

**Draft regulation amending Regulation no. 987-A/2020 of 5 November, as previously amended by Regulation no. 596-A/2021 of 30 June**

**Statement of reasons**

By determination of 30 October 2020, the Board of Directors of Autoridade Nacional de Comunicações (ANACOM) approved the Regulation which defines the procedures applicable to the auction and the conditions to which the rights of use of frequencies allocated under this auction are subject, in the following bands: 700 MHz, 900 MHz, 1800 MHz, 2.1 GHz, 2.6 GHz and 3.6 GHz. This Regulation was published as Regulation no. 987-A/2020 in *Diário da República* (Official Journal), 2nd series, no. 216, on 5 November (Auction Regulation).

As established in article 4 of this Regulation, the auction is to be held by ANACOM, and ANACOM's Board of Directors is responsible for conducting the respective procedure.

By means of this auction, ANACOM intends to allocate new rights of use of frequencies in these bands, which are considered essential for the installation of networks and the provision of electronic communications services compatible with 5G technology, as well as for the installation or enhancement of networks using other technologies.

The auction was begun in November 2020. The principal bidding phase started on 14 January 2021, following completion of the bidding phase for new entrants, and remains ongoing.

After the completion of 700 rounds, it was seen from the daily information published on ANACOM's institutional website that there had been successive and repeated use of the lowest price increments in bidding (often 1%). This made (and continues to make) the progress of the auction particularly slow, leading to a serious risk that the auction will carry on far longer than initially envisaged. As a result, ANACOM advanced with an amendment to the rules of the Auction Regulation as regards the duration of the rounds (shortening the duration from 60 to 30 minutes) and the daily bidding period (which was extended from 6 pm until 7 pm). These changes, implemented under the terms subsequently set out in Regulation no. 596-A/ 2021 of 30 June, which entered into force on 05 July, meant that twelve rounds could be carried out per day.

ANACOM expected that the introduction of these changes would be sufficient to prevent the auction from taking an excessive amount of time to conclude.

However, at the same time, ANACOM made it clear, within the scope of the respective regulatory procedure, that, if the increase in the daily number of rounds did not enable the speed required by the public interest objectives underlying allocation of rights of use of frequencies and failed to avert the scenario of an excessive delay to the auction's conclusion, it would consider introducing new amendments to the Regulation barring use of the minimum bidding increments in each round (1% and 3%).

Now that more than 450 rounds have been conducted since the amendment to the Regulation, it appears that, although the current rules allow bidders to proceed with the auction more quickly, if they so wish, the pace of progress remains very slow. Simply increasing the number

of rounds has not been sufficient to resolve the very low level of excess demand, and twelve daily rounds has, therefore, not achieved the speed intended.

Likewise, it can also be seen that recurrent use of lower percentage increments has largely continued.

In this situation, which has persisted since January and which Regulation no. 596-A/2021 of 30 June sought to change, it is necessary to reiterate that the delay in concluding the auction causes a severely negative impact on the development and entry into operation of 5G networks, to the detriment of citizens and companies. This delay denies citizens and businesses the economic and social benefits resulting from 5G-driven digital transition, in terms of the development and competitiveness of the Portuguese economy, social and territorial cohesion, social innovation and improving the quality of services of public interest. Naturally, this delay also has a significant impact on the benefits that can be derived from the strengthening of existing 3G or 4G networks or the development of new networks, regardless of the associated technology. In a situation where the pandemic extends over time, the impact could be even more significant.

This conclusion is further corroborated by the way in which some of the operators in the national market have publicised, through a wide range of different formats, the advantages arising from the implementation of 5G.

This delay also affects the enjoyment of the benefits arising from the fulfilment of coverage obligations, the development of networks and the strengthening of the voice signal, which will not reach populations and businesses as quickly as required by the collective interest. The longer it takes for the auction to conclude, the longer it will be before the population and businesses are able to benefit from the opportunities offered, even while some of the targets for accomplishing some of these obligations are maintained, as they are not directly dependent on the duration of the auction procedure.

Additionally, as has been shown, this delay could also have a significant impact on the conditions of competition existing in the market, given the measures provided for in the Auction Regulation to create a level playing field for all market participants.

As such, while much of Europe converges to make quick use of 5G as a key instrument of digital transition and economic competitiveness, in Portugal, an excessive delay to the auction's conclusion can only be considered, as has been publicly affirmed by different interests, as extremely harmful to national interests, affecting the Portuguese population, Portuguese businesses and the country in general, while jeopardizing rapid pursuit of the public interest objectives in question, particularly in more remote and less densely populated areas.

Therefore, in this specific scenario - where all interested parties are (or should be) aware of the public interest underlying the Auction and how it is impacted by a clearly disproportionate delay, and are intent (or should be intent), therefore, on achieving its quick conclusion -, it is

urgent, to advance with the adoption of measures that, duly considering all interests (public and private), minimise excessive delay to the proceedings.

In this context, and considering the contributions to the preparation of the draft amendment to the Auction Regulation, presented following the notice to commence this regulatory procedure (published on 12 August 2021), ANACOM's Board of Directors approved the present draft amendment to Regulation no. 987-A/2020 on 26 August 2021, pursuant to the provisions of paragraph 5 of article 15 and paragraph 8 of article 30 of Lei das Comunicações Eletrónicas (Electronic Communications Law), as well as the provisions of point b) of paragraph 1 and point a) of paragraph 2, both of article 9, of article 10 and point b) of paragraph 1 of article 26, all of ANACOM's Statutes (approved by Decree-Law no. 39/2015 of 16 March), also taking into account the provisions of paragraph 1 of article 20 of Lei das Comunicações Eletrónicas (Electronic Communications Law) and the provisions of point g) or paragraph 2 of article 4 of Regulation no. 987-A/2020, as amended by Regulation no. 596-A/2021 of 20 June.

This draft Regulation aims to implement barring of the use of the 1% and 3% minimum bidding increments in each round.

As seen from publicly available information, use of the 1% increment in the principal bidding phase has been widespread, so that the price of the lots has evolved very slowly without obvious gain in terms of price discovery, delaying the conclusion of this bidding phase and the auction.

In this context, it is therefore deemed appropriate to exclude use of the lowest increments (1% and 3%). This will make the auction faster, while continuing to provide the bidders with flexibility in determining the price, given that the remaining increments will still be available (5%, 10%, 15% and 20%).

As is known, for the practical implementation of each auction, it is necessary to define the duration of the rounds or the number of rounds to be held each day, and also to determine the increments that can be used in bidding, which in the case of an ascending and simultaneous auction of multiple rounds, may comprise different options. Both parameters can be used to control the progress of the auction and can be adjusted during the course of the auction, in order to guarantee the static and dynamic efficiency of its result, without undermining the strategies of the bidders.

Use of the minimum increment (the percentage increment by which new offers must exceed the highest offers (best offers) so far received) must provide for an appropriate compromise between two purposes, which do not necessarily coincide: price discovery (static efficiency) and ensuring that the auction proceeds at sufficiently rapid pace, with a view to contributing to a timely increase in market competition, investment and quality of service and network coverage (dynamic efficiency). The definition of increments is therefore necessarily based on finding a balance between these two objectives.

The sequence of bids presented by each bidder depends on the respective valuation given to the lots by that bidder and the value of the best submitted bids. The bidder responds to bids

made by other bidders with bids of its own until the value of the best bid reaches the bidder's valuation of the lot. In other words, while the exact value of the next bid must, of course, take into account the minimum increment required, the bidding strategy as a whole is not dependent on it.

Since it does not have retroactive effects, the option of barring bidders from use of the minimum increments (1% and 3%) does not affect the price discovery attained so far. But, without an adjustment to the increments rule and despite the increased number of rounds, the auction could easily continue for hundreds of rounds over several months, with incalculable damage to the public interests that allocation of the rights of use of frequencies in question is meant to achieve.

Bids are submitted by comparing the best offers for each lot with the valuation that the bidder itself attributes to the same lot, a bidder will make new bids for as long as the best competing bids remain below the value the bidder assigns to the targeted lot. The price rule (payment equal to the amount of the winning bid) means that a bidder will not bid an amount that exceeds the valuation which the bidder assigns, regardless of the value of the minimum increment.

Therefore, exclusion of the 1% and 3% increments, increasing the minimum increment to 5%, does not affect this strategic interaction, because the strategies depend only on the structuring rules of the auction. The increase only causes the value of new offers to be adjusted by a few percentage points, which preserves the legitimate private interests of each company participating in the auction and maintains the essential elements of the auction, such as the configuration of lots and the rules that establish how the last round is determined and who the winning bidders are.

Nor does exclusion of the minimum increments (1% and 3%) benefit one bidder over any other, as it applies equally to the bids submitted by all bidders. And it does not, in any discriminatory way, affect those bidders who have already withdrawn (because the amount of the best submitted bid has already exceeded their valuation of the lots) or bidders who continue to bid (and who would be doing so anyway).

In view of the above, it is considered appropriate to set a minimum increment value of 5%; it is considered that this achieves a reasonable balance between the objectives of efficient allocation (in terms of static efficiency) and of increasing dynamic efficiency, given that the respective barring of increments (1% and 3%) is appropriate and does not compromise the future strategies of bidders. This change does not affect the discovery of the price already achieved during the auction, and because it does not give any bidder an advantage over another, it does not lead to any discrimination between bidders.

In this context, and considering that the previous changes were not enough to prevent an excessive delay to the auction (the rate of progression remains very slow even as over 800 rounds have already taken place since the publication of the notice announcing the first amendment to the Regulation, in April 2021), it is clear that the proposed change is legitimate, being both necessary and warranted, while fulfilling the requirements inherent to the principle of proportionality.

Accordingly, pursuant to article 10 of ANACOM's Statutes and articles 98 et seq. of *Código do Procedimento Administrativo* (Administrative Proceeding Code), ANACOM has given notice of this draft regulation to the Government member responsible for the area of communications and has undertaken its publication in 2nd series of *Diário da República* (Official Journal) and on ANACOM's institutional website, so making provision for the intervention of the Government, the entities that are constituted bidders in the scope of the auction and other interested parties.

Contributions, in writing and in Portuguese, can be sent by email within a period of 5 working days to [reg.leilao@anacom.pt](mailto:reg.leilao@anacom.pt).

It should be noted that, following publication of the notice announcing commencement of the regulatory amendment procedure, ANACOM considered the various contributions received in relation to the proposed amendment, which reflect a range of non-convergent positions.

Given the circumscribed content of the amendments to the Regulation that ANACOM proposes to make, and the need, if an excessive delay to the auction's conclusion is to be prevented, to proceed without delay in order to effect the speed of the ongoing bidding process, it has been considered appropriate, under the terms of paragraph 3 or article 10 of ANACOM's Statutes, to grant interested parties a period of 5 working days to comment on the draft Regulation.

Indeed, given that the principal bidding phase continues at the same pace, with more than 1200 rounds conducted in total, it is considered that measures are needed urgently in order to prevent the Auction from taking far longer than was envisaged and than is necessary for the proper accomplishment of the public interest. On the other hand, interested parties were already aware of the adjustment that is now being considered, and have had opportunity to comment on it and present contributions towards the preparation of this draft Regulation.

Finally, it should be noted that, when applicable, information considered confidential must be expressly identified as such, and the reasons for confidentiality given. A non-confidential version of responses must be sent for publication, pursuant to the law and ANACOM's decision of 17 November 2011. The confidentiality of comments will be especially safeguarded in the case of bidders constituted as such within the scope of the Auction in progress and pursuant to Auction Regulation.

Once the regulatory consultation has been concluded, ANACOM will examine the comments and contributions presented, and will produce a report making reference to all replies received and providing an overall assessment that reflects ANACOM's position thereon and the reasoning for the options taken.

## **Draft Regulation**

### Article 1

#### **Amendment to Regulation no. 987-A/2020 of 05 November, as amended by Regulation no. 596-A/2021 of 30 June**

Article 30 of Regulation no. 987-A/2020 of 05 November is replaced by the following:

#### "Article 30

**[...]**

1 - In the following rounds, the bidder may bid for lots that have been the subject of bids, and shall indicate for each lot the increase in the lot price: 5%, 10%, 15% and 20%.

2 - ...

3 - ...

4 - ...

5 - ...

6 - ...

7 - ...»

### Article 2

#### **Entry into Force**

The amendment introduced by this regulation to Regulation no. 987-A/2020 of 5 November (amended by Regulation no. 596-A/2021 of 30 June), enters into force on the 5th working day following its publication.