

CLARIFICATION ON THE PORTABILITY REGULATION

COMPENSATION

The entry into force of the Regulation of Amendment to Regulation No 58/2005 of 18 August, as amended by Regulation No 87/2009 of 18 February - **Portability Regulation**¹ - introduced a set of new rules applicable in cases of failure or negligence, among providers and with respect to the subscriber, with provision made for monetary compensation.

Subsequent to the presentation of queries by a number of providers about the interpretation of these rules, ICP-ANACOM saw fit to publish the following clarification after having heard the providers who saw fit to comment in two meetings convened by ANACOM for this purpose on 28 January and 14 April.

Article 26 of the Portability Regulation (Compensation) sets out to establish a regime which gives incentive to the fulfilment of the obligations of providers, avoiding the occurrence and persistence of situations of non-compliance, given that sanctioning non-compliance through breach proceedings is necessarily a lengthy process. It sets out simultaneously to provide for:

- (i) the protection of competition**, in particular by seeking to prevent operators from engaging in mutual fraud;
- (ii) protection of subscribers**, seeking to ensure that the speed which it is intended to instil in the processes of portability is not obtained at the expense of a lesser degree of attention to the real will of users.

2. Under paragraph 1 of Article 26, the RP bears responsibility vis-à-vis subscribers and other participants in the portability process, especially the DP, for undue portability or for portability which does not match the will of subscribers.

The will of subscribers, as the basis of portability, is the properly expressed will, i.e. expressed through a request for portability and a declaration effecting

¹ <http://www.anacom.pt/render.jsp?categoryId=328895>

termination of the contract with the DP. This declaration of will must be issued prior to the submission of electronic portability request, because this declaration alone gives basis to the request.

Under paragraph 3 of article 26, the RP can still be accountable to the DP for lack of timely delivery of documentation that is required under paragraph 3 of article 10 (monthly remittance of termination documents - portability request, termination and supporting documents)².

3. The compensation scheme of Article 26 can therefore be activated whenever the DP fails to send a termination or supporting document in a timely manner.

3.1. Lack of timely submission of a valid termination

Occurs in the following cases:

- (I) lack of termination;
- (li) the termination is not signed;
- (iii) lack of correspondence between the signatory of the terminating document and the holder of the ported number;
- (iv) expired termination.

Under these circumstances, with examination of documents submitted to it by the RP - or failure to send the termination document - the DP may deem the situation as being one of **undue portability**.

The procedure shall be as follows:

- The DP shall inform the RP that it deems the situation to be one of undue portability, requesting payment of compensation as provided for in point c) of paragraph 2 of article 26 of the Portability Regulation;
- If, within a reasonable period - which ANACOM proposes to be 5 working days from the date on which the RP becomes aware of the deficiencies

² It was established between providers that terminating documentation should be sent within the first five working days of each month with respect to portability carried out in the previous month

in respect of the documents in question - the RP may remedy such deficiencies, presenting to the DP:

- A valid and written declaration of the will of the subscriber (termination) made on a date which is compatible with the presentation by the RP to the DP of the electronic portability request;
- A declaration of the representative of the subscriber, with powers for this effect, made on a date which is compatible with the presentation by the RP to the DP of the electronic portability request.

The RP can further proceed with the rectification presenting, within the same period:

- ratification/confirmation of the termination by the subscriber³.

By doing so, the RP proves that the situation is not in fact one of undue portability, since the real will of the subscriber with respect to portability has been carried out, which will is provided in a written statement, which was not submitted to the DP in a timely manner due merely to omission. In these cases the DP maintains the right **to demand compensation**: compensation for sending documents outside the time specified in paragraph 3 of Article 10, **under paragraph 3 of article 26**.

- If the RP **is unable to prove** the will of the subscriber with respect to portability, i.e. unless it submits the stipulated documents to the DP, **the situation is confirmed as being one of undue portability, whereby compensation becomes payable under paragraph 2 of article 26**.
- It may also occur that the **RP**, while not challenging the undue portability or not proving otherwise as described above, **proves, with respect to the DP, that the subscriber does not desire to return to that provider** [see article 26, paragraph 2, point a) final part].

³ Among the cases of possible " deficiencies" listed, lack of termination, the presentation of an unsigned termination or an expired termination, may be rectified only through the submission of a written declaration of the subscriber's intent with a date which is prior to or coincident with the date of the electronic portability request. In the case of lack of correspondence between the signatory of the termination document and the holder of the number, the signature may be ratified/confirmed.

In these cases, **compensation shall be due to the DP for undue portability as required under paragraph 2 of Article 26**, however **no compensation will be payable to the subscriber**.

3.2. Failure to send any of the supporting documents in a timely manner

When any **of documents supporting the termination are not sent to the DP⁴**, within the stipulated period, compensation shall become payable under paragraph 3 of article 26 (see footnote 2).

The lack of timeliness in sending can not be rectified, notwithstanding that the failure should be remedied through **remittance to the DP of the missing document**, within the same reasonable period of 5 working days.

Note should be made that failure to remit such "missing" items, may give rise to the institution of breach proceedings by ANACOM, pursuant to Article 25 of the Portability Regulation.

⁴ Reference is made to all documents that fulfil the requirements established by the DP to terminate the contract.