

**DETERMINATION**  
**TRANSFER OF THE RIGHT OF USE FOR BWA FREQUENCIES**  
**FROM ONITELECOM, S.A. TO F300, S.A.**

**1. INTRODUCTION**

Onitelecom - Infocomunicações, S.A. (hereinafter ONITELECOM) holds a right of use for frequencies in the 3664 MHz - 3692 MHz and 3764 MHz – 3792 MHz bands, for the operation of Broadband Wireless Access (BWA) systems, granted by determination of the Management Board of ICP - Autoridade Nacional das Comunicações (ICP - ANACOM), of 28 April 2010. The corresponding certificate<sup>1</sup> (ICP - ANACOM No 05/2010) was issued on 16 September 2010.

On 12 January 2011<sup>2</sup>, this company requested of ICP - ANACOM, pursuant to article 37 of Law number 5/2004, of 10 February (ECL), the transfer to F300 - Fiber Communications, S.A. (F300) of the mentioned right of use for frequencies.

In its application, ONITELECOM presents the following grounds for transferring the right of use under consideration:

- a) *«F300 is a company of the Grupo Oni, and owner of network assets and infrastructures, this company being intended to develop the BWA network project (...);*
- b) *F300 is owned at 100% by Oni, SGPS, thus meeting the requirements of article 8 of Regulation number 427/2009, of 29 October;*
- c) *Given the type of assets owned by the company and their weight on ONITELECOM's activity, the Group does not intend to sell the company to any external body, including those which did not apply to the BWA tender for failure to comply with the above-mentioned requirements of the respective Regulation;*
- d) *F300 will develop the BWA network of the Grupo Oni providing ONITELECOM with the necessary wholesale service of access to this network, so that the latter may make available to final customers retail electronic communication services supported on a BWA network».*

In addition to the application for transfer, a description of the network and services to be provided by F300 was also submitted, as well as particulars that allow its full identification, for the purposes of paragraph 1 of article 21 of the ECL and articles 8, paragraph 1, and 13 of the Tender Regulation.

**2. REGULATORY FRAMEWORK**

The ECL lays down in its article 37 that rights of use for frequencies may be transferred, where identified as such in the National Frequency Allocation Plan (NFAP).

In this scope, it is incumbent upon ICP - ANACOM to ensure that:

- a) The transfer does not cause a distortion of competition;
- b) The frequencies are used in an effective and efficient manner;

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<sup>1</sup> [Acesso de Banda Larga via Rádio \(BWA\).](#)

<sup>2</sup> It should be noted that the application was not completed until 28.01.2011.

- c) The intended use of frequencies is respected where such use has been harmonised through the application of Decision No 676/2002/EC (Radio Spectrum Decision) or other Community measures;
- d) The restrictions set forth in the law in respect of radio and television broadcasting are safeguarded.

Pursuant to paragraph 4 of the mentioned provision, ICP - ANACOM must take a decision within 45 days at the most as regards the contents of the application, and it is entitled to oppose the intended transfer of rights of use and well as to impose such conditions as may be necessary to comply with the above-mentioned requirements, on the basis of a duly grounded decision.

More specifically, paragraph 5 of article 33 of Regulation Number 427/2009, of 29 October<sup>3</sup> (hereinafter Tender Regulation) lays down that *«the awarded rights of use may be transferred by their respective holders, in compliance with article 37 of Law number 5/2004, of 10 February, and only upon the expiry of a period of two years from the start of the commercial operation of the services through the effective use of the frequencies which are assigned to them, except where a duly substantiated reason, acknowledged as such by ICP-ANACOM, is presented»*.

### 3. ANALYSIS

The general requirements which, according to article 37 of ECL, must be met so that ICP - ANACOM may authorize the transfer applied for will now be examined.

#### 3.1. Impact of the transfer on competition

In compliance with paragraph 5 of article 37 of ECL, ICP - ANACOM requested the Autoridade da Concorrência (AdC) - the Competition Authority - to provide a prior opinion, on 20 February 2011. This Authority replied on 15 March 2011 as follows:

*«(...) In this Authority's point of view, and in the light of paragraph 2 of article 2 of Law number 18/2003, of 11 June, as ONI, SGPS, S.A. owns 98,7% of OniTelecom's social capital and total voting rights, as well as F300 at 100%, these companies are deemed to be a single company.*

*Therefore, and as the transfer of the above-mentioned license is not likely to raise any competition issues, the Autoridade da Concorrência decides not oppose to it».*

#### 3.2. Effective and efficient use of frequencies

The transfer of the right of use for BWA frequencies does not have, and must not have, the effect of extending or reducing rights and obligations that currently fall on ONITELECOM.

Consequently, in case the transfer does take place, F300 must take over all obligations which are now laid down in the transmitting body's certificate - including the obligation to ensure an effective and efficient use of frequencies - which will thus integrate its scope of obligations.

The transfer in itself is not likely to damage the effective and efficient use of frequencies.

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<sup>3</sup> [Regulation no. 427/2009, published on 29 October](#)

In fact, the transfer of the right of use is not *per se* a source of an ineffective or inefficient use of frequencies, nor does it prevent any future ineffective or inefficient use from being subject to ICP - ANACOM's intervention.

### 3.3. Harmonised use of frequencies

The BWA band was harmonized by Commission Decision 2008/411/EC, of 21 May 2008, on the harmonisation of the 3400-3800 MHz frequency band for terrestrial systems capable of providing electronic communications services in the Community<sup>4</sup>.

As regards this requirement also, the transfer at stake, considered in itself, is not likely to affect the harmonized use of this band through the application of Decision No 676/2002/EC (Radio Spectrum Decision) or the referred Decision 2008/411/EC.

It should also be highlighted in this scope that F300 receives all rights and obligations in the same measure as they fall on ONITELECOM.

### 3.4. Legal broadcasting restrictions

As far as this requirement is concerned also, the transfer of the right of use under consideration is not likely to constrain compliance with legal restrictions laid down on media ownership, respectively in Law number 54/2010, of 24 December (Radio Law) and Law number 27/2007, of 30 July (Television Law), as according to elements available to this Authority, F300 does not hold, either directly or indirectly, any share capital of sound or television broadcasting operators.

### 3.5. Tender Regulation

It may be concluded from the analysis developed in the preceding paragraph that the transfer may be authorized *sub judice*, as requirements provided for in article 37 of ECL have been met. It must now be examined whether this transfer may be authorized under paragraph 2 of article 1, article 8 and paragraph 5 of article 33, all of the Tender Regulation.

#### 3.5.1 The first of the above-mentioned Tender Regulation provisions lays down that the transfer of rights of use for BWA frequencies concerns the provision of publicly available fixed, nomadic and mobile electronic communications services, for broadband access.

This Regulation aims to ensure that these frequencies are allocated to publicly available electronic communications services, enhancing the provision of competitive broadband offers, in alternative to those currently available on the market, thus maximizing the effective and efficient use of frequencies.

In this context, there are grounds for the provision of retail offers, that is, offers intended for end users - residential (consumers) and business users - that do not provide public electronic communications networks or publicly available electronic communications services.

In this case, F300 will provide ONITELECOM with wholesale services of access to the BWA network, so that the latter may provide its end customers with retail electronic

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<sup>4</sup> [Commission decision C\(2008\)1873, 21 May 2008.](#)

communications services supported on the referred network. It is also expected to start providing the network to other operators during the first quarter of 2011.

After the transfer of the granted right of use for frequencies is authorized, the new right holder - F300 - cannot fail to ensure the provision of publicly available services for at least two years from the date on which the qualifying certificate was issued, that is, 16 September 2012.

In fact, notwithstanding the fact that the publicly available services may be provided over the BWA network by third parties, this obligation falls on F300 as holder of the right of use for frequencies.

3.5.2 Having verified F300's shareholding structure and other relevant information available at ICP - ANACOM, it may be concluded that the required transfer is not likely to affect the restrictions set out in article 8 of the Tender Regulation, as far as shareholding is concerned, as the company does not hold, either directly or indirectly, any share capital of entities referred to in points a) to c) of its paragraph 3, nor do such entities hold directly or indirectly any share capital of F300.

3.5.3 As provided for in article 33, paragraph 5, of the Tender Regulation, rights of use for BWA frequencies which have been already awarded may be transferred by their respective holder only upon the expiry of a two-year period from the start of the commercial operation of the services through the effective use of the frequencies which are assigned to them, except where a duly substantiated reason, acknowledged as such by ICP-ANACOM, is presented.

In this case, although ONITELECOM has not yet started the commercial operation of services supported on BWA, and thus the two-year period, as from which the free-transfer rule takes effect, has not begun to run, the company justified its intention to transfer its right of use to another company within the Grupo Oni - F300 -, which will be responsible for developing the BWA network, while ONITELECOM will be charged with providing retail services supported on that network.

Therefore, the authorization applied for may only be granted if ANACOM acknowledges as valid and appropriate the grounds underlying the application.

In the light of the above, whereas the transfer of the rights of use for frequencies:

- a) Has an exclusively internal impact at the level of Oni, SGPS,
- b) Is not likely to harm competition, as the Competition Authority has also pointed out,
- c) Does not hinder the use of frequencies for publicly available services, which at retail level will be provided by ONITELECOM,
- d) Does not prevent the launch of services supported on BWA, nor does it obstruct the effective and efficient use of assigned frequencies,

ICP - ANACOM takes the view that there are no legal or factual reasons that prevent or advise against authorizing it.

#### 4. DRAFT DECISION

Therefore, in the scope of powers provided for in points c) and f) of article 6 of its Statutes, approved by Decree-Law number 309/2001, of 7 December, and under article 37, paragraph 4, of Law number 5/2004, of 10 February and article 33, paragraph 5, of Regulation number 427/2009, of 29 October, the Management Board of ICP - ANACOM determined, on 31 March 2011, as follows:

1. *«To authorize the transfer of the right of use for frequencies ICP - ANACOM No 05/2010, awarded to ONITELECOM – Infocomunicações, S.A. for the operation of Broadband Wireless Access (BWA) systems, to F300 – Fiber Communications, S.A., which will be subject to compliance with all conditions and obligations set out in Regulation number 427/2009, of 29 October, as well as in the issued certificate.*
2. *For the purposes of the final part of the preceding paragraph, F300 – Fiber Communications, S.A., undertakes to ensure that frequencies assigned for BWA are used for the provision of publicly available electronic communications services by 16 September 2012 at the latest.*
3. *To submit the determination in the preceding paragraph to the prior hearing of ONITELECOM – Infocomunicações, S.A., under articles 100 and 101 of the Administrative Procedure Code, with a 10-working-day time limit from the date of notification hereof being set for a written assessment of the matter by the company, if it so wishes.»*

#### 5. PRIOR HEARING AND FINAL DECISION

To implement the provision in paragraph 3 of the draft decision determination mentioned above, ONITELECOM, S.A., was notified to assess the matter, if it so wished.

The company failed to provide its opinion within the scope of the prior hearing, and thus there are grounds to retain unchanged the provisions of the approved draft decision.

Therefore, in the scope of powers provided for in points c) and f) of article 6 of its Statutes, approved by Decree-Law number 309/2001, of 7 December, and under article 37, paragraph 4, of Law number 5/2004, of 10 February and article 33, paragraph 5 of Regulation number 427/2009, of 29 October, the Management Board of ICP - ANACOM hereby determines as follows:

1. **To authorize the transfer of the right of use for frequencies ICP - ANACOM No 05/2010, awarded to ONITELECOM – Infocomunicações, S.A. for the operation of Broadband Wireless Access (BWA) systems, to F300 – Fiber Communications, S.A., which will be subject to compliance with all conditions and obligations set out in Regulation number 427/2009, of 29 October, as well as in the issued certificate.**
2. **For the purposes of the final part of the preceding paragraph, F300 – Fiber Communications, S.A., undertakes to ensure that frequencies assigned for BWA are used for the provision of publicly available electronic communications services by 16 September 2012 at the latest.**

Lisbon, 26 May 2011.