investment in fibre optic networks has been increasing, which may be observed by the kilometres of fibre optic set up in its access/distribution network.

The assessment of the request takes also into account the fact that Optimus informs that FWA-supported offers have been gradually migrated to alternative solutions, while still meeting client requirements, and that in a close collaboration with them, it wishes to conclude the migration of clients supported on FWA to alternative solutions by the end of 2012. It may thus be concluded that Optimus is safeguarding service users, who are entitled to be informed, at least 15 days in advance, of the termination of the offer (as provided for in article 39, paragraph 1 c) of ECL and in their right of use for frequencies), the company being also under the obligation to inform ICP-ANACOM of this fact (as provided for in paragraph 4 of article 39 of ECL).

In summary, bearing in mind that (i) the number of FWA subscribers reported by Optimus has been decreasing; (ii) the company's fibre optic network has expanded and (iii) the market provides alternative services/offers to FWA systems, it may be concluded that the acceptance of Optimus' request does not harm the public interest underlying the allocation of these frequencies.

Lastly, and in the light of the above, it is deemed that the decision to grant Optimus' request (to repeal the right of use for frequencies it was awarded) does not have a relevant impact in the market so as to 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 Optimus and which meets its request, it is also considered that the prior hearing of the company may be dispense with, by virtue of paragraph 2 b) of article 103 of the Administrative Procedure Code³.

³ Which provides that the prior hearing of the interested party may be dispense with by the body examining the issue where the elements of the procedure lead to a decision that is favourable to interested party.

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, in the exercise of competencies assigned under article 26 l) of the referred Statutes, as well as article 140, paragraph 2b), of APC, **hereby determines:**

1. To repeal the act awarding right of use for frequencies for FWA operation systems held by Optimus - Comunicações, S. A., and consequently, the document in which the awarded right of use had been drawn up (ICP-ANACOM No 08/2006 - FWA), with effect as from 31 December 2012.
2. To repeal radio license No 504240 held by Optimus - Comunicações, 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 Optimus - Comunicações, S. A., by virtue of paragraph 2 b) of article 103 of the Administrative Procedure Code.

Lisbon, 13 December 2012.