

Determination of 24.9.2002

**INTERVENTION OF ICP- ANACOM
IN THE RESOLUTION OF THE NETWORKS INTERCONNECTION
DISPUTE THAT OPPOSES ONIWAY – INFOCOMUNICAÇÕES, S.A.
(ONIWAY) TO VODAFONE TELECEL – COMUNICAÇÕES PESSOAIS,
S.A. (VODAFONE) AND OPTIMUS – TELECOMUNICAÇÕES, S.A.
(OPTIMUS)
(Articles 16, no. 3 and 18 of Decree-Law no. 415/98, of December 31)**

**A
LEGAL FRAMEWORK**

I – GENERAL PRINCIPLES

1. The Telecommunication Basic Law – Law no. 91/97, of August 1 – and Decree-Law no. 415/98, of December 31, that developed the bases established therein, ensure interconnection, as the physical and logical connection of the telecommunication networks used by one or several operators, so as to allow access and communications between the different users of the provided services.
2. Pursuant to article 11 of Decree-Law no. 415/98, both Vodafone and Optimus are committed to negotiate an interconnection agreement with the entities that request it, provided that the parties involved in the negotiation, duly empowered for that purpose, namely, offer fixed and or mobile switched public telecommunication networks and/or public use telecommunication services and, doing that, control the access means to one or several network terminal points, identified by one or several unique numbers of the national numbering plan.
3. Pursuant to article 6 of the same diploma, Vodafone, since it has significant market power in mobile telephone networks and in mobile

telephone services, is committed to meet all reasonable interconnection requests, providing access to the network, including the access in points different from the terminal network points offered to most final users, whenever requested by the interconnection applicant.

4. Article 16 of said Decree-Law entitles ANACOM, at any time, by its own initiative, and obliges it, upon request of any party, to intervene in the negotiations of the interconnection agreements, determining the inclusion of certain subjects, the establishment of specific conditions or the conclusion of the negotiations within 30 days. And, under the terms of article 16, no. 3, whenever the entities fail to conclude the interconnection agreement within the determined time period, it is up to ANACOM to carry on a well-founded administrative act pursuant to article 18.
5. Thus, the fundamental principle associated with the interconnection agreement is the freedom of the parties, which can be conditioned however by ANACOM, in the exercise of the powers granted by articles 16 to 19 of Decree-Law no. 415/98, having as subjective presupposition the exercise capacity of the agents involved in the signature of the interconnection agreement and as objective presupposition the fulfilment of the interests of users, with economic efficiency (article 4, no.1 of Decree-Law no. 415/98).

The subjective presupposition means that if there is an entity holding a validly issued license, the latter shall be entitled and will have the capacity to be a party in the interconnection agreements, being also considered legitimate to request ANACOM's intervention in the manner foreseen in articles 16 and 19 of Decree-Law no. 415/98.

The objective presupposition consists in the compulsory intervention of the regulatory authority in following the general objectives that preside its action and those that are indicated in the diploma related to interconnection.

II – PUBLIC TENDER FOR GRANT OF “IMT2000/UMTS” LICENSES

- 6.** A public tender was opened to grant four licenses of national scope for International Mobile Telecommunications system (IMT2000/UMTS) through the use of the frequencies identified by ANACOM.

The launch of the tender, according to a common guideline in all European Union countries, took place as a result of the application of Decision no. 128/1999/EC, of the European Parliament and the Council, of 14 December 1998, related to the coordinated introduction of a wireless third generation mobile communication system (UMTS) in the Community.

The Member-states undertake to take all the necessary measures to allow for the coordinated and progressive introduction of UMTS services in its territory, as from 1 January 2002 at the latest and to create a system of authorizations for UMTS, on the 1st of January 2000 at the latest.

- 7.** Based on the above-mentioned decision, ANACOM defined, on 23.12.99, the licensing system for IMT2000/UMTS and the Tender Regulations were approved by administrative rule no. 532-A/2000, of 31 July.

The result of the tender was that, out of the four granted licenses, only one was given to one operator that did not have a license for the second generation, OniWay; the three remaining ones were granted to Vodafone, Optimus and TMN, all of them holders of GSM/DCS licenses.

B

OTHER PERTINENT CONSIDERATIONS

III – TENDER OBJECTIVES

8. The Tender objective was, on the one hand, to promote the establishment of an own network and, on the other hand, to allow exploitation of mobile communication services, in both cases within the scope of a technology referred to as “third generation”.
9. In the definition of the rules applied to the grant of the licenses in question, the aim was to encourage market competition, both in what concerns the position of new entrants, that is, those operators that would be licensed for the third generation without holding second generation licenses and in what concerns the already existing operators in the mobile market, so that they could appropriately develop their business.

The bids evaluation criteria took into account the contribution to the conditions of real competition. Within this scope, the national roaming offer using the IMT2000/UMTS systems or the second-generation (GSM and DCS) systems was valued.

The Specifications defines *roaming*, for the purposes of the tender, as the possibility of an operator to provide the service to its customers in a certain geographic area, in the national territory, where it does not have coverage by its own means, using the IMT2000/UMTS systems or the 2nd mobile generation (GSM/DCS) systems.

The valorisation of the national roaming offer using the UMTS systems or the 2nd generation (2G) systems, for the purposes of the bids submitted to tender, were logically intended to attenuate the competitive disadvantage in the access to the mobile market of the operators that would be licensed for the 3rd generation (3G) not holding a GSM/DCS license.

In fact, the new entrants in the market, without previously holding the GSM/DCS license, for that reason, would always be in disadvantage as compared to the operators already installed in the mobile telecommunication market, due to the surplus effort that the circumstance would require from them.

This issue was raised in most of the European countries that imposed or valued the roaming offer provided by the 2G operators that would hold a 3G licence to the new enterers so that the latter could use this 2G network.

IV – THIRD GENERATION TECHNOLOGY AND LICENSES

- 10.** In the IMT2000/UMTS systems, the radio access network has technical features that are significantly different from the previous generation (the GSM/DCS 900/1800 second generation access networks); however, its concentration network or core network has technical features that are the result of the GSM/GPRS core network evolution.

GPRS functionality is associated with a data transmission network, based on packet switching, overlaid to the current GSM circuit switching network, sharing with this one the radio interface that allows high-speed access and information flow. Availability of this functionality requires the creation of two new nodes in the GSM (SGSN and GGSN) network to which new transmission elements exclusively related to this technology are associated. Consequently, we may consider that there is a “sub-network” in the GSM 900/1800 network.

When evolving, the core network of this set (related to circuit/packet switching) will constitute the IMT2000/UMTS core network.

11. In the current context, it is considered that the beginning of the exploitation of services provided through terminals with the GPRS functionality by the new operator, i) contributes to the reduction of barriers to its entry in the market within the scope of the 3rd generation; ii) contributes to maintain the continuity of the organization so that it may reinforce its future effectiveness, enabling therefore safeguarding of public interest, namely, fulfilling, at medium and long term, the commitments taken on by the company before the State within the scope of the development of the information society.

Note that the fundamental difference between GSM/GPRS and UMTS is the capacity that the latter has in supporting higher bit-rates taking into account the quality of service requirements for the various services.

Furthermore, a higher pressure on the development of these services allows that all market intervening parties, namely, operators, customers and suppliers of equipment, acquire a greater experience with the new wireless data applications, contributing effectively and globally to a better preparation of the market within the scope of the UMTS implementation and revitalization. This phase (acquisition of experience and knowledge) is considered a crucial stage for the satisfactory implementation of the 3G, with positive consequences in the development of the sector. In fact, the global experience acquired in the provision of a certain group of services, whenever they allow for the contact with the customers and their needs as well as the relationship with suppliers and the industry, cannot be forgotten as a contribution to a better preparation at the beginning of the provision of the next generation of services.

12. This objective of promoting the development of the 3G considers the transitional nature of the created situation. Allowing that the same be extended beyond a reasonable time period may have an effect opposite to the desired one.
13. In truth, the services accessible through the GPRS functionality may,

according to the European Commission (Liikanen information, of March 20, 2001), constitute a crucial step to the acceptance under satisfactory terms of the third generation systems. The Commission admits, therefore, a gradual transit of the current GSM systems to UMTS. In fact, GPRS, since it allows many applications previously limited by the data transmission speed available in circuit switched GSM, will be a trial to the introduction of the future and similar UMTS applications, namely multimedia services.

Concerning the implementation of the third generation mobile communications, according to the most recent European Commission communiqué, dated 11.06.2002, it is a consensus that “there are no short term solutions, the 3G implantation is an evolving procedure that, apart from the efforts made by the intervening parties who are directly involved, requires an ongoing support from the public authorities, which must also provide evidence of openness as to their approach of the challenges that are to be faced”.

14. OniWay holds a license for the exploitation of the UMTS system as well as a public telecommunications networks operator license granted by ANACOM under the terms of Decree-Law no. 381-A/97, of December 30.
15. OniWay informed ANACOM that they have began a trial period with *friendly users* and then that they will begin a *business simulation* stage where the network architecture that is being used corresponds to the final configuration for the commercial launch of their initial offer.

In this context, OniWay confirms that they have already available:

- a) BSS (*Business Support Systems*) where all support systems to OniWay business are included;
- b) Systems and Platforms for support of GSM/GPRS and UMTS services;

- c) A core network that includes network elements for circuit and packet switching, apart from other elements that are common to the circuit and packet switching domain;
- d) Access network composed of UMTS components and components that use the TMN access network. As far as this is concerned, OniWay has recently requested to ANACOM licensing of B nodes.

The operator confirms that in the *business simulation* trials the following services and facilities for the different profiles of customers were considered:

- Services: a) Voice;

b) Fax;

c) Data using circuit switching lines;

d) Internet access through packet/circuit switching ;

e) SMS;

f) MMS.

- Facilities: a) Voice mail;

b) Call divert;

c) Call waiting;

d) Conference calls;

e) CLIP;

f) CLIR;

g) COLR;

h) Call restriction.

- 16.** As described by OniWay, the network that they have includes, apart from Business Support Systems (BSS) and GSM/GPRS and UMTS services platforms systems, the basic blocks that constitute the access UMTS network (B and RNC nodes) as well as the core network (SGSN, GGSN, MSC, VLR and GMSC).

Thus, we are in the presence of a network that, supported in the new technology (UMTS) radio interface, is capable of transmitting and ensuring the execution of several procedures associated with the UMTS services offer, with the limitations that were caused by the postponement of production and marketing on a large scale of *dual mode* terminal equipment (GSM/GPRS and UMTS).

C

RELEVANT BACKGROUND

V – THE NON- CONCLUSION OF THE AGREEMENTS

17. On 20 June 2002, following previous determinations and upon request of OniWay, the Board of Directors of ANACOM decided, pursuant to subsection c) of no. 1 of article 16 of Decree-Law no. 415/98, that Vodafone, Optimus and OniWay should terminate the negotiation of the interconnection agreements, for all types of traffic, within a maximum deadline of 5 working days, sending immediately to ANACOM a full copy of the signed agreements.

On June 27, in view of the clarification requests put forward by the parties, the Board of Directors of ANACOM specified that the conditions to be observed in the interconnection agreements under negotiation, regardless of the associated technology, should cover both circuit and packet switching, and postponed the deadline for the conclusion of the interconnection agreements until 1 July 2002.

All the parties informed ANACOM that the interconnection agreements were not signed within the fixed deadline in accordance with subsection c), no. 1 of article 16 of Decree-Law no. 415/98. According to the same, the reasons for not signing the agreements consisted in the different positions of the parties, mainly as to the type of traffic to be included in the agreements as well as the date of the respective operation.

Upon confirmation that the agreements were not signed, by the end of the granted and fixed deadline, it is the responsibility of ANACOM, under the terms of no. 3 of the same article 16, to give a well-founded decision.

In short, this act observes the guiding principles of interconnection contained in article 4 as well as the criteria fixed in no. 3 of article 18, all of Decree-Law no. 415/98, namely the interests of final users, the public interest, the regulatory obligations and restrictions imposed to the parties, the interest of stimulating innovative market offers and to offer the users a wide range of telecommunication services, the interest of ensuring identical access conditions, the parties relative market positions and the promotion of competition.

Therefore, taking everything into account as well as the analysis of the replies given by the interested parties – OniWay, Optimus and Vodafone – within the scope of the previous hearing organised under the terms of articles 100 and 101 of the Rules of Civil Procedure, contained in the enclosed document:

D

DETERMINATION

The Board of Directors of ANACOM, pursuant to no. 3 of article 16 of Decree-Law no. 415/98, taking into account the guiding interconnection principles contained in article 14 of the same diploma, complying with the criteria contained in no. 3 of article 18, determines:

I

- 1. Vodafone and Optimus are committed to ensure interconnection to OniWay for the provision of services assigned through terminals with the GPRS functionality that are not *dual mode* (GSM/GPRS and**

UMTS).

- 2. For the purposes of the previous paragraph, Vodafone and Optimus are hereby notified that they are obliged to ensure interconnection to OniWay, through circuit and packet switching, within a maximum deadline of 15 calendar days, covering at least the following services:**
 - Call termination;**
 - Customer support service (169x);**
 - Information Services (189x);**
 - Free call service for the caller (800);**
 - Voice mail (6009, 609, 669);**
 - SMS termination;**
 - MMS termination.**

- 3. Under the terms of subsection c) of article 22 of Decree-Law no. 415/98, Vodafone, Optimus and OniWay must communicate to ANACOM the terms of the signed interconnection agreements.**

II

- 1. OniWay is obliged to include in the object of the contracts that they sign with final users the services offer covered by the terms of their UMTS license as well as to unequivocally ensure, since the respective signature, the migration of all their customers to this 3rd generation system, within a maximum deadline of 12 months as from the date established according to the law for the real beginning of the activity pursuant to the UMTS licenses.**

- 2. OniWay is not exempted from complying with all the obligations contained in the UMTS licence that they hold under the exact terms,**

conditions and deadlines foreseen therein.

- 3. OniWay is not exempted either from complying with the rules that are applicable to it, namely as far as the radio spectrum licensing and respective rates are concerned, pursuant to Decree-Law no. 151- A/2000, of July 20.**
- 4. Should OniWay fail to comply with the obligations contained in the UMTS license that they hold, this determination will be subject to revision.**

III

ANACOM will monitor compliance with what is established in the previous paragraphs and shall take at any time all adequate measures to enforce full compliance with the provisions of this determination.

The Board of Directors,