

DECISION

Transfer of the right of use of frequencies held by Radio NFM Oeste, Lda. to MATCH FM, Unipessoal Lda.

1. The application

In response to the application for termination of the local programme service known as “Radio NFM Oeste”, broadcasting at 94.8 MHz, in the municipality of Bombarral, and of the corresponding license for pursuit of the radio broadcasting activity, presented by Radio NFM Oeste, Lda. (hereinafter referred to as Radio NFM), *Entidade Reguladora para a Comunicação Social* (the Regulatory Authority for the Media - ERC), by means of a letter received on 27 April 2016, submitted the respective file to the examination of ANACOM, so that this Authority, under the combined terms of paragraph 9 of article 4 and paragraph 7 of article 22 of Law No. 54/2010, of 24 December (the Radio Law), rules on the transfer of the right of use for frequencies allocated to that body for the provision of a publicly available radio broadcasting service, of a local scope, in the municipality of Bombarral.

According to the corresponding investigation file, Radio NFM (formerly Publiárea - Publicações e Comunicação, Lda.) requested ERC’s authorization to transfer its local programme service to MATCH FM, Unipessoal Lda., on the following grounds:

- *«...for the safeguard of the licensed project, the transfer of the programme service and respective license is not only useful but indeed essential»;*
- *«... like so many broadcasting operators in this country, has felt the effects of the recent crisis which is faced by most of today’s economies, having been strongly affected above all in its ability to raise advertising income»;*
- *«... the decrease of such revenue has unbalanced the economical and financial situation of the Applicant, calling its sustainability and continuity into question, given that revenues earned are insufficient to meet costs associated to the exercise of the activity»;*
- *«On the other hand, the partnership which the Applicant has lately developed with Radio NFM (specifically with Superadio, Unipessoal Lda., a company of the NFM Group) must be stressed, having this partnership enabled objectives set from the outset by the*

Applicant to be met, as regards the production and transmission of broadcasting programmes.»;

- *«It therefore seems essential to the Applicant that the path that has been followed is safeguarded, by maintaining and extending the work carried out by the NFM Group partnership.»;*
- *«The safeguard of the licensed project assigned to the Applicant is guaranteed, in the latter's opinion, through the transfer of its local programme service and respective license to MATCH FM, UNIPESSOAL LDA., a Radio NFM company which is also undergoing a process of change and development of its broadcasting stations.»*

The application for transfer of the programme service is part of a cumulative set of applications submitted to ERC (as the documentation sent by ERC best indicates) on authorization for amendment of the licensed project, in particular the change of the classification of programme contents, the change of programme service name, and the association of programme services, namely the programme service provided by the operator Superadio, Unipessoal Lda..

2. Framework

2.1. The Radio Law

Pursuant to paragraph 9 of article 4 of the Radio Law, the transfer of local programme services and respective licenses or authorizations is permitted, according to the procedures laid down for the alteration of operator control, where it can be proved that this promotes the safeguard of the licensed or authorized project and insofar as all the property, rights and obligations, including those which are labour-related, exclusively concerned with the programme service under consideration, are transferred.

In this case, and without prejudice to powers granted to ANACOM according to the regime applicable to electronic communications networks and services and to radiocommunications, the transfer is dependent on an authorization granted by ERC (cfr. article 4, paragraph 10 of the Radio Law).

Paragraph 7 of article 22 of the Radio Law lays down that files on license transfers must be examined by ERC, which submits them to ANACOM for a decision on the transfer of the respective rights of use for frequencies, according to the regime applicable to electronic communications networks and services and to radiocommunications.

The Radio Law further specifies, in its article 4, the restrictions on the ownership of radio programme services, namely of a local scope:

- Natural or legal persons may not hold, either directly or indirectly, namely through a relationship of control, a number of licenses for radio programme services of a local scope exceeding 10% of all licenses granted on national territory;
- Natural or legal persons of private or cooperative sectors may not hold, either directly or indirectly, namely through a relationship of control, a number of frequency modulated radio programme services of a national scope equal to or exceeding 50% of programme services qualified for the same coverage area and for the same frequency band;
- Natural or legal persons may not hold in the same district, metropolitan area, municipality, or, in the autonomous regions, in the same island, either directly or indirectly, namely through a relationship of control, a number of licenses for radio programme service of a local scope exceeding 50% of programme services of the same scope qualified for each of the referred territorial areas.

2.2. The Electronic Communications Law (ECL)¹

ECL lays down in its article 34 that the transfer or lease of rights of use for frequencies between undertakings is authorized, in accordance with conditions attached to those rights of use and with procedures established in that article, where the transfer or lease of such rights has not been explicitly prohibited by the National Regulatory Authority (NRA - ANACOM) and published in the National Frequency Allocation Plan (NFAP).

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

¹ Law No. 5/2004, of 10 February, as amended by Law No. 51/2011, of 13 September.

- a) The intention to transfer or to lease rights to use frequencies, as well as the effective transfer or lease thereof, is made public;
- b) The transfer or lease does not distort competition, namely due to the accumulation of rights of use;
- c) Frequencies are efficiently and effectively used;
- d) The use for which frequencies are intended 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 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. 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.

In this scope, 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.

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

ANACOM's silence, after the elapse of the 45-day period referred to in paragraph 6 of article 34, is to be interpreted as a non-opposition to the transfer or lease of the rights of use, however the effective transfer or lease must still be notified.

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 (legal regime applicable to the licensing of radiocommunications networks and stations, 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 inherent 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, 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. Assessment

Having analysed the file submitted by ERC, it may be concluded that until 02 February 2011, NFM was known as Publiárea - Publicações e Comunicação, Lda. - as in fact the company itself declares in the application submitted to ERC - having on the referred date adopted the name Radio NFM Oeste, Lda., as best set out in Registration 11 of the Electronic Certificate included in the submitted file.

In line with the above, it was found that ANACOM issued on 26 March 2009 the title of the right of use for frequencies (RUF) ICP - ANACOM No. 93/2009, assigned to Publiarea - Publicações e Comunicação Lda., intended for the provision of a publicly available radio broadcasting programme service, of a local scope, for the municipality of Bombarral, in the 87.5 -108 MHz band, and it may be concluded that NFM is currently the holder of the referred RUF, which is valid up to 6 March 2024.

It was found also that Radio NFM Oeste, Lda. is specified in the National Frequency Allocation Plan (NFAP) as holder of RUF ICP - ANACOM No. 93/2009, thus only the title concerning the referred programme service must be rectified to bear the current name of the company.

NFM holds radio station license No. 20257 of the radio broadcasting service, valid up to 06 March 2019, according to which the station broadcasts at 94.8 MHz.

NFM holds also an Authorization for operation of the Radio Data System (RDS) with the programme channel name (PS): "NFM".

As regards the transferee, it was found that MATCH FM, Unipessoal, Lda., does not hold any license for the pursue of the FM radio broadcasting activity. It should be added that MATCH FM, Unipessoal, Lda., is also the transferee in the application for the transfer of the right of use for frequencies held by Radio Tempos Livres, Lda..

The application under consideration was analysed bearing in mind the requirements which, according to paragraph 5 of article 34 of ECL, must be fulfilled so that ANACOM may assess the planned transfer.

As such, and by letter of 20 May 2016, AdC was requested to issue an opinion for the purpose of paragraph 7 of article 34 of ECL.

Furthermore, in compliance with article 34, paragraph 5 a) of ECL, ANACOM disclosed at its website (<http://www.anacom.pt/render.jsp?contentId=1386124>), on 24 May 2016, that it had received from ERC an application to decide on the intention expressed by Radio NFM Oeste, Lda., to transfer to MATCH FM, Unipessoal, Lda., the right of use for frequencies (RUF) that it had been allocated for the pursue of the radio broadcasting activity.

In its response, received on 06 June 2016, AdC concludes as follows:

«Therefore, in the light of the referred elements, this Authority concludes that the intention of Radio NFM Oeste is not likely to give rise to competition distortions, not leading to a significant impediment of effective competition in the national market or in a substantial part of it».

With regard to other requirements, on whose fulfilment the granting of the authorization for the transfer of the right of use for frequencies depends, set out in paragraph 5 of article 34 of the ECL, as well as in article 14 of Decree-Law No. 151-A/2000, ANACOM takes the view that they have been duly safeguarded, in the light of available information.

Specifically on the safeguard of restrictions provided for in the Radio Law (requirement laid down in paragraph 5 e) of article 34 of ECL), in articulation with article 4 of that same Law, and given that ANACOM lacks information on capital shares between the several bodies qualified for the pursuit of the radio broadcasting activity, it is deemed that it is incumbent on ERC to assess, at all times, whether restrictions laid down on the ownership of radio programme service operators are not infringed.

4. Decision

Therefore, in the scope of the power provided for in paragraph 1 e) of article 8 of ANACOM's Statutes, approved by Decree-Law No. 39/2015, of 16 March, and under the combined terms of paragraph 6 of article 34 of Law No. 5/2004, of 10 February, as amended by Law No. 51/2011, of 13 September, paragraph 6 of 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 paragraph 7 of article 22 of Law No. 54/2010, of 24 December, **ANACOM's Management Board hereby determines:**

1. Not to oppose the transfer to MATCH FM, Unipessoal, Lda., of the right of use of frequencies in the 87.5-108 MHz frequency band allocated to Radio NFM Oeste, Lda., for the provision of a radio programme service, of a local scope, for the municipality of Bombarral, under paragraph 6 of article 34 of ECL.
2. Not to oppose the transfer to MATCH FM, Unipessoal, Lda., of the radio station license No. 20257 for the radio broadcasting service, valid up to 06 March 2019, according to which the station broadcasts at 94.8 MHz, which is held by Radio NFM Oeste, Lda..
3. Not to oppose the transfer to MATCH FM, Unipessoal, Lda., of the Authorization for operation of the Radio Data System (RDS) with the programme channel name (PS): "NFM".
4. To make this decision subject to the condition that the *Entidade Reguladora para a Comunicação Social* (ERC) grants the request for transfer of the programme service known as "Radio NFM Oeste" and of the respective license for pursuit of the radio broadcasting activity held by Radio NFM Oeste, Lda.

5. To notify ERC of decisions in the preceding paragraphs, requesting that Authority to inform ANACOM on the contents of the transfer decision, so that this Authority, where appropriate, may accordingly issue to MATCH FM, Unipessoal, Lda. the certificate laying down the respective right of use for frequencies.

Lisbon, 30 June 2016.