

Request for intervention submitted by Radiomóvel to obtain access or interconnection of its SMRP network with the networks of PTC, Sonaecom, TMN and Vodafone.

(Decision)

A. Interconnection application of Radiomóvel, SA Positions manifested.

Radiomóvel Telecomunicações, S.A. (applicant), in the capacity of operator of SMRP - serviço móvel de recursos partilhados (mobile trunking services) has requested the intervention of ICP-ANACOM (ANACOM) with the objective of exercising their right to *"negotiate interconnection with and obtain access or interconnection from other undertakings providing publicly available electronic communications networks and services,"* which right it claims has been refused by PT Comunicações, S.A. (PTC), by Sonaecom - Serviços de Comunicações S.A. (Sonaecom), by TMN - Telecomunicações Móveis Nacionais, S.A. (TMN) and by Vodafone Portugal, Comunicações Pessoais, S.A. (Vodafone).

Notification was made to PTC, Sonaecom, TMN and Vodafone (respondents) in order that these companies might set out their positions in respect of the pleas of fact and law that support their opposition to the interconnection requested by Radiomóvel.

In response, these companies stated the request put by Radiomóvel is untimely, that there are uncertain as to the existence of the right to interconnection, or go so far as to affirm that such right does not exist, that it is illegal and incompatible with the legal obligation of interconnection and that, on the terms by which it currently provided, through the telephone service provided by PTC, interconnection of the network for the provision of SMRP is fully adequate.

The arguments presented by the various respondents, which are briefly set out above were analyzed in the draft decision adopted by ANACOM on 14/05/2010, which as annex 1 constitutes an integral part and basis of this decision.

B. Draft decision - hearing of stakeholders

Considering the request, on which both applicant and respondents have expressed their positions and the analysis made of such positions, the Management Board of ANACOM gave approval, on 16.05.2010, as a draft decision (DE1482010CA):

- «...I. Under the current regulatory framework and having regard in particular to article 22 of the LCE, Radiomóvel, as an operator of SMRP which provides an electronic communication service available to the general public has a right to negotiate interconnection with and obtain access or interconnection from other undertaking which offer publicly available electronic communications networks and services;*
- II. In compliance with the obligations which are imposed at a legal and regulatory level pursuant to article 64, paragraph 2 and article 66 of the LCE, PTC, TMN, Sonaecom and Vodafone are bound to satisfy reasonable requests for interconnection of the mobile network of Radiomóvel with the fixed, mobile and nomadic networks in their possession, observing, in full, the obligations imposed on them pursuant to the procedures of market analysis and, in particular, the obligation to respond to reasonable requests for access and the obligation of non-discrimination.*
- III. The companies identified in II. shall, within a period of not more than 90 days counted from the date of the final decision issued in the context of the present process, notify ANACOM as to the conclusion of interconnection agreements necessary to ensure the right of Radiomóvel to obtain access or interconnection;*
- IV. Pursuant to and for the purposes of article 100 and 101 of Código do Procedimento Administrativo (Administrative Proceeding Code), Radiomóvel, PTC, TMN, Sonaecom and Vodafone shall be notified so that, within a period of 10 days, they may respond, if they so see fit, to the decision set forth in the preceding paragraphs.»*

The draft decision was notified to the applicant and to the respondents by official circular of ANACOM-S39614/2010 of 18/05/2010.

All stakeholders expressed their views within the prescribed period, Radiomóvel expressing its agreement with the notified decision, while the others reiterated the arguments raised previously and some responded with additional arguments.

The analysis and assessment of the arguments contained in the Report of the Hearing of Interested Parties which, as annex 2, forms an integral part of and basis to the present determination.

As a result of the analysis conducted, it was deemed that the arguments put forward by the applicant and respondents do not justify any amendment to the notified decision.

With the exception of the proposal made by Radiomóvel seeking the implementation, in section III of the decision, that the period of 90 days stipulated therein be measured in "*calendar days*", which amendment does not alter the meaning of the decision, before its implementation, ANACOM takes the position that there is no reason to make any changes to the sense of the notified decision.

C. Conclusion

1. Timeliness of the application and the legitimacy of intervention by ANACOM

As follows from the reasoning put forth in the notified draft decision, and as is concluded in the analysis and consideration of the report of the prior hearing, which documents form an integral part of the present determination, the request for administrative resolution of disputes that gave rise to the present process was presented by Radiomóvel with less than one year having elapsed since the beginning of the dispute whose settlement was required.

When in 2006, ANACOM refused to take a position on the process brought by Radiomóvel after the refusal of interconnection by Vodafone, it was because the request for intervention was deemed untimely.

The refused requests were based on titles giving authorisation to the activity of Radiomóvel - license - which should be interpreted according to the framework conferred by Law No 5 / 2004 of 10 February - LCE - Lei das Comunicações Electrónicas (Electronic Communications Law), which law has been in application since 2004.

Refusal of the application, made with such basis, occurred on 20 July 2004, which date was regarded as the beginning of the dispute, whereas Radiomóvel only sought the intervention of ANACOM under article 10 of the LCE in July 2006, almost two years after the start of the dispute. Given the time elapsed, the request for intervention could not but be considered as untimely.

In the case now under consideration, the denied interconnection corresponds to requests made under Right of Use of Frequencies ANACOM-05/2008.

The grounds now presented by Radiomóvel call for a reanalysis, on the part of the other operators and providers of electronic communications services, of applications for interconnection given that the different wording of that title might solve queries and reservations that addressees of the request for interconnection may have.

Considering the dates on which the denials to requests for interconnection made by Radiomóvel, following the adaptation of the license and renewal of their right of use of frequencies, occurred - between 16 and 28 January 2009 - and considering the date on which intervention by ANACOM was requested - 30 March 2009 -, it cannot but be concluded that such a request was made prior to the expiry of the period required in paragraph 2 of Article 10 of the LCE, and as such, said request cannot but be considered timely.

Intervention by ANACOM shall always be legitimate and justified in the exercise of its powers under article 63 of the LCE in order to guarantee proper access and interconnection in accordance with the regulatory objectives laid down in article 5 of the same Law, which reasoning is also cited in the notified draft decision.

2. As regards the existence of a right of Radiomóvel to interconnection and as regards the obligation of the respondents to answer reasonable requests for access made to them for the termination of calls originated on the mobile network of Radiomóvel.

Pursuant to article 22 of the LCE, *"undertakings which provide publicly available electronic communications networks and services enjoy the following rights: a) To negotiate interconnection with and obtain access or interconnection from other providers of publicly available communications networks and services, under the conditions of and in accordance with the present law"*.

Pursuant to article 62 of the LCE, the freedom of companies to negotiate is recognised whereby undertakings are entitled to negotiate and agree between themselves technical and commercial arrangements for access and interconnection, whereas article 64, paragraph 2 of the LCE sets out that the *"operators shall have a right and, when requested by other undertakings, an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of services"*¹.

The conditions attached to the right of use of frequencies ANACOM No 5/2008 include to *"negotiate and obtain access or interconnection from other undertaking offering publicly available electronic communications networks and services under the conditions of and pursuant to Law No 5/2004 of 10 February, without prejudice*

¹ According to the definition of the point s) of article 3 of the LCE *"operator"* *"means an undertaking providing or authorised to provide a public communications network or an associated facility"*, which unquestionably covers Radiomóvel.

to the powers of the National Regulatory Authority under the law, particularly in the context of the analysis of markets”.

Such provisions unequivocally give rise to the affirmation that Radiomóvel has the right, and the other companies called to account in the present process the obligation, to negotiate interconnection among themselves in order to ensure the provision and interoperability of their services.

Moreover, following the analyses of markets conducted, PTC, Sonaecom, TMN and Vodafone have been declared as undertakings with significant market power (SMP): Sonaecom, TMN and Vodafone in the wholesale market for voice call termination on individual mobile networks and Grupo PT, as well as the three companies named above, in the wholesale market for call termination on public telephone networks at a fixed location.

The declaration of SMP gives rise, for each of the named companies, under the terms so established by ICP-ANACOM, to the obligation to respond to reasonable requests for access which are submitted to them for the termination of calls originated on the mobile network of Radiomóvel.

It is clear that Radiomóvel has the right to obtain access to the network of PTC, Sonaecom, TMN and Vodafone and these companies have the obligation to provide such access, according to terms by which interconnection is made available to other undertakings and in observance of the obligations imposed in the context of the procedures of market analysis, observing, in particular, the obligation to respond to reasonable requests for access and the obligation of non-discrimination.

Meanwhile, the fact cannot be ignored that the Operation Regulation in annex to Administrative Rule No 797/92 of 17 August, already recognized that providers of SMRP have a right to interconnect with the fixed telephone service. By amending the legal regime applicable to telecommunications, arising from Lei de Bases das Telecomunicações (Basic Law of Telecommunications) - Law No 91/97 of 01

August - and other legislation adopted in its development, such right was enhanced².

As such, the interconnection recognized pursuant to the right of use of frequencies granted to Radiomóvel does not depreciate the original and current nature of the service. This nature is conferred by the conditions by which the providing company is entitled to make use of the frequencies and not by the terms by which it is offered interconnection.

The determination that the respondents grant interconnection of their networks with the network of this operator does not confer on the latter any right of use of frequencies that were assigned to it for any purpose for which there is no provision.

The fact of obtaining interconnection from the respondent companies in the context of the present process does not give any legitimacy to the provision by Radiomóvel of a service which is similar to that offered by other providers of the mobile telephone service/MTS/GSM-UMTS.

Any use of the rights of interconnection conferred on Radiomóvel which exceeds the limitation established in respect of the right of use of frequencies which, as referred to in paragraphs 1 and 2 of Right of Use No. 5/2008 are intended solely for provision of SMRP, will be unlawful and, as such, shall be sanctioned by ANACOM under the powers of supervision and oversight conferred upon it by law.

Indeed, ANACOM has means which enable it to enforce compliance with conditions attached to the right of use granted to Radiomóvel and, in particular, whether or not traffic between members of different closed user groups and among members of each group and other users services exceeds the established maximum limits. Therefore, not only does interconnection not give rise to eligibility for the provision of other services, the violation of the established rules legitimises sanctioning intervention by ANACOM which, without prejudice to the application of

² This Basic Law established, as general principle, the guarantee of interconnection through the core network as well as through the networks of operators with significant market power.

finances fitting any offense, may intervene in the use of the powers conferred upon it by article 110 of the LCE.

As referenced by the respondents to the case under consideration, any failure to comply with the right of use of frequencies can only be ascertained after it has occurred. In this respect, the situation in analysis is no different from any other event of non-compliance, and, in fact, it may not always be possible to correct its impact or its negative consequences.

However, a risk of non-compliance by Radiomóvil does not legitimize violation by other market agents of obligations laid down in law or by regulatory measures.

Weighing up the interests present, it is easily concluded that the damage caused by the refusal to grant a legitimate right of Radiomóvil is certainly greater than that resulting from a possible incident of breach of conditions attached to the right of use of that company, which would determine corrective and sanctioning intervention.

Notwithstanding this conclusion, it is noted that ANACOM does not stand in the way of the inclusion, in the context of contracts to be concluded, of mechanisms which provide for the cessation of the obligation of interconnection in the event that the object of such is other than the provision of electronic communication services by a company authorised for their provision. In the case of SMRP, this safeguard cannot legitimise the suspension or termination of interconnection without prior demonstration, in a separate process led by ANACOM, that, in breach of the conditions governing the use of frequencies assigned to SMRP, Radiomóvil is providing other services.

Although the law does not set a deadline for companies to reach an interconnection agreement, the good faith that is required from the parties in negotiating and concluding contracts (article 227 of the Código Civil (Civil Code)) is not compatible with the perpetuation of the negotiation process which precedes the conclusion of interconnection agreements.

As such, in the context of the present process, there is justification for fixing a time limit by which it is required that the concluded interconnection agreements shall be notified to ANACOM.

Taking as a reference the procedures in the Reference Interconnection Offer (RIO) to which PTC is subject, it is reasonable to determine the obligation on the companies involved to notify ANACOM of the conclusion of interconnection agreements within 90 days (consecutive) from the date of the final decision that will be issued (see point 12 of the RIO and annex 2 of the same Reference Offer).

D. DECISION

Based on the reasoning set out above, those expressed in the Draft Decision and in the Report of the Prior Hearing of Interested Parties annexed hereto, considering the request by Radiomóvel and pursuant to powers which are conferred upon this Authority under articles 10, 63 and 66 of the LCE, as well as the objectives of regulation which it is charged with accomplishing in accordance with point a) of paragraph 1 and points a), b) and d) of paragraph 2 of article 5 of the same Law, and the provisions of points b), e), n), and q) of paragraph 1 of article 6 of the Statutes in annex to Decree-Law No 309/2001 of 7 December, the Management Board of ANACOM pursuant to point l) of article 26 of the above-referenced statutes, decides that:

- I. Under the current regulatory framework and having regard in particular to article 22 of the LCE, Radiomóvel, as an operator of SMRP which provides an electronic communication service available to the general public, has a right to negotiate interconnection with and obtain access or interconnection from other undertakings which offer publicly available electronic communications networks and services;
- II. In compliance with the legal and regulatory obligations that are imposed pursuant to article 64, paragraph 2 and 66 of the LCE, PTC, TMN, Sonaecom and Vodafone are obliged to satisfy reasonable requests for interconnection of

the mobile network of Radiomóvel with the fixed, mobile and nomadic networks in their possession, fully observing the obligations imposed on them in the context of the market analysis procedures and, in particular, the obligation to respond to reasonable requests for access and the obligation of non-discrimination;

- III. The companies identified in II. shall, within 90 calendar days, counted from the date of the final decision issued in the context of the present process, notify ANACOM as to the conclusion of interconnection agreements necessary to ensure the right of Radiomóvel to obtain access or interconnection.