

Decision

Methodology for establishing and reviewing reference speeds associated with coverage obligations in the 800 MHz band

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1. Framework

Regulation No. 560-A/2011, of 19 October (Auction Regulation for the Allocation of Rights of Use For Frequencies in the 450 MHz, 800 MHz, 900 MHz, 1800 MHz, 2.1 GHz and 2.6 GHz Bands, hereinafter «Auction Regulation»), in paragraph 2b) of article 33 and article 34, imposes, under to paragraph 1 a) of article 32 of Law No. 5/2004, of 10 February (hereinafter «Electronic Communications Law») coverage obligations as a requirement associated to rights of use to be assigned for the 800 MHz band.

This coverage obligation falls within the regulatory goal of protecting the interests of citizens and consumers in the various geographical areas of the country, under point c) of paragraph 1 and paragraph 4 of article 5 of the Electronic Communications Law, aiming in particular to foster mass, widespread access to mobile broadband, contributing to a sustainable and cohesive development of the country, to the dissemination of the benefits inherent to the information society and to the reduction of the extent of info-excluded areas. The imposition of a coverage obligation is also in line with Community policy, which sets high and ambitious goals, especially the target of the European Commission's Digital Agenda to achieve, by 2020, broadband coverage throughout the European Union space with download rates of at least 30 Mbps¹. In Portugal, this target was in the meantime adopted by the Portuguese Government, via Resolution of the Council of Ministers No. 112/2012, of 31 December², which in setting the Digital Agenda for Portugal and taking on the mission of making Portugal one of the most advanced countries in the European Union as far as the Digital Economy is concerned, lays down in its paragraph 2 a), the objective of promoting the development of broadband infrastructure, so as to allow all citizens to have access to high-speed broadband of at least 30 Mbps by 2020.

Pursuant to paragraph 1 of article 34 of the Auction Regulation, each lot of 2x5 MHz in the 800 MHz band has an associated coverage obligation for at the most 80 parishes that tend to require mobile broadband coverage. In the light of auction results, each of the companies MEO – Serviços de Comunicações e Multimédia, S.A. (hereinafter, «MEO»)³, Optimus – Comunicações, S.A. (hereinafter, «OPTIMUS»), and Vodafone Portugal – Comunicações Pessoais S.A. (hereinafter, «VODAFONE»), as holders of rights of use of 2x10 MHz in the 800 MHz band, undertook to ensure the coverage of a set of up to 160 parishes that tended to require broadband mobile coverage, as the respective qualifying documents establishing their rights of use for frequencies⁴ subsequently set out.

The implementation of these coverage obligations covers:

- a) in a first strand, the definition of the respective geographical scope, each holder being required to choose 160 parishes from a list of 480 parishes that tend to require mobile broadband coverage, made available by ICP - ANACOM under paragraphs 2 and 3 of article 34 of the Auction Regulation;

¹ For more information, consult <http://ec.europa.eu/digital-agenda/en/our-goals/pillar-iv-fast-and-ultra-fast-internet-access>

² Available at <http://www.anacom.pt/render.jsp?contentId=1148247>

³ Meo – Serviços de Comunicações e Multimédia, S.A. corresponds to the new name of TMN – Telecomunicações Móveis Nacionais, S.A.

⁴ Vide qualifying documents establishing rights of use for frequencies for the provision of terrestrial electronic communications services No. 01/2012 (No. 18), 02/2012 (No. 18) and 03/2012 (No. 19), all issued on 9 March 2012, available at <http://www.anacom.pt/render.jsp?categoryId=345109>

- b) in a second strand, the definition of the data transmission speed which the mobile broadband service must allow (hereinafter, the “reference speed”), under paragraphs 5 to 7 of the same article 34.

The implementation of coverage obligations, in both strands mentioned above, integrates qualifying documents drawing up the respective rights of use for frequencies.

As far as the first strand is concerned, ICP - ANACOM, by determination of 9 November 2012⁵:

- a) approved and made available the list of parishes that tend to require mobile broadband coverage;
- b) determined the successive notification:
- of VODAFONE, to choose 160 parishes within a period not exceeding 30 days;
 - of MEO, to choose 160 parishes, within a period not exceeding 30 days, of a list updated further to the removal of parishes selected by VODAFONE; and
 - of OPTIMUS, which was provided with the list of remaining parishes.

After the three companies were successively and duly notified, and having the respective choices been made, fully in accordance with article 34 of the Auction Regulation and determination of 9 November 2012, this Authority, by determination of 22 August 2013⁶, decided to implement each operator’s coverage obligations in the 800 MHz frequency band, as regards their geographical strand, having determined that such obligations become an integral part of qualifying documents drawing up the respective rights of use for frequencies.

In this context, and turning to the second strand of the definition of coverage obligations, it is now important to start the process of implementation of reference speeds that each company must ensure, as a minimum, in parishes selected by themselves, specifically by defining, on the one hand, the methodology for its establishment, under paragraph 6 of article 34 of the Auction Regulation, as well as for its review, under paragraph 7 of that same article (*vide* point 2), and on the other hand, the procedure for enforcing coverage obligations (*vide* point 3).

This decision was submitted to the general consultation procedure and prior hearing of the above-mentioned interested parties, for 20 working days, which was extended for further 5 working days.

Timely responses were received from MEO, VODAFONE and ZON OPTIMUS, S.G.P.S. S.A. (on behalf of its associate companies OPTIMUS and ZON TV Cabo Portugal, S.A.), having been drawn up a report with the summary of contributions and ICP - ANACOM’s views as regards several issues under discussion, which substantiates this decision, of which it is deemed to be an integral part.

As regards restrictions to operations in the 800 MHz band due to its use in the scope of the Digital Terrestrial Television (DTT) in Spain, it must be stressed that,

⁵ Available at <http://www.anacom.pt/render.jsp?contentId=1143334>

⁶ Available at <http://www.anacom.pt/render.jsp?contentId=1172487>

notwithstanding the expiry of the time-limit granted by decision of the European Commission for termination of this use⁷, it still prevails (namely in the border area with Portugal), thus preventing the lift of restrictions on the use of the band.

In any case, ICP - ANACOM will ensure a permanent monitoring of this situation, and as soon as possible, and for the purposes of paragraph 8 of article 34 of the Auction Regulation, the due notification shall be sent to MEO, OPTIMUS and VODAFONE.

2. Methodology for establishing and reviewing reference speeds

In the scope of article 34 of the Auction Regulation, paragraphs 6 and 7 must be taken into account for the purpose of the establishment and review of reference speeds. Such provisions lay down:

“6. The mobile broadband service to be made available must enable data transmission speeds which are equal to the highest speed provided by commercial offers subscribed to, at any given time, by customers in the lowest quartile of such offers, which are ranked in increasing order according to maximum transmission speed of the offer subscribed to.

7. For the purpose of coverage obligations referred to in this article, ICP - ANACOM shall review every two years the maximum transmission speed associated with the lowest quartile referred to in the preceding paragraph.”

It follows from these provisions that the mobile broadband service to be provided by each obligated company must allow a data transmission speed that corresponds, at least, to the reference speed established and reviewed by ICP - ANACOM every two years, which will evolve, in this fashion and given the respective methodology for establishment and review, in a way that is dynamically related to offers that each company subject to coverage obligations makes available at national level. The particular way how the service relates dynamically to these offers is the fact that it corresponds to the maximum speed associated to the subscribed offer, in a given moment, by the client ranked in the upper limit of the lowest quartile of these offers. The goal is for clients to be able to have access to mobile broadband in parishes that require coverage on the basis of a transmission speed which, on the one hand, is not detached from that which is associated to offers made available at national level, and on the other, does not represent an excessive and disproportionate burden on each company.

It is clarified, additionally, that data transmission speed means download transmission speed. The option for the definition of reference speeds, both download and upload, would require the identification of two reference speeds per company, both associated to the lowest quartile of their clients, ranked on the basis, respectively, of maximum download and upload speeds of offers subscribed to. This could lead to a combination of speeds that would not be efficient from the point of view of the operator's commercial strategy, or possible for the point of view of the network architecture itself. Download speed, on its turn, has a more prominent role in the consumer's point of view, and in fact this is the direction taken by marketing strategies of companies when advertising their offers.

⁷ Available at <http://ec.europa.eu/digital-agenda/en/news/derogations-800-mhz-band>.

Note also that a reference speed will be set for each of the companies subject to a coverage obligation. This view is in line with the rationale referred above, being considered that a single reference speed for all obligated companies would be disproportionate, given that it would turn a key criterion, inherent to a specific obligation of a given company, into a task for commercial decisions and for choices by clients of other obligated companies. It is recalled that during the clarification stage of the multiband auction, it was notified in reply to a question made by an interested party, that “*clients subscribing operators’ broadband offers are the ones being ranked in increasing order according to maximum transmission speed of the offer subscribed to*”. As such, there will be as many ranking list of clients as companies subject to such obligation, and thus a specific reference speed will be assessed for each of these companies.

The determination of the methodology for establishing and reviewing reference speeds, whose guiding principle is the rationale described in the preceding paragraphs, implies bringing paragraphs 6 and 7 of article 34 of the Auction Regulation into effect, in particular by implementing:

- a) Commercial offers (*vide* point 2.1);
- b) The ranking of clients (*vide* point 2.2);
- c) Reference dates for ranking of clients (*vide* point 2.3);
- d) Procedure and formula to be applied for the determination of reference speeds (*vide* point 2.4).

2.1 Commercial offers

First of all, and for the purpose of the definition of the methodology for establishing and reviewing reference speeds, it is stressed that mobile broadband offers mean all offers supported on the mobile network, that are associated to maximum download speeds⁸ of 256 Kbps or more. This speed is in line with the one adopted in the scope of ICP - ANACOM’s assessment of markets for supply of wholesale (physical) network infrastructure access at a fixed location and wholesale broadband access⁹, that correspond to markets 4 and 5 of Recommendation 2007/879/EC, of 17 December. Moreover, statistical indicators on mobile services approved by ICP - ANACOM’s determination of 8 July 2009¹⁰, define 256 Kbps as the threshold for mobile broadband. Finally, this is also the reference adopted by international organizations, namely OECD¹¹ and ITU¹², as far as the submitting of statistical data is concerned.

The mobile broadband service is accessed via mobile stations/equipment, and for the purpose of the establishment and review of reference speeds associated to coverage

⁸ Namely offers the maximum speeds of which are defined in the respective contracts, in communications with users or in offer conditions.

⁹ Available at <http://www.anacom.pt/render.jsp?contentId=814541>

¹⁰ Available at <http://www.anacom.pt/render.jsp?contentId=963861>

¹¹ As can be checked at <http://www.oecd.org/sti/broadband/oecdbroadbandssubscribercriteria2010.htm>

¹² As presented in “ITU Handbook for the collection of administrative data on telecommunications/ICT 2011”, p.50.

obligations, only mobile stations/equipment of an active user with actual use are deemed to be relevant¹³.

Based on this assumption, the subsequent selection of commercial offers must take account of the following rules:

i) Promotional offers

All promotional offers, if any, must be included. This, on the one hand, prevents the need for a criterion - which would necessarily be subject to a high degree of discretion - that justified the promotional nature of the offer, and, on the other, helps reference speeds being representative of the most current options of clients of the respective companies in each reference date.

ii) Offers per segment, form of marketing and trademark

All commercial offers must be included, regardless of the market segment they are aimed at (residential or non-residential, including offers tailored to the needs of clients, typically aimed at the non-residential segment), the form of marketing (isolated or package) or the trademark under which they are marketed (including the so-called low-cost or no-frills). All offers, regardless of the segment they are aimed at, the form of marketing or the trademark under which they are marketed, are representative of offers made available in each moment by a given company at national level, thus they must be able to influence the establishment and review of the reference speed, according to the rationale described above.

iii) Offers not available for new subscriptions

All offers to which clients are associated must be included, regardless of whether they are available for new subscriptions in each reference date. Again, the rationale here is to ensure that the reference speed is representative of maximum speeds of offers that, in each reference date, are effectively subscribed by clients of companies subject to coverage obligations.

iv) Two or more offers associated to the same mobile station

In case on the reference date for the establishment and review of the reference speed there is more than one relevant commercial offer associated to the same mobile station/equipment of an active user with actual use, only the offer with the higher maximum speed is to be considered.

In conclusion, for the purpose of the establishment and review of the reference speed, all mobile broadband commercial offers subscribed on the reference date that are associated to maximum speeds exceeding 256 Kbps, are to be taken into consideration, regardless of any promotions, the market segment they are aimed at, the form of marketing, the trademark under which they are marketed or whether they are available for new subscriptions, and only offers associated to mobile

¹³ The definition of mobile stations/equipment of active users with actual use results from mobile service statistics approved by determination of the Management Board of ICP - ANACOM of 8 July 2009. This concerns specifically user mobile stations/equipment qualified to benefit from offers under consideration and that actually used such offers during the reporting period (that is, that registered traffic in the month to which the reference date mentioned in point 2.3 refers, that is, the month of March 2014 or of each second year following 2014).

stations/equipment of an active user with actual use on the month concerned by the reference date (that is, the month of March 2014 or of each second year following 2014) must be accounted for. Moreover, in case on the reference date for the establishment and review of the reference speed there is more than one relevant commercial offer associated to the same mobile station/equipment of an active user with actual use, only the offer with the higher maximum speed is to be considered. In case a client changes to a new offer on the exact reference date, the most recent offer is to be considered.

Hereinafter, offers that correspond to this description shall be known as “relevant commercial offers”.

2.2 Ranking of clients

As regards the ranking provided for in the final part of paragraph 6 of article 34 of the Auction Regulation, each client must be considered as many times as the relevant commercial offers it has subscribed by each reference date.

Moreover, in case more than one mobile station/equipment of an active user with actual use is associated to a relevant commercial offer, all mobile stations/equipment of an active user with actual use associated to that offer shall be accounted for. As such, where a given client is associated to vector x of relevant commercial offers, and to vector y of mobile stations/equipment of an active user with actual use associated to offers x , a total of $x*y$ times must be accounted for in the ranking list.

2.3 Reference dates for the ranking of clients

The ranking provided for in the final part of paragraph 6 of article 34 of the Auction Regulation must take place:

- i) In the scope of the initial establishment of reference speeds, by reference to 31 March 2014; and
- ii) In the scope of the review of reference speeds, by reference to 31 March of each second year following 2014.

2.4 Procedures and formula to apply

In compliance with paragraphs 6 and 7 of article 34 of the Auction Regulation and under points 2.1 to 2.3 of this decision, MEO, OPTIMUS and VODAFONE must submit to ICP - ANACOM, in accordance with Annex I hereto, a ranked list of clients, in digital format and via email, to the address dee.stats@anacom.pt, by the following deadlines:

- i) For the initial establishment of reference speeds: by 31 May 2014; and
- ii) For the review of reference speeds: by 31 May of each second year following 2014.

Based on the information submitted, ICP - ANACOM shall determine the reference speed to which must correspond data transmission speed allowed by the mobile broadband service provided by each company in parishes to be covered, carrying out the respective notification. For this purpose, the formula to be applied in order to

identify the client ranked in the upper limit of the lowest quartile of these offers, for each company subject to coverage obligations, is as follows:

- i. if $(n)/4$ is a whole number, $(n)/4$;
- ii. if $(n)/4$ is not a whole number, $\text{INT}[(n)/4]$,

where n is the total number of clients subscribers of relevant commercial offers and **INT** consists in the rounding down of the value concerned to the nearest whole number.

Additionally, MEO, OPTIMUS and VODAFONE must fill in, in the field "Reference value", included in Annex 1, their calculation for the reference speed, on the basis of the above mentioned formula.

Annex 2 hereto includes a practical example to clarify the procedure described above.

3. Enforcement of coverage obligations

The Auction Regulation lays down, in paragraph 8 of its article 34, that coverage obligations and transmission speeds must be fulfilled in at least 50% and 100% of the parishes within maximum periods of 6 months and 1 year, respectively, following ICP-ANACOM' notification on the lift of existing restrictions to the operation of the 800 MHz band.

Pursuant to paragraph 5 of the same article, and for the purpose of the compliance with coverage obligations, a parish will be considered as having coverage where a mobile broadband service is provided which covers, as a minimum, the seat of the respective parish council, and, in compliance with points No. 18.3 of Qualifying Document ICP - ANACOM No. 01/2012, No. 18.3 of Qualifying Document ICP - ANACOM No. 02/2012 and No. 19.3 of Qualifying Document ICP - ANACOM No. 03/2012:

- i) Parishes to be considered are those included, as far as nomenclature and administrative limits are concerned, in the 2011 *CAOP – Carta Administrativa Oficial de Portugal* (Official Administrative Map of Portugal); and
- ii) The location of seats of parish councils to be considered will be duly notified by ICP - ANACOM, in electronic format, to operators subject to coverage obligations.

3.1. Procedure for the first two-year period

For the purpose of the enforcement of coverage obligations in the course of the first two-year period, in conformity with reference values that are initially established, MEO, OPTIMUS and VODAFONE shall:

- Within 20 working days following the expiry of a period of six months from the date of notification, by ICP - ANACOM, of the lift of existing restrictions to the operation of the 800 MHz band; and

- Within 20 working days following the expiry of a period of one year from the date of notification, by ICP - ANACOM, of the lift of existing restrictions to the operation of the 800 MHz band,

submit to ICP - ANACOM the set of data specified in the questionnaire “BLM FREGUESIAS”, presented as Annex 3 hereto, where for each parish, the following must be indicated:

1) In Part A:

- download data transmission speed provided;
- bands and technologies used to meet coverage obligations;

2) In Part B:

- Minimum set of elements, justifying assumptions and methodology used to prove that the download data transmission speed is effectively provided.

The submission of this information is without prejudice to additional supervision, inspection and monitoring action, as well as to requests for additional information, undertaken by ICP - ANACOM in the scope of its powers and assignments.

3.2 Procedure for the following two-year periods

Simultaneously with the review of reference speeds and bearing in mind the scale of the difference between the reference speed under review and the reference speed in force, ICP - ANACOM shall set a deadline for compliance with coverage obligations in conformity with reviewed reference speeds, and until expiry of such time-limit, reference speed previously set shall remain in force.

In this context, within 20 working days from expiry of the time-limit set by ICP - ANACOM in the scope of each review of reference speeds, MEO, OPTIMUS and VODAFONE are required to submit to this Authority information referred in Annex 3.

The submission of this information is without prejudice to additional supervision, inspection and monitoring action, as well as to requests for additional information, undertaken by ICP - ANACOM in the scope of its powers and assignments.

3.3 Further considerations

Lastly, it is stressed that ICP - ANACOM will enforce requirements provided for in paragraphs 5, 6 and 7 of article 34 of the Auction Regulation and in this regulation. On the other hand, in view of the follow-up of commercial offers of companies subject to coverage obligations and in case the methodology for establishing and reviewing reference speeds fails to be able to obtain a data transmission speed that is adjusted to the underlying rationale of such obligations, ICP - ANACOM will not hesitate to take action in the framework of its assignments and competencies.

4. Decision

Therefore, under paragraph 1 a) of article 32, article 108 and paragraph 1c) of article 109 of the Electronic Communications Law, of paragraph 1 and paragraph 2 b) of article 33 and paragraphs 5, 6 and 7 of article 34, both of the Auction Regulation, and under paragraph 1 n) of article 6 and article 26 l) of its Statutes, approved in annex to Decree-Law No. 309/2001, of 7 December, and having already taken place the public consultation procedure and prior hearing of interested parties, and having been prepared a report that includes the summary of contributions received, as well as ICP - ANACOM's position on this subject, the Management Board hereby determines to approve the decision on:

- i) The methodology for establishing and reviewing reference speeds associated with coverage obligations in the 800 MHz band and corresponding information obligations, as laid down in point 2; and
- ii) The methodology for enforcing coverage obligations and corresponding information obligations, as laid down in point 3.