

Report on prior hearing on Draft auction report

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Background

Pursuant to the provisions of articles 28 and 29 of Regulation no. 560-A/2011 of 19 October (hereinafter, the "Auction Regulation"), the Management Board of ICP - Autoridade Nacional de Comunicações (hereinafter, "ICP-ANACOM"), at its meeting held on 15 December 2011, gave approval to the following drafts:

- a) Draft Auction Report (hereinafter the "Draft Report");
- b) Draft decision to grant rights of use of frequencies.

In compliance with article 28 of the same Regulation, ICP-ANACOM notified all bidders so that, where they saw fit, they might state their positions in writing, within ten working days from the date of reception of the notification, namely:

- Optimus - Comunicações, S.A. (Hereinafter, "OPTIMUS");
- TMN - Telecomunicações Móveis Nacionais, S.A. (hereinafter, "TMN");
- Vodafone Portugal - Comunicações Pessoais, S.A. (hereinafter, "VODAFONE");
- ZON III - Comunicações Electrónicas, S.A. (hereinafter, "ZON III").

Positions were received on a timely basis from OPTIMUS (**Annex 1**), from VODAFONE (**Annex 2**) and from TMN (**Annex 3**). TMN also sent a request seeking to rectify its position, which request was received subsequent to the expiry of the deadline (**Annex 4**).

Based on the positions and views received, the present prior hearing report sets out the position taken by ICP-ANACOM and gives basis, in conjunction with the final auction report, to the decision on the allocation of rights of use of frequencies.

Given the subject matter contained in the positions received, this report will be divided into the following chapters:

- Clarifications provided by ICP-ANACOM (**Part I**);
- Clarifications relating to article 35 of the Auction Regulation (**Part II**);
- Decision to release the guarantee deposit provided by ZON III (**Part III**);
- Other matters (**Part IV**).

I. Clarifications provided by ICP-ANACOM

Clarifications provided by ICP-ANACOM during the auction process should not, in the view of **VODAFONE**, be subject to commentary under the present procedure, in the most part because:

- a) Since it is impossible for a regulation to authorise its own authentic interpretation, integration, amendment, suspension or revocation by another act that does not hold equal value, the clarifications issued by ICP-ANACOM, in particular in the period subsequent to the beginning of the qualification stage, lose their effectiveness in the context of the internal sphere of Public Administration;
- b) As VODAFONE has already had occasion to express in appropriate context, particularly during the two conducted public consultations, with regard to the limits inherent to certain stipulations of the Auction Regulation, owing to the requirement that it be compliant and compatible with the Lei das Comunicações Eletrónicas (Electronic Communications Law) and also by force of various general legal principles such as equality, proportionality and (full) reasoning, any violation of such goals would stem from the practice of the Administration and not from the Regulation itself or from the interpretation thereof.

Despite such considerations, VODAFONE did not omit to express its position insofar as the administrative action specifically inherent to the provision of clarifications to interested parties will have suffered from a number of irregularities, particularly in terms of guarantees of impartiality, equality, legal certainty and regulatory visibility. VODAFONE considers that such irregularities result exclusively from the initial option of ICP-ANACOM not to adopt a fully transparent procedure in this respect, as the company had repeatedly requested.

VODAFONE presents what it considers to be several examples of such situations, namely:

- a) On occasions ICP-ANACOM notified all operators and, on other occasions, notified only a limited number of interested parties e.g., with regard to the issue of the national roaming obligation with respect to the 900MHz or 800MHz band or with regard to the issue of the minimum incrimination on previously cancelled lots; Such differential treatment had no evident justification, whereas it is at least questionable whether such treatment has had a decisive influence on the options taken by each interested party;
- b) In the same context, ICP-ANACOM submitted an initial line of argument which it later revoked (for example, with regard to the potential beneficiaries of national roaming agreements), whereas the initial position was not notified to all interested parties, and the reasons for this shift of position remain unclear;
- c) There were aspects of these requests for clarification which were not notified to the "other undertakings" - in particular, Grupo ZAPP.pt was alone in being notified by ICP-

ANACOM that the national roaming obligations included all services that could be provided through these frequency bands, regardless of whether or not they are already provided by beneficiaries.

VODAFONE considers that, given the widespread and transversal nature of the examples detailed above, ICP-ANACOM could have issued general clarifications on the questions raised, as it had done with regard to other matters, while safeguarding confidentiality in terms of the identity of the parties making the request and without undermining the non-discriminatory treatment of all interested parties.

The company further considers that, in order to prevent serious harm arising from said irregularities, ICP-ANACOM is called upon to take action in respect of the issues covered by these clarifications, with careful attention and consideration given to the potential inequality created among the various interested parties, especially given the importance of such information to the key investment decision in question.

Position of ICP-ANACOM

It was ICP-ANACOM's objective, throughout the auction process, as reflected in the Auction Regulation and as widely explained, specifically in the public consultations reports, to balance the need for transparency, ensuring that applicants and bidders have access to information, and the need to keep back certain information which is essential to the prosecution of the procedure.

ICP-ANACOM's main goal was to prevent applicants/bidders from engaging concentration strategies which might undermine the auction's genuine competitive mechanisms.

With specific regard to requests for clarification, in the context of the public consultation procedure on the Regulation, certain respondents expressed their views in support of the provision of clarifications to the market (as formulated by the interested parties and provided by ICP-ANACOM), provided that no revelation is made with regard to potential bidding strategies.

Having considered these comments, ICP-ANACOM added paragraph 5 of article 11 to the Auction Regulation, which in its view addressed the concerns raised without jeopardising the stipulated objectives.

ICP-ANACOM also takes the view that auction participants were able to ascertain the fairness and transparency of the entire process upon the publication of the final auction report, which fulfilled the requirement that all necessary information be released.

Analysis of the examples cited by VODAFONE

Regarding the issues with regard to point b) of paragraph 4 and paragraph 5 of article 35 of the Auction Regulation - network access obligations in the 800 MHz or 900 MHz band - ICP-ANACOM scrupulously fulfilled the principles of equality and non-discrimination in the treatment of all applicants, within the limits imposed by article 11 of the Auction Regulation.

As such, after it was determined that clarifications had been provided which did not reflect a correct interpretation of the regulation, pursuant to article 137 of the CPA - Código do Procedimento Administrativo (Administrative Proceeding Code) these were partially substituted (where inconsistency was found). This substitution was addressed to the recipients of the clarification in question.

On the same day, and under the terms of paragraph 5 of article 11 of the Auction Regulation, ICP-ANACOM issued a general clarification on the question.

The rules governing the provision of clarifications, as laid down in article 11 of the Auction Regulation stipulate (in paragraph 1 thereof) that individualised clarification be provided to any interested party, upon request, on any uncertainties arising with regard to the interpretation of documents governing the auction process, while determining the non-disclosure such clarifications. As such, depending on the questions put, these rules legitimize responses which individually address the queries raised.

However, it cannot be claimed, as is claimed by VODAFONE, that any action of ICP-ANACOM constitutes differential treatment of interested parties, much less that such treatment may have in any way influenced the courses of action chosen by each interested party.

Indeed, despite the existence of this specific rule regarding the provision of clarifications, as laid down in the Regulation, ICP-ANACOM used its powers under paragraph 5 of the same article 11 to issue general clarifications in exceptional situations whenever this was deemed justified; such claim is therefore without basis. In this consideration, particular account was taken as to whether the aspects related to the questions raised could reasonably be considered unclear or equivocal, which would support the premise that the question may also be raised by other interested parties. In judging which issues were to be included in general clarifications, ICP-ANACOM also considered their relevance in terms of substantive issues, especially where the opposing interests of various undertakings could be impacted.

Accordingly, whenever the matter warranted, ICP-ANACOM exercised its powers under paragraph 5 of article 11 of the Auction Regulation in order to maintain a level playing field between all applicants, as occurred in the specific case of clarifications in respect of article 35 of the Auction Regulation. As such, all undertaking which submitted an application had access to, and were in effective possession of, the same level of information.

With regard to the question of the request for clarification on the minimum increment applying to previously cancelled lots, this request was put by VODAFONE referring to an uncertainty as to the interpretation of the Auction Regulation. ICP-ANACOM did not provide clarification on the issue due to the fact that the respective request was untimely (it was received by ICP-ANACOM on 25 November 2011, following the expiry of the deadline for the provision of clarification, as stipulated in paragraph 1 of article 11 of the Auction Regulation). Therefore, this example cannot, as was the intention of VODAFONE, serve to support an allegation that ICP-ANACOM gave "differential treatment" to interested parties.

Meanwhile and also in the context of roaming obligations, a question was raised by Grupo ZAPP.pt with respect to services that might benefit, which question, in the view of ICP-ANACOM, clearly resulted from the wording of the Auction Regulation, given the fact that the obligation is expressed explicitly in terms of non-discrimination; as such no general clarification was deemed warranted.

In light of the above, ICP-ANACOM rejects the claim that the way in which clarifications were provided, provided as they were in full compliance with the rules laid down in the Regulation, might, in any way, have placed interested parties or applicants in a situation of inequality likely to cause harm as would warrant special caution in the future.

II. Clarifications relating to article 35 of the Auction Regulation

It was alleged by **TMN** that only with the analysis of the Draft Report and its annexes, it found that ICP-ANACOM adopted an initial position on the issue of clarifications provided in relation to article 35 of the Auction Regulation and then shifted to a diametrically opposite position which, in the view of the company, is unlawful.

Indeed, TMN takes the view that:

- a) Article 137 of the CPA does not provide legitimacy to ICP-ANACOM's "partial substitution" of clarifications provided in respect of article 35 of the Auction Regulation to OPTIMUS, to ZON Multimédia, S.A. and to Grupo ZAPP.pt;
- b) Since the "new" clarifications were not provided on a valid basis, they cannot be considered as prevailing over the "original" clarifications.

TMN bases its position on the premise that, in its opinion, this case does not entail ratification, reform or conversion of an administrative act, since it fails to fulfil the two requisites for this purpose: (i) that the clarification in question is an administrative act and (ii) that the original clarification is an invalid act.

With regard to the first of these requisites, TMN states that regulations may only be amended or interpreted by other regulations and not by administrative acts, whereby either the clarifications were administrative acts and, being in breach of regulation, were therefore unlawful or otherwise the clarifications are not administrative acts but regulations and therefore not covered by article 137 of the CPA, in which case the substitution of the information provided by ICP-ANACOM is invalid.

The second requisite also remains unfulfilled, according to TMN, since the original clarification would not have been invalid, ruling out the applicability of article 137 of the CPA.

Position of ICP-ANACOM

Without dismissing the distinction between regulation and administrative act, as detailed by TMN, ICP-ANACOM is of the view that it is important, above all, to ascertain that this Authority acted in this regard within its powers and in compliance with the Auction Regulation.

Pursuant to paragraph 1 of article 11 of the Regulation Auction, ICP-ANACOM provided clarifications to OPTIMUS and ZON Multimédia, S.A. (on October 27) and to Grupo ZAPP.pt (on 31 October) on a range of matters related to the regulation and specifically on the network

access obligation referred to in point b) of paragraph 4 of article 35, in accordance with the conditions stipulated in paragraph 5 of the same Article, namely:

- The obligation to agree to negotiate national roaming agreements with third parties which hold rights of use of frequencies in the bands above 1 GHz and which do not hold rights of use of frequencies over more than a total of 2 x 5 MHz cumulatively in the 800 MHz and 900 MHz bands;
- This obligation of access applies to third parties which undertake, within a period of 3 years, to use their frequencies in the 800 MHz or 900 MHz frequency bands in such a way as to achieve a coverage level which corresponds to making the service available to no less than 50% of the national population.

These clarifications were provided in response to specific questions put by these companies, which raised questions as to the interpretation of these rules.

Firstly, it is important to emphasise, subsequent to the position of ICP-ANACOM as set out in Section I of the present report, that the clarifications in respect of the auction proceedings, and in terms of the respective regulation, are governed by a very particular set of rules. Indeed, the option under the Auction Regulation was that the clarifications provided in response to requests addressed to ICP-ANACOM were not meant, in principle, for general dissemination. It is a solution which differs from that currently employed in the context of tender procedures, where clarifications provided by the contracting authority are made available to all interested parties (see paragraph 4 of article 50 of the CCP - Código dos Contratos Públicos (Public Procurement Code)). This option, as mentioned, took care to safeguard the confidentiality of the procedure, without prejudice to the requirement for transparency and impartiality, which is reflected in the solution of enabling ICP-ANACOM to disclose general clarifications.

The nature of the act of providing individualised clarifications to each interested party requesting them stems directly from these particular rules governing clarifications - in specific and individual situations. Given these special characteristics, this act is certainly not regulatory in nature, nor is it contaminated by the regulatory nature of the Auction Regulation. In fact, each of the clarifications provided by ICP-ANACOM pursuant to paragraph 1 of article 11 of the Auction Regulation had content focusing on a specific situation and was addressed individually to the respective recipients, whereby notification was limited to said recipients. They were, therefore, specific and individual resolutions.

It must therefore be concluded that, based on the legal notion of an administrative act - decision of an administrative body which, under public law, is intended to produce legal effects in an individual and specific situation (article 120 of the CPA) - the clarifications provided individually

to each party pursuant to paragraph 1 of article 11 of the Auction Regulation entails a *determination on or a resolution of an issue* which is put by a private party¹.

Accordingly, it must be concluded that the regime set out in article 137 of the CPA on the ratification, reform or conversion of an administrative acts is applicable.

Secondly, ICP-ANACOM rejects the notion that it would be correct to consider the substitution of the initial interpretation with the interpretation conveyed in second place as constituting an amendment to the Auction Regulation.

Referring to page 173 of the "Curso de Direito Administrativo" (Course in Administrative Law) by Diogo Freitas do Amaral, TMN affirms that "regulations may only be amended or interpreted by other Regulations and not by administrative acts." The page of this cited work, which can be read, is not as referenced by TMN, rather stating that "regulation is interpreted, and its weaknesses are integrated, in accordance with its own rules of interpretation and integration of legal rules; for the administrative act, other specific rules exist which apply to interpretation and integration - own rules of interpretation and integration of the administrative act."

Accordingly, what is important to keep in mind - and this is surely not questioned by TMN - is that the Auction Regulation established a clear and unequivocal rule insofar as it made it incumbent upon ICP-ANACOM to provide clarification to interested parties as to any uncertainties arising with regard to the interpretation of any documents governing the auction process. As such, ICP-ANACOM was given the power and the duty to interpret the Auction Regulation, as a document governing the auction. Therefore, given the nature of the clarifications provided under the terms of paragraph 1 of article 11 of the Auction Regulation, as individual and specific to each of the interested parties, it is naturally incumbent upon ICP-ANACOM, when called upon to correct such interpretation, to proceed with its correction. The course of action followed was the required course, in light also of the principles of administrative activity, including good faith and collaboration with private undertakings.

Accordingly, it is important to completely dispel the notion that ICP-ANACOM may have lacked authority in substituting the clarifications provided with another which it deemed more appropriate, considering that the first clarification suffered from contradiction as regards the combination of two rules of the Auction Regulation and as regards the position of ICP-ANACOM as expressed in the Regulation's public consultation report. Indeed, regardless of the legal nature of the act concerned, ICP-ANACOM would always retain authority to proceed with its substitution or amendment.

¹ Mário Esteves de Oliveira and others - Código do Procedimento Administrativo (Administrative Code of Proceeding), 2nd edition, Almedina, in notes to article 120.

With the practice of these acts, ICP-ANACOM made no amendment to the Auction Regulation, whereby notification of the adopted decisions was limited to the respective recipients only. It cannot therefore be claimed, as is alleged by TMN, that these acts of ICP-ANACOM lack validity as constituting a violation of regulation².

However, in parallel, and given the relevance of the clarification in question, the subject matter, insofar as it was relevant, was included in the general clarification issued on 2 November and published on the website of ICP-ANACOM on the same day. Pursuant to paragraph 5 of article 11 of the Regulation Auction, this clarification covered a wide range of matters which ICP-ANACOM, taking into account the various requests for clarification received, deemed as warranting the manifestation of its position.

These general clarifications include general and abstract positions, such as in respect of the regulation itself, i.e., they do not define specific recipients or specific situations.

In all such cases, the clarifications therefore constitute an interpretation of the documents governing the auction process, conducted by the entity that possesses the originating regulatory power, under the terms of its statutes and of the Lei das Comunicações Eletrónicas (Electronic Communications Law)³.

In conclusion, ICP-ANACOM has acted in full observance of the applicable rules in all aspects of its conduct throughout the period of provision of clarifications pursuant to the Auction Regulation.

² Cases of invalidity are those in which, as TMN indicates, citing Freitas do Amaral, the Administration derogates the regulations in isolated cases, keeping them in force for all other cases.

³ See point a) of article 9 of the Statutes of ICP-ANACOM, as in annex to Decree-Law no. 309/2001 of 7 December, and paragraph 8 of article 30 of Law no. 5/2004 of 10 February, as amended by Law no. 51/2011 of 13 September.

III. Decision releasing the guarantee deposit provided by ZON III

In the view of **TMN**, the decision by ICP-ANACOM to release the guarantee deposit provided by ZON III was adopted in breach of the Auction Regulation, taking into consideration, in summary, that:

- a) The guarantee deposit provided pursuant to article 10 has the aim of ensuring performance, not only of such obligations as are inherent to the auction procedure, but also of the commitment assumed upon presenting an application, which, in turn, and in line with practice in the context of public tenders, includes the obligation to pursue the application and to maintain participation in the subsequent stages of the auction;
- b) A *blank bid* is not admissible under the Auction Regulation - which stipulates in paragraph 2 of article 19 that, in the first round, the bid amount for each lot must equal or exceed its established reserve price - nor is it allowed according to the Electronic Platform User's Manual - which, in chapter 5.3, makes no provision for such a course of action among the options made available to the bidders in the bidding stage - as such, its acceptance by the electronic platform, can be nothing other than a software error;
- c) This position is reinforced by the definitions presented in article 2, wherein a *round* is defined in point p) as a "set of bids submitted for the various lots of the different categories within a given time period, whereby the various lot prices in the various categories constitute the minimum amounts of all of these bids" and the *price of the lot* is defined in point n) as "the value established for each lot which, in the first round, corresponds to the reserve price";
- d) By failing to submit a valid bid in the initial round - that is, by failing to submit a bid on one or more lots with an amount equal to or exceeding the respective reserve price - ZON III failed to participate in the initial round and, consequently, did not participate in the bidding stage; which conclusion is also in line with the statement issued by this company on the website of Comissão do Mercado dos Valores Mobiliários (Securities Market Commission);
- e) A bidder is an entity which effectively and validly participates in the bidding stage and not an entity which, while eligible to participate, sees fit not to do so - whereas no such definition of *licitante* (bidder) can be derived from point g) of article 2 which sets out to define the *qualification stage*; as a result and since it failed to participate in the bidding stage, ZON III cannot be said to have acquired the status of bidder;
- f) In short, ZON III did not participate in the bidding stage, did not acquire the status of bidder and could not therefore be determined as a non-winning bidder; as such, under the powers set forth in point c) of paragraph 2 of article 4, ICP-ANACOM was bound to declare the *blank bid* presented by this company as invalid and, due to lack of compliance with the

alternatives provided for in paragraph 4 of article 10, is called upon to deny the release of respective guarantee deposit.

Meanwhile, TMN adds that it is incomprehensible how a *blank bid* could have been accepted by the electronic platform and - since this option has no basis in the Auction Regulation or in the Electronics Platform User's Manual - how ZON III might consider that a completely empty submission would be allowed by the software and accepted by ICP-ANACOM.

Position of ICP-ANACOM

In the first place, it is important to make clear that the decision of ICP-ANACOM of 15 December regarding the release of the guarantee deposit of ZON III is a final decision - and independent of the decision granting approval to the Draft Report and to the draft decision on the allocation of rights of use of frequencies - and, as such, is not subject to the prior hearing procedure covered by this report.

Function of the guarantee deposit in the auction

As a guarantee of the commitment assumed upon the submission of applications and of the performance of the obligations inherent to the entire procedure, auction applicants are required to provide, by means of bank guarantee or insurance guarantee, a guarantee deposit made in favour of ICP-ANACOM, executable in both cases upon first demand, pursuant to paragraphs 1 and 2 of article 10 and in accordance with the forms provided in Annex 2 to the Auction Regulation.

Pursuant to the same paragraph 1 of article 10 of the Auction Regulation, the amount of the deposit to be provided varies according to the number of eligibility points that the applicant seeks to obtain for the initial round, in light of the points of the lot listed in the table in article 7 of the Auction Regulation and according to the following criteria:

- Each one million euros corresponds to one eligibility point;
- A deposit of 15 million ensures the maximum number of eligibility points available to each bidder, without prejudice to the provisions in respect of spectrum caps in Article 8 of the Auction Regulation.

Under paragraph 4 of the same article 10 of the Auction Regulation, the guarantee deposit is released by ICP-ANACOM in the following cases only, within a period of 5 days:

- Where an application has not been admitted;
- When, at the end of the bidding stage, the bidder has not been designated as a winning bidder;

- When a winning bidder has made the deposit required under article 30 of the Auction Regulation, corresponding to the final amount payable plus the amount corresponding to any penalties imposed pursuant to article 24;
- When a bidder other than a winning bidder which cancels their best offers has made the deposit required under article 30 of the Auction Regulation, corresponding to the penalties applied pursuant to article 24.

According to this framework, the guarantee deposit provided by the applicants pursuant to the provisions described above plays a dual role:

- A procedural function;
- A function of guarantee.

At a procedural level, the guarantee deposit constitutes:

- A condition of qualification, insofar as an application is to be rejected under the provisions of paragraph 2 of article 15 of the Auction Regulation, in the event that the guarantee deposit is not provided in accordance with article 10;
- A condition and a criterion for the assessment of eligibility, whereby the eligibility of each bidder in the initial round is determined according to the amount of the guarantee bond provided, following the criteria set out in points a) and b) of paragraph 1 of article 10 and in accordance with paragraph 3 of article 17 of the Auction Regulation.

Insofar as it acts as a guarantee, and starting from the provisions of paragraph 1 of article 10 - which gives the object of the guarantee bond as a guarantee of "the commitment assumed upon the submission of the applications and to guarantee the obligations inherent to the entire auction process" - and proceeding to a systematic interpretation of the various relevant provisions of the Auction Regulation, it is found that the reason for the guarantee bond is limited exclusively to ensuring performance of the following obligations:

- The obligation to make payment of the final amount payable by the winning bidders, calculated in accordance with paragraphs 2 and 3 of article 25 of the Auction Rules;
- The obligation to settle any penalties payable by the bidders, winning and non-winning, pursuant to paragraphs 5 et seq. of article 24 of the Auction Regulation.

This is the meaning that is obtained from paragraph 4 of article 10 of the Auction Regulation, which determines that release of the guarantee deposit can only be authorised by ICP-ANACOM:

- When all payment obligations have been met, specifically in the case of winning bidders [point c)] and non-winning bidders to which penalties are applied under paragraphs 5 et seq. of Article 24 of the Auction Regulation [point d)];

- When no payment obligations exist, in particular in cases of applicants which are not admitted to the auction [point a)] and non-winning bidders not subject to the application of penalties pursuant to paragraphs 5 et seq. of article 24 of the Regulation Auction [point b)].

This view is also confirmed by the provisions of paragraph 5 of article 29 of the Auction Regulation, under which the guarantee deposit provided is made forfeit in favour of ICP-ANACOM where, except for reasons of force majeure which are so recognized by ICP-ANACOM, bidders fail to make the deposit required under paragraph 1 of article 30 of the same Regulation.

Indeed, the general statement contained in paragraph 1 of article 10 of the Regulation as to the role of guarantee deposit - "guarantee the commitment assumed upon the submission of the applications and to guarantee the obligations inherent to the entire auction process" - are to be read in conjunction with the express provisions governing the situations which are determinant for its release - paragraph 4 of this article - and its forfeiture - paragraph 5 of article 29.

It follows that the guarantee deposit provided in the present auction process is not intended to guarantee compliance with the obligations imposed on bidders in the bidding, assignment and allocation stages, where the consequences of non-fulfilment of obligations are set out, on a case-by-case basis, in the relevant provisions of the Auction Regulation. That is, other rules of the Auction Regulation, and not those governing the guarantee deposit, suffice to govern the possible conduct of the companies, particularly in the bidding stage, as was indeed the case in this situation.

Analysis of the arguments put forward by TMN

In light of the framework outlined above, and proceeding with an analysis of the arguments presented by TMN, ICP-ANACOM makes the following clear:

- (i) Upon conclusion of the qualification stage, as foreseen in articles 9 to 13 of the Auction Regulation, where the parties apply for the allocation of rights of use of frequencies up for auction, ICP-ANACOM decides on the admission of applications and, in full accordance with the definition of point g) of article 2, determines which entities are eligible to participate in subsequent stages of the auction.

At this time and in accordance with the provisions in that point, the applicants acquire the status of bidders, i.e., undertakings eligible to participate in subsequent stages of the auction, in accordance with the provisions and rules of the Auction Regulation.

Regardless of the conduct of the party in subsequent stages of the auction, the status of bidder is maintained from the time of admission to the auction until the conclusion of the procedure, except where ICP-ANACOM, in light of said conduct and under the powers set forth in point g) of paragraph 2 of article 4 of the Auction Regulation, adopts a decision determining the party's exclusion.

In this respect, the terminology used in the Auction Regulation in relation to the auction's participants concurs, insofar as only three successive and distinct statuses are recognised: "*interesado*" (interested party), "*candidato*" (applicant) and "*licitante*" (bidder); as such, it can be assumed that these terms fully cover the statuses of entities involved in the auction and that upon notification of the decision of admission to the auction, since the status of "applicant" ceases to be applicable and since eligibility to participate in the auction is thereby determined - in accordance with point g) of article 2 of the Auction Regulation - an immediate transition is made to the status of "bidder".

Likewise, it should be noted that the provisions of the Auction Regulation, with a scope applicable to all stages of the procedure, use the terminology "*candidato e/ou licitante*" (applicant and/or bidder), thereby supporting the premise that no transition period exists between the two statuses, preventing query of its application during such a period. This applies in the following provisions:

- Point f) of paragraph 2 of article 4 and paragraph 1 of article 5, wherein it is stipulated that applicants and bidders are, under terms therein, obliged to provide such clarifications as are requested by ICP-ANACOM, under penalty of possible exclusion from the auction;
- Point j) of paragraph 2 of article 4, which establishes that decisions of ICP-ANACOM referred to therein are to be communicated "to applicants or bidders as applicable."

A different understanding would imply that, in the period elapsing between notification of the decision of admission to the auction and the end of the first round, eligible entities - being neither "applicants", or "bidders" - would have no defined status, putting in question, in a very revealing example, the extent to which they are subject to the authority of ICP-ANACOM to exclude them in cases provided for and pursuant to point g) of paragraph 2 of article 4 of the Auction Regulation.

Consequently, ICP-ANACOM cannot accept the line of argument put forward by TMN that the acquisition of status of "bidder" depends on what the company considers as valid and effective participation in the bidding stage, whereby the claimed formality and artificiality of the definition of "bidder" taken from the point g) of article 2 of the Auction Regulation is rejected - which definition, as mentioned above, is unequivocally confirmed by a systematic analysis of the provisions and terminology used in this regulation.

In the situation under review, therefore, and contrary to the view put forward by TMN, ZON III acquired the status of *licitante* (bidder) on 17 November 2011, upon notification of the decision of admission to the auction, retaining this status throughout the entire procedure of the auction, and was later determined as *licitante não vencedor* (non-winning bidder) in light of the final results of the bidding stage, as disclosed pursuant to article 26 of the Auction Regulation.

(ii) Once notified of the decision of ICP-ANACOM of admission to the auction pursuant to paragraph 3 of article 15 of the Auction Regulation, the admitted applicant, now a bidder, is as such eligible to participate in the bidding stage, and is notified under that same act as to the date of commencement of this stage.

In the initial round, according to the provisions of paragraphs 3 and 5 of article 19 of the Auction Regulation, the bidder may choose from 7 lot prices, which correspond to the reserve price increased by the following percentages: 0%, 1%, 3%, 5%, 10%, 15% and 20% and may not exercise waivers as provided for in article 23.

Given the eligibility originally calculated according to the amount of the guarantee deposit provided in accordance with the provisions of paragraph 1 of article 10 and paragraph 3 of article 17 of the Auction Regulation, the bidder's activity in the first round:

- Cannot exceed his eligibility, in accordance with paragraph 6 and according to the criteria laid down in paragraph 1 of article 17 of the Auction Regulation; and
- is subject to a required level of activity corresponding to 60% of the bidders eligibility, in accordance with paragraphs 7 and 8 of the same article 17.

If its activity in the initial round is equal to or greater than 60% of its eligibility, under paragraph 10 of article 17, the bidder maintains its eligibility in the second round. However, if its activity in the initial round is less than 60%, falling short of the required level, it is determined, under paragraph 11 of the same article, that its eligibility in the second round will correspond to its eligibility in the initial round multiplied by the ratio between the activity of the bidder in the initial round and the level of activity required.

In this context, with a correct articulation of the provisions of articles 17 and 19 of the Auction Regulation it is stipulated that the bidders are, in fact, subject to an obligation to bid in the initial round, whereas failure to fulfil this obligation, by application of the criterion in the above mentioned paragraph 11 of article 17 (according to the formula $\frac{e_1}{e_2}$, with the result $\frac{e_1}{e_2}$ where e_1 is the eligibility in the initial round and e_2 eligibility in the second round) results in the bidder being totally barred from participating in subsequent rounds of the bidding stage.

In the present case and whereas, in the initial round, ZON III executed its submission without selecting any bid, its eligibility - which, given the amount of the guarantee deposit provided by the company, amounting to fifteen million euros and pursuant to the provisions of point b) of paragraph 1 of article 10 of the Auction Regulation, was 42 points - was reduced to zero by application of the criterion laid down in paragraph 11 of article 17 ([redacted]), with the result [redacted]), whereby this company was barred from participating in subsequent rounds.

Strictly speaking, the conduct of the company consists of making a submission without selecting any of the lots at auction, that is, a submission without bidding options, as demonstrated in the second paragraph of Section 4 of ICP-ANACOM's decision regarding the release of the bond provided by ZON III of 15 December 2011 and on page 16 of the Draft Report. In this sense, the expression *licitação em branco* (blank bid) - which was only used in brackets and in italics in the above decision - takes on no more than an illustrative function.

It follows, therefore, that the line of argument put forward by TMN that a *blank bid* is not admissible under the Auction Regulation, insofar as it is in breach of the provisions of paragraph 2 of article 19 and of the definitions set out in points n) and p) of article 2, cannot be upheld. Indeed, since it is not a bid *in the original sense*, but rather, and precisely, a submission without a bid, it is not subject - as is claimed by the company - to the minimum amounts specified in point n) and p) of article 2 and imposed by paragraph 2 of article 19 of the Auction Regulation, nor is this action subject to the authority of ICP-ANACOM under the first part of point c) of paragraph 2 of article 4 - "to assess the validity of all the received bids".

In line with this view, the claim made by TMN that ZON III did not participate in the bidding stage, insofar as it failed to submit a bid in the initial round, is also rejected. Rather, it was precisely the participation of this company - executed, as it should be reiterated, through a submission without bidding options - which determined, pursuant to paragraph 11 of article 17 of the Auction Regulation and through the electronic platform, the reduction of its eligibility to zero and its barring from subsequent rounds. That is, ZON III participated in the bidding stage, submitting to the consequences of its conduct, as clearly provided for in the *mechanics* of the auction rules and as the company itself foresaw.

It is also to be recalled in this respect that ICP-ANACOM stated in the report of the public consultation on the first draft of the auction regulation, in commentary regarding article 10 (Guarantee deposit), on page 45, that "considering the possibility that the bidders might not submit any bid, ICP-ANACOM envisages inclusion in the new draft regulation of the obligation to bid in the first round, under penalty of being barred from bidding in subsequent rounds, as results from the mechanics of the proposed new auction model, according to articles 17 and 19 of the new draft regulation" (not underlined in the original).

On the same point, TMN argues that it follows from chapter 5.3 of the Electronic Platform User's Manual that, during the bidding stage, bidders may only submit the options listed therein and may not submit any other, and that, consequently, if bids are carried over or cancelled and if use is not made of the waiver, the bidder shall be required to submit bids by specifying the desired lot and a choice of price.

Under the terms of this chapter, "in each round, bidders may opt for one or more of the following:

- To submit bids for the desired lots, and for those which it does not have the best offer, through the selection of a price from among the options available, which correspond to the application of the defined increments;
- To submit bids for the desired lots, for which it has the best offer carried over from the previous round, through the selection of a price from among the options available, which correspond to the application of the defined increments, and which necessarily result, in this case, in prices exceeding the amount of the best offer carried over from the previous round.
- Carry over the best offers;
- Use waivers (active);
- Cancel one or more best offers that have been carried over from the previous round."

At this point, it is stressed that the list of options is not, and could not be, exhaustive, since it does not include choices which are essential to a proper functioning of the auction - the statement that "bidders may opt for one or more of the following" is not meant to rule out the possibility that bidders may opt for none of the options.

In one example, if, in a given round, a bidder is supplanted in all their best offers by competitors, and does not see fit to submit bids with amounts exceeding the new best offers, desiring instead to be determined as a non-winning bidder, it is left with the following alternatives in order to exhaust its eligibility:

- An immediate alternative, which is to make submissions without selecting any options, confirming, as such, that it does not see fit to use an active waiver, leading to immediate loss of all its eligibility, as determined by application of paragraph 11 of article 17 of the Auction Regulation;
- A non-immediate alternative, which is to not make any submission, which, upon exhaustion of the passive waivers under article 23 of the Auction Regulation, also entails loss of all eligibility, as determined by the application of paragraph 11 of article 17.

In this example, if, as argued by TMN, the list in section 5.3 was exhaustive, this same bidder, not being the holder of any best offers which it is able to carry over or cancel, and having no reason to make use of any waivers that may still be available, would, absurdly, be required to exceed the best offers of the competing bidders.

In this respect, ICP-ANACOM considers the argument presented by TMN to be invalid.

(iii) The execution of a submission without any option in the initial round of bidding has, as its sole and exclusive result, the total loss of eligibility and a prohibition from participation in subsequent rounds of the auction, pursuant to paragraph 11 of article 17 of the Auction Regulation.

Therefore, in light of the above, this action has no bearing upon:

- The status of its author as a bidder, which, as mentioned, is maintained from notification of the decision of admission to the auction until conclusion of the procedure, except where the bidder is excluded by decision of ICP-ANACOM pursuant to point g) of paragraph 2 of article 4 of the Auction Regulation;
- The decision to release the guarantee deposit which, as is explained above, only covers the bidders' payment obligations and does not cover other obligations as arise during the course of the bidding, assignment and allocation stages, where non-compliance has consequences as provided for on a case-by-case basis in the relevant provisions of the Auction Regulation.

In this respect, note is again made of the position of ICP-ANACOM set out in the report of the public consultation on the first draft of the Auction Regulation (page 45), recalling that such a position sought precisely to clarify uncertainties arising with regard to the function of the deposit as a provision of guarantee, whereby this Authority concluded that in the "event that bidders do not submit any bid, ICP-ANACOM envisages the inclusion in the new draft regulation of a requirement to bid in the first round under penalty of being barred from bidding in subsequent rounds, as a result of the mechanics of the proposed new auction model, in accordance with articles 17 and 19 of the new draft regulation", whereas forfeiture of the guarantee deposit was not foreseen as a consequence.

In this context and as follows from the position of ICP-ANACOM with regard to the function of the guarantee deposit in the context of the present auction process, it is concluded that the position taken by TMN that the guarantee deposit provided pursuant to article 10 has the aim of guaranteeing, *in first place*, the obligation to pursue the application and to maintain participation in subsequent stages of the auction, cannot be upheld.

Even if it were the case - and it definitely is not - and assuming, as a mere exercise, that the aim of the guarantee deposit is to ensure performance of an obligation to participate in the

auction, it is reiterated that ZON III, with the status of bidder, did in fact participate in the initial round, and that as a result of a choice it itself made and executed, and with subsequent application of the Auction Regulation, was barred from participating in subsequent rounds, which, in light of the final results of the bidding stage, disclosed pursuant to article 26 of the Auction Regulation, determined the company as *licitante não vencedor (non-winning bidder)*.

On this point, TMN also states that if any applicant had withdrawn its application after the admission thereof, such applicant would necessarily forfeit the guarantee deposit, in the same way as a tenderer which withdraws its tender from a public tender after being admitted to the public act of the tender forfeits the guarantee deposit which it has provided.

ICP-ANACOM has difficulty ascertaining the scope of TMN's affirmations, given that the present procedure is not a tender and given that the public tender system, as set out in the CCP, makes provision for guarantee deposits provided by tenderers - as is well known, under the terms of this code, the guarantee deposit is only required from the prevailing tenderer and is used only as a means of ensuring conclusion of the contract and performance of all legal and contractual obligations assumed upon its conclusion. The guarantee deposit, in the context of the prevailing public procurement regime, does not therefore have any function as a guarantee in terms of the pursuit of applications, whereby only the prevailing tenderer is, under certain conditions, bound to provide one.

Accordingly, TMN's claim that "such is the case in all public tenders and is the case in auctions which have a qualifying stage," cannot be upheld.

(iv) Finally, as regards the allegation of a software error in the operation of the electronic platform supporting the auction, it is made clear that this platform was developed to ensure application of the rules laid down in the Auction Regulation, in accordance with paragraph 4 of article 6 thereof.

In this context and in full accordance with the position set out above, the submission of ZON III in the initial round, once processed through the electronic platform, resulted in automatic loss of all the company's eligibility points in the second round, thereby ensuring, through this support, the proper application of paragraph 11 of article 17 of the Auction Regulation (see, in this respect, Annex 45 of the Draft Report), whereby there is evidently no software error.

Knowledge of this feature could not but be derived, from the outset, from knowledge of the Auction Regulation itself - with the platform ensuring application of the rules laid down therein - and, as is recalled, could be properly ascertained by all applicants admitted to the auction in training sessions and tests scheduled and duly provided by ICP-ANACOM.

Conclusion

In short, ICP-ANACOM is of the position that:

- a) Following the submission of its application and its admission by decision of ICP-ANACOM, ZON III acquired the status of bidder and, as such, became eligible to participate in subsequent stages of the auction;
- b) ZON III participated in the initial round insofar as it made a submission without bidding options, which action had as its sole and exclusive consequence total loss of eligibility and the subsequent barring of the company from participation in subsequent rounds;
- c) The determination and dissemination of final results of the bidding stage in accordance with article 26 of the Regulation Auction, whereby no lot was assigned to ZON III, rendered this company to be immediately determined as a non-winning bidder;
- d) The designation of ZON III as a non-winning bidder determined the release of the guarantee deposit which the company had paid, pursuant to point b) of paragraph 4 of article 10 of the same Regulation, given that, as far as ICP-ANACOM was concerned, this guarantee deposit no longer performed any procedural or guarantee function.

In this context and since the decision to release the bond provided by ZON III had been adopted in full compliance with the provisions of the Auction Regulation, ICP-ANACOM rejects, as baseless, the allegation that a detrimental act has been committed against the public purse and, as such, of an unlawful benefit to this company.

IV. Other matters

1. **TMN** states that, on page 10 of the Draft Report, the quantification of envelopes addressed to representatives of the bidders is incorrect.

Position of ICP-ANACOM

Of the sixteen sealed envelopes delivered to ICP-ANACOM by the platform operator, eleven were collected during the training sessions, four were collected from the Public Attendance Service, located at the headquarters of ICP-ANACOM, between 23 and 25 November 2011 and one remained uncollected, whereas ICP-ANACOM was informed that the respective recipient would not collect it. In this context and in respect of commentary presented by TMN, ICP-ANACOM will correct this information in the final report of the auction.

2. **TMN** alerted to the fact that Annex 53 was left blank, assuming that the corresponding page is the one presented in error at the end of Annex 52.

Position of ICP-ANACOM

In the organization of the annexes of the Draft Report, the body of Annex 53 was replaced with the respective cover, which error will be corrected in the final auction report.

3. **TMN** states that, in chapter 2. *Test sessions*, part D. *Training and test sessions*, there is no reference to the fact that in the test sessions, use would be made of definitive templates (in place of those initially conveyed to the applicants), despite this being referred to in the electronic message addressed to the company on the evening of 25 November 2011.

Position of ICP-ANACOM

This issue is referenced in point g) of part F. *General clarifications and other requests*, whereas the answer given to this company about this issue (Annex 40) and the content of the general clarification issued by ICP-ANACOM on this question (Annex 37) is duly attached to the Draft Report.

4. **VODAFONE** alerts to the omission of documents within the documentation provided for the purpose of the prior hearing of interested parties, in respect of part of the clarifications which OPTIMUS sought from ICP-ANACOM, in particular in terms of Annexes 2 and 8. VODAFONE asks that it be given full knowledge of the entirety of the requests for clarification of the various interested parties in this procedure as well as the entirety of

ICP-ANACOM's responses. Likewise, **TMN** draws the attention of ICP-ANACOM to the fact that, in the printed version of Annex 2, the last questions put by OPTIMUS are omitted, specifically question 10.17 thru question 26.

Position of ICP-ANACOM

As evidenced by Annexes 1 to 14, it was the intention of ICP-ANACOM to make available not only the clarifications provided to the interested parties, but also the full texts of the requests made by said parties. However, due to a printing error, and as regards, in particular, the request for clarification put by OPTIMUS on 25 October 2011, the last pages of the request were omitted from Annex 2. While, given the content affected, this omission did not impair the commentary received, ICP-ANACOM will include the omitted pages in the final report of the auction, thereby considering the error as rectified.

Annex 8 already contains the full content of both the request of OPTIMUS and of the clarifications provided by ICP-ANACOM.

5. **TMN** states that the Annexes to the Draft Report omit certain documents that were delivered to the admitted applicants, such as the "Condições de utilização dos meios alternativos à Plataforma Eletrónica" (Conditions of use of alternative electronic platform) and the "Manual de Utilização da Plataforma Eletrónica" (Electronics Platform User's Manual), whereas the company takes the view that all auction documents should be included in the annexes to the final report to ensure completeness of the process.

Position of ICP-ANACOM

ICP-ANACOM will attach the *Condições de utilização dos meios alternativos à Plataforma Eletrónica* (Conditions of use of alternative electronic platform) and the *Manual de Utilização da Plataforma Eletrónica* (Electronics Platform User's Manual) to the final version of the auction report, notwithstanding that all items related to the auction comprise administrative processes existing at ICP-ANACOM.