

DECISION
on revocation of right of use of frequencies
ICP-ANACOM no. 05/2008,
held by MobiZAPP - Comunicações Electrónicas, S.A.

I. BACKGROUND

Draft decision and respective consultation procedure

By determination of the Management Board of ICP-ANACOM of 29 September 2011 and subsequent to a request submitted to ICP-ANACOM by MobiZAPP - Comunicações Electrónicas, S.A. (MobiZAPP) by letter received on 8 September 2011, approval has been given to the draft decision to revoke the act granting the right of use of frequencies for the Complementary Mobile Telecommunications Service - Mobile Trunking Service held by MobiZAPP and, consequently, to revoke the title establishing the right of use allocated to the company (ICP-ANACOM no. 05/2008). In this draft decision it was announced that the final revocation decision would have retroactive effects from 30 September 2011.

It was further determined that, for a period of 20 working days, the draft decision be submitted to the prior hearing of interested parties (in accordance with articles 100 and 101 of the CPA - *Código do Procedimento Administrativo* (Administrative Proceeding Code) and also submitted to the general consultation procedure (pursuant to article 8 of LCE - *Lei das Comunicações Electrónicas* (Electronic Communications Law), as amended and republished by Law no. 51/2011 of 13 September).

Notified to this effect, MobiZAPP set out its position at the prior hearing.

Prior to the closing date for the receipt of comments (31 October 2011), responses were also received from Optimus - Comunicações, S.A.

The report prepared with basis in this consultation process forms an integral part of the present decision and includes a summary of views expressed with regard to the draft determination submitted to consultation.

II. ASSESSMENT

1. The request presented by MobiZAPP

By letter received by ICP-ANACOM on 8 September 2011, MobiZAPP - Comunicações Eletrónicas, S.A. detailed and gave notice as follows (summarised):

- For the purposes of paragraph 7 of article 21¹ of Law no. 5/2004 of 10 February, MobiZAPP announced that it had decided, with effect from 30 September, to discontinue the use of frequencies allocated to the company in the 450-470 MHz band and also to discontinue operation of its CDMA 450 network, given that prevailing economic conditions did not support the operation of services and following strategic review of the market framework that will result from the multi-band auction which ICP-ANACOM is due to conduct by the end of 2011.
- MobiZAPP announces that it will cease its current provision of electronic communications services supported over the CDMA 450 network and, as such, concomitantly, the right of use of frequencies ANACOM no. 05/2008 for which it holds title is void, whereby, for all purposes, it renounces said right.
- MobiZAPP considers that the evolution of UMTS services offered by incumbent mobile operators in the 2100 MHz band have enabled these operators to achieve national population coverage of approximately 90% and provide mobile broadband services, with which MobiZAPP has been unable to compete, for the following reasons: (i) the restrictions included in the current license inhibit MobiZAPP in offering mobile broadband to the market in general; (ii) the lack of

¹ As prevailing prior to its amendment by Law no. 51/2011 of 13 September, in accordance with the date of the letter sent by MobiZAPP.

bandwidth available to it, whereby it considered that only one carrier of 2 x 1.25 MHz is available for EVDO (3G) services out of the 2 x 2.5 MHz of spectrum allocated to the company; (iii) the CDMA450 technology ecosystem is limited, with a worldwide volume of approximately 20 million subscribers, compared to 800 million subscribers to UMTS-supported services, with this difference in scale resulting in higher terminal equipment costs, a limited choice of equipment and therefore a more limited offer of services; (iv) the current annual spectrum fee structure which, despite the lower economic value of spectrum in the 450 MHz band, requires payment of the same amount in the 450 MHz band as in the GSM/UMTS bands (spectrum which has undeniably higher economic value); and (v) the obligation, set out in the license, to maintain at least 250 base stations, irrespective of the level of demand.

- Despite the disadvantages which it identifies, MobiZAPP considers that CDMA450 has been shown to be a suitable technology for providing an important service to rural communities and populations residing in remote locations who are not properly covered by the incumbent mobile operators (citing as such the high propagation capacity of 450 MHz). In its view, this is a niche market in areas which will tend to become smaller in size with the launch of UMTS and LTE, respectively, at 900 MHz and 800 MHz, estimating that the total market for broadband services supported using CDMA450 will, in the long run, be limited to between 50,000 and 100,000 subscribers.
- MobiZAPP states that this is a market segment that it plans to serve again, if it is able to obtain a new license in the 450 MHz band, proposing that the frequencies which it is returning be included in the multi-band spectrum auction being organised by ICP- ANACOM. In such case, the company advocates incorporation of the following set of essential features: (i) inclusion in a single batch of the entire available spectrum, i.e. 2 x 5 MHz in the 450-470 MHz band; (ii) association of the new license to be awarded in the auction with a wireless broadband access (BWA) license, having full neutrality (technology and service) and no obligations in respect of coverage (and, therefore, with no obligation to install a minimum number of stations); (iii) reduction in annual spectrum fees;

(iv) no minimum reserve price for this spectrum (given the limited potential of the niche market in question), whereby the price should be set through the auction by the market.

- MobiZAPP also expresses its interest in participating in the auction with the aim of acquiring a new right of use of frequencies in the 450 MHz band, in the event that ICP-ANACOM accepts the proposal which it has presented.
- In conclusion, MobiZAPP reports that it sent a notice to all existing clients on 31 August 2011 (which it attaches) under the terms of article 39, paragraph 1, point c) of Law no. 5 / 2004 of 10 February, informing customers that ZAPP electronic communications services, as currently provided, will be discontinued as of 30 September 2011.

2. Framework

2.1. The right of use of frequencies to which MobiZAPP

By order of the Minister of Public Works, Transport and Communications (MOPTC) no. 19/93-XII of 10 March 1993, enacted pursuant to paragraph 2 of article 17 of the Regulation in annex to Administrative Rule no. 796/92 of 17 August, and subsequent to the Public Tender for the allocation of two national licenses for the Provision of Complementary Mobile Telecommunications Service - Mobile Trunking Service, opened by Order 70/92 MOPTC -XII of 18 August 1992, published in Diário da República (Official Gazette), Series II, of 25 August 1992, RADIOMÓVEL - Telecomunicações, S.A. (RADIOMÓVEL) was granted licence no. ICP-012/TCM.

By order of the Secretary of State for Housing and Communications of 5 February 1999, RADIOMÓVEL was authorized to use the TETRA System (Terrestrial Trunked Radio System) for the provision of the mobile trunking service, with the allocation of new frequencies to the company. Use of this system was, however,

discontinued in December 2004, whereas the MPT 1327 analogue system was discontinued in December 2006.

By order of the Secretary of State for Transport of 14 March 2002, amendments were authorised to license no. ICP-012/TCM and additional frequencies allocated to RADIOMÓVEL for the provision of the mobile trunking service using Code division multiple access technology (CDMA).

In May 2002, the Management Board of ICP-ANACOM reissued the title authorising the company to provide the mobile trunking service.

On 18 April 2008, following analysis of the obligations set out under License ICP-ANACOM no. 012/SMRP, stemming from the documents of the public tender and from the proposal submitted in the context of said tender, and also stemming from the presentation submitted by RADIOMÓVEL when requesting the allocation of additional frequencies for the provision of the mobile trunking service with CDMA technology, in light of the regime established under Law no. 5/2004 of 10 February (LCE - Lei das Comunicações Electrónicas (Electronic Communications Law)), ICP-ANACOM concluded that said obligations were compatible and fitting in light of the regulatory framework, thereby maintaining their applicability and undertaking the adjustment of said title.

On 25 September 2008, ICP-ANACOM determined to renew the right of use of frequencies allocated to RADIOMÓVEL (ICP-ANACOM no. 05/2008) for the provision of the mobile trunking service and proceed with the specification of the general conditions governing provision of the mobile trunking service, the conditions associated with the right of use of frequencies and the conditions associated with the right of use of numbering².

Finally, on 26 January 2011, endorsing right of use of frequencies no. 05/2008, the holder was stated as MobiZAPP, Comunicações Electrónicas, S.A.

² Available at <http://www.anacom.pt/render.jsp?contentId=928463>

The notification of MobiZAPP therefore constitutes a request to revoke the act of granting right of use of frequencies no. 5/2008, being, as such, the revocation of a valid administrative act.

2.2.Revocation of valid administrative acts - the authority of ICP-ANACOM to undertake revocation and interested parties

It is, therefore, in the light of the regime of revocation of valid administrative acts, as set forth in the CPA - *Código do Procedimento Administrativo* (Administrative Proceeding Code), that this request should be examined. This consists of "*an administrative decision as to the cessation of the effects of another prior administrative decision, in light of the position that the effects of said prior decision are not suitable, do not represent an appropriate way to pursue the public interest in question (...)»*³.

The CPA set outs in article 140 that administrative acts are freely revocable unless i) when their irrevocability is legally binding, ii) they were constitutive of rights, or iii) they result in legal obligations or inalienable rights for the administration. Where acts are constitutive of rights, as in the present case, the acts may only be revoked to the extent that they are unfavourable to the interests of the recipients or where all stakeholders give their agreement to the withdrawal thereof and they do not refer to unavailable goods.

It is therefore important first of all to ascertain which Authority is competent to revoke the act.

Under paragraph 1 of article 142 of the CPA, in the absence of specific provision which assigns responsibility for the purpose to different entities, the revocation of an administrative act remains incumbent upon its author. Under the current legal

³ CPA - *Código do Procedimento Administrativo* (Administrative Proceeding Code), 2nd Ed., Mário Esteves de Oliveira, Pedro Costa Gonçalves and J. Pacheco de Amorim, Section IV, II, page 667).

regime⁴, ICP-ANACOM has authority over the allocation of rights of use frequencies (see article 19, paragraph 3 of the LCE) and the renewal thereof (see article 33 of the LCE), which authority was already exercised by ICP-ANACOM⁵ in 2008 in respect of the right of use under examination, as referred to above.

Accordingly, ICP-ANACOM has the authority to renew the rights of use frequencies, including in cases where this allocation is preceded by a selection procedure, such as by tender, in which the rules governing allocation are the responsibility of the member of the Government responsible for communications. Therefore, ICP-ANACOM also has the authority to revoke the act by which said right is allocated.

The reason why the law recognizes that the author has the power to revoke the administrative act is based on concept that revocation authority is a mere extension of depositative or primary authority. It is therefore concluded that it is ICP-ANACOM which has authority to revoke the act.

In this case, the revocation request is made on the initiative of MobiZAPP, as the single interested party under article 140 of the CPA, i.e. as holder of legally protected rights or interests whose agreement is warranted for the revocation of the act.

However, taking into account a broader concept of interested party, ICP-ANACOM recognizes the existence of a potential impact on the market that may result from the revocation of the right of use frequencies held by MobiZAPP, in particular on the users of their service, whereby ICP-ANACOM is of the position that the appropriate general consultation procedure should be undertaken, pursuant to article 8 of the LCE, thereby enabling a decision process which is transparent and participatory.

⁴ It is noted that Law no. 5/2004 of 10 February (LCE) has been recently amended and republished by Law no. 51/2011 of 13 September.

⁵ Pursuant to the then article 36 of the LCE.

Having ascertained the framework of the request, it is important to take into account that the act to which revocation relates - the granting of rights of use of frequency - fits into the category of favourable acts. As such, the issue at hand, first and foremost, is the assignment of an advantage, being in this case the allocation of a right to exploit a determined resource that an undertaking seeks for their interest and to develop an economic activity. Accordingly, when faced with a request to revoke an act which gives an advantage to an undertaking - which request is obviously based on the interests and motivations of its respective title holder - ICP-ANACOM is charged with assessing whether or not harm is done to the public interest whose accomplishment was also associated with the favourable act as a result of granting the request submitted by the undertaking.

3. Analysis of the request

In the electronic communications sector, the LCE, transposing the framework established at Community level, sets out that "the freedom to provide electronic communications networks and services is hereby ensured" (article 19, paragraph 1).

No obligation to remain in activity (in the provision of electronic communications networks and services) results from the current legal regime, where an undertaking does not see fit to remain, notwithstanding, naturally, that it is bound to comply with the obligations which are designed to safeguard, specifically, the interests of consumers and other economic agents, which, in this respect, may be determined by law or by the Regulator.

Put another way - and without prejudice to the rules and regulations which, by virtue of the scarcity of the resources involved or by virtue of the nature of the service, including universal service, may impose conditions governing access and use - current legislation sets out no obligation to remain in activity which, existing on absolute terms, may possibly void the concept of freedom of private initiative.

In the present case, it must be considered that MobiZAPP enjoys the freedom to see fit not to develop the business for which it was granted the right of use of frequencies, with the view, as explained above, that the act in question - allocation of rights of use of frequencies - fits into the designated category of favourable administrative acts. Of course, it will be important, on a case-by-case basis, to evaluate the conditions that apply in each specific situation, in light of the intention to abandon the concerned activity.

Indeed, the statistics available to ICP-ANACOM provide confirmation that the company has seen a sharp decline in customers and revenues, given that at the end of the second quarter of 2011 the company had [SCI] [ECI] customers when in July 2007 it had [SCI] [ECI] customers, which decline is followed by a parallel decline in quarterly revenues [SCI] [ECI] euros to [SCI] [ECI] euros.

In the light of this data and having analyzed the request put by MobiZAPP, ICP-ANACOM considers that, in terms of spectrum management, especially given the principle of effective and efficient use of the spectrum, there is no impediment to the revocation of the right of use of frequencies for the mobile trunking service.

MobiZAPP also properly executed the safeguards required by law in respect of the users of its services (set out in article 39, paragraph 1, point c) of the LCE and in their right of use of frequencies) since it gave advance notice, with the period of notice stipulated for the purpose of the law, that it would terminate provision of services, giving notice also to ICP-ANACOM, as required under the LCE.

Given the above analysis and considering that the premises which give basis to the revocation of the act allocating the right of use of frequencies to MobiZAPP already existed as on the date of the draft decision, the position is taken that there is no impediment to determining that this draft decision should take effect from 30 September 2011, as requested by MobiZAPP.

Finally, it is important to note that any determination of the future use of the frequencies which MobiZAPP now seeks to return to ICP-ANACOM is not covered by the present decision.

Nevertheless, taking into account that this company has presented a proposal to this end, this Authority is of the view that it must be noted that MobiZAPP must know (and knows) that such request is not made on a timely basis, given that the inclusion of these frequencies in the 450 MHz band of the multi-band auction cannot be accomplished under the current timetable, considering the date of the draft decision and considering that the final decision on limiting the number of rights of use of frequencies to be allocated in the 450, 800, 900, 1800 MHz and 2.1 and 2.6 GHz bands and on the definition of the respective allocation procedure (the auction) was taken on 13 July 2011.

Moreover, MobiZAPP has closely accompanied the auction process, participating in the public consultations which this Authority has conducted, both on the above decision and on the drafts of the regulation governing the procedure for granting such rights of use of frequencies, the last of which concluded on 26 August; as such, MobiZAPP has presented no request to return the right of use of frequencies, such as the one in question.

Finally, it should be noted that MobiZAPP cannot but be aware of the legal procedure to which the processes of revoking the rights of use of frequency are subject and which ICP-ANACOM has widely disseminated on its website; a recent example of such dissemination is the disclosure of procedures that led to the withdrawal of rights of use of DTT frequencies associated with Muxes B to F and the right of use of frequencies of the T-DAB network.

III. DECISION

In light of what has been established, the Management Board of ICP-ANACOM, pursuant to the assignments set forth in article 6, paragraph 1, point c) of its Statutes, published in annex to Decree-Law no. 309/2001 of 7 December, in

pursuit of the regulatory objectives set forth in article 5, paragraph 1, point a) and paragraph 2 point d) and pursuant to articles 15, 19, paragraph 3 and 33 of the LCE⁶, and in the exercise of the powers conferred upon it under article 26, point I) of said Statutes and also by article 140, paragraph 2, point b) of the CPA, **determines:**

1. To revoke the act of granting the right of use of frequencies for the Complementary Mobile Telecommunications Service - Mobile Trunking Service held by MobiZAPP, and therefore, to revoke the title which supported the allocated rights of use (ICP-ANACOM no. 05/2008).
2. To determine that the revocation decision has retroactive effect from 30 September 2011.

Lisbon, 10 November 2011

⁶ As amended by Law no. 51/2011 of 13 September.