

Decision

1. Framework

Regulation No. 560-A/2011, of 19 October (Auction Regulation for 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 the «Auction Regulation»), imposed under paragraph 2 b) of article 33 and article 34, pursuant to paragraph 1 of article 32 of Law No. 5/2004, of 10 February (hereinafter, the «Electronic Communications Law¹»), a coverage obligation as condition associated to rights of use for frequencies to be allocated in the 800 MHz frequency band.

As a result of the auction, each of the companies MEO - Serviços de Comunicações e Multimédia, S.A. (hereinafter, «MEO»), NOS - Comunicações, S.A. (hereinafter, «NOS»), and Vodafone Portugal - Comunicações Pessoais S.A. (hereinafter, «VODAFONE»), as holders of rights of use for frequencies over 2x10 MHz in the 800 MHz frequency band, was required to ensure coverage of a set of up to 160 parishes as tend to lack mobile broadband coverage, as provided for in the respective titles of rights of use for frequencies².

The specification of these coverage obligations required, in a first phase, the definition of the respective geographic scope, through the choice of 160 parishes by each title holder, on the basis of a list of 480 parishes as tend to lack mobile broadband coverage, previously approved by ANACOM, further to Decision taken on 09.11.2012³, under paragraphs 2 and 3 of article 34 of the Auction Regulation.

Once the parish selection process had been completed, this Authority decided, by determination of 22.08.2013⁴, to integrate these coverage obligations in titles that identify rights of use for frequencies held by each operator.

In a second phase of the specification of these coverage obligations, the definition of data transmission speed which the mobile broadband service must allow (hereinafter

¹ Law No. 5/2004, of 10 February, as amended and republished by Law No. 51/2011, of 13 September, and subsequently amended by Law No.10/2013, of 28 January, by Law No. 42/2013, of 3 July, by Decree-Law No. 35/2014, of 7 March, by Law No. 82-B/2014, of 31 December, by Law No. 127/2015, of 3 September and by Law No. 15/2016, of 17 June.

² *Vide* titles of rights of use for frequencies for terrestrial electronic communications services No. 01/2012 (point 18), 02/2012 (point 18) and 03/2012 (point 19), all issued on 9 march 2012, available at <http://www.anacom.pt/render.jsp?categoryId=345109>.

³ Available at <http://www.anacom.pt/render.jsp?contentId=1142896>.

⁴ Available at <http://www.anacom.pt/render.jsp?contentId=1171334>.

the «reference speed») was undertaken, under paragraphs 5 to 7 of article 34 of the Auction Regulation.

In this scope, by determination of 03.03.2016⁵, ANACOM approved, under articles 8 and 20, as well as paragraph 1 a) of article 32, all of the Electronic Communications Law, the reference speed for the purpose of coverage obligations in the 800 MHz frequency band, which each company is required to meet, as well as the respective integration in titles laying down rights of use for frequencies held by each operator.

This determination was issued on the basis of information submitted by MEO, NOS and VODAFONE in compliance with the methodology for establishing reference speeds, approved by ANACOM by determination of 21.03.2014⁶, under paragraph 6 of article 34 of the Auction Regulation, and for reviewing it, under paragraphs 6 and 7⁷ of the same article.

In this decision, ANACOM referred that it follows from the referred provisions laid down in the Auction Regulation 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 (...) (emphasis added).*

In this context, in the scope of the methodology for establishing and reviewing reference speeds, ANACOM decided as far as scheduling is concerned:

- a) As regards reference dates for the ranking of clients by operators, as follows:
 - 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” (emphasis added).*

- b) As regards deadlines for submitting to ANACOM a ranked list of clients, as follows:
 - 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” (emphasis added).*

⁵ Available at <http://www.anacom.pt/render.jsp?categoryId=385184>.

⁶ Available at <http://www.anacom.pt/render.jsp?contentId=1194254>.

⁷ Paragraph 7 of article 34 of the Auction Regulation: “(...) ICP - ANACOM shall review every two years the maximum transmission speed (...)”.

In line with this framework, the scheduling of the establishment and submission of information for the purpose of the review of reference speeds set out by ANACOM determination of 03.03.2016 must now be determined. For this purpose, a draft decision was approved on 05.05.2016, which was submitted to the prior hearing of stakeholders, under articles 121 *et seq* of the Administrative Procedure Code (approved by Decree-Law No. 4/2015, of 7 January), a time-limit of 10 working days having been granted for stakeholders to assess the matter in writing, if they so wished.

In the scope of the prior hearing of stakeholders, timely contributions were received from the following bodies: MEO and VODAFONE.

The corresponding prior hearing report was drawn up, which is an integral part of this Decision and includes a summary of positions taken, as well as ANACOM's views thereon.

2. Periodicity of reviews of reference speeds and reference dates for establishing and submitting a ranked list of clients

Taking into account that reference speeds for the purpose of coverage obligations in the 800 MHz band were set out, for the first time, on 03.03.2016 and bearing in mind paragraph 7 of the Auction Regulation, according to which “*ICP - ANACOM shall review every two years the maximum transmission speed (...)*”, ANACOM shall only undertake the review of reference speeds in 2018.

It should be noted that MEO, NOS and VODAFONE were notified by ANACOM on 10.03.2016 that restrictions to the operation in the 800 MHz band had been lifted, time limits applicable to compliance with coverage obligations to which each company is bound in the referred band⁸ having started to run on that date.

Also in this respect it should be added that a review of reference speeds before 2018 would bring about a disruption which would be not only excessive and disproportional but also unnecessary, as it would affect investment decisions as well as the implementation of measures developed by companies to comply with coverage obligations by the deadlines which they are required to meet⁹, in the light of reference speed already set out, according to which at least 50% of parishes must be covered by September 2016 (6 months after notification of the lifting of restrictions in the 800 MHz band), and the remaining 50% by 2017.

⁸ According to paragraph 8 of article 34 of the Auction Regulation.

⁹ Provided for in paragraph 8 of article 34 of the Auction Regulation.

As such, taking into account that it is incumbent on ANACOM, in the framework of regulatory assignments conferred on the Authority by law, to adopt proportionate, objective and transparent regulatory principles, namely to promote “*regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods*”¹⁰, reference speeds established by determination of 03.03.2016 must remain in force for a 2 (two)-year period, as necessarily follows from the periodicity established in paragraph 7 of article 34 of the Auction Regulation.

In this context, the scheduling provided for in section 2.4 of ANACOM decision of 21.03.2014 concerning reference dates for the ranking of clients by operators and for submitting to ANACOM the respective ranked list shall not apply in the “second year following 2014”, that is, 2016.

In fact, reference speeds are not to be reviewed in 2016, but only in 2018 (and each second year following 2018), thus in this context, MEO, NOS and VODAFONE, in compliance with this Authority’s decision of 21.03.2014, are only required to submit to ANACOM the ranked list of clients, by reference to 31 March 2018 (and each second year following 2018) by 31 May 2018 (and every second year following 2018).

This decision is in accordance with the methodology defined in ANACOM decision of 21.03.2014, which remains in force, on the basis of:

- i) The information to be conveyed, on that (those) year (years) by the established deadline, by operators under the terms provided for in their Annex 1; and
- ii) The application of the formula mentioned in the referred methodology.

3. Decision

In the light of the above, under point a) of paragraph 1 of article 32, article 108 and point c) of article 109, all of the Electronic Communications Law, and in accordance with paragraph 7 of article 34 of the Auction Regulation, the **Management Board** hereby decides as follows:

To determine that, for the purpose of the review, which shall only take place in 2018 (and each second year following 2018), of reference speeds associated to compliance with coverage obligations in the 800 MHz frequency band imposed for the first time on MEO, NOS and VODAFONE by decision of 03.03.2016, such companies are required

¹⁰ According to point a) of paragraph 5 of article 5 of the Electronic Communications Law.

to submit to ANACOM the ranked list of respective clients, by reference to 31 March 2018 (and each second year following 2018) by 31 May 2018 (and every second year following 2018), according to the methodology defined in the decision of 21.03.2014.

Lisbon, 7 July 2016