

Recommendation

to undertakings providing electronic communications networks and services in connection with WAP Billing

Autoridade Nacional de Comunicações (ANACOM) has received a significant number of complaints from users of the mobile Internet access service related to charges for entertainment services and/or content (including ringtones, games, wallpapers). There are usually subscribed to through access to Internet pages.

Essentially, in these cases:

- a) claimants access WAP (Wireless Application Protocol) pages where, it is claimed, they acquire entertainment content typically intended for mobile consumption, such as ringtones, games or wallpapers;
- b) under an agreement between the provider of the mobile internet access service and the content provider, the price of the acquired content, consisting of a weekly or monthly charge, is:
 - added to the mobile Internet access service bill, in the case of post-paid offers; or
 - deducted from the customer's balance, in the case of pre-paid offers;
- c) it is claimed that users become aware of these situations, either through a free SMS which they receive in confirmation of the purchase of the content or only subsequently, when they check their bill or balance.

Responding to requests for clarifications from ANACOM, providers of the mobile Internet access service maintain that they only bill and charge for the subscribed service in the name of and on behalf of the respective provider, and that they are not involved in the contracting and provision of the service.

Since the services concerned are not electronic communications services, neither audiotext nor value-added services based on message sending (SMS/MMS), they are not covered by sector-specific legislation.

However, taking into account ANACOM's assigned responsibilities in the area of consumer protection, it is deemed that the legality of the practice in question must be assessed pursuant to legislation protecting consumer interests, applicable across different economic sectors.

1. In the first place, it is important to take into account the provision in Law no. 24/96 of 31 July (as subsequently amended), which establishes the legal regime applicable to consumer protection.

Under paragraph 4 of article 9 (Right to protection of economic interests) of this law, "*Consumers shall not be obliged to pay for goods or services which they have not previously and expressly ordered or requested, or which do not conform to a valid contract. Moreover, they shall not be responsible for returning the goods or services or making compensation for them, nor are they responsible for the risk of the object perishing or deteriorating*".

In addition, the provisions of article 9-A of the same law (Additional payments), partially transposing Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011, state that:

"1 - Before the consumer is bound by the contract or offer, the provider of goods or services shall seek the express consent of the consumer as to any extra payment in addition to the remuneration agreed upon for the provider's main contractual obligation.

2 - Any obligation to make additional payments remains subject to a clear and comprehensible communication to the consumer, whereas acceptance by the consumer is deemed invalid except where the consumer has been given opportunity to opt for the inclusion or otherwise of these additional payments.

3. The consumer shall be entitled to a refund of said payment in cases where, in lieu of the consumer's express consent, the obligation to make additional payment results from options established by default (options which the consumer has to refuse in order to avoid additional payment).

4 - It is incumbent upon the supplier of goods or service provider to demonstrate their compliance with the communication obligation established in paragraph 2.

5. The provisions of the present article apply to purchasing and sales, supply of services, contracts for the provision of essential public services of water, gas, electricity, electronic communications and district heating and to contracts for digital content."

It is clear from the provisions referred to above, in particular from the provisions of paragraph 1 of article 9-A of *Lei de Defesa do Consumidor* (Consumer Protection Law), that, even where

providers of electronic communications services are not responsible for the provision of services or for the availability of the entertainment content concerned, they remain subject to the requirement, in so far as they collect the associated charges, to obtain express consent from their customers (consumers) in respect any extra payment in addition to the remuneration agreed upon for the provider's main contractual obligation, which, in the present case, typically corresponds to provision of the Internet access service, particularly mobile access.

Detailed analysis of the information obtained by ANACOM in the present context indicates that the prior and express consent of customers (consumers) as regards subscription to these services or content for billing (in the case of post-paid customers) or deduction (in the case of pre-paid customers) has not been obtained by electronic communications service providers; this indicates inconformity with the provisions of *Lei de Defesa do Consumidor* (Consumer Protection Law).

However, the fact remains that *Lei de Defesa do Consumidor* (Consumer Protection Law) does not set out a sanctioning regime, whereby the safeguards provided for in the law depend on intervention before the Courts by entities which are responsible for representing the collective rights and interests of consumers in legal proceedings.

2. The position which stems from *Lei de Defesa do Consumidor* (Consumer Protection Law) is reinforced by other transversally applied regimes which protect consumer interests, albeit at a more specific level and with narrower scope.

Such is the case of Decree-Law no. 57/2008 of 26 March (as subsequently amended), which establishes the regime applicable to unfair commercial practices of companies in their dealings with consumers before, during or after a commercial transaction relating to a good or service.

Pursuant to article 12, point f) of the above law, it is considered aggressive commercial practice, whatsoever the circumstances, and it is therefore prohibited (see articles 4 and 6 of the same Decree-Law) “to demand immediate or deferred payment in respect of goods and services, or the return or custody of goods provided by the trader where these goods and/or services have not been requested by the consumer, without prejudice to the provisions of the regime governing distance contracts as regards the possibility of providing a good or service of equivalent quality and price”.

The same applies in the case of Decree-Law no. 24/2014 of 14 February, which establishes the legal regime applicable to contracts concluded at a distance and away from business premises, with a view to promoting the transparency of commercial practices and safeguarding the legitimate interests of consumers.

For this purpose, under paragraph 1 of article 28 of this Decree-Law, *“the collection of any type of payment in respect of the unsolicited supply of goods, water, gas, electricity, district heating or digital content or in respect of the provision of services not requested by the consumer is prohibited (...)”*.

In view of the above and exercising the powers and responsibilities assigned to it under point h) of paragraph 1 of article 8 and under point b) of paragraph 2 of article 9, and pursuant to point q) of paragraph 1 of article 26 of its Statutes (approved by Decree-Law no. 39/2015 of 16 March), and without prejudice to any other initiatives deemed fitting within the framework of its assigned powers and responsibilities, **ANACOM makes the following recommendation to undertakings providing public communications networks and publicly available electronic communications services which have entered into agreements with content providers and which, in the context of said agreements, charge their customers for entertainment services or content:**

Companies offering public communications networks and publicly available electronic communications services should not require payment from their subscribers in respect of provided digital content or services which are not electronic communications, except where payment for each instance of said content or service is expressly and specifically authorised by the customer, by means of a declaration given using a durable medium.