

## DECISION

### **Transfer of rights of use for frequencies held by MEO - Serviços de Comunicações e Multimédia, S. A., to PT Comunicações, S. A.**

#### **1. Request**

By notification received on **18 December 2014**, PT Comunicações, S. A. (PTC) and MEO – Serviços de Comunicações e Multimédia, S. A. (MEO) informed ICP - ANACOM that they had registered on 21 November 2014 the **draft terms of the merger** by means of acquisition of MEO into PTC, in the competent Commercial Register, having also requested from the Minister for Economy the authorization required for the purpose.

According to the referred communication, PTC was of the view that the register of the merger would result in the formal termination of MEO, and that by virtue of the law, the whole of its rights and obligations would be transferred to PTC, especially those resulting from licenses for the pursue of activities within the electronic communications sector, certificates allocating rights of use for numbers and codes of the National Numbering Plan and certificates allocating rights of use for frequencies.

In this framework, PTC requested of ICP - ANACOM that this Authority took all appropriate steps to formalise any amendments required to accommodate the notified merger.

As regards the authorization requested from the Minister for Economy, concerning the change in the ownership of MEO's share capital in the scope of the UMTS Tender Regulation (in annex to Administrative Rule No. 532-A/2000, of 31 July), it is noted that ICP - ANACOM, further to a request for an opinion from the Secretary of State for Infrastructures, Transports and Communications, informed, by letter date 18 December 2014, that although there seemed to be no reasons to issue a negative opinion on PTC's request, the position taken was without prejudice, nor could it be otherwise, to the analysis and understanding that this Authority should adopt in the exercise of its own powers granted under the Electronic Communications Law (Law No. 5/2004, of 10 February<sup>1</sup>), namely in the scope of the transfer of rights of use for frequencies and numbers.

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<sup>1</sup> As amended and republished by Law No. 51/2011, of 13 September, and subsequently amended.

## 2. Framework

MEO is the holder of license ICP - ANACOM No. 02/2012, granting rights of use for frequencies for the provision of terrestrial electronic communications services, as well as of radio licenses No. 512291 and No. 513926.

### 2.1 Rights of use for frequencies

The **Electronic Communications Law** lays down in its **article 34** that the transfer of rights of use for frequencies between companies is allowed in accordance with conditions attached to those rights of use and with procedures established in the referred article, where the transfer of such rights is not 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 to use frequencies, as well as the effective transfer or lease 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 under paragraph 6 of the mentioned provision, it is incumbent on ICP - ANACOM to address, within 45 days at the most, **the intention and conditions for the transfer which must be notified in advance**, being entitled to oppose the intended transfer of rights of use, as well as to impose any conditions required for compliance with the provision in the

preceding paragraph. Silence on the part of ICP - ANACOM, after the elapse of the 45-day period, should be interpreted as non-opposition to the transfer of rights of use, however this does not affect the obligation to notify the effective transfer.

In this scope, ICP - ANACOM must request the prior opinion of *Autoridade da Concorrência* (the Competition Authority - AdC), 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.

On the other hand, **license ICP-ANACOM No. 02/2012, granting rights of use for frequencies for the provision of terrestrial electronic communications services** lays down, in the chapter concerning rights of use for frequencies allocated prior to the multiband auction, that **MEO is required to notify ICP - ANACOM in advance of its intention to transfer its rights of use for frequencies as well as conditions for doing so**, under article 34 of the Electronic Communications Law and provisions in force at any given time in the NFAP (clause 12 of the RUF).

In the scope of conditions associated to rights of use for frequencies in the 800 MHz, 1800 MHz and 2.6 GHz bands, **allocated subsequently to the multiband auction**, points 22, 28 and 34 establish that rights of use for frequencies **may only be transferred, in compliance with article 34 of the Electronic Communications Law, following a two-year period from the date of commencement of commercial operation of services**, on the basis of an effective use of frequencies assigned, except for demonstrated good cause, acknowledged as such by ICP - ANACOM.

For this purpose, MEO is required to notify ICP - ANACOM of its intention to transfer the respective rights of use for frequencies, as well as the conditions to do so, under article 34 of the Electronic Communications Law and provisions in force at any given time in the NFAP.

## **2.2. Radio licenses**

It follows from the **radio licensing system**<sup>2</sup> that network and station licenses are transferable, **the respective holders being required to notify ICP - ANACOM in advance of their intention to transfer them** and of applicable conditions.

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<sup>2</sup> *Vide* article 14 of Decree-Law No. 151-A/2000, of 20 July, as amended and republished by Decree-Law No. 264/2009, of 28 September, and later amended by Law No. 20/2012, of 14 May.

In this context also ICP - ANACOM must rule, within 45 days at the most, 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 and, specifically, for the effective and efficient use of frequencies and to prevent distortion of competition.

The body to which licenses are transferred assumes all associated rights and obligations, the transfer of a network licence implying the transfer of all licences of the stations which comprise the network, if any.

**Systematising** the framework set out above, it is incumbent upon ICP - ANACOM, when faced with a merger operation, such as the one here under consideration, which involves the transfer of rights of use for frequencies and of radio licenses, to verify whether it does not call into question the regulating principles of use of those spectrum resources or user rights, imposing, where appropriate, the conditions that enable such rights to continue to be used within the applicable legal framework.

### **3. Steps taken**

Notwithstanding the fact that, as PTC refers, under the *Código das Sociedades Comerciais* (the Portuguese Companies Act), the rights and obligations of the acquired company (MEO) are transferred under exactly the same terms to the acquiring company (PTC) with the final registration of the merger in the commercial register, it is equally true that the legislator did not waive nor did it provide for derogation from legal rules the opposability or full effectiveness of which is dependent on certain formalities, as regards certain transfer acts.

This position taken by ICP - ANACOM is public and PTC was fully aware of it, as it was specifically established in the scope of the procedure for transfer of rights of use for numbers resulting from the merger by acquisition of PT Prime into PTC, the final decision<sup>3</sup> of which stressed as follows:

*«It is also clarified that, as referred above, PT PRIME does not hold any right of use for frequencies. If it did, the respective transfer would be subject to the procedure laid down in article 34 of ECL, namely the requirement for holders of rights of use for frequencies to previously communicate their intention to this Authority. This means, in this specific case, that PT PRIME would be subject to comply with the obligation to communicate its*

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<sup>3</sup> Available at [Transfer of rights of use of numbering resources to PT Comunicações](#)

*intention to ICP - ANACOM before the merger operation took place, given that such operation would involve the transfer of its rights of use.*

*Analysing this specific request, it is concluded that the merger by acquisition that involved the overall transfer of PT PRIME's assets to PTC, and in the scope of which obligations that fell on PT PRIME were fully transferred to the acquiring company - PTC -, entails, as such, the transfer of rights of use for numbers, which must be assessed by this Authority under article 38 of ECL.»*

Furthermore, as highlighted in the prior hearing report concerning this decision<sup>4</sup>, the transfer of assets in the scope of a process of merger by acquisition is not merely a question of the entry in the register, although this step is endowed with constitutive effectiveness, given that it involves a process of negotiation and approval promoted by interested parties, that in the electronic communications sector may be the holders of rights of use for frequencies, of rights of use for numbers and of radio licenses, as is the case of MEO.

In this context, although PTC and MEO failed to specifically mention the applicable legal framework and to explicitly present the required request for authorization, ICP - ANACOM took the view that the communication submitted should be integrated and analysed under the provisions laid down in the Electronic Communications Law and of Decree-Law No. 151-A/2000, of 20 July, having thus been launched the appropriate procedure for the exercise of its powers in these matters, in the light of the deadlines provided for under the law - a position which was conveyed to PTC and MEO **by fax dated 23 December 2014**.

As such, as regards RUF ICP - ANACOM No. 02/2012, the procedure laid down was followed, that is:

- Under paragraph 5 a) of the article 34 of the Electronic Communications Law, MEO's intention to transfer to PTC its rights to use frequencies for the provision of terrestrial electronic communications services was published at this Authority's website [at [MEO requests transfer of rights of use frequencies](#)]; and
- Pursuant to article 34, paragraph 7, of ECL, ICP - ANACOM sought AdC's opinion.

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<sup>4</sup> *Vide* in this regards the prior hearing report on the transfer to PT Comunicações of rights of use for numbers held by PT Prime, available at "[Relatório da audiência prévia](#)"

## **5. Subsequent facts**

Although companies were duly informed of the framework applicable in accordance with the terms set out above, **on 2 January 2015**, PT Portugal, SGPS, S.A., informed this Authority that, on 29 December 2014, it had registered the merger by acquisition of MEO – Serviços de Comunicações e Multimédia, S. A., into PT Comunicações, S. A. (Legal Person Identification No. 504 615 947), which adopted as from that date the name MEO – Serviços de Comunicações e Multimédia, S.A., as well as new headquarters, located at Av. Fontes Pereira de Melo, No. 40, 1069-300 Lisbon.

This means that MEO failed to await ICP - ANACOM's opinion to be provided within the legal period available to the Authority to do so.

Later, on **9 January 2015**, AdC's opinion was received, having that Authority concluded that the intended transfer took place in the scope of an internal restructuring procedure within the PT Group, developed on the basis of the merger by acquisition of MEO into PTC, these companies being deemed to be a single company for the purpose of paragraph 2 of article 3 of Law No. 19/2012, of 8 May. AdC thus took the view that the claim of the PT Group is not likely to give rise to distortions of competition, specially as regards the creation of significant barriers to effective competition in the national market or in a substantial part thereof.

## **6. Analysis**

Although the behaviour described in the preceding point does not constitute an offence, it is nonetheless objectionable, given that, under the applicable legal system, explicitly stated by this Authority by fax submitted to PTC and MEO on 23 December 2014, these companies knew (and could not be unaware) of competences to be exercised by this Authority before the transfer of rights of use for frequencies and of radio licenses took effect, ICP - ANACOM being ultimately entitled to oppose the intended transfer, for duly justified reasons, or to impose the conditions deemed to be necessary (article 34, paragraph 6, of the Electronic Communications Law and article 14, paragraph 6, of Decree-Law No. 151-A/2000, of 20 July), as well as to take the steps involved in the transfer of such rights, namely to promote the hearing of the Competition Authority (article 34, paragraph 7, of ECL).

As such, bearing in mind, as referred earlier, that **license ICP-ANACOM No. 02/2012, granting rights of use for frequencies for the provision of terrestrial electronic communications services** establishes:

- As regards rights of use for frequencies allocated before the multiband auction, that MEO is required to notify ICP - ANACOM in advance of its intention to transfer its rights of use for frequencies, as well as of conditions for doing so, under article 34 of the Electronic Communications Law and provisions in force at any given time in the NFAP (clause 12 of the RUF).
- As regards rights of use for frequencies in the 800 MHz, 1800 MHz and 2.6 GHz bands, allocated subsequently to the multiband auction, such rights may only be transferred, in compliance with article 34 of the Electronic Communications Law, following a two-year period from the date of commencement of commercial operation of services, on the basis of an effective use of frequencies assigned, except for demonstrated good cause, acknowledged as such by ICP - ANACOM. For this purpose MEO is required to notify ICP - ANACOM of its intention to transfer its rights of use for frequencies, as well as the conditions to do so, under article 34 of the Electronic Communications Law and provisions in force at any given time in the NFAP.

It was incumbent on ICP - ANACOM to check whether the time condition established as a rule for the transfer of rights of use for frequencies in the 800 MHz, 1800 MHz and 2.6 GHz bands, allocated subsequently to the multiband auction, had been met.

According to data available at this Authority, MEO (at the time called TMN), notified on 15 March 2012 that it had commenced operating 4 G services using the 2.6 GHz frequency band on 13 March 2012.

On 27 April 2013, this same company informed ICP - ANACOM that it intended to start operating services in the 800 MHz on 30 April 2012.

As far as the 1800 MHz band is concerned, it must be recalled that further to the multiband auction and under article 31 of the respective Regulation (Regulation No. 560-A/2011, of 19 October), a specific allocation procedure was launched, which involved the redistribution of spectrum in this band through an agreement reached among the three mobile network operators, which was approved by determination of ICP - ANACOM of 9 March 2012. As such, under the agreed and approved terms, mobile operators made the redistribution of frequencies

effective, having this Authority issued MEO (at the time still called TMN) the respective radio license on 1 August 2012, date as from which this company started providing services in the spectrum assigned in the 1800 MHz band.

This clearly shows that MEO was entitled to request the transfer of these rights of use for frequencies, having complied with the time condition set out in license ICP - ANACOM No. 02/2012.

Notwithstanding, and given that on 29 December 2012, MEO's merger by acquisition into PTC was registered - a fact that, under article 112 of the *Código das Sociedades Comerciais*, has constitutive effect, whereupon the acquired company (MEO) is extinguished and the whole of its rights and obligations are transferred to the acquiring company (PTC, now known as MEO – Serviços de Comunicações e Multimédia, S.A.) - it is important to check whether conditions must be imposed in the scope of this operation, under the applicable legal regime.

As such, taking into account that the merger by acquisition of MEO into PTC (i) involved the transfer of rights of use for frequencies between companies of the same economic group, (ii) has an exclusively internal impact on the PT Group, (iii) is not likely to provoke competition distortions on the market, namely due to the accumulation of rights of use, having AdC concluded that the claim of the PT Group is not likely to give rise to distortions of competition, specially as regards the creation of significant barriers to effective competition in the national market or in a substantial part thereof, and (iv) is without prejudice to the effective and efficient use of frequencies;

**ICP - ANACOM takes the view that the imposition of conditions to ensure compliance with paragraph 5 of article 34 of the Electronic Communications Law and with paragraph 6 of Decree-Law No. 151-A/2000, of 20 July, is not required.** There is only need for amendment of license ICP-ANACOM No. 02/2012, granting rights of use for frequencies for the provision of terrestrial electronic communications services, so as to include the legal person identification number and new address of the acquiring company's headquarters.

Lastly, and bearing in mind that elements in the procedure lead to a decision in favour of interested parties, and which meets their request, it is also deemed that the prior hearing of the at present MEO may be waived, under paragraph 2 b) of article 103 of the Administrative Procedure Code.



## 7. Decision

Therefore, in the scope of powers provided for in points c) and f) of article 6 of its Statutes, published in annex to Decree-Law No. 309/2001, of 7 December, and under article 21-A and paragraph 6 of article 34 of the Electronic Communications Law, paragraph 6 of article 14 of Decree-Law No. 151-A/2000, of 20 July, and point l) of article 26 of its Statutes, the **Management Board of ICP - ANACOM** hereby determines as follows:

1. Not to impose any conditions in the scope of the transfer of rights of use for frequencies for the provision of terrestrial electronic communications services, established in license ICP-ANACOM No. 02/2012, from the extinguished MEO - Serviços de Comunicações e Multimédia, S. A., to PT Comunicações, S. A., which in the meantime adopted the name MEO - Serviços de Comunicações e Multimédia, S. A., and new headquarters, located at Av. Fontes Pereira de Melo, No. 40, 1069-300 Lisbon.
2. Not to impose any conditions in the scope of the transfer of radio licenses No. 512291 and No. 513926 from the extinguished MEO - Serviços de Comunicações e Multimédia, S. A., to PT Comunicações, S. A., know called MEO - Serviços de Comunicações e Multimédia, S. A.
3. To amend license ICP-ANACOM No. 02/2012, granting rights of use for frequencies for the provision of terrestrial electronic communications services, according to endorsement No. 3 in annex hereto, which is deemed to be an integral part hereof.
4. To waive the prior hearing of interested parties, under paragraph 2 b) of article 103 of the Administrative Procedure Code.

Lisbon, 19 February 2015.

**ANNEX**

**License ICP-ANACOM No. 02/2012**

**GRANTING RIGHTS OF USE FOR FREQUENCIES**

**FOR THE PROVISION OF TERRESTRIAL ELECTRONIC COMMUNICATIONS SERVICES**

**ENDORSEMENT No. 3**

1. The body of clause «1. *Subject-matter*» of this license is hereby amended to read as follows:

*«This license defines the conditions that apply to rights of use for frequencies allocated to MEO – Serviços de Comunicações e Multimédia, S. A., legal person No. 504 615 947, with headquarters located at Avenida Fontes Pereira de Melo, No. 40, 1069-300 Lisbon, (MEO), for the provision of publicly available terrestrial electronic communications services, without prejudice to compliance with obligations identified in the Radio Regulation issued by the International Telecommunication Union (ITU) and in the National Frequency Allocation Plan (NFAP), namely: (...)».*

Lisbon, 19 February 2015.