

DETERMINATION

1. By determination adopted on 30 October 2014 and pursuant to the provisions of paragraphs 1 to 3 of article 111 of the LCE, ICP-ANACOM ordered Vodafone Portugal - Comunicações Pessoais, S.A., as follows:

1. To suspend, with immediate effect, restrictions on access to the "760" numbering range imposed on subscribers with prepaid tariffs, as entailing the need to constitute and credit a second balance, and to include and highlight information about suspension of this measure on the company's website and inform affected subscribers to this effect, and further (albeit by means of another source of information) inform affected subscribers as to how any second balance credited in the meantime may be used.
2. In the event that immediate suspension as determined in paragraph 1 is not possible, to carry out these instructions as soon as possible and at the latest within ten working days of this Determination's notification, demonstrating to ICP-ANACOM that it will execute the order under the terms so defined.
3. To inform ICP-ANACOM as to the procedures adopted pursuant to the preceding paragraphs, within 10 working days;
4. To state its position on the determined measure, if it so sees fit, within 10 working days.

It is also specified in the Determination that the ruling in question shall remain in force for a period of 3 months or until such time as a final decision is issued, where issued prior to this three-month period elapsing.

Vodafone was notified as to the Determination of 30 October 2014, by protocol, on this same day.

2. In response, sent by fax dated 03 November 2014, Vodafone set out its position on the urgent action in question, arguing that, by contravening the principles of proportionality and equality, it was without basis and unlawful, and, in conclusion, sought its repeal or otherwise, in the event that repeal is not granted, its substitution by a proportionate measure to be maintained until the duty to provide prior information is properly discharged.

Vodafone further requested that ICP-ANACOM clarify what is to be considered as the set of customers covered by the obligation to give notice of the suspension of the requirement for a 2nd balance: all its prepaid tariff customers or solely those customers objectively affected by the suspension of the 2nd balance as a result of having already credited the 2nd balance.

The requested clarification was provided by means of a Determination adopted on 06 November 2014 and notified to Vodafone on the same date.

3. Analysis of Vodafone's response

3.1. Prior note

Prior to examining the reasoning advanced by Vodafone, note must be made of the following clarification on the scope of the ruling laid down in the Determination of 30 October 2014.

It appears, from the wording of the response presented, that Vodafone's position stems from a erroneous assumption, which is to consider that ICP-ANACOM ordered the company, by means of its Determination of 30 October 2014, to undertake definitive suspension of the measure to be adopted on 22 October 2014, entailing a requirement that subscribers with prepaid tariff constitute and credit a second balance to access the "760" numbering range of the Plano Nacional de Numeração (National Numbering Plan).

However, as is clear from the reasoning which gives basis to the Determination of 30 October 2014, the intention of the urgent measure was to prevent Vodafone from putting the contract amendment governing prepaid tariffs into effect without having first observed the requirements stipulated in paragraph 6 of article 48 of the LCE, i.e., without having fulfilled the obligation to give respective subscribers one-month prior written notice and to grant the right, in accordance with the period established therein, to terminate the contract without penalty where the subscriber does not accept the new condition.

Accordingly, the Determination of 30 October 2014 did not prohibit the adoption of such a measure by Vodafone, but merely prohibited its adoption without prior observance of the provisions of paragraph 6 of article 48 of the LCE. However, given the entry into force of Regulation no. 495/2014 of 3 November, it is not possible for Vodafone to observe the requirement of advance notice and execute the measure before it is made unlawful, as according to paragraph 1 of said Regulation.

3.2. *The alleged lack of basis*

Vodafone begins by maintaining that the assertion made in the Determination of 30 October 2014 as to the company's non-compliance with the provisions of paragraph 6 of article 48 of the LCE is without basis - Vodafone claims that it gave notice of the decision to apply the 2nd balance mechanism to customers with pre-paid tariffs in January 2014 by SMS, with a view to bringing the decision into force in February 2014. However, given the impossibility of communicating the entirety of the alterations due to the character limitations of SMS, it chose to inform customers in general terms, referring customers to its website or to a phone number for full information and further detail on these changes and their respective rights.

However, Vodafone's argument is not accepted.

In the first place, it is not true that Vodafone complied with the prior notice period as stipulated in paragraph 6 of article 48 of the LCE, and much less that it exceeded said requirements.

As found in the investigation conducted on 27 October 2014¹, Vodafone gave notice in January 2014, by means of an SMS sent to customers with pre-paid tariffs, informing them of the existence of contractual changes, but not referring, in particular, to a second balance to make calls to 760 numbers; meanwhile, during 2014, Vodafone made several updates to the information on its website concerning this issue, informing customers by this means of the need to postpone the procedure's implementation.

In this regard, see document 1 in annex to the Investigation Record, consisting of a copy of an e-mail from Vodafone, dated 27 October 2014, which was provided to officers in the context of the investigation, which reads:

"SMS sent in January:

- to Customers with tariffs not subject to increase:

'On 1 Feb Vodafone conditions and prices will be updated 2.5%. There is no change to your plan. + info on 1 Jan: 12710, complete info on tariff page on Vodafone.pt'

¹ See Investigation record.

- to customers with tariffs subject to increase:

'On 1 Feb Vodafone will amend the conditions of service and update prices. + info on 1 Jan: 12710, complete info on tariff page on Vodafone.pt''

As such, the notice given by SMS in January 2014 was limited to referring, in general terms, to the existence of *changes in the conditions of service and an update of pricing*; it made no reference to the requirement for a 2nd balance to access 760 numbers. The fact that the company sought to introduce more than one contractual change detracts further from the clarity of the information sent. It is noted that the recipients of the first SMS may even have thought, in their case, that there would be no changes. Therefore, solely on this aspect of missing information (and there are other aspects as stated in the Determination of 30 October 2014), this notice did not accomplish the function required by paragraph 6 of article 48 of the LCE to give notice of the specific change entailing the requirement that subscribers with pre-paid tariffs constitute and credit a second balance for access to the 760 range.

Furthermore, the successive updates given on Vodafone's website on the procedure alluded to in the notice of January 2014 and the postponement of its implementation can only have instilled uncertainty in customers as to the actual date when these changes were due to enter into force (even those customers with Internet access, which is certainly not the case of all customers); It is evident that this circumstance in itself calls into question the accomplishment of certainty regarding the date on which changes take effect, which accomplishment underlies the requirement to give prior notice.

And this is so to such an extent that, as also found in the investigation carried out on 27 October 2014, Vodafone felt the need to send notice by SMS on 16 October 2014, this time making reference to the requirement for a 2nd balance, from 22.10.2014, it is claimed, to all customers with pre-paid tariffs - see the referenced document 1 - and this notice was also published on its website, clearly demonstrating that Vodafone considered, given the period of time elapsed, that the validity of the claimed notice of January 2014 could not be extended until 22 October 2014 and also that this notice did not specify the contract change to be made. This second communication, of 16 October 2014, did not provide one-month prior notice in respect of the introduction of this amendment to contracts.

As such, it is concluded that the change imposed by Vodafone on prepaid tariff as from 22 October 2014 was not preceded by prior written notice of at least one month.

As regards the information on the contractual changes, as well as on the right of subscribers to withdraw from the contract without penalty, none of the SMS communications cited by Vodafone fully complied with these requirements:

- The SMS claimed to have been sent in January 2014 made no mention of the requirement for a 2nd balance to make calls to the "760" range, referring merely to changes in the conditions of services and an update to prices, requiring customers to check the company's website to obtain information or to call a specified number (without being informed if the call was free); moreover, the SMS did not inform subscribers of their right to cancel the contract without penalty within the period prescribed in the contract in the event that they do not accept the new conditions;
- The SMS it is claimed was sent to all customers with pre-paid tariffs on 16 October also did not contain complete information about the imposed changes, since, to obtain information on how to constitute and credit the second balance, subscribers are required to send an SMS, albeit free; the SMS also failed to inform subscribers as to their right to terminate the contract without penalty in the event they do not accept the new condition.

As is clear from the documentation collected through the investigation, and despite a footnote making reference to the alteration of 1 February 2014 / 1 March 2014 / 1 April 2014/ 1 October 2014 as regards the balance for calls to numbers starting with 760, Vodafone's website makes no mention, not even through reference to another source, as to the right of subscribers to withdraw from the contract without penalty in the event they do not accept the new conditions.

As regards the claimed limitations to the number of characters permitted in an SMS, the LCE does not require the provider to send information in a single SMS, whereby Vodafone may, given the claimed impossibility, send the subscriber the information as required by paragraph 6 of article 48 of the LCE, by dividing it between as many SMS messages as necessary for the purpose.

As regards allegedly similar situations, where subscribers have been informed in general and have been referred to the company's website, without generating ICP-ANACOM censure, Vodafone does not specify what these situations were and how they were similar -

the only case identified, concerning a determination of 11 December 2008, refers to a specific situation in which there were a significant number of amendments to be made to contracts *ex lege*, and not at the service provider's initiative, and where ICP-ANACOM (not the law) determined that these be notified to subscribers by written communication, allowing that **such communication, in the case of prepaid tariff subscribers who had not provided their identification data be replaced by an SMS with indication of the page on the provider's website containing the information.** In this case, the obligation to send notification was established by ICP-ANACOM and not by law; and was defined at the time along the lines indicated, whereby it is not valid for Vodafone to seek extrapolation of this procedure to situations in which the LCE stipulates written communication and makes no allowance for a replacement.

Vodafone claims, contrary to what is maintained by ICP-ANACOM, that subscribers had time to react to the measure adopted by the company on 22 October 2014, given that, *within days of it adopting the 2nd Balance rule*, the company registered over 6,000 customer balance credits. However, this fact does not mean that all required information had been made available to subscribers with proper advance notice, and it cannot be known how many subscribers would have reacted and how (because some of them may have chosen to terminate the contract) had the legal conditions been observed; it merely means that some of the regular users of the services provided through the range "760", wishing to maintain access from that date, were confronted with an audio message that warned them of the requirement to constitute a 2nd balance for this purpose and they may even have thought there was no alternative. Therefore, Vodafone's argument has no bearing on the original conclusion that proper notice was not provided.

In addition, subsequent to the measure adopted on 22 October 2014, other operators with services provided using the "760" numbering range (e.g. competitions, market surveys, fundraising / donations) received complaints from customers of such services and claimed to have suffered a reduction in income as a result of the respective decrease in the volume of calls made to this numbering range.

There is no truth in the claim that, because it sought to comply with the applicable legal and regulatory framework, Vodafone postponed adoption of the 2nd balance rule (initially planned for February 2014) until such time as the legitimacy of its actions was confirmed, which confirmation - it claims - was obtained by means of the Determination issued by ICP-

ANACOM on 21 October 2014 recognizing the possibility that operators may adopt a second balance. The postponement of the decision in question was not due to the company seeking to observe the applicable legal and regulatory framework, or because it was waiting for ICP-ANACOM to confirm the legitimacy of its conduct, but due to technical difficulties in implementing this measure, as explicitly stated by the member of Vodafone staff present during the inspection carried out on 27 October 2014. In fact, if Vodafone had been waiting for confirmation of the legitimacy of its actions - which, as claimed, it considered granted through the Determination of 21 October 2014 - it is not understood why it sent customers an SMS with information on 16 October 2014, i.e., five days before the Determination it claims legitimised the act, when it did not then know that the Determination would be issued. In any case, the above Determination of 21 October 2014 did not give legitimacy to the unilateral imposition of any measure to restrict access to numbering ranges of the Plano Nacional de Numeração (National Numbering Plan), as will be detailed below.

Likewise, ICP-ANACOM does not accept the claim that the urgent measure adopted sought to defend the interests of third parties and not consumers, given that, according to Vodafone, to protect consumers, it would have been sufficient to require compliance with the rules of prior notification.

The requirement for Vodafone to comply with the rules of prior notification necessarily led to suspension of the measure, because there was no other way to fulfil the notice period of one month stipulated in paragraph 6 of article 48 of the LCE.

Furthermore, the urgent measure applied to Vodafone sought, first and foremost, to safeguard the rights of subscribers using the "760" numbering range, who, as noted in the Determination of 30 October 2014, faced a unilaterally imposed restriction on access to the "760" numbering range without prior notice given with the content required by law; these deficiencies in the prior notice procedure reduced the scope of subscribers to react to the measure adopted by depriving them of time and information to terminate contracts or even simply to constitute and credit the second balance; as such, while any unilaterally imposed measure would always constitute a restriction on the freedom of subscribers, especially a measure that prevents subscribers from freely using sums already credited, in some cases before becoming aware of the pending limitation, the cited flaws in the prior notice procedure make the contractual amendment in question yet more restrictive. Accordingly, this lack of proper prior notice exacerbated and aggravated the consequences of a measure of this type

(for the subscribers themselves and for third parties), since customers did not have proper information, not just one month, but up to a few days in advance, as would enable a free and informed option as guaranteed by law.

As also noted by Vodafone, provision of the 2nd balance did not, in itself, constitute unlawful conduct - as on date of its provision. But it is so rendered subsequent to Regulation no. 495/2014 of 21 October, especially under paragraph 1 thereof (which strengthened the condition in point j) of paragraph 1 of article 27 of the LCE) because it is a measure imposed unilaterally.

Under these terms it is concluded that the change imposed by Vodafone on prepaid tariff customers as from 22.10.2014 was not preceded by written communication to subscribers with complete information about the contract amendment in question, or with information about their right to terminate the contract within the period prescribed therein and without penalty, in the event they do not accept the new condition.

It is therefore concluded that the comments made by Vodafone, as regards the urgent measure applied to it having no basis, are manifestly invalid; as such, the position is taken that there are no valid grounds for repealing the Determination of 30 October 2014, which is a wholly valid act.

3.3. *The alleged violation of the principle of proportionality*

Vodafone submits that the Determination of 30 October 2014 disregards the principle of proportionality in all its aspects, since it affects in unfitting or inappropriate terms its legally protected rights or interests and its imposition is likely to cause damages in excess of any benefits achieved, whereas satisfaction of the public interest in question would be easily achieved by the requirement of compliance with the unfulfilled duties.

However, this claim is not accepted, since, as mentioned above, the determination of 30 October 2014 sought precisely and exclusively to correct irregularities detected in the measure adopted by Vodafone as regards the failure to fulfil the notification stipulations of paragraph 6 of article 48 of the LCE, whereas this deliberation is the only way of obtaining such a result and whereas the suspension ordered is solely dependant on compliance with

this rule (evidently without prejudice to the restrictions imposed under the determination of 21 October 2014, as from its entry into force)

Moreover, in addition to the fact that the measure precludes the imposition of a mandatory 2nd balance without notice under the required terms, Vodafone does not specify or quantify the damages which, it claims, exceed the interest protected by paragraph 6 of article 48, as caused to the company as a result of the determination of 30 October 2014, as would be essential to demonstrate the disproportionate measure of the ordered urgent measure.

To pursue the public interest it was sought to safeguard - the right of subscribers with prepaid tariff to be given the legally stipulated period of prior notice as to the amendments introduced to these tariffs on 22 October 2014 and as to the right of termination in the event they do accept said amendments, - the ruling laid down by the Determination of 30 October 2014 is the only possible, appropriate, necessary and proportionate means. As Vodafone itself accepts, the imposition does not entail any disproportionate forgoing of Vodafone's legitimate interests versus the interests of consumers and injured third parties that it is sought to protect.

Any other limitation to the measure adopted by Vodafone on 22 October 2014, which does not result from failure to comply with article 48, paragraph 6, of the LCE, will find basis in the rules adopted by ANACOM by determination of 21 October 2014, laid down by Regulation no. 495/2014 of 21 October, published on 03 November 2014.

Under these terms it is concluded that the determination of 30 October 2014 does not violate the principle of proportionality, whereby the arguments advanced to this effect are deemed unfounded.

3.4. *The alleged violation of the principle of equality*

Vodafone also holds that the Determination of 30 October 2014 indicates different treatment of Vodafone compared to other operators which adopted similar measures some time ago and which were not censored by the Regulator.

Once again, Vodafone is not correct.

The Regulator has not been aware of any conduct engaged in by any other company providing electronic communications services which is similar in nature to the introduction of this measure without prior notice being given as required by law, as in this case.

In its comments, Vodafone also failed to identify the cases which it claims to be aware of and which, in its view, would call for a similar response from ICP-ANACOM.

The rulings laid down in the Determinations of 21 October 2014, which approved the rules governing end-user access to numbers from the Plano Nacional de Numeração (National Numbering Plan), apply to all undertakings which offer electronic communications networks and services.

Therefore, there is no evidence to support the conclusion that the ruling laid down in the Determination of 30 October 2014 has violated the principle of equality.

4. Definitive measure

Whereas, in the determination of 30 October 2014, the Management Board of ICP-ANACOM informed Vodafone that it had found that, on 22 October 2014, the company had unilaterally imposed a measure on all its prepaid tariff customers requiring them to constitute and credit a second balance to be able to place calls to numbers within the "760" range of the PNN - Plano Nacional de Numeração (National Numbering Plan) while failing to fulfil the provisions of paragraph 6 of article 48 of the LCE:

- as regards the period of prior written notice of the contractual change effected, which communication should have been sent to prepaid tariff customers one month in advance,
- as regards the information that this communication should provide, both because the communication is incomplete in terms of information about the imposed contract amendment, and in terms of the communication failing to refer to the right of subscribers to withdraw from the contract within the period prescribed therein without penalty in the event that they do not accept the new condition;

Whereas, as already mentioned in the Determination of 30 October 2014, the measure unilaterally imposed by Vodafone, in the described circumstances, results in consequences that materially accentuate the negative impact for users and competition had by measures of this type, as demonstrated by the 70 complaints received by ICP-ANACOM as of 28 October

2014, by the comments posted on the Vodafone Forum² and directed to television providers and attached to the application for urgent intervention submitted and formulated by AR Telecom - Acessos e Redes de Telecomunicações, S.A., by RTP - Rádio e Televisão de Portugal, S.A., by SIC - Sociedade Independente de Comunicação, S.A. and by TVI - Televisão Independente, S.A.;

Whereas, pursuant to the Determination of 30 October 2014, ICP-ANACOM ordered Vodafone, to suspend, with immediate effect, restrictions on access to the "760" numbering range imposed on subscribers with prepaid tariffs, as entailing the need to constitute and credit a second balance, and to include and highlight information about the suspension of this measure on the company's website and inform affected subscribers to the effect, and further (albeit by means of another source of information) inform affected subscribers as to how any second balance credited in the meantime may be used;

Whereas, subsequent to an analysis of the positions advanced by Vodafone, the reasoning giving basis to imposition of the suspension, on an interim basis, is confirmed

The Management Board of ICP-ANACOM determines, in accordance with paragraph 3 of article 111 of the LCE, to confirm its suspension of the restriction imposed by VODAFONE PORTUGAL - Comunicações Pessoais, S.A., as regards access to the "760" numbering range by respective subscribers with prepaid tariffs, as entailing the need to constitute and credit a second balance, and that it include and highlight information about the suspension of this measure on its website and inform affected subscribers to the effect, and further (albeit by means of another source of information) inform affected subscribers as to how any second balance credited in the meantime may be used.

² <http://forum.vodafone.pt/>