

Notice

In accordance with the provisions of point b), paragraph 2 of article 9 and point q), paragraph 1 of article 26 of ANACOM's Statutes (approved by Decree-Law no. 39/2015 of 16 March), by decision of 22 June 2017, Autoridade Nacional de Comunicações (ANACOM) has approved a Recommendation made to undertakings in possession of or managing infrastructure suitable for carrying electronic communications networks where ownership of infrastructure is in dispute (hereafter the "Recommendation").

Pursuant to article 112, paragraph 1, point e) and paragraph 4, of *Código do Procedimento Administrativo* (Administrative Proceeding Code), published in annex to Decree-Law no. 4/2015 of 7 January, all undertaking as identified in article 2 of Decree-Law no. 123/2009 of 21 May (current version) are hereby given notice of the Recommendation which is transcribed below:

"ANACOM recommendation to undertakings in possession of or managing infrastructure suitable for carrying electronic communications networks where ownership of infrastructure is in dispute"

A number of requests have been brought to ANACOM's attention related to situations where more than one undertaking has claimed rights of ownership or use over certain infrastructure which is used or might be used to carry electronic communications networks. Such situations inevitably have repercussions on electronic communications companies which seek access to such infrastructure, obstructing the exercise of a right granted to them by law. Doubts as to the ownership of infrastructure, as well as the disparate range of applied access criteria and conditions, are factors of insecurity which undermine investment decisions in developing electronic communications networks. Furthermore, the costs of using this infrastructure rise significantly. Undertakings wishing to develop their electronic communications networks are often confronted with the need to make multiple payments to different undertakings for the use of the same set of infrastructure or to ensure compliance with multiple demands made by the various undertakings claiming rights of use over the (same) infrastructure.

Given the legal framework in force, ANACOM does not have the means to resolve problems generated by the fact that more than one undertaking claims rights of use over the infrastructure in question by deciding who should manage their access. In its work, ANACOM is subject to principles of legality¹ and specialty² and to the absence of an express provision empowering it to resolve disputes involving the right to use infrastructure suitable for carrying electronic communications networks; it is therefore precluded from making decisions to allow electronic communications companies to fully enforce the access rights conferred by Decree-Law no. 123/2009 of 21 May, as currently worded (DL 123/2009).

Accordingly, in light of the legal framework currently in force, conflicts over ownership or the right to use infrastructure suitable for carrying electronic communications networks can only be resolved by agreement between the parties in dispute or by recourse to judicial or extrajudicial mechanisms which, by their nature, do not allow speedy solutions compatible with the requirements of a

¹ Article 3 of *Código do Procedimento Administrativo* (Administrative Proceeding Code), published in annex to Decree-Law no. 4/2015 of 7 January.

² Article 6 of ANACOM's Statutes, published in annex to Decree-Law no. 39/2015 of 16 March.

decision-making process on investments necessary in the development of electronic communications networks.

As already mentioned above, disputes over the right to use infrastructures suitable for carrying electronic communications networks severely obstruct companies in the sector and constitute a deterrent to the development of these networks, in a dynamic market, hampering the appearance of innovative offers which are geared to the satisfaction of end-users. Aware of this situation, ANACOM has been developing multiple steps to find solutions which overcome the difficulties identified, but without success.

Whereas it does not have powers to intervene and resolve the disputes described, considering the above and making use of the option granted by point b) of paragraph 2 of article 9 of its Statutes (approved by Decree-Law no. 39/2015 of 16 March), ANACOM's position is that there may be advantages in expressing a view on the situations described above and, through a recommendation, inform and guide the various undertakings involved towards the need to find a solution.

Accordingly, in view of the above, and bearing in mind the need to find quick alternative mechanisms or solutions, albeit on a transitional basis, which will allow electronic communications companies access to infrastructure suitable for carrying their networks, regardless of any disputes over ownership and/or applicable jurisdiction, pursuant to point b), paragraph 2 of article 9 of its Statutes and taking into account the principles established under the legal regime governing access to infrastructure suitable for carrying electronic communications networks, ANACOM makes the following recommendation to undertakings as identified in article 2 of Decree-Law no. 123/2009, as regards situations where there is a dispute over the ownership, possession or control of infrastructure suitable for carrying electronic communications networks which they own or manage:

(I) To promote, together with other undertaking as claim powers of administration/management over the same infrastructure, such steps as may be necessary to reach a solution or agreement, albeit on a transitional basis, which allow access to the indicated infrastructure by electronic communications companies, according to conditions of equality, transparency, non-discrimination and cost-oriented remuneration;

(ii) establish mechanisms which, in the context of solutions or agreements referred to in the previous paragraph, ensure that, in return for access and use of a particular set of infrastructure suitable for carrying electronic communications networks, companies are not required to make payments to more than one undertaking."

Lisbon, 22 June 2017

Vice-Chair of the Board of Directors

José Manuel de Almeida Esteves Perdigoto