

## **DECISION**

### **Amendment to the right of use of frequencies as granted to Vodafone Portugal - Comunicações Pessoais, S. A., to operate the fixed wireless access (FWA) system**

#### **1. Request from Vodafone**

By fax, received on 30 November 2012, Vodafone Portugal, Comunicações Pessoais, S.A. (hereinafter "Vodafone") set out the following:

- The company holds Right of Use of Frequencies ICP-ANACOM no. 09/2006, which authorizes it to operate in the bands detailed therein using the Fixed Wireless Access (FWA) system, and based on which it provides services to end-users and support for its transmission network.
- In recent years, due to the growing demands of customers and data transmission support systems, Vodafone has sought to provide services based on technologies with capacity and flexibility suited to such requirements, naturally taking into account the evolution of technology.
- In this respect, offers based on optical fibre are presented as suitable solutions, and as extremely valuable and perfectly compatible with current market demands, particularly in terms of transmission speeds.
- The evolution of options based on FWA technology has stalled markedly, both as leading manufacturers have abandoned support equipment, and due to difficulties in securing support and maintenance for equipment already installed by operators.
- Additionally, and as is the knowledge of ICP-ANACOM, the inflexible requirements that characterize deployment and use of this technology - such as difficulty in leasing space for the installation of equipment and technical requirements whereby station must be installed at a height above the surrounding targeted coverage area - severely restricts the option to use FWA equipment to provide the data transmission service.

As such, and pursuant to the provisions of article 20 of LCE - Lei das Comunicações Eletrónicas (Electronic Communications Law - Law No. 5/2004 of

10 February, as amended and republished by Law no. 51/2011 of 13 September), Vodafone sought revocation of Right of Use of Frequency ANACOM no. 09/2006, with effect from 1 April 2014, and also sought approval of the revision of commitments contained therein, in particular article 4, section 2 as regards the number of licensed stations, to the values given below:

	Zone 1	Zone 2	Zone 3	Total Stations
Dec - 2012	26	13	1	40
Jun - 2013	7	5	1	13
Dec - 2013	1	1	1	3
Mar - 2014	0	0	0	0

The company further states that it undertakes to take all measures necessary to ensure observance of the rights of current users of the FWA network under the LCE, particularly with regard to the deadlines stipulated for giving notice of discontinuation of commercial offers or of the amendment of contractual conditions (i.e., providing the same services by other means), in accordance with the deadlines and terms stipulated by law.

## **2. The FWA right of use of frequencies and radio license granted to Vodafone**

By order of MEPAT - Ministério do Equipamento Social (Minister of Social Equipment) 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, following the public tender for the allocation of licensing, on a national basis, for the use of frequencies for Fixed Wireless Access (FWA), opened by MEPAT Order of 28 June 1999, Vodafone was awarded **Licence no. ICP - 09/99-FWA**.

Subsequently, Administrative Rule no. 1062/2004 of 25 August, which approved the alteration in the operating model of FWA systems, introduced a new model of coverage by geographical area, permission to use frequencies in the transmission network and reformulation of the radio fees system.

Under the terms of this Administrative Rule, it was made incumbent upon ICP-ANACOM to define the model governing use by area of the allocated FWA frequency bands, as well as to adapt the respective qualifying titles.

Article 121 of the LCE, as originally worded in 2004, sets out that companies retained rights of use of frequencies granted prior to its publication, until the expiry of the period prescribed in the respective title of allocation, whereby all obligations taken on by licensed undertakings in tenders carried out before the publication of the law also continue to apply, thus the respective tender instruments remain also in force, in the relevant part<sup>1</sup>.

It falls, in the meantime, to ICP-ANACOM to proceed with the necessary changes and adjustments to the licenses issued under Decree-Law no. 381-A/97 of 30 December, whereby, on 23 November 2006, ICP-ANACOM issued the reconfigured title supporting the right of use of frequencies for operation of fixed wireless access (FWA) systems which had been awarded to Vodafone.

Accordingly, under **Right of Use of Frequencies ICP-ANACOM no. 09/2006 - FWA**, Vodafone maintains, until 1 January 2015, the right of use of a block of 2 x 56 MHz, corresponding to the 24.997 GHz - 25.053 GHz and 26.005 GHz - 26.061 GHz frequencies for geographical areas 1, 2 and 3, as well as a block of 2 x 56 MHz, corresponding to the 25.053 GHz - 25.109 GHz and 26.061 GHz - 26.117 GHz frequencies for geographical areas 1 and 2<sup>2</sup>.

In accordance with the original wording of paragraph 4.1. of the title, Vodafone is bound to maintain a minimum number of installed central stations respecting the accumulated evolution and quantification which follows:

Years	Zone 1	Zone 2	Zone 3	Total Stations
2006	45	36	6	87
2007	65	53	9	127
2008	75	61	12	148

<sup>1</sup> Currently, provision of article 122, paragraph 2 of the LCE.

<sup>2</sup> See <http://www.anacom.pt/render.jsp?contentId=958920>

2009	81	67	14	162
2010	87	71	16	174

By determination of **17 June 2009**<sup>3</sup>, which followed an amendment request submitted by the company, Right of Use of Frequencies ICP-ANACOM no. 09/2006 was amended as regards the minimum number of central stations to be installed by the company, thereby providing for the following as is currently in force:

Years	Zone 1	Zone 2	Zone 3	Total Stations
2008	43	28	4	75
2009	47	30	4	81
2010	51	30	4	85

It is further noted that, in the context of FWA provision, pursuant to Right of Use of Frequencies ICP-ANACOM no. 09/2006, Vodafone holds title to **Radio Licence no. 504740** for use of a public fixed service - point-to-multipoint radiocommunications network, valid until 9 October 2016.

### 3. Analysis of the request

The request submitted by Vodafone, as now under examination, more properly constitutes an amendment ("revision" as expressed itself Vodafone) of the conditions associated with Right of Use of Frequencies ANACOM no. 09/2006 - and not a request for revocation under article 20 of the LCE, as the company made reference to - especially as regards the minimum number of central stations that the company is bound to install, as well as the expiry of the validity of Right of Use of Frequencies, being brought forward from 1 January 2015 to 1 April 2014. Such requests are, as such, based on the amendment of the awarded network radio licence.

<sup>3</sup> Available at <http://www.anacom.pt/render.jsp?contentId=960924>

### 3.1. Framework

Under the terms of article 20 of the LCE, the conditions applicable to the exercise of activity, including as applicable to rights of use, may be changed where objectively justified and in accordance with the principle of proportionality, by means of law, regulation or administrative measures, as appropriate.

Approval of the amendment is made subject to the general consultation procedure<sup>4</sup>, whereby interested parties, including users and consumers, shall be allowed a sufficient period of time to express their views on the proposed amendments, which shall be no less than 20 days, except in exceptional and duly justified circumstances (paragraph 3).

However, the requirement to hold the general consultation procedure in the context of article 20 of the LCE, may be waived in cases involving minor amendments, which do not change the substantial nature of the general authorisations and the rights of use, namely not causing any comparative advantage, and which have been agreed with the holder of the rights of use (paragraph 4).

In terms of radio licensing, in point b) of paragraph 1 of article 16 of Decree-Law no. 151-A/2000 of 20 July<sup>5</sup>, it is set out that radio licences may be altered on application by the licence holder.

The alteration sought by Vodafone thereby constitutes an amendment of valid administrative acts, as performed by ICP-ANACOM, by which the company was awarded the right of use of frequencies for FWA and the corresponding radio network license, permitted under the terms of article 147 of the *Código do Procedimento Administrativo* (Administrative Proceeding Code), whereby regulatory revocation rules apply.

In this context, ICP-ANACOM is the authority with competence to undertake the

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<sup>4</sup> As foreseen under article 8 of the LCE.

<sup>5</sup> Law which establishes the regime applicable to the licensing of radiocommunications networks and stations and to the oversight of their installation and use of radio spectrum, as well as to the sharing of radiocommunications infrastructure.

necessary alterations, which alterations are to be implemented in the form of the revoked act (Articles 142 and 143 of the CPA, applicable *ex vi* article 147).

Valid administrative acts as constitute rights or legally protected interests may be amended to the extent that they are unfavourable to the interests of the recipients or where all parties concerned give their consent to revoke the act and where it does not involve non-disposable rights or interests (article 140, paragraph 2 of the CPA applies pursuant to article 147 of the same Code).

In the present case, alteration of the administrative acts in question was requested by the recipient, whereby there is no question of non-disposable rights or interests.

### **3.2. Analysis**

In terms of evolution of FWA service provision and as ICP-ANACOM has previously stressed<sup>6</sup>, the CEPT concluded in its report on the evolution of the fixed service and of spectrum needs, approved in March 2012, that use of the 24.5-26.5 GHz band has generally not seen a significant increase, compared to other frequency bands, and it has been more relevant for point-to-point links than for point-to-multipoint links (FWA systems).

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

As such, further to these difficulties at the level of technologies/services and investment required to maintain an operational network, it seems natural that companies will seek technological alternatives for services provided via FWA.

It is deemed that, from a spectrum-management perspective, especially in light of the principle of effective and efficient use of spectrum, there is nothing as would warrant denying the company's wishes.

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<sup>6</sup> See. ANACOM decision of 13 December 2012 - revocation of the right of use of frequencies to operate fixed wireless access (FWA) systems held by Optimus - Comunicações, S.A., available at <http://www.anacom.pt/render.jsp?contentId=1147517&languageId=1>.

It is considered also that there is nothing to prevent the request for amendment of radio license no. 504740 as awarded to Vodafone, given that under paragraph 1 point b) of article 16 of Decree-Law No 151-A/2000 of 20 July, as amended and republished by Decree-Law no. 264/2009 of 28 September<sup>7</sup>, licenses may be amended at the request of the holder.

Moreover and as also referred to by the company, their FWA subscribers have been falling in numbers since 1st quarter 2012, whereas, in parallel, the company has been investing in optical fibre networks.

On examination of the application, it is also noted that Vodafone emphasises that it will undertake such steps as are necessary to ensure that the rights of current FWA users are respected, particularly with regard to the deadlines for giving notice of discontinuation of commercial offers or alterations to contractual conditions (i.e., providing the same services by other means), in accordance with the deadlines and terms stipulated by law.

With this conduct Vodafone is upholding the legal safeguards provided to users of its services, which, in the first case, are entitled to receive a minimum of 15 days notice in the event of termination of provision (as stipulated in article 39, paragraph 1, point c) of the LCE and its right of use of frequencies), while complying with the parallel obligation that this fact shall likewise be notified to ICP-ANACOM within the same period of time (as stipulated in paragraph 4 of article 39 of the LCE). In the second case, Where the undertaking decides to amend any of the contractual conditions, it shall give subscribers prior written notice of not less than one month, in appropriate form, and at the same time inform subscribers of their right to withdraw, without penalty, from such contracts, in the event that they do not accept the new conditions, within the time limit set out in the contract (Article 48, paragraph 6 of the LCE), without prejudice to paragraph 7 of Article 48 of the LCE<sup>8</sup>.

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<sup>7</sup> Law which establishes the regime applicable to the licensing of radiocommunications networks and stations and to the oversight of their installation and use of radio spectrum, as well as to the sharing of radiocommunications infrastructure.

<sup>8</sup> Which states that the notice obligations shall not apply to contractual amendments where an objective advantage for the subscriber can be identified, nor does it exclude compensatory measures laid down in case of early termination by subscribers of contracts including minimum contractual periods.

According to the case, Vodafone will comply with the applicable legal provisions.

Accordingly, in light of, in summary, the fact that (i) the number of FWA subscribers reported by Vodafone have been declining, (ii) the company is investing in its optical fibre network, and (iii) there are various services/offers in the market which provide alternatives to FWA systems, it is concluded that the alteration of the title of Vodafone in no way harms the public interest underlying the allocation of these frequencies.

However, and while it is considered that the premises which support alteration of the act awarding the Right of Use of Frequencies to Vodafone have existed since the time alteration was requested, it is concluded that there is no usefulness in establishing a deadline for the first phase of its network deactivation as December 2012, since ICP-ANACOM found that the company continued to maintain installation of the minimum number of stations on 31 December 2012 as currently stipulated in Clause 4 of the Right of Use of Frequencies.

Therefore, it is deemed that it only makes sense that Clause 4, paragraph 1 of the Right of Use of Frequencies be amended so that the company is required to maintain installation of a minimum number of central stations, observing the accumulated evolution and quantification as follows:

	Zone 1	Zone 2	Zone 3	Total Stations
June 2013	7	5	1	13
December 2013	1	1	1	3
March 2014	0	0	0	0

Based on the above, it is considered that the decision granting the application to amend the Right of Use of Frequencies presented by Vodafone will not have a significant impact on the market as would require performance of the general consultation procedure laid down in Article 8 the LCE.

Additionally, and considering the specific requirements of article 20, paragraph 4 of the LCE, it is deemed that alterations to the conditions associated with the Right



of Use of Frequencies do not alter the substantial nature of the right, given that, while a phased reduction is foreseen in the number of central stations, the company will maintain the right of use of frequencies granted to it until 1 April 2014 to operate the Fixed Wireless Access (FWA) system.

This alteration will also not create any competitive advantage for the company, since it only entails a process of phased shutdown of its network while the company seeks to provide services based on technologies with capacity and flexibility which is appropriate to the pressing needs of its customers and data transmission support systems.

The facts and circumstances of the present procedure lead to a decision that is favourable to Vodafone and which responds positively to its request, whereby it is likewise considered that the alteration has the agreement of the holder of the Right of Use of Frequencies as required.

In this sense and in relation to what is established in article 4 of article 20 of the LCE, it is considered that the requirement to conduct a general consultation procedure may be waived as regards the decision to adopt the amendment as requested by Vodafone.

Additionally, and notwithstanding that it was deemed that there was no usefulness to be obtained from setting December 2012 as the deadline for the first phase of deactivation, it is considered that the decision remains favourable to Vodafone and is as sought in its application, whereby ICP-ANACOM also sees fit to waive the requirement to hold a prior hearing of Vodafone, under the terms of point b) of paragraph 2 of article 103 of the *Código do Procedimento Administrativo* (Administrative Proceeding Code)<sup>9</sup>.

#### **4. Decision**

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<sup>9</sup> In which it is set out that the competent body may waive the requirement to conduct a hearing of interested parties where the elements contained in the procedure lead to a decision which is favourable to the interested parties.

In light of the above, **the Management Board of ICP-ANACOM**, pursuant to the assignments set forth by article 6, paragraph 1, point c) of its Statutes, as in annex to Decree Law no. 309/2001 of 7 December, in pursuing the objectives of regulation set out in article 5, paragraph 1, point a) and paragraph 2, point d), under articles 15 and 20 of the LCE, and in exercise of the powers conferred by article 26, point l) of its Statute, and by articles 147 and 140, paragraph 2, point b) of the CPA, **determines**:

1. To amend the right of use of frequencies awarded to Vodafone Portugal - Comunicações Pessoais, S.A., for operation of FWA systems, as regards the minimum number of central stations to be maintained by the company (article 4, paragraph 2) and as regards the expiry of its validity (article 9) under the terms of endorsement no. 2 to be included in the qualifying title, as attached hereto.
2. To alter, accordingly, Radio Licence no. 504740 to which Vodafone Portugal - Comunicações Pessoais, S.A. holds title, pursuant to and under the terms of point b) of paragraph 1 of article 16 of Decree-Law no. 151-A/2000 of 20 July, as amended and republished by Decree-Law no. 264/2009 of 28 September.
3. To waive the requirement to conduct a prior hearing of Vodafone Portugal - Comunicações Pessoais, S.A., under the terms of point b) of paragraph 2 of article 103 of the *Código do Procedimento Administrativo* (Administrative Proceeding Code).

Lisbon, 15 February 2013.

## RIGHT OF USE OF FREQUENCIES

ANACOM No. 09/2006

### ENDORSEMENT NO. 2

1. Paragraph 2 of clause 4 of the present Right of Use of Frequencies is amended to read as follows:

«2. VODAFONE is bound to maintain installation of a minimum number of Central Stations, observing the evolution and accumulated quantification as follows:

	Zone 1	Zone 2	Zone 3	Total Stations
June 2013	7	5	1	13
December 2013	1	1	1	3
March 2014	0	0	0	0

1. Clause 9 of the present right of use of frequencies is amended to read as follows:

"The right of use of frequencies for use of FWA systems remains valid until 1 April 2014."