

DECISION

Repeal of the right of use for frequencies and radio license granted to Vodafone Portugal – Comunicações Pessoais, S. A. for operation of fixed wireless access (FWA) systems

1. The request

By fax received at ICP - ANACOM on 18 July 2013, Vodafone Portugal, Comunicações Pessoais, S. A. (hereinafter Vodafone) «*under article 20 of the Electronic Communications Law hereby (...) requests ICP - ANACOM to repeal the Right of Use for Frequencies ICP - ANACOM No 09/2006, with effect from 1 July 2013*», indicating for the purpose the following factors:

- In order to meet the increasing needs expressed both by customers and by data transmission support systems, Vodafone has sought to provide services supported on technologies with suitable ability and flexibility for the respective needs, taking into account technological developments;
- In this context, technologies such as fibre optic have, in its opinion, provided solutions that are more appropriate, extremely valuable and perfectly consistent with the market's current demands and, as such, more efficient than solutions based on the FWA technology;
- These and other issues arising from the use of the FWA technology (such as an stagnated technological evolution, lack of technical support from leading manufacturers and the strict requirements concerning the installation and use of this technology) compelled Vodafone to submit a request for review and subsequent repeal of its right of use for the Fixed Wireless Access system, which was submitted to ICP - ANACOM on 29 November 2012 and approved by this Regulatory Authority on 15 February 2013;
- The request submitted by Vodafone on November was based on a plan for migration of customers provided with electronic communications solutions based on FWA technology to alternative technologies, a reasonable amount of time being given to the customer to adjust to/adopt such alternative solutions, if he/she so wished. On the basis of this customer migration plan, Vodafone estimated that by the end of February 2014, the company would have installed alternative technological solutions for all FWA customers, deactivating subsequently its FWA network, requesting the respective repeal of the qualifying title for use of spectrum;
- 8 months after this migration plan was put in place, and further to a joint effort from Vodafone's commercial and technical areas, the company informs that all customers who used this technology have had installed alternative technologies (such as fibre optic, for example), the last equipment supported on FWA technology having been deactivated in June 2013;

- As such, Vodafone does not require any longer the use of spectrum frequencies allocated by means of the Right of Use for Frequencies ICP - ANACOM No 09/2006, and intends to return such frequencies to ICP - ANACOM, thus contributing to the promotion of an effective and efficient use of that resource.

2. The right of use for frequencies and the radio license held by Vodafone

By Order of the Minister for Social Equipment (MEPAT) of 19 November 1999, issued pursuant to paragraph 2 of article 17 of the Regulation in annex to Administrative Rule No 465-B/99, of 25 June, and further to a public tender for the allocation of licences, of a national scope, for the use of frequencies for operation of Fixed Wireless Access (FWA) systems, launched by Order of MEPAT of 28 June 1999, Vodafone was awarded Licence no ICP – 09/99-FWA.

Subsequently, Administrative Rule No 1062/2004, of 25 August, approved the amendment of the model of operation of FWA systems, introducing a coverage model according to geographic zones, the permission to use frequencies in the transmission network and the overhaul of the radio fee system.

According to the mentioned administrative rule, it was incumbent on ICP-ANACOM to define the model per zones of awarded FWA frequency bands, as well as the adjustment of the respective qualifying documents.

The Electronic Communications Law¹, in original wording from 2004, determined in its article 121, that companies would maintain the rights of use for frequencies awarded prior to its publication, up to the expiry of the period established in the respective qualifying document, and that all obligations undertaken by companies licensed in tenders² prior to its publication would also remain applicable, as well as the respective tender instruments in the relevant part thereof.

Nevertheless, it was incumbent on ICP-ANACOM to promote the necessary amendments and adjustments to licenses issued under Decree-Law No 381-A/97, of 30 December, thus on 23 November 2006, ICP-ANACOM issued a document recasting the right of use for frequencies for FWA operation which had been allocated to Vodafone.

Consequently, by virtue of the right of use for frequencies **DUF ICP-ANACOM No 09/2006 – FWA**, Vodafone maintained its right of use of a block of 2 x 56 MHz, corresponding to frequencies 24,997 GHz - 25,053 GHz and 26,005 GHz - 26,061 GHz, for geographic zones 1, 2 and 3, and a block of 2 x 56 MHz, corresponding to frequencies 25,053 GHz - 25,109 GHz and 26,061 GHz - 26,117 GHz, for geographic zones 1 and 2³.

In accordance with the original wording of paragraph 4.2.⁴ of the title, Vodafone is bound to maintain a minimum number of installed central stations respecting the accumulated evolution and quantification which follows:

¹ Law no 5/2004, of 10 February, amended and republished by Law no. 51/2011, of 13 September, and subsequently amended by Law no. 10/2013, of 28 January, and Law no. 42/2013, of July.

² Currently, set out article 122., no. 2 of ECL.

³ Available at [VODAFONE PORTUGAL - Comunicações Pessoais, S.A.](#)

⁴ Promoted by [Decision of 15.02.2013](#)

	Zone 1	Zone 2	Zone 3	Total No of Stations
June 2013	7	5	1	13
December 2013	1	1	1	3
March 2014	0	0	0	0

In the scope of the operation of FWA systems under DUF ICP-ANACOM No 09/2006, Vodafone is also the holder of radio license No 504740, for use of a public radio network of the fixed service - point-to-multipoint links, valid until 9 October 2016.

3. Analysis

As referred above, according to paragraph 2 of clause 4 of DUF ICP-ANACOM No 09/2006 - FWA, Vodafone is bound to maintain a minimum number of installed central stations respecting a specific evolution and quantification.

Consequently, in the case under consideration, Vodafone should have requested in good time, or notified immediately in case of urgency or of force majeure, the change (in the light of the respective deactivation) of that minimum number of stations.

In fact, this change entails the change of conditions associated to DUF ICP-ANACOM No 09/2006 - FWA, and, in parallel, of conditions of the radio network license granted to the company in the scope of that title for the purpose of the operation of FWA systems, which this Authority must analyse in the scope of duties entrusted to it as far as spectrum management matters are concerned, namely the effective and efficient use of frequencies, weighing and assessing its effects on titles held by the company - the DUF and the radio license.

Notwithstanding, Vodafone's request under examination thus represents a request to repeal the award of right of use for frequencies ICP-ANACOM No 09/2006, as well as the allocation of radio license No 504740, that is, the repeal of valid administrative acts.

3.1. Framework

It is in fact in the light of the regime of the repeal of valid administrative acts, provided for in the Administrative Procedure Code (APC), that this request must be analysed. It consists of an *“administrative decision to end the effects of a previous administrative decision, as such effects are deemed not to be convenient, not to represent an appropriate way of pursuing the public*

interest concerned (...)"⁵

APC lays down, in its article 140, that administrative acts may be freely repealed, except where i) their irrevocability results from a binding legal provision, ii) they create rights or iii) they impose legal obligations or fundamental rights on the administration. In case acts create rights, as here, they can only be repealed in the part where they negatively affect the interests of their addressees or where all interested parties agree on the repeal of the act and inalienable rights or interests are not at issue.

In the case under consideration, Vodafone, the sole interested party in the implicit sense of the mentioned article 140 of APC, takes the initiative to submit the request for repeal, inalienable rights or interests not being at issue.

Under paragraph 1 of article 142 of APC, in the absence of a special provision empowering another body for the purpose, the author of the act is competent to repeal it.

In the current legal Framework⁶, it is incumbent on ICP-ANACOM to grant rights of use for frequencies (vd. article 19, paragraph 3 of ECL), thus ICP-ANACOM is also entitled to repeal the act awarding that right.

In the scope of the regime governing the licensing of radio networks and stations, laid down by Decree-Law No 151-A/2000, of 20 July, as amended and republished by Decree-Law No 264/2009, of 28 September, it is also incumbent on ICP-ANACOM to grant (article 5) and to cancel (article 17) the corresponding radio licenses, and point b) of paragraph 1 of article 17 explicitly provides that radio licenses may be repealed at the request of the license holder.

In this framework, it must be also taken into account that the acts the repeal of which is under consideration here (the award of rights of use for frequencies and radio licenses) are included in the so-called category of favourable acts. In fact, this concerns mainly the granting of an advantage, involving the allocation of a right to operate a given resource, which is intended to be used in the interest of a private party, for the development of an economic activity.

Having been faced with a request to repeal an act which grants an advantage to a private party - a request which is obviously based on the interest and motives of the respective holder - ICP-ANACOM must assess whether the public interest, the pursuit of which was also associated to the favourable act, is harmed in case the private party's request is granted.

3.2. Assessment of the request

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

It does not follow from this regime the obligation to remain in the market (to provide electronic communications networks and services) by whoever wishes to exit it, without prejudice,

⁵ In *Código do Procedimento Administrativo comentado*, 2nd edition, Mário Esteves de Oliveira, Pedro Costa Gonçalves and J. Pacheco de Amorim, Section IV, II, page 667.

⁶ Deriving from the Electronic Communications Law

obviously, to compliance with obligations to safeguard, in particular, the interests of consumers or of other economic agents, which on this issue, the Law or the Regulator may impose.

In another words - and without prejudice to legal provisions imposing conditions of access and use, due to the scarcity of resources involved or the nature of the service, namely an universal service -, the current legal framework does not impose an obligation to stay in the market, which would ultimately constitute a denial of the concept of freedom of private initiative.

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

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

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

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

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

The assessment of the request must also take into account that Vodafone informed that it had established a plan for migration of its customers to alternative technologies to FWA, a reasonable amount of time having been given to the customer to adjust to/adopt such alternative solution, if he/she so wished and that, further to a joint effort from Vodafone's commercial and technical areas, all customers who used FWA technology had had installed alternative technologies (such as fibre optic, for example), the last equipment supported on FWA technology having been deactivated in June 2013.

Considering that, according to spectrum management and planning criteria, it is up to this Authority to ensure an effective and efficient use of frequencies, guaranteeing that their use is not suboptimal, and bearing in mind that (i) by the end of 2012, the number of FWA subscribers reported by Vodafone was low, (ii) the company has invested in its fibre optic network and (iii) there are several services/offers in the market in alternative to FWA systems, it is deemed that the acceptance of Vodafone' request does not harm the public interest underlying the allocation of these frequencies.

Consequently, it is considered also that there is nothing to prevent the request for cancellation of radio license No 504740 held by Vodafone, given that under paragraph 1 b) of article 17 of

Decree-Law No 151-A/2000, of 20 July, licenses may be cancelled upon request of the respective holder.

In the light of the above, it is deemed that the decision to grant Vodafone' request does not have a relevant impact in the market so as to impose the promotion of a general consultation procedure, as set out in article 8 of ECL.

Considering also that the elements in the procedure lead to a decision which is favorable to Vodafone and which meets its request, it is also considered that the prior hearing of the company may be dispensed with, by virtue of paragraph 2 b) of article 103 of the Administrative Procedure Code⁷.

Lastly, taking into account that Vodafone requests that its request is granted with effect from 1 July 2013, and considering that the repealing act may be given retroactive effect, as it is favourable to the interested party, it does not harm legally protected rights of interests of third parties, namely given that the company informs that all customers that used this technology have had installed alternative technologies, and that the last equipment supported on FWA technology was deactivated on June 2013, and considering also that at the date of the request the assumptions justifying the reactivity had been met (cfr. paragraph 2 a) of article 128 of APC), it is deemed that the effects of this decision may refer to 1 July 2013.

4. Determination

In the light of the above, the Management Board of ICP-ANACOM, in the scope of powers provided for in article 6, paragraph 1 c) of its Statutes, published in annex to Decree-Law number 309/2001, of 7 December, and in the pursue of regulatory objectives set out in article 5, paragraph 1 a) and paragraph 2 d), and under articles 15, 19, paragraph 3 and 4, all of ECL, in the exercise of competencies assigned under article 26 l) of the referred Statutes, as well as article 140, paragraph 2b), of APC, hereby **determines**:

1. To repeal the act awarding right of use for frequencies for FWA operation systems held by Vodafone Portugal – Comunicações Pessoais, S. A., and consequently, the document in which the awarded right of use had been drawn up (ICP-ANACOM No 09/2006 - FWA).
2. To repeal the act awarding of radio license No 504740 held by Vodafone Portugal – Comunicações Pessoais, S. A., pursuant to and for the purposes of paragraph 1b) of article 17 of Decree-Law number 151-A/2000, of 20 July, amended and republished by Decree-Law number 264/2009, of 28 September.

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⁷ Which provides that the prior hearing of the interested party may be dispense with by the body examining the issue where the elements of the procedure lead to a decision that is favourable to interested party.

3. To determine that the repealing acts mentioned in the preceding paragraphs take effect on 1 July 2013.
4. To dispense with the prior hearing of Vodafone Portugal - Comunicações Pessoais, S. A. by virtue of paragraph 2 b) of article 103 of the Administrative Procedure Code.

Lisbon, 22 August 2013.