

## DECISION

### **Transfer of the right of use for BWA frequencies allocated to F300 - Fiber Communications, S.A. to ONITELECOM - Infocomunicações, S.A.**

#### **1. Request**

By communication received on 3 December 2013, Grupo ONI informed ICP-ANACOM that it intended to merge by means of acquisition HUBGRADE, S.A. ("HUBGRADE") into KNEWON, S.A. ("KNEWON") and F300 - Fiber Communications, S.A. ("F300") into ONITELECOM - Infocomunicações, S.A. ("ONITELECOM"), in both cases assets of the acquired company being fully transferred to the acquiring company. By virtue of these mergers, acquired companies would be shut down.

For this purpose, Grupo ONI claims that *"due to the current framework of economic instability that Portugal has faced over the last few years, marked by the worsening of the declining trend, the Grupo ONI decided to merge some of its companies, in order to focus resources in its main areas of action"*.

Thus, as regards the merger of HUBGRADE into KNEWON, Grupo ONI provides the following information:

- KNEWON is a company entirely owned by ONI SGPS, S.A., which is registered with ICP-ANACOM as an electronic communications service provider, and which has been issued Declaration ICP-ANACOM No 05/2011 for the provision of Internet access services and Data Centre services.
- HUBGRADE is a company entirely owned by ONI SGPS, S.A., which does not provide electronic communications services, but rather integrates and implements solutions provided by other companies of Grupo ONI or its partners, thus it is not registered with ICP-ANACOM.
- This merger by acquisition does not imply any change in the scope of activity of KNEWON, as far as the provision of electronic communication services is concerned, and therefore does not affect the registration with ICP-ANACOM nor the issued Declaration, thus the merger is notified merely for information purposes.

As regards the merger of F300 into ONITELECOM, the Grupo refers that:

- ONITELECOM, company entirely owned by ONI SGPS, S.A., holds Public Network Operator license No. ICP-05/99-RPT, as well as other licenses and authorizations issued by ICP-ANACOM. The purpose of this company is to set up, manage and operate telecommunications infrastructures and systems, to provide telecommunications services, as well as to pursue any additional, related or ancillary activities, either directly or by establishing or holding shares in companies.
- F300 is also entirely owned by ONI SGPS, S.A., and concluded in 2009 with ONITELECOM contracts for the transfer of the right of use of fibre optic infrastructures, having registered with ICP-ANACOM as provider of electronic communications networks and services, having been issued Declaration ICP-ANACOM No 06/2011 for the provision of a public electronic communications network and of publicly available data transfer services.
- Subsequently, the right of use for frequencies (RUF) for BWA systems, purchased in 2011 by ONITELECOM at the BWA auction, was transferred to F300 (Endorsement No 1 to RUF ICP-ANACOM No 05/2010).

- The merger by acquisition of F300 into ONITELECOM will not change the scope of activity of the latter in terms of the provision of publicly available electronic communications network and services, given that ONITELECOM is also authorized to provide public electronic communications network and publicly available data transfer services.

Intending to conclude the referred mergers before the end of December 2013, Grupo ONI thus requests, 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, within a compatible period of time, of RUF ICP-ANACOM No 05/2010, as well as of radio license No 514540 (public network for broadband wireless access - BWA).

## **2. Framework**

### **2.1. Electronic Communications Law (ECL)**

ECL (Law No. 5/2004, of 10 February<sup>1</sup>) lays down in its article 34 that the transfer of rights of use for frequencies between companies is authorized in accordance with conditions attached to those rights of use and with procedures established in that article, where the transfer of such rights has not been explicitly prohibited by the National Regulatory Authority (NRA -ICP-ANACOM) and published in the National Frequency Allocation Plan (NFAP).

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

- a) The intention to transfer rights of use, as well as the effective transfer thereof, is made public;
- b) The transfer does not distort competition, namely due to the accumulation of rights of use;
- c) Frequencies are efficiently and effectively used;
- d) The frequency use 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 ICP-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. ICP-ANACOM is entitled to oppose the intended transfer of rights of use, as well as to impose the necessary conditions for compliance with requirements listed in the preceding paragraph.

ICP-ANACOM's silence, after the elapse of the referred 45-day period, is to be interpreted as a non-opposition to the transfer of the rights of use, however the effective transfer must still be notified.

In this scope, ICP-ANACOM must also request 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 request, save where the complexity of the matter requires an extension.

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<sup>1</sup> As amended and republished by Law No. 51/2011, of 13 September, and subsequently amended by Laws No. 10/2013, of 28 January and 42/2013, of 3 February.

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 granted, and that after the transfer, conditions attached to rights to use frequencies continue to apply, unless otherwise specified by the NRA (paragraphs 9 and 10 of article 34).

## **2.2. Regulation of the auction for allocation of rights of use for frequencies for BWA**

Regulation No 427/2009, of 29 October, rectified by Declaration No 2930/2009, of 27 November (BWA Auction Regulation)<sup>2</sup> lays down in paragraph 5 of article 33 that *“allocated rights of use may only be transferred by the respective holders, in compliance with article 37<sup>3</sup> of Law No 5/2004, of 10 February, and only after a period of two years has elapsed from the date in which the commercial operation of the services started, through the effective use of the frequencies which are assigned to it, except where duly reasoned grounds are provided and are recognized as such by ICP–ANACOM”*.

## **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 (regime applicable to the licensing of radiocommunications networks and stations and to 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 associated 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, ICP-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. Background**

By determination of 28 April 2010, ICP-ANACOM decided, under the applicable legal and regulatory standards, to endorse the proposal, submitted by the Committee appointed for the conduct of the auction, to allocate rights of use for frequencies for BWA to ONITELECOM - Infocomunicações, S.A. (and also to BRAVESENSOR - Unipessoal, Lda.) - [BWA auction - Endorsement of Committee proposal to allocate the respective rights of use of frequencies](#).

By determination of 16 September, 2010, ANACOM decided to issue the qualifying document that embodied the rights to use frequencies assigned to ONITELECOM for the operation of BWA systems - right of use for frequencies (RUF) No 05/2010 ([Issuance of title to Onitelecom for operation of BWA systems](#)).

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<sup>2</sup> Available at [Regulation no. 427/2009, published on 29 October](#).

<sup>3</sup> Article 34, in the present wording of ECL.

On 26 May 2011, ICP-ANACOM authorized ONITELECOM to transfer to F300 RUF No 05/2010, which had been granted to the former for the operation of BWA systems - [Transfer from Onitelecom to F300 of the BWA right of use for frequencies](#). F300 undertook to ensure that frequencies assigned for BWA would be used by 16 September 2012 at the latest.

In this decision, it was deemed that *“the two-year period, as from which the free-transfer rule takes effect, [had] not began to run”*, and as such the authorization applied for could only be granted if ANACOM acknowledged as valid and appropriate the grounds underlying the application. Therefore, taking into account that the transfer *a)* had an exclusively internal impact at the level of Oni, SGPS, *b)* was not likely to harm competition (as AdC had also pointed out), *c)* did not hinder the use of frequencies for publicly available services, which at retail level would be provided by ONITELECOM, and *d)* did not prevent the launch of services supported on BWA, nor did it obstruct the effective and efficient use of assigned frequencies, ICP-ANACOM took the view that there were no legal or factual reasons that prevented or advised against authorizing it.

On 26 July 2012, and concerning a prior request (made on 26 April 2012) to extend the time limit to launch a commercial offer supported on the BWA network (which failed to take place) F300 informed that *“a client had awarded a 3-year contract for the provision of services supported on the RUF’s constituent frequencies. The contracted services are expected to start operating before the deadline of 16 September 2012”*.

#### **4. Steps taken**

Taking into account that the merger of F300 into ONITELECOM would take the form of an overall transfer of assets from one company to the other (merger by acquisition), this would imply, as such, the transfer to ONITELECOM of the RUF held by F300, which Grupo ONI requested, prior to the conclusion of the merger process, in compliance with ECL and the BWA Auction Regulation.

In this context, in compliance with paragraph 5 a) of article 34 of ECL, ICP-ANACOM published in the respective site F300’s intention to transfer to ONITELECOM its right of use for frequencies for operation of broadband wireless access (BWA) systems ([Transfer of right of use of frequencies held by F300](#)).

Pursuant to paragraph 7 of article 34 of ECL, AdC’s opinion was requested, and according to its communication received on 16 January 2014, that Authority concluded that *“the intended transfer takes place due to internal restructuring within Grupo ONI, on the basis of two mergers by acquisition which involve four companies of the group (...) the four above mentioned companies represent a single company for the purpose of paragraph 2 of article 3 of Law No. 19/2012 of 8 May (...), thus the intentions of Grupo ONI, as conveyed to this Authority, are not likely to give rise to competition distortions, specially as regards the creation of significant barriers to effective competition in the national market or in a substantial part thereof”*.

#### **5. Analysis**

Bearing in mind paragraph 5 of article 33 of the BWA Auction Regulation (according to which the RUF under consideration could only be transferred *after a period of two years has elapsed from the date in which the commercial operation of the services started, through the effective use of the frequencies which are assigned to it, except where duly reasoned grounds are provided and are recognized as such by ICP-ANACOM*) as well as data available at ICP-ANACOM, resulting from responses of companies to the 2013 Annual Electronic

Communications Questionnaire as well as from the BWA network radio licensing requested by F300, it may be concluded that the time condition established as rule for the transfer of the RUF is not fulfilled.

As such, it must be verified, as was the case with the previous transfer of this same RUF, whether the exception provided for in the final part of paragraph 5 of article 33 of the BWA Auction Regulation occurs, according to which the transfer may take place within a shorter period of time insofar as *duly reasoned grounds are provided and are recognized as such by ICP-ANACOM*.

Given that the merger by acquisition of F300 into ONITELECOM involves the transfer of a right of use for frequencies between companies of the same economic group, it is considered that, the impact being exclusively internal for Grupo ONI, (i) it is not likely to give rise to competition distortions in the market, due to the accumulation of rights of use, (ii) it does not affect an effective and efficient use of frequencies, (iii) it does not conflict with the allocation of frequencies for publicly available service, (iv) it is without prejudice to the offer of services supported on BWA.

Moreover, it is stressed that AdC took the view that *the intentions of Grupo ONI, as conveyed to this Authority, are not likely to give rise to competition distortions, especially as regards the creation of significant barriers to effective competition in the national market or in a substantial part thereof*.

In this context, ICP-ANACOM does not oppose to the transfer of RUF ICP-ANACOM No 5/2010, nor does the Authority impose any conditions to ensure compliance with paragraph 5 of article 34 of ECL.

For the same reasons, there is nothing to prevent also the transfer of radio license No 514540 (public network for broadband wireless access - BWA).

The implementation of the merger by acquisition and the effects resulting therefrom also require the regularisation of the registration of providers of electronic communications networks and services which ICP-ANACOM must make available and keep updated, under articles 21, 21-A and 120 of ECL.

Lastly, taking into account that elements within the procedure lead to a decision which is favourable to interested parties and which grants the request submitted, it is also deemed that the prior hearing of F300 and ONITELECOM may be waived, under paragraph 2b) of article 103 of the Administrative Procedure Code.

## 7. Decision

Therefore, in the scope of powers provided for in paragraph 1 c) and f) of article 6 of its Statutes, published in annex to Decree-Law No. 309/2001, of 7 December, and under paragraph 5 of article 33 of the BWA Auction regulation, article 21-A and paragraph 6 of article 34 of the Electronic Communications Law, 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 26 l) of its Statutes, **the Management Board of ICP-ANACOM hereby determines** as follows:

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 radio license No 514540 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.
4. To waive the prior hearing of interested parties, under paragraph 2b) of article 103 of the Administrative Procedure Code.

Lisbon, 6 February 2014