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Determination of 29.5.2002

COMPLEMENTARY DETERMINATION BY ANACOM'S BOARD OF DIRECTORS ON THE AGREEMENT BETWEEN TMN AND ONIWAY

I. Background

1. On March 6, 2002 ANACOM's Board of Directors issued the following determination:

- 1º To refuse OniWay's application for assignment of DCS1800 frequencies.**
- 2º To determine that the *roaming* agreement signed between OniWay and TMN, shall include the use – even if on an experimental basis – of 3rd generation network components and terminal equipment, within the framework of the conditions specified in the UMTS tender.**

OniWay was duly notified of this determination on March 26, and the determination was also transmitted to Vodafone and Optimus, on April 9, in response to their respective letters requesting clarifications from ANACOM regarding the regulatory framework applicable to the agreement signed between OniWay and TMN.

2. On April 8, 2002, OniWay communicated to ANACOM that, despite the said determination, it was still unable to conclude interconnection agreements with Vodafone and Optimus, because they claimed that the regulator had not clarified the legality of such interconnection requests.

Given this situation, OniWay requested ANACOM's intervention, under the terms of no. 1 of article 16 of Decree-Law no. 415/98, of 31.12, in order to *"oblige Vodafone and Optimus to conclude interconnection agreements and immediately implement them, specifically through the establishment of*

existing interconnection facilities and the opening of numbering ranges reserved for OniWay's customers and services within the respective networks, in order to correctly route calls and carry out number portability tests".

3. On May 15, 2002 ANACOM organised a meeting with the four UMTS operators in order to assess questions that these operators considered to persist.
4. In the wake of this meeting, in its letter of May 21, 2002, Optimus posed questions to ANACOM that it in its opinion still required clarification.

II. Analysis and decision

In view of the doubts raised by the other mobile operators, and as a complement to the determination of March 6, 2002, ANACOM hereby issues the following additional clarification:

In regards to the alleged contradiction between arguments invoked for the refusal of assignment of frequencies and the positive effects identified by ANACOM in the signing of an access agreement, it is clarified that the understanding expressed in the determination of March 6, is based on the assumption that when presented with a frequency assignment request, the regulator is responsible for issuing a judgement in terms of both the request's legal framework and its effect on the mobile market; and otherwise, when presented with an access agreement that is voluntarily and freely signed between the parties, ANACOM is solely responsible for issuing a statement on the agreement's conformity with the law and does not have to decide upon a request formulated to it.

These two situations are clearly distinct. In the former case, the regulator has exclusive powers to make a decision. In the latter case, the regulator must assess a freely negotiated agreement, but is not required to directly intervene unless the object of the contract is impossible or prohibited within the law. In effect, ANACOM neither imposed nor encouraged signature of the said agreement.

On the basis of this assumption, the main objective of the understanding formulated and expressed by ANACOM in regard to this agreement is to describe OniWay's specific situation, within the context of an overall assessment of the set of problems posed by UMTS, in particular those related to the delay in the introduction of UMTS and the development of advanced third generation services.

In the first case, the issue in question is that installation of a new GSM/DCS network, through the assignment of frequencies for a 15-year period, is likely to discourage the development of the IMT2000/UMTS network, thus contravening all European guidelines in this field.

In the second case, the implicit public interest advantages must be identified, in view of a freely signed agreement between two parties, where one of the parties is a new entrant to the mobile market, which has suffered clear negative effects from the delayed introduction of UMTS.

As already stated by ANACOM, the introduction of innovative 2.5 G services on competitive terms by OniWay, will contribute to the development of advanced services that are often highly similar to 3G services, from the user's perspective, even though they are provided using different access networks. This will be achieved, directly through the provision of services by OniWay, and indirectly by the provision of services by the other operators and a general climate of greater competition.

There will also be a global contribution in terms of increased preparation of the market for the entry of UMTS, from the viewpoint of operators, customers and equipment suppliers and thus with a positive impact on the sector's overall development.

In this sense, GPRS services are a forerunner to UMTS services, as emphasised in the Commission's Communication on *"Introduction of third generation mobile communications in the European Union: state of play and the way forward"*.

The regulator has thus decided to attempt to stimulate this market through the development of 2.5 G services, which will give all intervening parties the opportunity to acquire experience with new wireless data applications. Such development will also prove to be a crucial step for the satisfactory implantation of 3G services. As such, the provision of GPRS services by OniWay eliminates a possible entry barrier to the UMTS market that it would otherwise confront.

It is thus recognised that despite the differences between services provided on the basis of distinct technologies, the overall experience acquired in the provision of a specific group of services (contact with customers and their needs, relationships with suppliers, industry, similarities in data services and *billing* configurations etc), may be useful in the preparation to launch the next generation of services.

In this context, ANACOM's Board of Directors issues the following clarification:

1º UMTS license-holders are permitted to sign agreements for access to the networks of Land Mobile Service operators in order to provide GPRS services;

2º Under these terms, OniWay:

- a) May provide GPRS services and use the 95 numbering range already assigned by ANACOM for this purpose;**
- b) The contractual terms agreed with TMN must conform with the terms of the present determination and that of March 6, as well as the terms of other applicable legislation, specifically, the Regulation of Operation of Public Telecommunications Networks, approved by Decree-Law no. 290-A/99, of July 30;**
- c) Has the right to request interconnection under the terms defined in Decree-Law no. 415/98, of December 31.**
- d) Must include third generation network components and terminal equipment, even if on an experimental basis, from the start of such activities.**

Lisbon, May 29, 2002

Board of Directors