

DECISION

Transfer of the right of use for frequencies held by Sintonizenos - Comunicação Social, Lda.

1. The application

Further to the application for transfer of the programme service of a local scope known as «*Radio 5 FM*», broadcasting at 89 MHz, in the municipality of Póvoa de Varzim and of the corresponding license for exercise of the radio broadcasting activity, submitted by Sintonizenos - Comunicação Social, Lda., (hereinafter Sintonizenos), Entidade Reguladora para a Comunicação Social (the Regulatory Authority for the Media - ERC), by means of a letter received on 26 January 2018, submitted the respective file to the examination of ANACOM, so that this Authority, under the combined terms of paragraph 9 of article 4 and paragraph 7 of article 22 of Law No. 54/2010, of 24 December (the Radio Law), rules on the transfer of the right of use for frequencies allocated to that body for the provision of a publicly available radio broadcasting service, of a local scope, in the municipality of Póvoa de Varzim.

According to the corresponding investigation file, Sintonizenos applied for ERC's authorization to transfer its programme service of a local scope to RDD - Rádio Desporto, S.A. (hereinafter RDD), for the following reasons:

«Over the past few years, the profitability of the "Radio 5-89.0FM" programme service has deteriorated, undermining its viability in the very short term.

In fact, the gradual deterioration of the economic and financial situation during the last two years has made it difficult for the company to meet obligations, namely tax obligations, forcing the company to constantly use its equity.

In this context, so as to avoid a more serious and irresolvable problem, the Applicant started negotiations with a company able to maintain the radio broadcasting activity, according to the legal requirements set out in the Radio Law.

In this scope, RDD - RÁDIO DESPORTO, S.A., appears as a company with a team of professionals with high technical skills in the field of television and radio sports news, able to ensure that the programme service is maintained. »

The file submitted also included Sintonizenos's application for authorization to change the licenced project *«as regards the programme contents, to a sports information thematic radio, under article 26 of Law No. 54/2010, of 24 December, as well as the authorization to broadcast jointly, in accordance with article 10 of Law No. 54/2010, of 24 December»*.

2. Framework

2.1. The Radio Law

Pursuant to article 4, paragraph 9, of the Radio Law, the transfer of programme services of a local scope and respective licenses or authorizations is permitted, according to the procedures laid down for the alteration of operator control, where it can be proved that this promotes the safeguard of the licensed or authorized project and insofar as all the property, rights and obligations, including those which are labour-related, exclusively concerned with the programme service under consideration, are transferred.

In this case, and without prejudice to powers granted to ANACOM according to the regime applicable to electronic communications networks and services and to radiocommunications, the transfer is dependent on an authorization granted by ERC (cfr. article 4, paragraph 10 of the Radio Law).

Article 22, paragraph 7, of the Radio Law lays down that files on license transfers must be examined by ERC, which submits them to ANACOM for a decision on the transfer of the respective rights of use for frequencies, according to the regime applicable to electronic communications networks and services and to radiocommunications.

The Radio Law further specifies, in its article 4, the restrictions on the ownership of radio programme services, namely of a local scope:

- Natural or legal persons may not hold, either directly or indirectly, namely through a relationship of control, a number of licenses for radio programme services of a local scope exceeding 10% of all licenses granted on national territory;
- Natural or legal persons of private or cooperative sectors may not hold, either directly or indirectly, namely through a relationship of control, a number of frequency modulated radio programme services of a national scope equal to or

exceeding 50% of programme services qualified for the same coverage area and for the same frequency band;

- Natural or legal persons may not hold in the same district, metropolitan area, municipality, or, in the autonomous regions, in the same island, either directly or indirectly, namely though a relationship of control, a number of licenses for radio programme service of a local scope exceeding 50% of programme services of the same scope qualified for each of the referred territorial areas.

2.2. The Electronic Communications Law (ECL)¹

ECL lays down in its article 34 that the transfer or lease of rights of use for frequencies between undertakings is authorized, in accordance with conditions attached to those rights of use and with procedures established in that article, where the transfer or lease of such rights has not been explicitly prohibited by the National Regulatory Authority (NRA - ANACOM) and published in the National Frequency Allocation Plan (NFAP).

In this scope, it is incumbent on ANACOM to ensure that:

- a) The intention to transfer or to lease rights to use frequencies, as well as the effective transfer or lease thereof, is made public;
- b) The transfer or lease does not distort competition, namely due to the accumulation of rights of use;
- c) Frequencies are efficiently and effectively used;
- d) The use for which frequencies are intended is complied with where it has been harmonised through the application of Decision No. 676/2002/EC of the European Parliament and of the Council of 7 March (Radio Spectrum Decision) or other Community measures;
- e) The restrictions set forth in the law in respect of radio and television broadcasting are safeguarded.

For this purpose, and according to paragraph 6 of the mentioned provision, it is incumbent on ANACOM to address, within 45 days at the most, the intention to transfer the rights, as well as the conditions to do so, which must be duly communicated to this Authority. ANACOM is entitled to oppose the intended transfer of rights of use, as well

¹ Law No. 5/2004, of 10 February, as amended by Law No. 51/2011, of 13 September.

as to impose the necessary conditions for compliance with requirements listed in the preceding paragraph.

In this scope, ANACOM must also apply for the prior opinion of Autoridade da Concorrência (AdC - the Competition Authority), which must be issued within a 10-day period of time from the date of the application, save where the complexity of the matter requires an extension.

It must also be borne in mind that the transfer of these rights of use does not suspend nor interrupt the period for which the respective rights were allocated, and that after the transfer, conditions attached to rights to use frequencies continue to apply, unless otherwise specified by ANACOM (paragraphs 9 and 10 of article 34).

ANACOM's silence, after the elapse of the 45-day period referred to in article 34, paragraph 6, is to be interpreted as a non-opposition to the transfer or lease of the rights of use, however the effective transfer or lease must still be notified.

2.3. Regime applicable to the licensing of radio networks and stations

According to article 14, paragraph 1, of Decree-Law No. 151-A/2000 of 20 July, as amended and republished by Decree-Law No. 264/2009, of 28 September (legal regime applicable to the licensing of radiocommunications networks and stations, the supervision of the installation of such stations and the use of the radio spectrum), network or station licences are transferable.

The body to which a license is transferred undertakes all inherent rights and obligations and, where appropriate, the transfer of a network licence implies the transfer of all licences of stations integrating it.

In this scope also, ANACOM must rule within 45 days on the content of the notification, being entitled to oppose the transfer of licenses or to impose any conditions required for the optimal management of the spectrum, specifically the effective and efficient use of frequencies and non-existence of competition distortions.

The transfer of network and station licenses does not suspend nor interrupt the term for which licenses were granted.

3. Assessment

Transferor

According to documents attached to the application, Sintonizenos holds license for the exercise of the radio broadcasting service No. 423093, valid from 9 May 2009 to 8 May 2024, for local coverage of the municipality of Póvoa de Varzim, broadcasting at 89 MHz and called «Rádio 5 FM».

Sintonizenos is also the holder of:

- The right of use for frequencies ICP - ANACOM No. 263/2009, issued on 27 April 2009 and valid up to 30 March 2024, intended for the provision of a publicly available radio broadcasting programme service, of a local scope, for the municipality of Póvoa de Varzim, in the 87.5 -108 MHz band;
- A radio station license of the radio broadcasting service No. 20310, valid up to 9 May 2019, according to which the station broadcasts at 89 MHz;
- A radio network license of the fixed service-studio-to-transmitter links No. 503741, valid up to 9 May 2019;
- An authorization for operation of the Radio Data System (RDS) with the programme channel name (PS) «RADIO 5».

Transferee

As regards the transferee, it was found that RDD does not hold any license for the exercise of the FM radio broadcasting service.

The application under consideration was analysed bearing in mind the requirements which, according to article 34, paragraph 5, of ECL, must be fulfilled so that ANACOM may assess the intended transfer.

As such, and by letter of 27 June 2017, Autoridade da Concorrência (AdC) was requested to issue an opinion for the purpose of article 34, paragraph 7, of ECL.

Furthermore, in compliance with article 34, paragraph 5 a) of ECL, ANACOM disclosed at its website (<https://www.anacom.pt/render.jsp?contentId=1430071>), on 26 February 2018, that it had received from ERC an application to decide on the intention expressed by Sintonizenos - Comunicação Social, Lda., to transfer to RDD - Rádio Desporto, S.A., the right of use for frequencies that it had been allocated for the exercise of the radio broadcasting activity.

In its response, received on 12 March 2018, AdC concluded that *«(...) the intended transfer to RDD of the license for the exercise of the radio broadcasting service with local coverage is not deemed to be a concentration operation such as to require the respective notification, under article 37 of the Competition Law, nor seems likely to give rise to competition distortions, in particular as regards the creation of significant barriers to effective competition in the national market or in a substantial part thereof».*

With regard to other requirements, on whose fulfilment the granting of the authorization for the transfer of the right of use for frequencies depends, set out in article 34, paragraph 5, of ECL, as well as in article 14 of Decree-Law No. 151-A/2000, ANACOM takes the view that they have been duly safeguarded, in the light of available information.

Specifically on the safeguard of restrictions provided for in the Radio Law (requirement laid down in paragraph 5 e) of article 34 of ECL), in articulation with article 4 of that same Law), and given that ANACOM lacks information on capital shares between the several bodies qualified for the pursuit of the radio broadcasting activity, it is deemed that it is incumbent on ERC to assess, at all times, whether restrictions laid down on the ownership of radio programme service operators are not infringed.

4. Decision

Therefore, in the scope of the power provided for in paragraph 1 e) of article 8 of ANACOM's Statutes, approved by Decree-Law No. 39/2015, of 16 March, and under the combined terms of article 34, paragraph 6, of Law No. 5/2004, of 10 February, as amended by Law No. 51/2011, of 13 September, article 14, paragraph 6, of Decree-Law No. 151-A/2000, of 20 July, as amended and republished by Decree-Law No. 264/2009, of 28 September, and article 22, paragraph 7, of Law No. 54/2010, of 24 December, **ANACOM's Management Board hereby determines:**

1. Not to oppose the transfer to RDD - Rádio Desporto, S.A., of the right of use for frequencies in the 87.5-108 MHz frequency band held by Sintonizenos - Comunicação Social, Lda., for the provision of a radio programme service, of a local scope, for the municipality of Póvoa de Varzim, under paragraph 6 of article 34 of ECL.

2. Not to oppose the transfer to RDD - Rádio Desporto, S.A., of the radio station license for the radio broadcasting service No. 20310, valid up to 9 May 2019, according to which the station broadcasts at 89 MHz, which is held by Sintonizenos - Comunicação Social, Lda..
3. Not to oppose the transfer to RDD - Rádio Desporto, S.A., of the radio network license of the fixed service-studio-to-transmitter links No. 503741, valid up to 9 May 2019, which is held by Sintonizenos - Comunicação Social, Lda.
4. Not to oppose the transfer to RDD - Rádio Desporto, S.A., of the authorization for operation of the Radio Data System (RDS) with the programme channel name (PS): «RADIO 5».
5. That the effective transfer to RDD - Rádio Desporto, S.A., of the right of use for frequencies in the 87.5-108 MHz frequency band, allocated to Sintonizenos - Comunicação Social, Lda, for the provision of a radio programme service, of a local scope, for the municipality of Póvoa de Varzim, is subject to the condition that Entidade Reguladora para a Comunicação Social (ERC) grants the application for transfer of the programme service known as «*Rádio 5 FM*» and of the respective license for exercise of the radio broadcasting activity held by Sintonizenos - Comunicação Social, Lda..
6. To notify ERC of determinations set out in the preceding paragraphs, requesting that Authority to inform ANACOM on the contents of the transfer decision, so that this Authority, where appropriate, may accordingly issue to RDD - Rádio Desporto, S.A., the certificate laying down the respective right of use for frequencies.

Lisbon, 23 March 2018.