

DECISION

RE: APPLICATION FOR THE ASSIGNMENT OF DCS 1800 FREQUENCIES TO ONI WAY AND AN AGREEMENT BETWEEN TMN AND ONI WAY

I. Background

1. In June 2001, ONI Way – Infocomunicações, SA (hereinafter referred to as ONI Way) made the following applications to the National Communications Authority (ANACOM), based on the awareness that it was unable to launch the UMTS service prior to the third quarter of 2002:

- (i) For access to a number of DCS1800 frequencies, even if only on a provisional basis, to enable it to have its own network for the provision of services using GSM/GPRS technology, in areas of greater traffic;
- (ii) The facility to use the networks of its three competitors to provide the said services, on a “ national roaming” basis, as envisaged in tender documentation for the UMTS tender.

2. Having considered the two applications ANACOM gave notice of the following decision to ONI Way, in August:

2.1 Firstly the frequency attribution application: whereas;

- a) ONI Way applies for the attribution of frequencies, which are destined for the provision of services for which it is not licensed;
- b) Frequency planning and allocation is governed by criteria of radio spectrum availability, assurance of effective

competition in the markets in question and effective and efficient frequency use;

- c) In the light of the above-mentioned criteria, the provision of frequencies for the creation of a fourth GSM/DCS network is not envisaged.

The Board of Directors approved a draft decision rejecting the application for the assignment of DCS1800 frequencies and gave ONI Way 10 days in which to respond thereto.

2.2 With regard to roaming:

- a) ONI Way cannot take advantage of the roaming conditions envisaged in the UMTS tender documentation, i.e. it is not possible to impose the roaming in question, namely within the ambit of the conditions already negotiated with other operators, unless the UMTS network, which is the subject matter of the licence, has been implemented;
- b) It was accordingly decided to submit a discussion document, containing an analysis of the concept and necessary conditions for the carrying on of the activity of a service provider, when it does not have its own frequencies, as a way to limit consent to the entry of new service providers in this market, to the ANACOM Consultative Committee and the four mobile operators.

3. With regard to the draft decision refusing the grant of CDS-1800 frequencies: ONI Way responded in writing within the time limit established, claiming:

- A change of circumstances as reflected in the overall delay in the provision of IMT2000/UMTS services, leading to the need to further development of GPRS for which intermediate technologies have been developed;

- That the type of services supported by GSM/DCS with GPRS functions are essentially the same as those offered by the UMTS system for which ONI Way was licensed;
- That there is a need for the regulatory authority to intervene in order to re-establish the company's capacity to compete with the other three operators, thus recognising that the UMTS delay is particularly penalising for the new entrant in the mobile market;
- That it is impossible to attain ONI Way's objectives of access to the radio network of the current GSM operators by commercial negotiation, given the difficulty involved in attaining price levels, which render the provision of services viable;
- The existing precedents involving the grant of access to new frequencies by operators, which are already licensed.

4. With regard to the question of mobile service providers, which do not have their own frequencies: the Consultative Committee considered the document submitted by ANACOM, in September 2001 and it was agreed that a working party be established to consider market and competition questions related to this question. As at the date hereof the Consultative Committee has neither submitted a further contribution nor has it requested ANACOM to participate in any meeting of the said working party.

5. In November 2001, ONI Way, gave notice to ANACOM of a “National Roaming Agreement between ONI Way and TMN” dated the 7th of November, together with a request for confidentiality, pursuant to paragraph f) of art. 13 of its licence no. ICP-03/UMTS, which provides that “ONI Way shall be subject to a duty to the ICP to give notice of the terms of national roaming agreements made, within 15 days of the making thereof”. The said agreement was a preliminary agreement,

which provided for the signing of a definitive agreement within no more than 60 days.

6. At the end of November 2001, OPTIMUS - Telecomunicações SA (hereinafter referred to as OPTIMUS), claiming that it had become aware of the said agreement via the press, although it was unaware of the provisions thereof, requested ANACOM to clarify some doubts to which the said agreement gave rise, i.e. with regard to the extent of the impact thereof on competition in the mobile market.

At the beginning of March, ANACOM received a similar letter from Vodafone Telecel, Comunicações Pessoais SA, (hereinafter referred to as Vodafone), in which it sought clarifications with regard to the legal and regulatory framework to which ONI Way was subject as an interconnection applicant, and expressed its concern with regard to the preservation of competitive conditions in the market.

7. At the beginning of February this year, TMN – Telecomunicações Móveis Nacionais, SA (hereinafter referred to as TMN) submitted to “National roaming agreement between TMN and ONI Way” dated the 21st of January, to ANACOM, and also requested that the matter be dealt with confidentially.

Also in February, ONI Way expressed its concern to ANACOM with regard to the making of interconnection agreements and submitted a letter from OPTIMUS with regard to the motivation and timing of the interconnection negotiations between the two companies.

II. Analysis and decision

ANACOM considered as a preliminary point that the questions associated with the launch of UMTS should not be dealt with separately.

ANACOM accordingly decided in October 2001:

- Having consulted the manufacturers and the four licensed operators, to propose to the Minister of Social Infrastructure (MES), that the time limits for the commencement of the activity specified in the licenses be extended until no later than the 31st of December 2002, which the Minister duly ordered in Order no. 111/MES/2001 de 24.10;
- To re-evaluate the market situation in the light of developments, during the 3rd quarter of 2002;
- To propose to the MES that a nil fee be levied for the use of the radio spectrum used for UMTS services in 2002, for operators, which commence their activity during that year, which was duly ordered by the said MES Order dated the 24th of October;
- To consider that the network components identified in the said decision can be shared, within the ambit of the existing licences.

The MES accordingly decided, in Statutory Instrument no. 1428-A/2001, of the 17th of December, on the basis of an ANACOM proposal, to extend the time limit for compliance with the shareholding requirements established in the UMTS Tender Regulations.

Given the notification of the agreement between TMN and ONI Way ANACOM is required to:

1. make a final decision with regard to the application for the assignment of DCS1800 frequencies;
2. give its opinion with regard to the regularity of the agreement.

And whereas:

- a) It is a fundamental assumption of the basis of the UMTS licensing conditions that it is a service with a technology, which differs from GSM technology, and which is targeted at markets other than the GSM markets;
- b) ONI Way is licensed to supply services via 3rd generation systems, so that it is accordingly not possible to consider the assignment of DCS1800 frequencies, in addition to the frequencies specified in its UMTS licence;
- c) There is a need, which is recognised worldwide, for the development of the information society, to develop multimedia services, which are accessible from the land mobile service, which has led to the worldwide co-operation of the entire industry, together with administrations and operators, with a view to the creation of a family of standards – IMT 2000, which include “UMTS”, as contained in ITU recommendation ITU-R M1457;
- d) These standards, which clearly define the possible radio interfaces within the ambit of this service, in order to permit the use thereof in any part of the world, do not include GSM/DCS;
- e) Various frequency bands have been identified via the use of plans adapted to the new technologies developed, in order to permit the development of these systems with a capacity to provide multimedia services and clearly surpass the potential of GSM systems, in terms of both capacity and speed. ONI Way's claim that “the access network is a neutral component in the system architecture” is consequently not true, as it is precisely this component, which, in the opinion of ANACOM, *makes the difference*;
- f) The 2.5 generation services identified by ONI Way as GPRS are not, contrary to the company's claim, technology, which is “subsequent” to GSM/DCS, but is rather a case of the introduction of new functions supported by the same technology;

- g)** At the end of 2001, more channels were released, during the reorganisation of DCS 1800 frequency bands, which could reduce the impact of any claim of spectrum insufficiency;
- h)** The announcement of the frequencies approved by ANACOM of the 7th of February, which identifies the channels suitable for allocation in 2002, includes a reservation of 150 channels for allocation in duly justified cases, in the foreseeable eventuality that the three operators licensed for the land mobile service apply to ANACOM for the attribution of additional spectrum for GSM/DCS1800;
- i)** Furthermore, given the time necessary for the installation of a GSM/DCS network, any authorisation of the use of these frequencies, at the present time, would clearly amount to a disincentive to the development of the IMT2000/UMTS network, which is already delayed one year in relation to the original plans, i.e. it would be contrary to current domestic and EU policy for the promotion of the development of IMT2000/UMTS global networks, as a decisive contribution to the development of the Information Society;
- j)** Referring more specifically to market and competition factors, ANACOM considers that there is no proper basis for the grant of a fourth licence for the DCS1800 network - according to the legislation, these licences are granted for 15 years and may be renewed – as the development of Land Mobile Service markets is nearing maturity;
- k)** The assignment of the frequencies to ONI Way would involve major investment in the construction of a new network, which is unlikely to be profitable in the short term and which could, in this context, encourage delay in the start-up and development of UMTS;
- l)** Accordingly, an access agreement is considered to be an alternative, which will enable the organisation to preserve its continuity and strengthen its future efficiency, thus contributing to the lowering of the barriers to market entry within the ambit of the 3rd

generation service: i) by providing immediate contact with the market; ii) thus permitting the creation of a client base;

- m)** This framework could also favour the development of effective competition of 3rd generation services, by taking advantage the investments already made by ONI Way, thus minimising the impact of the fixed costs, which it will have to bear in the meantime, in the current circumstances (absence of revenue during an unforeseeable period during the launch of the project and as a consequence of an unfavourable economic conjuncture both nationally and internationally). Such an agreement will enable the company to avoid, or at least attenuate, the negative impacts arising from the fact that it is not possible to commence the provision of UMTS services within the time limits initially envisaged, which could extend to the UMTS market;
- n)** Although it is admitted that this approach will make it possible to protect the company's private interests, it is no less true that it will have a positive effect on matters falling within the public interest; i.e. the short-term social consequences in terms of employment and, the implementation of the company's obligations to the State, within the ambit of the development of the Information Society, in the medium and long terms;
- o)** The existence of another mobile operator in the current situation could contribute to increased competition in the market, i.e. because of the pressure, which it could bring to bear to accelerate an overall decline in price levels and the appearance of services with greater added value to users. This is because the introduction of innovative 2.5G services by ONI Way, could compel the current 3 operators to develop 2.5G solutions more rapidly, thus making an overall contribution to an improved market preparation for the commencement of UMTS, i.e. operators, clients and equipment suppliers, with a positive effect on the growth of the sector and the development of the Information Society;

The Board of Directors of ANACOM decides, pursuant to the provision of paragraph c) of no. 1 of article 6 of its Bylaws, approved by Decree-Law no. 309/2001, of the 7th of December, and articles 21 and 22 of Decree-Law no. 381-A/97, of the 30th December:

- 1 To refuse the application for the assignment of DCS1800 frequencies to ONI Way.**
- 2 That the roaming agreement between ONI Way 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.**