

DECISION
resolving a cross-border dispute between EDA and Optimus
concerning telephone directories

I

FACTS

1. Request presented by EDA

- 1.1. On 07.12.2010, ICP - ANACOM received a request for resolution of a cross-border dispute brought by European Directory Assistance, S. A. (EDA) against Optimus – Comunicações, S. A. (Optimus)¹, under article 12 of Law number 5/2004, of 10 February (Electronic Communications Law - ECL).
- 1.2. This request was written in English, having ICP - ANACOM thus asked EDA to submit it in Portuguese, as applications by interested parties must be drawn up in this language, in the light of principles governing the administrative procedure.
- 1.3. The request for dispute resolution written in Portuguese was submitted on 04.02.2011², date on which it is considered that the request was duly presented and that ICP - ANACOM's intervention was sought for the purposes of article 12 of ECL.
- 1.4. EDA first provides an overview of the economic activities it pursues, its field of activity concerning the provision of directory enquiry services and directories in the territory of the Kingdom of Belgium.
- 1.5. As far as this dispute is concerned, EDA provides international directory enquiry services by means of which Belgium residents can access information on telephone numbers of subscribers living in other countries.
- 1.6. For this purpose, the claimant set up its own integrated database, having concluded agreements with telecommunications operators of several countries which assign national numbers to their subscribers.
- 1.7. In the case of Portugal, EDA refers that, notwithstanding several requests sent to all telecommunications operators for provision of the respective databases so that a telephone directory could be set up, no response was received. It was thus impossible to create a Portuguese integrated database and to provide Belgian users with enquiry services on Portuguese subscribers.
- 1.8. EDA declares that, in order to pursue its activities, it is registered with the Belgian telecommunications regulator (Belgian Institute for Postal services and Telecommunications - BIPT) as provider of directory enquiry services and directory editor, as well as with the Commission for the Protection of Privacy (CPVP) as especial personal data administrator.

¹ Document 2010112235.

² Document 2011020224.

- 1.9. EDA sets out the regulatory framework which applies, in its opinion, to the provision of directory enquiry services and to the publication of directories, stressing the following provisions:
- Article 25, paragraph 1, of Directive 2002/22/EC³ and article 50 of ECL that lay down the right of subscribers of publicly available telephone services to be included in a comprehensive directory available to the public, provided for respectively in paragraph 1 a) of article 5 of the Directive and in paragraph 1 a) of article 89 of ECL. EDA highlights that this right refers not only to the inclusion of data in a universal telephone directory, but to the inclusion in any list, whether Portuguese or of any other Member State;
 - Article 5 of Directive 2002/77/EC, imposing on Member States the obligation to ensure that all special and/or exclusive rights with regard to the establishment and provision of directory services on their territory are abolished;
 - Article 12 of Directive 2002/58/EC and paragraph 1 i) of article 48 and paragraph 1 of article 50, both of ECL, which require undertakings that assign telephone numbers to obtain the prior explicit consent of subscribers as regards the inclusion of their data on directories and/or directory enquiry services;
 - Article 25, paragraph 2, of Directive 2002/22/EC and paragraph 4 of article 50 of ECL that require undertakings which assign telephone numbers to subscribers to provide data on subscribers who have given their consent as regards the inclusion of their data on directories and/or directory enquiry services to providers of such services that have submitted duly substantiated requests. In this connection, EDA explains the various European models for the transmission of subscriber databases for publication of directories.
- 1.10. EDA also describes the procedure for setting up an integrated database, stressing that it cannot be carried out without the provision by operators of all databases of subscribers who have provided their explicit consent for the publication of their data in directories or directory enquiry services.
- 1.11. Turning to the facts giving rise to the dispute, EDA informs that, in order to meet the increasing number of enquiries on telephone numbers of Portuguese companies and individuals, made through its international directory enquiry service, it contacted all providers of publicly available telephone service in Portugal that assign telephone numbers to their subscribers, including Optimus.
- 1.12. This contact was established by letter sent on 29 January 2010 and by email, by means of which the claimant, invoking paragraph 2 of article 25 of Directive 2002/22/EC, requested the provision of the database so that the respective operator's directory was set up and included in EDA's Portuguese integrated database.
- 1.13. According to the claimant, until 30 November 2010 no response was received, which is deemed to be contrary to the applicable Community and Portuguese law.

³ Directive 2002/22/EC of the European Parliament and of the Council, of 7 March 2002, on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

1.14. Therefore, on the basis of article 21 of Directive 2002/21/EC⁴ and article 12 of ECL, as well as of paragraph 2 of article 25 of Directive 2002/22/EC and paragraph 4 of article 50 of ECL, EDA requests ICP - ANACOM to:

- Accept its request as a valid call for settlement of a cross-border dispute and to indicate the extent of its competence in respect of this dispute;
- Coordinate its opinion with the Belgian Regulatory Authority (BITP) so that a decision is taken in compliance with article 8 of Directive 2002/21/EC and paragraph 2 of article 12 of ECL;
- Ask the European Regulators Group for Electronic Communications networks and services (BEREC), if possible, to provide its opinion on this request;
- Require Optimus to immediately conclude with EDA a contract for transmission of its database for directory set up;
- Decide clearly the contents and number of attributes which must be supplied to EDA, contained in the databases for directory set up;
- Require Optimus to provide access to the referred databases in conformity with Case C-109/03 of the Court of Justice of the European Union, that is, EDA would only pay actual costs resulting from the provision of information required to set up directories, and to explicitly indicate the respective amount in case it decides that it is entitled to a payment;
- Take into account the spirit of Community law in the settlement of this dispute and to set aside any national provision that may obstruct the application of directives, in addition to the request in the preceding point and bearing in mind Community case law.

2. Response provided by Optimus

2.1. By letter dated 16 March 2011⁵, ICP - ANACOM notified Optimus of the request for dispute settlement submitted by EDA, and asked the company to assess the matter, having informed⁶ the claimant of this letter on the same date.

2.2. Optimus submitted its response on 1 April 2011⁷.

2.3. The company starts by referring that in its opinion ICP - ANACOM should hold itself as lacking competence to decide the matter, as in this case paragraph 1 of article 12 of ECL, whose requirements are not fulfilled, does not apply.

2.4. For this purpose, Optimus argues that, on the one hand, EDA is not a company subject to the electronic communications regulatory framework, as it does not provide nor supply this type of services, and, on the other, the issue under consideration

⁴ Directive 2002/21/EC of the European Parliament and of the Council, of 7 March 2002, on a common regulatory framework for electronic communications networks and services (Framework Directive).

⁵ ANACOM- S025720/2011.

⁶ ANACOM-S026213/2011.

⁷ AH012590/2011.

exclusively concerns the regulatory framework of protection of personal data and privacy.

- 2.5. Without prejudice, and in case ICP - ANACOM does not agree with this view, Optimus considers that it cannot, in the light of rules in force, fulfil the wishes of EDA.
- 2.6. Optimus believes that, contrary to what is claimed by EDA, the reference made in paragraph 1 of article 50 of ECL to paragraph 1 a) of article 89 of the same statutory instrument explicitly and exclusively concerns the obligation imposed on the universal service provider.
- 2.7. It further declares that the requirement in paragraph 4 of article 50 may only be considered as an obligation that falls on companies that assign telephone numbers in situations associated to the fulfilment of requests that aim at the inclusion of data in directories referred to in paragraph 1 a) of article 89, that is, in the scope of universal service obligations, to ensure to all users the provision of a minimum set of services, among which the directory service.
- 2.8. As this case does not concern a request with an underlying public interest, but rather a request that aims for an eminently commercial target, Optimus deems that it cannot be forced to provide data on its clients to any third party, which in its opinion would be an “inappropriate, disproportional and costly” obligation.
- 2.9. Moreover, Optimus refers that the response to all requests and applications such as this one must comply with applicable rules on data protection, as results from paragraph 5 of article 50 of ECL.
- 2.10. Consequently, according to article 6 of Law No 67/98, of 26 October, and to paragraph 1 of article 13 of Law No 41/2004, of 18 August, the inclusion of any client data in a public directory requires at all times an expression of the will to have such data included in directories, and failure to comply with this is deemed to be an infringement subject to penal, administrative and civil liability.
- 2.11. Optimus refers that, given the provision in paragraph 1 i) of article 48 of ECL, it is only authorized by its clients to include the respective data in universal service directories or in Optimus’ own directories, and that it is prevented from using them for other purposes, and as such, even if it was bound to supply data to EDA, it would need to obtain a prior and explicit authorization from data holders.
- 2.12. In conclusion, Optimus considers that all requests made by EDA to ICP - ANACOM lack a legal basis, and that it cannot be forced to conclude with that company any contract for the transmission of its database or for provision of access thereto, for the purpose of setting up directories.

On the basis of facts described above, and given the requests made by EDA, the Management Board of ICP - ANACOM approved on 28 July 2011 a draft decision ruling as follows, in the scope of the administrative dispute resolution procedure provided for in article 10 of ECL:

1. To order Optimus, in response to the request made to it by EDA in January 2010 and in compliance with paragraph 4 of article 50 of ECL, to submit to EDA the conditions

under which the company will provide relevant information on its subscribers for the purpose of provision of publicly available directory enquiry services and directories;

2. For the purpose of the preceding paragraph, the proposal to be presented must be reasonable, aim for the transmission of relevant information on Optimus' subscribers and observe the format and conditions under which data must be supplied, which must be fair, objective, cost-oriented and non-discriminatory;
3. To submit points 1 and 2 of this determination to the prior hearing of interested parties, under articles 100 and 101 of the Code of Administrative Procedure, setting for the purpose a 10 working-day-time-limit so that EDA and Optimus may assess the issue in writing if they so wish;
4. To submit this decision to BIPT, for the purposes of paragraph 2 of article 12 of ECL, setting for the purpose a 10 working-day-time-limit so that the Authority may assess the issue in writing if it so wishes;
5. To submit, in the scope of the cooperation duty provided for in article 7 of ECL and in article 8 of ICP - ANACOM's Statutes, this decision to the Comissão Nacional de Proteção de Dados (CNPd) - the National Commission for Data Protection - setting for the purpose a 10 working-day-time-limit so that it may assess the issue in writing if it so wishes.

Responses received in the scope of consultation carried out on the draft decision, as well as ICP - ANACOM's views thereon and grounds for options taken by the regulatory authority are covered in the Report on the Prior Hearing and other consultations, in annex hereto and which is deemed to be an integral part hereof.

II

ANALYSIS

Having been described the relevant facts, issues raised in this case will now be analysed, starting necessarily with the verification of requirements for the intervention of the Regulatory Authority, under article 12 of ECL.

1. Preliminary issue: verification of ICP - ANACOM's material competence under article 12 of ECL

As referred above in point I - 2.3 and 2.4, Optimus takes the view that ICP - ANACOM lacks material competence to assess this dispute as EDA does not provide electronic communications services and the matter under consideration exclusively concerns the framework on protection of personal data and privacy.

Paragraph 1 of article 12 of ECL lays down that the cross-border dispute resolution mechanism applies in the event of a dispute arising in respect of the obligations resulting from the regulatory framework on electronic communications between undertakings which are subject thereto and established in different Member States.

This provision transposes paragraph 1 of article 21 of the Framework Directive, which determines that this procedure is applied “in the event of a cross-border dispute arising under this Directive or the Specific Directives between parties in different Member States”.

Recital 32 of Directive 2002/21/EC is also very clear, laying down that “In the event of a dispute between undertakings in the same Member State in an area covered by this Directive or the Specific Directives, for example relating to obligations for access and interconnection or to the means of transferring subscriber lists, an aggrieved party that has negotiated in good faith but failed to reach agreement should be able to call on the national regulatory authority to resolve the dispute”. This ruling applies also to cross-border disputes, the material scope of application of which coincides with the one defined for disputes between undertakings in the same State.

This implies that the relevant issue for the application of the cross-border dispute resolution procedure is the fact that the conflict concerns a matter governed by the electronic communications framework, especially compliance with sector obligations provided for, by companies subject to them, and the fulfilment of the corresponding rights which the law can grant to companies that do not provide electronic communications networks or services. The dispute under consideration concerns compliance by Optimus of the obligation set out in paragraph 4 of article 50 of ECL, which results from paragraph 2 of article 25 of the Universal Service Directive⁸, which is one of the specific directives referred to in the quoted article 21 of the Framework Directive. This obligation falls on companies that assign telephone numbers to subscribers and benefits providers of publicly available directory enquiry services and directories, a category in which EDA is included⁹.

For this reason, the argument that this dispute concerns exclusively rules on the protection of personal data and privacy must also be rejected, without prejudice, naturally, to the fact that the ECL itself safeguards compliance with such rules (cfr. paragraph 5 of article 50).

In the light of the above, it must be concluded that ICP - ANACOM is competent to resolve this dispute.

2. EDA’s request for access to Optimus’ database

In this analysis, ICP - ANACOM believes that it is relevant to consider the terms of the initial request made by EDA to Optimus. In this scope, it must be taken into account that, after this request was made and ICP - ANACOM’s draft decision of 28 July 2011 was approved, Law number 51/2011, of 13 September took effect amending ECL, transposing Directive 2009/136/EC, of the European Parliament and of the Council of 25 November 2009, which amended the Universal Service Directive.

The contact established by EDA with Optimus, in which the company explicitly invoked Community rules provided for in article 25 of the Universal Service Directive, aimed for the conclusion of a contract for the use of the latter’s subscriber database, including at least the

⁸ Directive 2002/22/EC of the European Parliament and of the Council, of 7 March 2002, on universal service and users’ rights relating to electronic communications networks and services

⁹ Although the conclusion reached by ICP - ANACOM remains unchanged, it should be referred that, in the letter sent by EDA to Optimus in January 2011, the former informs that it is registered as provider of electronic communications services, activity which however is not mentioned in the request for dispute resolution submitted to ICP - ANACOM.

following data: name and surname or corporate name, street address and telephone number, post code, city, etc.

These data would be used for the provision of directory enquiry services and possibly online universal directories.

For this purpose, EDA requested Optimus to submit, during the month of February 2010, a proposal similar to the one based on which it already sends its database to other directory editors in Portugal, under fair, objective, cost-oriented and non-discriminatory conditions¹⁰.

This aspect should be stressed: EDA framed its request under the regime of the Universal Service Directive, establishing a first contact in which it requires Optimus to submit a proposal for the provision of data on its subscribers, again, under fair, objective, cost-oriented and non-discriminatory conditions.

This request is thus legitimately based on paragraph 4 of article 50 of ECL, which appropriately transposes paragraph 2 of article 25 of the Universal Service Directive, EDA having full freedom to establish contacts with one, several or even all companies that assign telephone numbers to subscribers.

It should be remembered that the provision of directories and directory enquiry services is open to competition¹¹, thus the regime of the Universal Service Directive, on the one hand, gives subscribers the right to have their personal data included in a printed or online directory and, on the other, ensures that all service providers that assign telephone numbers to their subscribers are obliged to make relevant information available in a fair, cost-oriented and non-discriminatory manner, as laid down in recital 35 of the referred Directive.

The current version of ECL, which transposes the amended Universal Service Directive, reinforces rights conferred on this matter upon subscribers of publicly available telephone services, laying down explicitly:

- The right of end-users to access directory enquiry services, pursuant to paragraph 2 of article 50 [paragraph 2 d) of article 39];
- The right of subscribers to have an entry in directory enquiry services and directories, pursuant to paragraph 1 of article 50 [paragraph 3 h)) of article 39];
- The right of subscribers to have their personal data made available to providers of publicly available directory enquiry services and directories, this provision being subject to compliance with paragraph 4 of article 50 (paragraph 1 of article 54).

The mentioned paragraph 4 of article 50 of ECL lays down that “undertakings which assign telephone numbers to subscribers shall meet all reasonable requests for the supply of the relevant information on the respective subscribers for the purposes of the provision of publicly available directory enquiry services and directories, in an agreed format and on terms which are fair, objective, cost oriented and non-discriminatory”.

¹⁰ In alternative, EDA suggested the sending of a standard contract.

¹¹ Cf. article 5 of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services.

In this respect, attention must now be drawn to a brief analysis of case-law of the Court of Justice of the European Union and of a decision of the Belgian Regulatory Authority, which have been invoked by EDA to emphasize arguments supporting its request.

Community case-law

In Case C-109/03, in the proceedings KPN v OPTA, the **Court of Justice** was requested to give a preliminary ruling on the interpretation of paragraph 3 of article 6 of Directive 98/10/EC of the European Parliament and of the Council, of 26 February 1998, on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (ONP Directive)¹². This interpretation may be found in its Judgement of 25 November 2004, in which the Court of Justice concludes that paragraph 3 of article 6 of the ONP Directive must be interpreted as meaning that:

- 1) “Relevant information” that bodies assigning telephone numbers (in these proceedings, the universal service provider) must pass on to third parties refers only to data relating to subscribers who have not expressly objected to being listed in a published directory and which are sufficient to enable users of a directory to identify the subscribers they are looking for. Those data include in principle the name and address, including postcode, of subscribers, together with any telephone numbers allocated to them by the entity concerned. However, it is open to the Member States to provide that other data are to be made available to users where, in light of specific national circumstances, they appear to be necessary in order to identify subscribers;
- 2) With regard to data such as the name, address and telephone number, only the costs of actually making those data available to third parties may be invoiced by the supplier of the universal service. With regard to additional data which such a supplier is not bound to make available to third parties, the supplier is entitled to invoice, apart from the costs of making that provision, the additional costs which he has had to bear himself in obtaining the data, provided that those third parties are treated in a non-discriminatory manner.

BIPT Decision

On its turn, the Belgian Regulatory Authority - **BIPT** - by decision taken on 18 February 2009, determined and defined the conditions that govern the provision of the minimum set of data by telephone service providers to directory editors and providers of directory enquiry services. This decision was approved pursuant to the Belgian law transposing the Universal Service Directive, taking into account paragraph 2 of article 25 of this Directive as well as the Court of Justice case-law in the above-mentioned Judgement of 25 November 2004.

According to this BIPT decision, the minimum set of identification data to be comprised in all directories and directory enquiry services corresponds to elements required to identify a subscriber, including:

- Name and surname of the subscriber, as communicated by the latter;
- Full street address of the subscriber, as communicated by the latter;

¹² This Directive was repealed by the 2002 Community regulatory framework. The directory and directory enquiry service matters were then governed by the Universal Service Directive, which was in the meantime amended by Directive 2009/136/EC of the European Parliament and of the Council, of 25 November 2009.

- Telephone number assigned to the subscriber by the operator.

In case the subscriber has demonstrated, to his/her telephone service provider, his/her will to have the following elements included in a telephone directory or directory enquiry service, collected when the contract was concluded or amended, such elements must also be deemed to integrate the minimum set of identification data:

- Occupation of the subscriber, as communicated by the latter;
- Full name of the subscriber, as communicated by the latter;
- Identification of the persons living with the subscriber who wish to appear under their own name.

BIPT clarifies that this definition is without prejudice to the inclusion of additional data, insofar as the subscriber's consent has been obtained.

As regards the conditions for transmission of a minimum set of data, BIPT recalls that neither the Universal Service Directive nor the Court of Justice distinguish between, on the one hand, the provider of the universal directory and of the universal directory enquiry service and, on the other, directory editors or providers of directory enquiry services that do not provide the universal service.

As such, BIPT has determined that the minimum set of identification data must be provided free of charge to all directory editors or providers of directory enquiry services, by providers of telephone services that assign numbers to subscribers. Such providers may charge only the actual costs of transferring and providing data.

In case additional data are transmitted, providers of telephone services may charge for that transmission, under fair and non-discriminatory commercial terms.

ICP - ANACOM Decisions

ICP - ANACOM has also issued several decisions in matters relating to telephone directories, all of which concern the comprehensive directory to be made available by the universal service provider. One of those determinations¹³, under Decree-Law number 458/99 of 5 November, which transposed the ONP Directive, instructed the then Portugal Telecom, S.A., as universal service provider, to amend the proposals put forward on the structure of the presentation of client entries on telephone directories and on data collection files. Data to be included in such files, as far as fixed access was concerned, were then deemed to be as follows: name of client, telephone numbers, type of use - telephone/fax, installation address, name to be entered in the directory, directory distribution address, date on which data was changed and provider identification.

Later, a final decision¹⁴ was approved on the inclusion of data of users of mobile telephone services (clients of Vodafone and the then Sonaecom) on universal service directories and directory enquiry services. ICP-ANACOM determined that it should be sent the following data:

¹³ ICP - ANACOM determination of 11 January 2001, available at <http://www.anacom.pt/render.jsp?contentId=417867>.

¹⁴ ICP - ANACOM determination of 14 January 2009, available at <http://www.anacom.pt/render.jsp?contentId=818858>.

names, telephone numbers and post codes of users of mobile telephone services who expressed their wish to be included in universal service directories. In case users wished their street address to be included in such directories, this element could be submitted by providers, on the prior agreement from the National Data Protection Commission.

Minimum set of subscriber data

In the light of the entire legal framework, ICP - ANACOM takes the view that Optimus must negotiate with EDA specific contractual terms allowing this company to obtain, under fair, objective, cost oriented and non-discriminatory conditions, the following minimum set of identification data, supplied as such by subscribers themselves:

- Full name of the subscriber;
- Full street address of the subscriber, which corresponds to the installation address in the case of the fixed telephone service;
- Telephone number(s) assigned by Optimus or by another provider, received by Optimus through portability, and respective type of use - telephone/fax.

Cost orientation

For this purpose, cost orientation shall be deemed to mean that Optimus may charge EDA only for costs incurred with the actual transmission and provision of data to this company.

This shall be without prejudice, naturally, to the negotiation, under fair, objective and non-discriminatory conditions, of the transmission of additional subscriber data. However, as this is not covered by the concept of "relevant information" for the purposes of paragraph 4 of article 50 of ECL, it is subject to the commercial freedom for parties as far as the price is concerned.

Protection of personal data and privacy

This matter is also subject to rules governing the protection of personal data and privacy (cf. paragraph 5 of article 50 of ECL), and in this context article 13 of Law No 41/2004, of 18 August¹⁵, as well as paragraph 1 I) of article 48 of ECL must also be taken into account.

According to the mentioned article 13 of Law No 41/2004, subscribers must be informed, free of charge and before the respective data are included in printed or electronic directories, available to the public or obtainable through directory enquiry services, of the intended purposes of such directories and of any further possibility of use based on search functions embedded in electronic versions of the directories.

The article further lays down that subscribers have the right to determine whether their personal data are included in a public directory, and if so, which, to the extent that such data

¹⁵ Transposes into national law Directive 2002/58/EC of the European Parliament and the Council of 12 July concerning the processing of personal data and the protection of privacy in electronic communications.

are relevant for the purposes of the directories, as determined by the provider of the directories. Additional consent must also be obtained from subscribers for any purpose of a public directory other than the search of contact details of persons on the basis of their name and, where necessary, a minimum of other elements of identification.

The referred article 48 of ECL establishes as one of the elements which must be included in contracts for the provision of public communications networks or publicly available electronic communications services the explicit indication of subscribers' willingness in respect of the inclusion or not of their respective personal information in a public directory and on their disclosure through the directory enquiry service, whether or not the transfer thereof to third parties is involved.

To clarify and specify the content of each of the points of paragraph 1 of article 48 of ECL, by determination of 11 December 2008¹⁶, approval was given to amendments to the *Guidelines for minimum content to be included in electronic communications contracts*, the initial version of which had been approved by determination of 1 September 2005¹⁷.

Such guidelines provide that the standard contract must include appropriate blank spaces so that the subscriber may:

- Explicitly indicate its will on the inclusion of his/her personal data on directories and on their disclosure through the directory enquiry service, whether or not the transfer thereof to third parties is involved, with the option not to grant such consent, pursuant to paragraph 1 l) of article 48 of ECL and paragraph 2 of article 13 of Law No 41/2004;
- Indicate data to be included in a public directory, pursuant to the same provision;
- Explicitly give its consent for any use of a public directory beyond the search for details of persons based upon their name and, if necessary, upon a minimum of other identifying particulars, pursuant to paragraph 4 of article 13 of Law No 41/2004.

It is clear from the presented legal framework that Optimus is subject, as from 2004, to the obligation to obtain from subscribers their explicit consent as to the inclusion or not in directories and to the disclosure through the directory enquiry service of data strictly required for their identification, covering any type of directories and enquiry services - except for directories whose use does not consist in the search of persons based on the name, for which an additional expression of will is required -, whether or not the transfer thereof to third parties is involved, pursuant to legislation of the protection of personal data.

Even before the ECL took effect this obligation already arose from the law and fell on providers both of mobile telephone services and of fixed telephone services [cf. paragraph 2 g) of article 9 of the Operation Regulation, approved by Decree-Law number 290-B/99, of 30 July, and paragraph 3 b) of article 17 of Decree-Law number 474/99, of 8 November].

Moreover, by determination of 18 of December 2003¹⁸, and to implement these legal provisions, ICP - ANACOM ordered providers of mobile telephone services to request of their clients, within 30 days, that they explicitly stated their will as regards the inclusion of their personal data in directories and enquiry services, in particular in the scope of the Telecommunications Universal Service, making it clear that the absence of an explicit

¹⁶ <http://www.anacom.pt/render.jsp?contentId=808758>.

¹⁷ <http://www.anacom.pt/render.jsp?contentId=419155>.

¹⁸ <http://www.anacom.pt/render.jsp?contentId=417954>.

statement of will would be deemed as a statement of a will not to be entered in a directory. FTS providers were also ordered to ensure compliance with the same procedures, within the same time limits, immediately after the entry into force of the Law transposing Directive 2002/58/EC of 12 July 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector - which came to be Law No 41/2004.

In this regard, it is worth while noting the most recent case-law of the Court of Justice of the European Union, that in Case C-543/09, opposing Deutsche Telekom and the Federal Republic of Germany, gave a preliminary ruling on two issues concerning the inclusion of subscriber data in telephone directories provided in a competition system, that is, outside the scope of universal service obligations.

The Court was questioned on whether paragraph 2 of article 25 of the Universal Service Directive allowed national legislators to bind undertakings assigning telephone numbers to subscribers to make available, for the purpose of provision of publicly available directory enquiry services and directories, data on subscribers to whom they have not assigned telephone numbers, insofar as such data are in their possession. If so, the Court was questioned whether article 12 of the Privacy Directive should be interpreted as making the imposition of the referred obligation dependant on the consent for the transmission of data given by the other provider of the telephone service, that assigned the numbers under consideration, or by the respective subscribers, or, in any case, on a lack of opposition to such transmission.

By judgment of 5 May 2011, the Court of Justice answered in the affirmative to the first question, however it is the answer to the second question that must be considered on this case, as regards the issue of whether article 12 of the Privacy Directive made the transmission to a third party - provider of publicly available directory enquiry services and directories - of personal data conditional on renewed consent from a subscriber who already authorized the publication of his/her data on the directory drawn up by the universal service provider.

The Court concludes that article 12 of the Privacy Directive must be interpreted as not precluding national legislation under which an undertaking publishing public directories must pass on personal data in its possession relating to subscribers of other telephone service providers to a third-party undertaking whose activity consists in publishing a printed or electronic public directory or making such directories obtainable through directory enquiry services, and under which the passing on of those data is not conditional on renewed consent from the subscribers. This conclusion assumes that, on the one hand, those subscribers have been informed, before the first inclusion of their data in a public directory, of the purpose of that directory and of the fact that those data could be communicated to another telephone service provider, and, on the other hand, that it is guaranteed that those data will not, once passed on, be used for purposes other than those for which they were collected with a view to their first publication.

By applying this case-law to this situation and based on article 13 of Law No 41/2004, ICP - ANACOM considers that Optimus was bound to have obtained, when each contract was concluded, the necessary indication of the will of subscribers as to the inclusion of their data on a public directory and on directory enquiry services such as those provided by EDA. Only in case EDA intends to make a use of data that does not consist in a name-based search of subscribers, would Optimus be required to obtain an additional consent from subscribers. In this case, costs borne by Optimus could be passed on the price negotiated with EDA. Conversely, if this additional consent has already been obtained from subscribers, there are no costs to be borne by this company that may be passed on the price to be negotiated with EDA.

In conclusion:

It follows from the above-mentioned rules, in particular paragraph 4 of article 50 of ECL, that the conclusion of agreements of a distinct commercial nature must be prioritised, through which the wish of subscribers to have their data published in directories other than the one set up by the universal service provider is fulfilled.

In this context, and having the legitimacy of EDA's request been clarified in the light of the current regulatory framework, ICP - ANACOM deems that at this stage the preferred approach should now be negotiation between the parties, to the detriment of a unilateral establishment by the Regulatory Authority of the format and conditions for transmission of data under consideration.

As such, and given that the letter sent to Optimus by EDA represented a first contact that failed to be followed up, it is now up to the former to promote the establishment of negotiations between the parties.

For this purpose, Optimus must present EDA with a proposal indicating the conditions under which the company will provide relevant information on its subscribers, for the purpose of the provision of publicly available directory enquiry services and directories. This proposal must comply with the applicable regulatory framework, and ICP - ANACOM deems that it should set out some of the terms and conditions to be observed, which result from the applicable legislation, from Community case-law and from regulatory decisions, as explained above.

This solution does not prevent the Regulatory Authority, naturally, from monitoring the development of negotiations between the parties.

III**Determination**

Therefore, in the light of the above, the Management Board of ICP - ANACOM, in the pursue of the assignment conferred in paragraph 1 q) of article 6 of its Statutes, published in annex to Decree-Law No 309/2001, of 7 December, and to achieve the regulatory objectives provided for in paragraph 1 of article 5 of Law No 5/2004, of 10 February, as amended by Law No 51/2011, of 13 September, and under article 12 of this Law, hereby determines:

1. To order Optimus, in response to the request made to it by EDA in January 2010 and in compliance with paragraph 4 of article 50 of ECL, to present to EDA the conditions under which the company will provide relevant information on its subscribers, for the purpose of the provision of publicly available directory enquiry services and directories.
2. For the purpose of the preceding paragraph, the proposal to be presented must be reasonable, aim for the transmission of relevant information on Optimus' subscribers and observe the format and conditions under which data must be supplied, which must be fair, objective, cost-oriented and non-discriminatory.

3. By virtue of the principle of cost-orientation referred to in the preceding paragraph, Optimus may only charge EDA for costs incurred with the actual transmission and provision as regards the following minimum set of subscriber data:
 - Full name;
 - Full street address, which corresponds to the installation address in the case of the fixed telephone service;
 - Telephone number(s) assigned by Optimus or by another provider, received by Optimus through portability, and respective type of use - telephone/fax.
4. After the parties have concluded their agreement on data transmission, and before this transmission occurs, the persons in charge of the data processing must notify such transmission to the CNPD, for prior checking purposes, pursuant to Law No 67/98, of 26 October.
5. Optimus must submit to ICP - ANACOM, within 20 working days from the date of notification hereof, the proposal submitted to EDA in compliance herewith, as well as the subsequent agreement concluded between the parties.