

DECISION

ON THE USE OF THE TERM “UNLIMITED” TO DESCRIBE OFFERS OF ELECTRONIC COMMUNICATIONS SERVICES

I. FRAMEWORK

1. Facts

ICP - ANACOM has noticed that companies providing electronic communications networks and services (hereinafter referred to as “companies”) increasingly make available offers that are announced as unlimited, usually called offer with “*unlimited traffic*” or “*unlimited calls/SMS*”, which suggest, as the name itself indicates, that there is an unrestricted and unlimited access to services.

The issue is particularly important in the case of internet access offers announced as *unlimited traffic offers*, which lead users to believe that the use of such services is not subject to any limitations as far as capacity or traffic volume are concerned.

Such offer announcements give rise to complaints from users who, contrary to expectations, are surprised when made subject to restrictions in the use of services that are announced and known as “unlimited” (*traffic/calls/SMS*), and as such are supposed not to be subject to limits. These limitations take the form of restrictions on traffic or transfer speed.

In the specific case of unlimited offers of telephone services (provided on their own or in packages), after specific consumption limits have been exceeded, restrictions in the use of the service or an increase in the price charged may take place.

As regards internet access offers, speed reductions applied in this context usually mean a reduction of transfer speeds to values that are significantly lower than those provided so far for these offers. As such, they also constitute an indirect way of limiting capacity, which does not determine the unavailability of the service, but nevertheless significantly limits the volume of transferred data.

Moreover, in most cases, these restrictions applied by companies remain until the end of the ongoing billing period.

This Authority confirmed in “general conditions” of services, in offer conditions and in pages disclosing prices in websites of several companies providing those services that it is rather common for the referred offers to provide for the possibility of providers constraining the service access speed - or, in the case of telephone services, to make the continuity of the provision subject to an additional charge - where users reach a certain traffic, calls or SMS volume, under the so-called “Fair Use Policy” or “Acceptable Use Policy”.

The disclosure of both types of policies, in the scope of companies’ offer conditions, is badly operated, it is hard to see, and available frequently only at tariff pages of websites or in “footnotes”, or through link references.

2. Regulatory framework

The Electronic Communications Law (ECL)¹ ensures the freedom to provide electronic communications networks and services².

According to that law, the provision of electronic communications networks and services is subject only to the general authorisation regime, that is, to compliance with *the legal framework established by the present law and by regulations issued by the national regulatory entity, ensuring rights for the provision of electronic communications networks or services and laying down sector specific obligations that may apply to all or to specific types of electronic communications networks and services, in accordance with the present law*, and, in this framework, to compliance with operating rules and observance of use and subscriber rights set out in the law³.

Companies must bring their offers into line with these limits, in terms of services, quality, conditions and prices.

However, they are required to *make available to the public adequate, transparent, comparable and up-to-date information on standard terms and conditions in respect of access to, and use of, services provided to end-users and consumers, setting out in detail the applicable prices and any other charges, as well as, where appropriate, those due on termination of a contract*.⁴

In this context, under paragraphs 1 and 2b) of article 47 of ECL, and pursuant to ICP - ANACOM's determination on the object and form of public disclosure of conditions of provision and use of electronic communication services⁵, companies must ensure that in the offer conditions, namely at their websites, appropriate, transparent, comparable and up-to-date information is provided, on:

- (i) *Services provided*, which includes the *description of services and any restrictions on access thereto*;
- (ii) *Levels of quality of service provided*, and specifically as regards Internet access services, companies must guarantee:
 - a) *That interested parties are provided with clear and accurate information for the various service offers, distinguishing between upload and download speeds, the maximum access speed provided and the average access speed estimated by the provider (the speed which on average is estimated by the provider to be made available under normal usage conditions, which may frequently differ from the maximum access speed disclosed)*;
 - (...)
- (iii) *Standard tariffs*, which includes *information on "Fair Use Policy"/ "Acceptable Use Policy", where appropriate, in particular on their content and means to access this information* and, specifically for Internet access services, *disclosure of the respective*

¹ Law No. 5/2004, of 10 February, as amended by Law No. 51/2011, of 13 September, by Law No. 10/2013, of 28 January and by Law No. 42/2013, of 3 July.

² Cfr. article 19, paragraph 1.

³ Vide article 19, paragraph 2, and article 3h) of ECL.

⁴ Cfr. article 47, paragraph 1.

⁵ Available at [Decision amending determination on the object and form of disclosure of conditions of provision and use of electronic communications services](#).

traffic management policies, if any, restricting the use of the Internet access service, when subscribing an unlimited traffic tariff (including happy hours).

As regards procedures put in place by companies to measure and shape traffic generated by clients, ECL allows them to be adopted where they are associated to two objectives:

- (i) to avoid overfilling a network link [article 47-A, paragraph 1 d)] and;
- (ii) to avoid overfilling the contracted capacity [article 47-A, paragraph 1d) and article 48, paragraph 1 c)].

In any of these situations, the adoption of restrictive measures must be (i) informed to the public, in an appropriate, transparent, comparable and up-to-date manner, and (ii) disclosed to users and subscribers in a clear and appropriate manner.

II. “UNLIMITED” OFFERS

In the light of the above, two situations should be distinguished, in the scope of restrictive measures allowed by law:

- either offers provided by service providers are presented as being subject to traffic/calls/SMS limits and, in this case, it is permissible to restrict or limit traffic or the use of the service whenever the contracted capacity, meaning the traffic volume or maximum amount of calls or SMS, is reached;
- or offers provided are made known as “*unlimited traffic/calls/SMS*” and, in this case, it is hard to conceive that any restrictions are allowed.

“Unlimited”⁶ means “without limits”, “without restrictions”, “infinite”, “absolute”, and it is a term that leaves no doubt to a standard user as to its meaning and scope.

As such, to admit that companies may simultaneously qualify and publicize an offer as “unlimited”, or “with unlimited traffic”, or by another term that leads users to reach the same conclusion as to its meaning, and in the contract or elsewhere, to provide for restrictions to that offer, seems to be paradoxical and misleading, being contrary to the requirements of transparency and appropriateness of information to be provided to the public in compliance with paragraphs 1 and 2 of article 47 of ECL.

In another perspective, it is likely that when internet access providers make available “unlimited traffic” offers, their network is adapted so as to allow the speed to be maintained, under normal circumstances, irrespective of the traffic volume, without overfilling capacity in the respective network links. This is true also for unlimited offers of other communication services. As such, the constraining of traffic or of the use of the services, although admissible in specific situations - as when the number of users competing for the same network resources is exceptionally higher than planned - may not be admitted as a rule or common practise.

⁶ According to: *Dicionário Houaiss da Língua Portuguesa*, Book IV, Lisbon 2003; Cândido de Figueiredo, *Grande Dicionário da Língua Portuguesa*, Volume II, 25th edição, Bertrand Editora; *Dicionário da Língua Portuguesa Contemporânea da Academia de Ciências de Lisboa*, volume II, Verbo, 2001.

In fact, under ECL, it is admitted that in exceptional circumstances, and to avoid overfilling a network link, procedures are adopted to shape traffic. In these cases, companies may apply restrictive measures that are necessary and appropriate to react to these situations, so as to manage the volume of joint traffic of different users competing for the same resources, allowing their access to congested resources to an equal degree. However, these measures must have a nature of contingency and must cease as soon as the situation that determined them is over.

As such, taking into account the demands of adequacy and transparency that govern the provision of information on standard terms and conditions, in respect of access to and use of services, this Authority takes the view that:

- a) The term “unlimited” used to designate, announce and characterize several offers, namely those provided by providers of access to internet and telephone services (including calls and/or messages) must have the meaning given by a standard user, that is “without limits” or “without restrictions”;
- b) The provision of services where their use is constrained beyond situations justified by exceptional circumstances, so as to avoid overfilling a network link, under ECL, must not be made known as “unlimited traffic offer”, “unlimited calls/SMS offer” or by any other term likely to mislead users into the same conclusion as regards their meaning, such as “without limits”, “without restrictions” (as to the classification of offers), “infinite” or “absolute” (as to the classification of traffic/calls/SMS);
- c) Restrictive measures applied in situations justified by exceptional circumstances must be:
 - Adequate and proportional to the objective pursued, both as regards the measure on its own, and the respective duration, and normal conditions must be resumed as soon as the exceptional situation or circumstance is over;
 - Equitable, in the way different users with the same tariff/package are treated;
- d) “Fair Use Policies”/ “Acceptable Use Policies”, where they exist, must be included in offer conditions of companies, namely, in the scope of the disclosure in the respective websites, in pages where information on tariffs and features is provided in a clear and transparent manner and, in the scope of “unlimited traffic offers”, only the framework referred to in b) and c) is allowed, and applicable restrictions must be duly specified.

III. DRAFT DECISION and CONSULTATION PROCEDURE

By determination of 23 January 2011, and taking into account issues mentioned above, the Management Board approved a draft decision on the use of the term “unlimited” by electronic communications service providers.

The referred draft decision was submitted to the general consultation procedure (article 8 of ECL) and prior hearing procedure (article 100 *et seq.* of the Administrative Procedure Code), in the scope of which timely responses were received from the following bodies:

- Cabovisão - Televisão por Cabo, S. A. (hereinafter, «CABOVISÃO») and Onitelecom – Infocomunicações, S.A (hereinafter «ONITELECOM»);

- Portugal Telecom, S.G.P.S., S. A. (hereinafter, «GRUPO PT»);
- Vodafone Portugal – Comunicações Pessoais, S.A (hereinafter «VODAFONE»); and
- Optimus – Comunicações, S.A, ZON TV Cabo Portugal, S.A, ZON TV Cabo Madeirense, S.A and ZON TV Cabo Açoreana, S.A (hereinafter jointly referred to as “ZON OPTIMUS”).

A consultation report was drafted, which integrates this decision and includes a summary of positions taken, as well as ICP - ANACOM’s views thereon.

The report substantiates this decision, and justifies the amendments that ICP - ANACOM considered appropriate to include and which had not been laid out in the draft decision, namely: **(i)** the mandatory nature of the express reference, in the offer conditions, to the exceptional nature of restrictive measures that may be adopted (amendment to point 1.3) and **(ii)** the establishment of a 90-day time-limit as from the notification of the decision, for the implementation of measures required to comply with determinations set out (new point 2).

IV. DECISION

Therefore, in order to fulfil tasks conferred on ICP - ANACOM under paragraph 1 h) of article 6 and pursuant to article 9 g) of the Statutes, approved in annex to Decree-Law No. 309/2001, of 7 December, in the pursuit of regulatory objectives provided for in paragraphs 1 a) and c), 2, and 4 b) and d) of article 5 of Law No. 5/2004, of 10 February, as amended by Law No. 51/2011, of 13 September, and in order to ensure compliance with paragraph 1 of article 47 of the referred law, as well as with paragraph 2 b) of the same article, the Management Board of ANACOM hereby determines:

1. To order electronic communications service providers to:
 - 1.1. Use only the terms “*unlimited traffic*” or “*unlimited calls/SMS*” to qualify electronic communications services that are effectively provided “without limits” or “without restrictions” for the whole term of the contract. This determination applies to any situation where there are terms likely to mislead users into the same conclusion as regards their meaning, such as “without limits”, “without restrictions” (as to the classification of offers), “infinite” or “absolute” (as to the classification of traffic/calls/SMS).
 - 1.2. Refrain from qualifying offers as “*unlimited traffic*” or “*unlimited calls/SMS*” or by using any other term in the sense referred in 1.1., where the use of services is constrained after certain limits have been reached, except where such restriction is determined by exceptional circumstances in compliance with provisions in ECL.
 - 1.3. Provide in the respective offer conditions, clear and transparent information on any restrictive or traffic-constraining measures, whose exceptional nature must be expressly mentioned, that may be applied - namely indicating their repercussions in the quality of service provided - which in offers of an “unlimited traffic”, “unlimited calls/SMS”, or known by any other term in the sense refers in 1.1,

- a) May only lead to service limitations where they are justified by exceptional circumstances, clearly characterised and substantiated, with the purpose of avoiding the overfilling of a network link;
 - b) Must, at all times, be (i) adequate and proportional to the objective pursued, as regards the measure on its own, and the respective duration, and normal conditions must be resumed as soon as such circumstances are over; and must also be (ii) equitable, in the way different users with the same tariff/package are treated.
2. Companies providing electronic communications networks and publicly available electronic communications services must implement measures required to comply with determinations set out in this decision within 90 days from notification thereof.