

DECISION

RULES GOVERNING END-USER ACCESS TO NUMBERING OF THE PLANO NACIONAL DE NUMERAÇÃO (NATIONAL NUMBERING PLAN)

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I. Facts

I.1. Request of AR Telecom

AR Telecom - Acessos e de Telecomunicações, S.A. (AR Telecom) submitted a request to ICP-ANACOM, seeking the regulator's intervention in relation to practices engaged by VODAFONE PORTUGAL - Comunicações Pessoais (Vodafone), by OPTIMUS - Comunicações S.A. (Optimus), as then named, currently NOS - Comunicações, S.A., and by TMN - Telecomunicações Móveis Nacionais, S.A. (TMN), as then named, currently MEO - Serviços de Comunicações e Multimédia, S.A. (MEO).

The practices which prompted this request were as follows: **(i)** Vodafone announced a decision, as of 1 February 2014¹, whereby customers with prepaid tariffs would not be allowed access to "760" numbering unless they maintained a separate balance, which could only be credited at the retail outlets of the company or its agents; **(ii)** Optimus adopted a similar measure, also in relation to customers with prepaid tariffs, although the balance required for access to such numbers could be credited in the same manner as other balance top-ups; and **(iii)** TMN restricted calls to said "760" number from its customers with prepaid tariffs by requiring a balance of at least 5 euros.

Arguing that said practices were contrary to a number of provisions of LCE - Lei das Comunicações Eletrónicas (Electronic Communications Law- Law no. 5/2004 of 10 February, as republished by Law no. 51/2011 of 13 September, and subsequently amended by Law no. 10/2013 of 28 January and Law no. 42/2013 of 3 July), AR Telecom held that the practices constituted unilateral barring of services of this type by mobile operators, particularly Vodafone, whose conditions of access are most geared to discouraging calls to these numbers. AR Telecom further held that this measure, which is not requested by users, creates an obstacle that exceeds traditional barring as imposed by law, *"since it requires ongoing intervention by the consumer (separate balance top-ups) to access the service, while 'normal' barring only requires a single act by the consumer to make the service accessible on a permanent basis."*

AR Telecom also held that, in implementing this measure, Vodafone was discriminating against customers with prepaid tariff in relation to other customers - a practice which it

¹ Date later changed to 1 March 2014 and, successively, to 1 April, 1 May, 1 July, 1 October and 20 October 2014.

deems highly irregular. And it confirmed its position that this type of policy will likewise promote discrimination in respect of the type of service that the consumer will want to access, since it differentiates access to "760" numbering from all other numbering covered by the PNN.

AR Telecom reported that as a direct impact of these procedures, it estimated a significant, directly attributable, loss of turnover, given that a considerable percentage of its traffic from mobile networks is generated by this type of traffic (with the majority based on the pre-paid tariff option). In particular, AR Telecom highlighted the impact of the measure announced by Vodafone, whose customers originate a substantial share of the traffic in question.

Furthermore, AR Telecom gave an account of the indirect impact that would result from reduced investment by the promoters of this type of content, as a result of seeing the potential for gain artificially limited. It set out that, given the steep decline in advertising revenue, the sustainability of some companies promoting these services is increasingly reliant on the revenues generated from "760" numbering.

According to data based on their own estimates, the value of the business in 2013 amounted to about 108 million euros [assumed as total revenue generated by calls to numbers in this range], representing an increase of 44% compared to 2012 - this demonstrates the interest of users in these services.

In the Operator's view, the practices in question constitute a dangerous precedent that may ultimately lead to restrictions being placed on other numbering ranges or on other specific services which are governed by a similar regulatory framework.

I.2. Positions taken by other undertakings

In this context, it is also noted that TVI - Televisão Independente, S.A. (TVI) and SIC - Sociedade Independente de Comunicação, S.A. (SIC) sent letters to ICP-ANACOM, on 31 March and 1 April respectively, requesting participation in the administrative procedure on the basis of being users of the 760 numbering range and since any measures restricting access would impact their activities.

Subsequently, these two TV operators submitted their positions on the matter, TVI on 22 April and SIC on 23 April, with reference to ICP-ANACOM's statement of 4 February 2014, as published on its website².

In its submission, TVI stated that it considered the occurrences alluded to by ICP-ANACOM in its statement as likely to cause considerable damage to the legally protected interests of TVI and its viewers, whereby it reiterated that the company should be heard prior to any decision on the matter.

Meanwhile, SIC, considering that any restrictive practices related to the 760 numbering range fell clearly within ICP-ANACOM's responsibility, held that the process should culminate with a decision that determined a cessation of the restrictive and discriminatory practices in question. SIC also reiterated its request to be considered as an interested party to the process.

Previously, Controlinveste Media, SGPS, S.A. (Controlinveste) had sent ICP-ANACOM (i) on 22 January 2014 - a request for information about Vodafone's creation of a specific balance for the "760" numbering range, questioning the legality of this procedure, and (ii) on 24 January 2014 - a set of questions about the possibility of telephone operators creating a second balance specifically to make calls to "760" numbers.

II. Legal framework governing access to PNN numbering

II.1. Access to PNN numbering as an end-user right

Under the terms of paragraph 1 of article 27 of the LCE, undertakings providing electronic communications networks and services may be subject, *inter alia*, to conditions designed to guarantee:

- Accessibility by end users to numbers of the National Numbering Plan, numbers of the European Telephone Numbering Space, to Universal International Freephone Numbers, and, where technically and economically feasible, to numbers of numbering plans of other Member States, and respective conditions in conformity with the LCE; [see point j) of paragraph 1 of article 27];

² [ANACOM intervenes to bar mobile operators from engaging in discriminatory practices](#)

- Consumer protection rules specific to the electronic communications sector, including conditions in conformity with the LCE, and conditions on accessibility for users with disabilities in accordance with article 91 of the LCE [see point I) of paragraph 1 of article 27].

ICP-ANACOM considers that, as regards access to the numbering of the PNN, the condition laid down in Article 27 is to be understood as determining the stipulation that undertakings make access available to all numbering ranges, without creating barriers which are not legally prescribed. Indeed, provision is only made for the possibility of distinction, based on "*technical and economic feasibility*" with respect to the numbering plans of other Member States. ICP-ANACOM effectively made the three mobile operators subject to this condition pursuant to the respective rights of use of frequencies for terrestrial electronic communications services³.

The LCE establishes further (article 44) that, where technically and economically feasible, undertakings holding numbers of the National Numbering Plan on national territory shall guarantee: **(i)** access to all numbers provided in the European Union and **(ii)** access and use of services by end-users through non-geographic numbers, within the European Union [paragraph 3, point a) and b)]. This rule shall only not apply where a called subscriber has, for commercial reasons, chosen to limit the access of calls from specific geographical areas (see article 44, paragraph 4).

In this context, and from the legal formulation of this condition, it is concluded that, as an obligation/condition, the stipulation, whereby undertakings providing electronic communications networks and services are required to allow access to the numbering of the PNN, results in the assurance that end-users are likewise guaranteed the right of access to numbers, from the outset, without limitations other than those which stem from customary business practices, such as the differentiation of retail prices.

This right therefore tends towards a fully enjoyable right, whereby it is incumbent upon ICP-ANACOM to ensure that it is not unreasonably restricted by undertakings that offer electronic communications networks and services.

The condition imposed on undertakings to guarantee end-user access to PNN numbering is an instrumental requirement in relation to the objectives set out in the

³ [Serviço de comunicações eletrónicas terrestres](#)

regulatory framework and a condition which ICP-ANACOM is bound, in particular, to enforce **(i)** in the context of promoting competition in the provision of electronic communications networks, ensuring that users derive maximum benefit in terms of choice, price and quality [see article 5, paragraph 1, point a) and paragraph 2, point a) of the LCE], and ensuring that there is no distortion or restriction of competition [see article 5, paragraph 1, point a) and paragraph 2 point b) of the LCE] and **(ii)** in the context of promoting the interests of citizens, promoting the ability of end-users to access and use services of their choice [see article 5, paragraph 1, point c) and paragraph 4 point g) of the LCE].

Since access to numbers is the rule, it appears that the legislature took care to specify the exceptional cases where such access is to be barred by default, which implies contrarily that the availability of such access depends on a manifestation of the subscriber's will.

II.2. Legal restrictions on access to specific numbering ranges and the willingness of subscribers

The practice of barring by default has basis in article 45 of the LCE (as amended by Law no. 51/2011 of 13 September and Law no. 42/2013 of 3 July) for Audiotext and message-based valued added services - in this case where services involve the sending of more than one message or the sending of messages on a regular or ongoing basis or where services have sexual or erotic content (paragraphs 1 and 3 of article 45).

It is only with regard to these situations, as characterized by the legislature, where access to certain numbers depends on the express manifestation of will by subscribers, i.e. to lift the legally mandated barring of services (paragraph 4 of Article 45 of the LCE).

Other than in these situations, the LCE only provides for other cases of barring where at the subscriber's request. Such is the case in the following situations:

- Article 45, paragraph 5, sets out that, at the request of the respective subscribers, undertakings that provide public communications networks or publicly available electronic communications services which support the provision of message-based valued added services shall provide free barring

for such services, irrespective of whether there is a contract with the provider of such services or whether any contract has been resolved.

- Article 45, paragraph 8: provides for other cases in which ICP-ANACOM may order undertakings to make available, upon subscriber request, the selective and free barring for outgoing or incoming communications of similar applications to those mentioned in paragraph 3 of article 45 (message-based valued added services, (including where SMS and MMS-based) or for other defined types of numbers⁴.
- Article 94, paragraph 1, point b), sets out that the universal service providers, in the context of facilities and mechanisms to "control the charges", shall make barring available for outgoing calls of or to defined types of numbers or of premium SMS or MMS or other services or applications of value-added message-based services, upon the request of the subscriber, without prejudice to the provision of article 45 of the LCE;

It is therefore concluded that even in situations where restrictions on access to certain numbering ranges are justified - based on the need for special protection for end-users - the subscriber's freedom of choice prevails at all times.

III. The right of access by end-users to "760" numbering range

III.1. The "760" numbering range - Service with flat-rate calls (maximum retail price of 0.60 euros excluding VAT), irrespective of call duration or time of day call is made

The "760" numbering range was set up by ICP-ANACOM on 28 January 2004, following establishment of the "707", "708" and "809" numbering ranges; *given the alleged lack of business margin in the provision of certain services*, it was considered that it would be *beneficial to have a code to access services associated with a flat tariff (fixed price irrespective of call duration or time of day at which calls are made) in order to provide the offer to the market in general and providers in particular without*

⁴ ICP-ANACOM has never imposed any obligation on companies under this provision.

discontinuity in their range of services. ICP-ANACOM favoured the definition of a code for the new service in which the user could intuitively associate the price payable with the number dialled.

The "760" code is characterized by the fact that it always allows access in the same manner and by the fact that pricing is per call and not by the type of service associated with the number⁵.

III.2. The restrictions on the right of access to the "760" numbering range imposed by undertakings providing electronic communications networks and services

Since a range of services are provided through the "760" numbering range and since access to this numbering range is not covered by any legal restriction, end-users have, from the outset, enjoyed full right of access to this range of numbers in the same manner as they access remaining numbers of the PNN and, in the event that ICP-ANACOM uses the powers conferred by paragraph 8 of article 45, consumers will have the right to request barring or restriction of access to these numbers and the services provided.

However, as already noted, the undertakings which themselves offer electronic communications networks and services and which are therefore subject to the condition laid down in article 27, paragraph 1, point j) of the LCE, have unilaterally adopted or announced adoption of restrictive practices with respect to access to certain numbers, allegedly as mechanisms intended to protect consumers by making it possible to control spending on such calls, which is the present case in the "760" range.

These measures entail, in prepaid services offered by operators of the mobile telephone service, **(i)** setting up independent ("separate") balances to make calls to the "760" numbering range, requiring subscribers to separately maintain a specific balance for calls to these numbers and **(ii)** making calls to this numbering range subject to a minimum balance requirement. In both cases, these measures give the "760" number the characteristics of a "service apart".

⁵ See document on the reasoning giving basis to the [draft decision](#) on the creation of specific codes in PNN for the provision of the flat-rate call service and definition of the conditions to apply on [Establishment of new '761' and '762' codes within the NNP](#)'.

Furthermore, in post-paid (fixed and mobile) services, measures can likewise be identified with a (potential) equivalent effect where applied to certain numbering ranges. Indeed, clauses are found in the general conditions governing these services, consisting of **(i)** consumption limits in the use of specific services, which once reached, allow the provider to apply certain rules as laid down in the contract, which may involve, for example, mandatory early payments or obligatory set-up of direct debit facilities under penalty of service suspension, or **(ii)** advance payment in respect of a certain monthly volume of communications, calculated based on the customer's average monthly consumption, non-payment of which may determine a restriction (after prior warning) on communications to certain numbering ranges, such as "760 " until such time as respective payment is made.

It is therefore important to assess, given the tendency to full right of access to PNN numbers, whether the measures detailed above in relation to the "760" range, as imposed unilaterally by operators and which have resulted, or may result, in constraints on access to that numbering range are or are not warranted.

In the case under analysis, by restricting the access enjoyed by their prepaid MTS customers to the "760" numbering range - which in this way is differentiated from other numbering ranges with similar characteristics - the operators of the MTS have sought to impose restrictive conditions (in particular as regards payment) on access to this numbering range.

Indeed, there is no doubt that such operator practices, targeting a range of numbers in particular, hinder user access to the services provided through this range, entailing significantly more effort versus access to other services.

Such practices, as unilaterally imposed by operators, cannot be considered cost-control mechanisms to protect users. Two aspects are given emphasis in this regard: first, the "760" range of numbers has a fixed retail price of 60 cents plus VAT per call, which in itself constitutes a mechanism to protect users, ensuring they are not surprised by unintended bill values which could not be reasonably envisaged, based on the duration of calls; secondly, the number of complaints received by ICP-ANACOM from users about excessive pricing in relation to these calls or in relation to the billing of such calls has been negligible.

In this context, it is possible to consider these restrictions on access to services provided through a specific numbering range as excessive and disproportionate. At the limit, the imposition of especially onerous access conditions on users may produce an effect that approaches barring, with the aggravating circumstances that the numbering range in question has a retail price which is fixed per call and that the services in question are not barred by the legislature.

Notwithstanding the view, as stated above, that the imposed restrictions are excessive to the extent that they unreasonably restrict the freedom of choice enjoyed by end-users, thereby contradicting the condition of access to the numbers of the PNN imposed on undertakings, it is noted that the restrictions are considered more serious and less fitting where the method of changing the system set up by operators is more complex or costly for the subscriber.

These are also likely to harm the economic interests of others, causing a negative impact on competition.

It is noted, as regards the impact of these measures on competition, that the provision of retail services based on "760" numbering naturally depends on end-users having free access to this range of numbers, via the establishment of calls.

Accordingly, it is critical that all providers with numbering resources in the "760" range ensure that end-users can make calls from the most part of existing networks without restriction. Otherwise, "760" service providers will be unable to acquire customers who intend to use this numbering range to offer services, such as contests, market surveys, fundraising/donations, at retail level. It is also noted that smaller "760" providers, precisely as a result of their small market share, also have a high degree of dependence on calls originating on third-party operator networks, whereby any measure which has the effect of hindering or discouraging such calls will have a major impact on their businesses.

As such, the adopted measures in question harm the retail business of "760" providers, not only by reducing the number of calls made, with a direct impact on business profitability, given that the retail revenues of these calls accrue to these providers, but also due to the effect of reducing the attractiveness of their business; and in this context, the adopted measures may particularly affect providers for whom this specific

business is a prominent part of their overall activity, such as is the case for smaller providers, and so have the effect of distorting competition.

The impact on competition may persist even if the described measures are adopted by providers which provide services on the "760" range, given, on the one hand, that smaller operators might potentially abandon the business and so hand operators that implement these restrictive measures an opportunity to strengthen their own positioning in the market; On the other hand, for the set of operators which do not provide services on the "760" range, these practices will increase their capacity to negotiate conditions for the provision of the call origination service; and finally there are also services provided to retail by all these providers, such as SMS-based VAS, which in certain circumstances may be perceived as potential replacements for services provided using the range "760".

Finally, it should be noted that the measures taken can also affect the undertakings which use the "760" numbering range to provide retail services, such as those already mentioned related to competitions and fundraising. Without assessing the extent of this impact, given the proliferation of these services, particularly as used by the media, it is anticipated that the impact may be significant.

In this context, it is ICP-ANACOM's view that the restrictions in question are disproportionate and unwarranted, and as such, their unilateral imposition should be prohibited.

It is also not acceptable that access to the "760" numbering range be made subject to the express expression of will by subscribers in this sense - the law did not establish this condition, so it should not be established unilaterally by undertakings. To the contrary, such access must, from the outset, always be made available by undertakings that offer electronic communications networks and services, whereas subscribers may also be given the option to have their access to the "760" range of numbers (or any other) restricted.

It is noted that, in accordance with paragraph 8 of article 45 of the LCE, ICP-ANACOM may, whenever it deems fit, order companies to implement selective and free barring for defined types of numbers.

Other than in that specific context, any limitations on access to the "760" range of numbers can only be accepted when based on the will of subscribers as regards the configuration of the form of access to numbers and the establishment of calls and where set up in the context of undertakings' freedom to offer tariff plans.

As such, there are grounds for adopting a rule which, consolidating the condition laid down in point j) of paragraph 1 of article 27 of the LCE, stipulates that, since access to PNN numbers tends towards full access, undertakings offering electronic communications services and networks may only restrict such access where such restrictions do not disproportionately affect the interests of other undertakings or the interests of end-users, especially in terms of their freedom of choice.

Measures that lead to making access to certain numbering range subject to the maintenance of separate or minimum balances, or which have an equivalent effect, constitute disproportionate restrictions the unilateral imposition of which is prohibited, i.e., they are only acceptable when users request their activation or agree to contracts that contain such measures.

Considering, however, that contracts governing provision of electronic communications services are, normally, subscription contracts in which the will of subscribers is made subject to conditions from the outset, it is necessary to ensure that a real and effective right of choice does in fact exist.

The intention therefore is to ensure that (i) not all commercial offers provided by undertakings for each of the services and bundles of services contain these restrictive measures and that (ii) where alternative offers without restrictions are made available, the difference in price between offers with and without restrictions is not such as would negate user freedom of choice.

Along the same lines, it is important to ensure that undertakings do not differentiate procedures for crediting balances used to access to specific numbering ranges, in a discriminatory and unjustified manner, leading to a restriction that is so excessive as to approach a denial of actual access. ICP-ANACOM therefore considers that it should oppose the provision of models with balance credits made exclusively at the retail outlets of the undertaking or of its agents for access to specific numbering ranges.

The intention, therefore, is to ensure that, for access to specific numbering ranges, undertakings do not fail to provide other forms of payment (balance credits) such as "Multibanco" (Portuguese ATM system) or e-banking, which are used widely as modes of payment for services, and as such, that lack of choice in terms of payment does not constitute a significant impediment to users in exercising their right of choice in accessing these numbering ranges.

Finally, in order that the determination accomplishes its considered goals, it must necessarily be applied to all contracts in force and, accordingly, provide subscribers with the ability to find out about the existence of alternative offers without restrictions. To this end, where undertakings have restricted access to a specific numbering range by unilaterally imposing measures on subscribers as, under the present determination, are deemed to be incompatible with point j) of paragraph 1 of article 27 of the LCE, the undertakings must notify said subscribers as to the existence of unrestricted offers and grant them the possibility of subscribing to them, without application of any penalties associated with early contract termination.

However, to safeguard the right of choice of subscribers, it is also necessary for the choice to be an effective choice. As such, in addition to eliminating the direct costs that stem from opting for an alternative offer, as may constitute a disincentive for subscriber freedom of choice, undertakings shall also, as regards concluded contracts which do not contain restrictions, refrain from justifying price increases during the term of these contracts based on the creation of alternative commercial offers which include restrictions - even where these alternative offers are more economically attractive to users.

IV. Draft Decision and Consultation Procedures

By determination of 15 May 2014, the Management Board approved the Draft Decision on calls made to the "760" numbering range and the submission of said Draft Decision to the consultation procedure laid down in article 11 of the Statutes of ICP-ANACOM, as in annex to Decree-Law no. 309/2001 of 7 December, and to the general consultation procedure laid down in article 8 of the LCE. Under these procedures, interested parties were given a period of 30 working days in which to comment; this period expired on 30 June 2014.

In response to the consultation procedure, and within the prescribed period, contributions were received from the following undertakings:

- DECO - Associação Portuguesa para a Defesa do Consumidor (Portuguese Association for Consumer Protection).
- AR Telecom - Acessos e Redes de Telecomunicações, S. A., submission of confidential and non-confidential versions;
- CABOVISÃO - Televisão por Cabo, S.A. and ONITELECOM - Infocomunicações, S.A., submission of a joint response;
- Controlinveste Conteúdos, S.A. (CIC);
- NOS - Comunicações, S.A., (NOS)
- Portugal Telecom, S.G.P.S., S.A. (Grupo PT), submission of confidential and non-confidential versions;
- RTP - Rádio e Televisão de Portugal, S.A. (RTP);
- SIC - Sociedade Independente de Comunicação, S.A. (SIC)
- TVI - Televisão Independente, S.A. (TVI);
- Vodafone Portugal - Comunicações Pessoais, S.A. (Vodafone).

And one private individual:

- Mr. Eduardo Fernandes.

The report on the consultation process was prepared, forming an integral part of the present decision and including a summary of views expressed and the positions taken by ICP-ANACOM thereto.

The report gives basis to the present decision, and also explains the changes that ICP-ANACOM saw fit to make to the decision.

IV. Decision

In light of the above, and pursuant to the assignments laid down in points b) and h) of article 6 of the Statutes of ICP-ANACOM, as in annex to Decree-Law no. 309/2001 of 7 December, pursuant to paragraph 2 of article 27 and paragraph 1 of article 125 and in consideration of paragraph 8 of article 45 (all of the LCE) and paragraph a) of article 9 of the Statutes of ICP-ANACOM, and in pursuit of the objectives of regulation,

particularly as established in points a) and c) of paragraph 1, points a) and b) of paragraph 2, point g) of paragraph 4, all of article 5 of the LCE, the Management Board of ICP-ANACOM decided to approve the following rules as regards access by end-users to the numbers of the PNN - Plano Nacional Numeração (National Numbering Plan):

1. The condition stipulated in point j) of paragraph 1 of article 27 of the LCE, whereby undertakings that offer electronic communications networks and services are required to guarantee end-user access to PNN numbering, is incompatible with any unilateral imposition of measures likely to restrict access to specific ranges of numbers, whatever their nature or content, including through:
 - a) Constitution of ("separate") independent balances to make calls to specific numbering ranges;
 - b) Requirement of a minimum balance to permit calls to specific numbering ranges;
 - c) Imposition of limits on consumption in the context of using specific numbering ranges;
 - d) Contractual stipulation of early payment in respect of average or fixed monthly values, where non-payment results in an impediment to making calls to specific numbering ranges.
2. The preceding paragraph does not prohibit undertakings which offer electronic communications networks and services from offering subscribers measures which restrict access to specific numbering ranges, including those listed in paragraph 1, provided such measures are at the request of users and for so long as users maintain interest in them.
3. The condition stipulated under point j) of paragraph 1 of article 27 of the LCE is incompatible with the provision by undertakings of any commercial offer which entails the restrictions referred to in paragraph 1, in the context of each service or bundle of services, except where the same offer is made available without restrictions - that is with identical characteristics, possibly excluding price.
4. The condition stipulated in point j) of paragraph 1 of article 27 of the LCE is incompatible with the procedure whereby user account balances for access to specific number ranges may only be credited at an undertaking's retail outlet or their respective agents.

5. These rules are immediately applicable to contracts currently in force as on the date on which the rules take effect, in accordance with paragraph 9.
6. Companies are to bring their respective offers into accordance with the present Rules, within 60 calendar days following the date of their publication.
7. Undertaking as have unilaterally imposed restrictions on access to specific numbering ranges shall notify subscribers as to the existence of unrestricted offers, giving them the option to subscribe to these unrestricted offers; switching offers in this context shall not generate any costs for the subscriber, including penalties, as resulting from early contract termination or related to change of tariff.
8. Companies may not amend concluded contracts that do not contain restrictions, in terms of increasing the prices therein, on the basis of alternative tariffs being available which include restrictions.
9. These rules shall come into force 5 working days subsequent to their publication.