

DECISION

Repeal of the right of use for frequencies and radio license held by ONITELECOM - Infocomunicações, S.A. for the operation of BWA systems

1. Request submitted by Grupo ONI

By letter received on 12 February 2014 (dated 10 February 2014) and further to the request for “transfer of RUF ICP - ANACOM No. 05/2010 [held by F300] to ONITELECOM, as well as of license No. 514540 of the public radio network for operation of broadband wireless access systems (BWA)», the ONI Group, «under paragraph 8 of the referred article 34 of the Electronic Communications Law, hereby formally communicates that the transfer has taken place».

It also refers that «on expiry of the deadline set in paragraph 6 of article 34 of Law No. 5/2004, of 10 February (...) for ANACOM to assess the transfer of the rights of use under consideration, it is deemed that there has been no opposition to the referred transfer, being now incumbent on ONITELECOM, at this time, and under paragraph 8 of the referred article 34 of the Electronic Communications Law, to formally notify that the transfer has been implemented, which this letter aims to do».

ONI Group further refers that, «without prejudice to the above, in the light of the current economic and financial context and of the need to carefully channel investment resources to sustainable projects, that meet customer and market needs, Grupo ONI conducted an analysis as to whether there are grounds that justify the maintenance of this RUF, as well as of license No. 514540, in its technological asset portfolio».

In this scope, the Group concludes that «the technology now available for the frequency band for which ONI Group holds the referred RUF did not allow expectations of the business plan that justified seeking this right in auction to be met (...) LTE technology is not yet available with an appropriate maturity for this band. For these reasons it has been difficult for the ONI Group to enhance this license for the provision of competitive electronic communications services by means of the referred RUF».

Consequently, «taking into account the current framework of economic instability and also the ongoing market situation», the ONI Group, under article 138 of the Code of Administrative Procedure, requests of ICP - ANACOM the repeal of the administrative act concerning the above-mentioned RUF.

On 20 February 2014, ICP - ANACOM received a new communication from the ONI Group (dated 19 February 2014), reporting, in compliance with point 3 of ICP - ANACOM’s decision of 6 February 2014, as regards the transfer of the BWA RUF allocated to F300, that the merger by incorporation of F300 into ONITELECOM had taken place, having the former terminated its activity after transferring to ONITELECOM the right of use for BWA frequencies and radio licence No. 514540.

In the same letter, ONITELECOM indicates that it will wait for ICP - ANACOM to «take due steps further to these acts, indicated in point 3» of the referred decision.

Lastly, the company recalls its former communication in which it had requested “the repeal of the administrative act that allocated the BWA RUF, for the reasons put forward therein».

2. Background

By determination of 28 April 2010, ICP - ANACOM decided, under the applicable legal and regulatory provisions, to endorse the proposal submitted by the Committee appointed for the conduct of the BWA auction, to allocate rights of use of BWA frequencies to ONITELECOM - Infocomunicações, S.A. (as well as to BRAVESENSOR - Unipessoal, Lda.) - www.anacom.pt/render.jsp?contentId=1025830.

By determination of 16 September 2010, ANACOM decided to issue a title that embodies the rights to use frequencies assigned to ONITELECOM for the operation of BWA systems - right of use for frequencies (RUF) No. 05/2010 (<http://www.anacom.pt/render.jsp?contentId=1054159>).

On 26 May 2011, ANACOM authorized ONITELECOM to transfer to F300 the referred RUF No. 05/2010 - <http://www.anacom.pt/render.jsp?contentId=1087821>.

By communication received on 3 December 2013, the ONI Group informed ICP-ANACOM that it intended to merge F300 - Fiber Communications, S.A. into ONITELECOM, assets of the acquired company being fully transferred to the acquiring company, the acquired company being shut down by virtue of this merger.

ONI Group thus requested, prior to the conclusion of the merger and pursuant to article 37 of Law No. 5/2004, of 10 February and paragraph 5 of article 33 of Regulation No. 427/2009, of 29 October, the transfer to ONITELECOM of RUF ICP-ANACOM No. 05/2010, as well as of radio license No. 514540.

By determination of 6 February 2014¹, ICP - ANACOM's Management Board determined:

«1. Not to oppose, or to impose any conditions on, the transfer to ONITELECOM - Infocomunicações, S.A., of the right of use for BWA frequencies held by F300 - Fiber Communications, S.A.

2. Not to oppose, or to impose any conditions on, the transfer to ONITELECOM - Infocomunicações, S.A., of the right of use for BWA frequencies held by F300 - Fiber Communications, S.A.

3. To order F300 - Fiber Communications, S.A. and ONITELECOM - Infocomunicações, S.A., in compliance with paragraph 8 of article 34 of ECL, to notify ICP-ANACOM when this transfer takes place, so that this Authority may take the following steps:

a) Endorse the corresponding change of ownership in right of use for frequencies No 05/2010 and radio license No 514540;

b) Cancel F300's entry in the registration of companies providing electronic communications networks and services;

c) Amend ONITELECOM's entry in the registration of companies providing electronic communications networks and services, to include services this company will provide after the merger by acquisition of F300.»

This decision was notified to ONITELECOM on 11 February 2014.

¹ <http://www.anacom.pt/render.jsp?contentId=1190301>.

3. Analysis

As regards the transfer of RUF ICP - ANACOM No. 05/2010, and having consulted *Portal de Justiça*, ICP - ANACOM found that the merger was registered on 31 December 2013, which leads to the conclusion that the applicant did not wait for this Authority to assess the matter within the legal timeframe provided to do so. Notwithstanding the fact that, under the law, this behaviour does not constitute a breach, it is still objectionable, given that, under the applicable legal regime, which the Group correctly invoked in the request for transfer, the applicant is well aware of the competencies which this Authority is entitled to pursue prior to the transfer of the right of use for frequencies. Ultimately, this Authority could oppose in a justified fashion to the intended transfer or impose conditions deemed to be necessary (article 34, paragraph 6) as well as steps involved, such as requesting the opinion of *Autoridade da Concorrência* (article 34, paragraph 7, of ECL).

Pursuant to article 112 of the Code of Commercial Companies, having the merger been registered at the commercial register, acquired companies cease to exist, and all their rights and obligations are transferred to the acquiring company, thus the entry of the merger in the commercial register has a constitutive effect.

Under paragraph 7 of article 21 of ECL, undertakings that cease the provision of electronic communication networks or services are required to inform ICP - ANACOM about it at least 15 days in advance. And paragraph 2 a) of article 21-A of ECL lays down that undertaking's entry in the register of undertakings providing electronic communications networks and services is cancelled where "*undertakings notify termination of their activity, pursuant to paragraph 7 of the preceding article*".

In this context, and without prejudice to the analysis at the appropriate time of a possible failure to comply with the time-limit provided for in provided for 7 of article 21 of ECL, and taking into account that the merger was registered on 31 December 2013, ICP - ANACOM cancels F300's entry in the register of companies providing electronic communications services, with effect as from this date.

As regards other steps provided for in point 3 of ICP - ANACOM's decision of 6 February 2014, on the endorsement of the change of ownership in qualifying documents [point 3 a)] and on the amendment to ONITELECOM's entry in the register of companies providing electronic communications networks and services [point 3 c)], they are no longer useful in the light of this request for repeal of RUF.

Lastly, the request of the ONI Group consists in a request for repeal of the act granting a right of use for frequencies for operation of BWA systems, embodied in document ICP - ANACOM No. 05/2010, as well of the act granting radio license No. 514540, that is, the repeal of valid administrative acts, which is analysed below.

3.1. Framework

It is in fact in the light of the regime of the repeal of valid administrative acts, provided for in the Administrative Procedure Code (APC), that this request must be analysed.

APC lays down, in its article 140, that administrative acts may be freely repealed, except where i) their irrevocability results from a binding legal provision, ii) they create rights or iii) they impose legal obligations or fundamental rights on the administration. In case acts create rights, as here, they can only be repealed in the part where they negatively affect the interests of their addressees or where all interested parties agree on the repeal of the act and inalienable rights or interests are not at issue.

In this case, the request for repeal was triggered by the ONI Group, the sole interested party in the implied sense of article 140 of APC, inalienable rights or interests not being at issue.

Pursuant to paragraph 1 of article 142 of APC, in the absence of a special provision empowering another body for the purpose, the author of an administrative act is competent to repeal it. In this process, ICP - ANACOM is the author of acts granting both the right of use for frequencies and the radio license.

3.2. Assessment of the request

Given that this request concerns the repeal of an act allocating spectrum that the company does not intend to continue using and bearing in mind that, according to spectrum management and planning criteria, it is incumbent on this Authority to ensure the effective and efficient use of frequencies, ensuring that they are not under-exploited, it is deemed that the repeal of the right of use for frequencies held by ONITELECOM will in no way harm the public interest underlying frequencies under consideration, and, as such, there is nothing to prevent the company's intentions.

Moreover, and considering that, under paragraph 1 b) of article 17 of the regime applicable to the licensing of radio networks and stations², radio licenses may be repealed at the request of the respective holder, there is nothing to prevent the repeal of radio license No. 514540 held by ONITELECOM.

In the light of the above, it is deemed that acceptance of the request under consideration will not have a significant impact on the market such as to impose the launch of a general consultation procedure under article 8 of ECL.

It is also concluded that, the decision being favourable to ONITELECOM and the request submitted being accepted, conditions for waiving the prior hearing of the company have been met, under paragraph 2b) of article 103 of the Administrative Procedure Code³.

² Laid down by Decree-Law No. 151-A/2000, of 20 July, as amended and republished by Decree-Law No. 264/2009, of 28 September, and subsequently amended by Law No. 20/2012, of 14 May.

³ Which provides that the investigating body may waive the prior hearing of interested parties where elements within the procedure lead to a decision which is favourable to interested parties.

4. Determination

Therefore, in the scope of powers provided for in paragraph 1 c) of article 6 of its Statutes, published in annex to Decree-Law No. 309/2001, of 7 December, in the pursue of regulatory objectives set out in article 5, paragraphs 1 a) and 2 d), under articles 15, 19, paragraphs 3 and 4, and 33, paragraph 5, all of ECL, and in the exercise of competencies assigned by article 26 l) of its Statutes, as well as by article 140, paragraph 2 b) of APC, **the Management Board of ICP-ANACOM hereby determines as follows:**

1. To repeal the right of use for frequencies for operation of BWA systems, embodied in qualifying document ICP - ANACOM No. 05/2010, held by ONITELECOM - Infocomunicações, S.A.
2. To repeal radio license No. 514540 held by ONITELECOM - Infocomunicações, S.A., pursuant to paragraph 1 b) of article 17 of Decree-Law No. 151-A/2000, o 20 July, as amended and republished by Decree-Law No. 264/2009, of 28 September.
3. To cancel the entry of F300 - Fiber Communications, S.A. in the register of companies providing electronic communications services, with effect as from 31 December 2013.
4. To waive the prior hearing of ONITELECOM - Infocomunicações, S.A., under paragraph 2b) of article 103 of the Administrative Procedure Code.

Lisbon, 15 May 2014