

DECISION

Partial revocation of the right of use of frequencies and radio license granted to Vodafone Portugal - Comunicações Pessoais, S.A. for the provision of terrestrial electronic communications services

1. The request

By fax, received by ICP-ANACOM on 5 February 2013, Vodafone Portugal, Comunicações Pessoais, S.A. (hereinafter Vodafone) contacted this Authority to request the following:

- *"approval of its request to renounce the right of use of the 5 MHz block of UMTS TDD frequencies corresponding to the 1915.1 MHz - 1920.1 MHz frequencies, with immediate effect;*
- *amendment of Right of Use of Frequencies ICP-ANACOM no. 03/2012 for Terrestrial Electronic Communications Services, following approval of the request to renounce the right of use referred to above".*

In this regard, the company claims that, in light of the need to provide, on a permanent basis, for efficient use of the various resources allocated to it, it conducts regular assessments as to the amount of radio spectrum it has available in relation to the new technologies and new features demanded by the market and its customers, thereby ensuring optimal use of resources. Subsequent to this exercise and considering the additional rights of use of frequencies which it acquired following the spectrum auction held in 2011, Vodafone, in support of the public interest, deems it appropriate to request renunciation, with immediate effect, of the right of use of the 5 MHz block of UMTS TDD frequencies corresponding to the 1915.1-1920.1 MHz frequencies and to return said frequencies to ICP-ANACOM.

The company also considers that, in this way, it will provide the regulator with additional spectrum resources that could be used for the promotion of other services as an alternative to those available to its customers, encouraging innovation and diversity of

usage supported by this strategic resource, without jeopardizing the clear fulfilment of its obligations under title ICP-ANACOM no. 03/2012.

2. The rights of use of frequencies and the radio licence granted to Vodafone

By order of the Minister for Social Infrastructure of 19 December 2000, issued pursuant to paragraph 2 of article 19 of the Public Tender Regulation approved in annex to Administrative Rule no. 532-A/2000 of 31 July, TELECEL - Comunicações Pessoais, S.A., as it was then named, was awarded Licence no. ICP-01/UMTS for exploration of International Mobile Telecommunications Systems (IMT2000/UMTS) using 2x15 MHz of paired spectrum comprised in the 1920-1980 MHz/2110-2170 MHz bands, as well as 5 MHz of unpaired spectrum comprising the 1900-1920 MHz band, which the company now renounces. Meanwhile, by Order no. 1704/2003 of 28 January, Vodafone was granted a further 2x5 MHz of paired spectrum comprised in the 1920-1980 MHz/2110-2170 MHz bands for exploration of International Mobile Telecommunications Systems (IMT2000/UMTS); as a result Vodafone currently has 2x20 MHz of paired spectrum comprised in the 1920-1980 MHz /2110-2170 MHz bands.

However, by determination of 8 July 2010, ICP-ANACOM decided, in the context of refarming the spectrum in the 900 MHz and 1800 MHz frequency bands, to unify the conditions applicable to exercise of the rights of use of frequencies, as allocated to Optimus, TMN and Vodafone for the provision of the mobile telephone service, into a single title, according to the GSM 900/1800 and UMTS networks.

As such, Vodafone became holder of Right of Use of Frequencies ICP-ANACOM no. 03/2010, according to which it maintained right of use, in the national territory, of 2x8 MHz in the 900 MHz band (880-915 / 925-960 MHz) and 2x6MHz in the 1800 MHz band (1710-1785/1805-1880 MHz) for GSM and UMTS systems, as well as other systems as were included in Annex to Decision 2009/766/EC, and a further 2x20 MHz sub-band in the 1920-1980 MHz/2110-2170 MHz sub-band and 5 MHz of unpaired spectrum comprised in the 1900-1920 MHz sub-band for the UMTS system.

Subsequently, by determination of 9 March 2012 and following the multi-band auction, ICP-ANACOM approved the issuance of new unified titles of rights of use of frequencies for terrestrial electronic communications services allocated to Optimus, TMN and Vodafone, whereby Vodafone is now holder of ICP-ANACOM title no. 03/2012, which therefore covers the right of use of the block of 5 MHz of unpaired spectrum comprised in

the 1900-1920 MHz sub-band for the UMTS system which Vodafone renounces.

Indeed, as specifically regards rights of use of frequencies allocated prior to the multi-band auction and according to paragraph of 10.1 of said title, Vodafone retains the rights of use, in the national territory, for the provision of publically available terrestrial electronic communications services, consisting of:

- a) 2x8 MHz in the 900 MHz band (880-915 MHz / 925-960 MHz) and 2x6 MHz in the 1800 MHz band (1710-1785 MHz / 1805-1880 MHz), for the systems identified in Annex to Decision 2009/766 EC, as amended by Decision 2011/251/EU, as well as other systems as may be covered thereunder;
- b) 2x20 MHz in the 1920-1980 MHz / 2110-2170 MHz sub-band and 5 MHz of unpaired spectrum comprised in the sub-band 1900-1920 MHz (the latter 5 MHz block being the block which the company now renounces) for the UMTS system or other systems which are compliant with the technical conditions as may be set forth pursuant to the implementation of Decision no. 676/2002/EC of the European Parliament and of the Council of 7 March.

Vodafone is also the holder of **Radio Licence no. 513927** for use of a radiocommunications network of terrestrial electronic communications services, valid until 2 April 2017, under which licence provision is made for use of a block of 5 MHz in the 2100 MHz frequency range for UMTS TDD technology.

3. Analysis of the request

The application of Vodafone, as now under analysis, constitutes a request for the partial revocation of the act of granting the right of use of frequencies for the exploration of UMTS systems currently comprised in ICP-ANACOM title no. 03/2012, as well as of the act of awarding Radio Licence no. 513927, i.e. the partial revocation of valid administrative acts.

3.1. Framework

As such, analysis of the present application is to be conducted pursuant to the regime which governs the revocation of valid administrative acts, as provided for in the CPA - *Código do Procedimento Administrativo* (Administrative Proceeding Code). This consists of "*an administrative decision as to the cessation of the effects of another prior*

*administrative decision, in light of the position that the effects of said prior decision are not suitable, do not represent an appropriate way to pursue the public interest in question (...)*¹.

It is set out in article 140 of the CPA that administrative acts are freely revocable except where i) their irrevocability is legally binding, ii) they were constitutive of rights, or iii) they result in legal obligations or inalienable rights for the administration. Where acts are constitutive of rights, as in the present case, the acts may only be revoked to the extent that they are unfavourable to the interests of the recipients thereof or where all stakeholders give their agreement to their revocation and they do not refer to non-disposable assets.

In this case, the revocation request is made on the initiative of Vodafone, as the single interested party under article 140 of the CPA, whereby there is no question of non-disposable rights or interests.

Under paragraph 1 of article 142 of the CPA, in the absence of specific provision which assigns responsibility for the purpose to different entities, the author of an administrative act remains responsible for its revocation.

At present, under the current legal regime², the allocation of rights of use of frequencies remains the responsibility of ICP-ANACOM (see article 19, paragraph 3 of the LCE), whereby the power to revoke the acts conferring these rights falls to ICP-ANACOM.

Meanwhile, under the rules governing the licensing of radiocommunications networks and stations established by Decree-Law no. 151-A/2000 of 20 July, as amended and republished by Decree-Law no. 264/2009 of 28 September, the award (article 5) and revocation (article 17) of the corresponding radio licences is also incumbent upon ICP-ANACOM, whereas point b) of paragraph 1 of article 17 expressly stipulates that said licences may be revoked upon request of the holder.

In this context, it should also be taken into account that the acts whose revocation is now under examination (the allocation of rights of use of frequencies and radio licences) fall into the designated category of favourable acts. As such, the issue at hand, first and

¹ *Código do Procedimento Administrativo* (Code of Administrative Procedure) commented, 2nd Ed, Mário Esteves de Oliveira, Pedro Costa Gonçalves and J. Pacheco de Amorim, Section IV, II., page 667).

² Established by Law no. 5/2004, of 10 February (LCE), as amended and republished by Law no. 51/2011 of 13 September.

foremost, is the assignment of an advantage, in this case, the allocation of a right to exploit a determined resource sought by an undertaking for their interest and in order to develop an economic activity.

Accordingly, when faced with a request to revoke an act which gives an advantage to a private undertaking - which request is obviously based on the interests and motivations of its respective title holder - it is incumbent upon ICP-ANACOM to assess whether or not harm is done to the public interest whose accomplishment was also associated with the favourable act as a result of granting the request submitted by the undertaking.

3.2. Analysis of the request

As set out in paragraph 11.1 of ICP-ANACOM title no. 03/2012, Vodafone is bound to use the allocated frequencies in a manner that is effective and efficient, in accordance with the stipulations of point b) of paragraph 1 of article 32 of *Lei das Comunicações Eletrónicas* (Electronic Communications Law), while observing the specific conditions of use of frequencies set out in the radio licence issued pursuant to Decree-Law no. 151-A/2000 of 20 July, as amended by Decree-Law no. 264/2009 of 28 September.

Since the present case concerns the return of spectrum which the company deems as no longer required, without jeopardizing the clear fulfilment of its obligations as under the ICP-ANACOM title no. 03/2012, it is considered that, in fact, in terms of spectrum management and given in particular the principle of effective and efficient use of the spectrum, there is no obstacle to the wishes of the company.

Specifically, the return of this spectrum is covered by current discussion in the European Commission and CEPT, in the context of which technical conditions are being developed for the use of the 1900-1920 MHz and 2110-2125 MHz bands for the introduction of other alternative uses beyond those supported over mobile communications systems in the context of the provision of terrestrial electronic communications services.

Likewise, there is also no obstacle to the partial revocation of radio licence no. 513927 awarded to Vodafone, as regards the component thereof related to the 5 MHz block in the 2100 MHz frequency range for use of UMTS TDD technology, also taking into account that, under the terms of point b) of paragraph 1 of article 17 of Decree-Law no. 151-A/2000 of 20 July, licences may be revoked upon request of the holder.

Therefore, given that, according to the criteria governing spectrum management and planning, it is incumbent upon ICP-ANACOM to ensure effective and efficient use of frequencies, ensuring that such use does not lead to underutilization, and considering that the company warrants that the return of spectrum in question does not jeopardise the clear fulfilment of its obligations under ICP-ANACOM title no. 03/2012, the view is taken that the pretension of Vodafone does no harm to the public interest underlying allocation of the frequencies in question; as such the respective request merits favourable consideration by ICP-ANACOM.

Further to the above, it is also considered that to grant the request submitted by Vodafone will not have significant market impact as would warrant conducting the general consultation procedure laid down in Article 8 of the LCE.

It is likewise concluded that, since the decision is favourable to Vodafone and since it is in line with Vodafone's request, the requisites are fulfilled as permit waiver of a prior hearing of the company, pursuant to the provisions of point b) of paragraph 2 of article 103 of *Código do Procedimento Administrativo* (Administrative Proceeding Code)³.

Finally, bearing in mind that Vodafone asks that its request to renounce the spectrum in question be granted with immediate effect, and also that, according to information available to ICP-ANACOM, the company never used this spectrum and considering that the act of revocation may be given retroactive effect, since it is favourable to the applicant and does no harm to the rights or legally protected interests of third parties, and because at the time of the request the assumptions justifying retroactivity are deemed to have existed (see point a) of paragraph 2 of article 128 of the CPA), the view is taken that the effects of this act may can be considered as from 5 February 2013.

4. Determination

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 the Statutes, as in annex to Decree Law no. 309/2001 of 7 December, in pursuit of the objectives of regulation set out in article 5, paragraph 1, point a) and paragraph 2, point d), under articles 15 and 19,

³ In which it is set out that the competent body may waive the requirement for a hearing of interested parties where the elements contained in the procedure lead to a decision which is favourable to interested parties.

paragraphs 3 and 4, of the LCE, and in exercise of the powers conferred by article 26, point l) of its Statutes, and by article 140, paragraph 2, point b) of the CPA, **determines:**

1. To revoke the right of use of the 5 MHz block in the 2100 MHz frequency range for use of UMTS TDD technology granted pursuant to the rights of use of frequencies for terrestrial electronic communications services and embodied in ICP-ANACOM title no. 03/2012 granted to Vodafone Portugal - Comunicações Pessoais, S.A.
2. To amend ICP-ANACOM title no. 03/2012 under the terms of Endorsement no. 1 as is in annex to the present Decision, which is to be incorporated into said title.
3. To revoke radio licence no. 513927, insofar as it corresponds to the 5 MHz block in the 2100 MHz frequency band for use of UMTS TDD technology, to which Vodafone Portugal - Comunicações Pessoais, S.A. holds title, under and pursuant to point b) of paragraph 1 of article 17 of Decree-Law no. 151-A/2000 of 20 July, as amended and republished by Decree-Law no. 264/2009 of 28 September, whereby the licence is reissued in accordance with the present decision.
4. To determine that the acts of revocation referred to in the preceding paragraphs shall take effect as on the date of the request of the company, i.e, as on 5 February 2013.
5. To waive the requirement for a prior hearing of Vodafone Portugal - Comunicações Pessoais, S.A., in accordance with point b) of paragraph 2 of article 103 of the *Código do Procedimento Administrativo* (Administrative Proceeding Code).

Lisbon, 24 April 2013.