

DETERMINATION

Transfer of the right of use of frequencies from RSF – Radiodifusão, Lda to Rádio Renascença, Lda

1. Introduction

The Regulatory Authority for the Media (hereinafter ERC) submitted to ICP-ANACOM on 4 August 2011, for a decision, pursuant to article 4, no. 9 and article 22, no. 27, both of Law no. 54/2010, of 24 December (Radio Law), the request for transfer of the right of use of frequencies granted to RSF – Radiodifusão, Lda for the exercise of the radio broadcasting activity, through the “Rádio NoAr” programme service, to Rádio Renascença, Lda.

Having received the request, it was sent to the Competition Authority on 11 August 2011 for the issue of an opinion as laid down in the current article 34, no. 7 of Law no. 5/2004, of 10 February (ECL), as amended by Law no. 51/2011, of 13 September, with a view to determining if the planned transfer might cause distortions of competition.

On 29 September 2011, the Competition Authority expressed the view that the transfer in question is not likely to create or strengthen a dominant position as a result of which effective competition might be significantly impeded in the national market or a substantial part of that market.

2. Regulatory framework

2.1 The ECL

As previously mentioned, the request of the ERC was received by ICP-ANACOM on 4 August 2011, in other words, prior to the amendments to the ECL introduced by Law no. 51/2011, of 13 September. Accordingly, the procedure initiated and developed by this Authority followed the rules laid out in article 37 of the ECL (as is well known, the rules applicable to the transfer of rights of use of frequencies, as laid out in article 37 of the

ECL, were amended by Law no. 51/2011, and are currently set forth in its article 34).

In the case under analysis, in terms of the applicable regime, the amendment to article 37 by article 34 of Law no. 51/2011 did not introduce any substantial amendments, i.e., the competence and criteria for the decision are materially the same.

In fact, the “novelty” introduced by said Law no. 51/2011 follows on, in essence and with regards to the present case, from the process handling to be observed in this area. More specifically, a new point has been added that calls for the need for ICP-ANACOM to guarantee the publication of the intention to transfer the rights of use, as well as its fulfilment.

And, in this area, it is noted that *«(...) with regards to the law applicable to the procedure itself, the preferable solution seems to be the application of the law prior to the terms and procedural acts practiced during the time it was in effect»¹*.

Since what is essentially at issue are changes of a procedural nature, the doctrine considers that *«(...) according to the system of procedural unity, the process can only be governed by a single law. This is because, in spite of unfolding into a series of various acts, the process forms a unit. Therefore, the process in progress shall be governed by the old law, under penalty of retroactivity of the new law and prejudice to acts practiced prior to the time it was in effect»* (emphasis added).

It is also important to point out that if the request presented by RSF was analysed in the light of the current article 34 of the ECL, the decision to be taken by the ICP-ANACOM would not be materially different.

As such, the request submitted must be assessed and decided in light of what was laid out in article 37 of the ECL (and not what is laid out in the current article 34 as amended by said Law no. 51/2011).

¹ Opinion no. 38/2002 of the Consultative Council of the Attorney General's Office.

The ECL stipulates in article 37 that the transfer of rights of use of frequencies is permitted, where identified as such in the National Frequency Allocation Plan.

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

- a) The transfer does not cause a distortion of competition;
- b) The frequencies are used in an effective and efficient manner;
- c) The intended use of frequencies is respected where such use has been harmonised through the application of Decision no. 676/2002/EC (Radio Spectrum Decision) or other Community measures;
- d) The restrictions set forth in the law in respect of radio and television broadcasting are safeguarded.

Pursuant to paragraph 4 of the mentioned provision, ICP - ANACOM must take a decision within 45 days at the most as regards the contents of the request for authorisation, and it is entitled to oppose the intended transfer of rights of use and well as to impose such conditions as may be necessary to comply with the above-mentioned requirements, on the basis of a duly grounded decision.

2.2 The Radio Law

Pursuant to the Radio Law (article 22, no. 7), the processes relative to the transfer of licences as provided for in no. 9 of article 4 of the same Law are evaluated by the ERC, which submits them to the ICP-ANACOM for a decision regarding the transfer of the respective rights of use of frequencies.

The said Law establishes, in article 4, restrictions relative to the ownership of radio programme services on a local level, namely:

- Natural or legal persons shall not hold, either directly or indirectly, namely through a relationship of control, a number of licenses for radio

programme services on a local level exceeding 10% of all licenses granted on national territory;

- Natural or legal persons of private or cooperative sectors shall not hold, either directly or indirectly, namely through a relationship of control, a number of frequency modulated radio programme services on a national level equal to or exceeding 50% of programme services qualified for the same coverage area and for the same frequency band;
- Natural or legal persons shall 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 on a local level exceeding 50% of programme services of the same scope qualified for each of the referred territorial areas.

In this area, the ICP-ANACOM is required to ensure that, within the strict scope of the transfer of rights of use of frequencies, the restrictions prescribed by law in relation to radio broadcasting are duly safeguarded.

3. Analysis

The request was analysed bearing in mind the requirements that, subject to the provisions of article 37 of the ECL, must be met for ICP-ANACOM to be able to authorise the requested transfer.

For the purposes of the specific provisions of article 37, no. 3, point a) of the ECL, the Competition Authority stated its position which may be summarised as follows:

«(...) the intended transfer of the rights of use of frequencies relative to the radio broadcasting activity of “Rádio NoAr” to Rádio Renascença does not seem likely to create or strengthen a dominant position as a result of which effective competition might be significantly impeded in the national market or a substantial part of that market.» (emphasis added).

With regards to the examination of the other requirements, upon which depends the granting of authorisation for the transfer of the rights of use of frequencies, laid out in article 37, no. 3, points c) and d) of the ECL and in point e), linked to the provisions of article 4 of the Radio Law in terms of restrictions relative to the ownership of radio programme services, said requirements are considered, according to the information available, to be duly safeguarded.

With regards to this final requirement, it is noteworthy that, although Rádio Renascença, Lda. (transmitting entity of the right of use of frequencies in question) has annexed to the process a declaration stating that it does not violate, directly or indirectly, the restrictions laid out in said article 4 of the Radio Law, ICP-ANACOM does not have any information on the share capital interests between the various entities qualified to exercise the activity of radio broadcasting.

It is important to note that, pursuant to article 24 of the Radio Law, it is incumbent upon ERC to organise the registration of radio operators as well as of the respective programme services, in order to make their ownership, organization, operation and obligations public.

As such, it is the responsibility of ERC to verify, at any time, that there is no violation of the restrictions laid out in terms of the ownership of the radio programme service operators.

4. Determination

Therefore, within the scope of powers provided for in points c) and f) of article 6 of its Statutes, approved by Decree-Law no. 309/2001, of 7 December and under article 37 of Law no. 5/2004, of 10 February, and of article 22, no. 7 of Law no. 54/2010, of 24 December, the Management Board of ICP-ANACOM determines as follows:

1. To authorise the transfer of the right to use of frequencies granted to RSF – Radiodifusão, Lda for the exercise of the activity of radio

broadcaster on a local level, through the “Rádio NoAr” programme service, to Rádio Renascença, Lda., provided that the fulfilment of the restrictions laid out in article 4 of Law no. 54/2010, of 24 December are safeguarded by the Regulatory Authority for the Media.

2. To notify the Regulatory Authority for the Media (ERC) of the deliberation in the preceding paragraph.

Lisbon, 13 October 2011.