

## **DRAFT DECISION**

### **Settlement of a crossborder dispute between EDA and Optimus concerning telephone lists**

#### **I**

#### **FACTS**

##### **1. The application of EDA**

- 1.1. On 07.12.2010, an application was filed at ICP-ANACOM for the settlement of a crossborder dispute by European Directory Assistance, S.A. (EDA) against Optimus – Comunicações, S.A. (Optimus)<sup>1</sup>, under article 12 of Law number 5/2004, of 10 February (Electronic Communications Law - LCE).
- 1.2. This application had been written in English, and ICP-ANACOM requested its presentation in the Portuguese language due to considering, in view of the principles ruling the administrative procedure, that the applications of the interested parties herein should be drawn up in that language.
- 1.3. The application for the settlement of the dispute drawn up in Portuguese was submitted on 04.02.2011<sup>2</sup>, with this date being considered as the date when it was duly presented and the intervention of ICP-ANACOM requested under article 12 of the LCE.
- 1.4. EDA begins by making a presentation of the economic activities to which it is dedicated, with its area of activity related to the services providing list information and telephone lists in the territory of the Kingdom of Belgium.

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<sup>1</sup> Document recorded under number 2010112235

<sup>2</sup> Document recorded under number 2011020223

- 1.5. Relevant to the present dispute, EDA offers services providing information on international lists through which residents in Belgium may access information relative to the telephone numbers of subscribers resident in other countries.
- 1.6. For this purpose, the applicant created its own integrated database, and has reached an agreement with the telecommunications operators of various countries which attribute national numbers to their subscribers.
- 1.7. In the case of Portugal, EDA notes that, in spite of the numerous requests addressed to all the telecommunications operators regarding the provision of the respective database for the preparation of a telephone list, it received no response whatsoever, so that it was impossible for it to construct a Portuguese integrated database and provide its Belgian users with research services relative to Portuguese subscribers.
- 1.8. In order to exercise its activities, EDA states that it is registered at the Belgian telecommunications regulator (Belgian Institute for Postal services and Telecommunications - BIPT) as a provider of services of list information and editor of telephone lists, as well as at the Belgian Commission for the protection of personal data (CPVP) as a special administrator of personal data.
- 1.9. EDA presented the regulatory framework that, in its understanding, is applicable to the provision of services offering list information and publication of telephone lists, in particular the following provisions:
- Article 25, 1st § of Directive 2002/22/EC<sup>3</sup> and article 50 of the LCE which establish the right of subscribers of telephone services accessible to the public to figure in the complete telephone list placed at the disposal of the public, pursuant to, respectively, subparagraph a) of number 1 of article 5 of the Directive and subparagraph a) of number 1 of article 89 of the LCE.

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<sup>3</sup> Directive 2002/22/EC of the European Parliament and Council, of 7 March 2002, relative to the universal service and to user rights on matters of electronic communications networks and services (Universal Service Directive).

EDA emphasises that this right does not refer only to the inclusion of the data in a universal telephone list, but also to its inclusion in any list, either Portuguese or any other Member State;

- Article 5 of Directive 2002/77/EC which imposes on the Member States the obligation to assure that all special and/or exclusive rights on matters of creation and provision of subscriber list services on its territory will be eliminated;
- Article 12 of Directive 2002/58/EC and sub-paragraph i) of number 1 of article 48 and number 1 of article 50, both of the LCE, which oblige the companies which attribute telephone numbers to request from subscribers their prior and explicit consent for the inclusion of their data in telephone lists and/or list information services;
- Article 25, 2nd § of Directive 2002/22/EC and number 4 of article 50 of the LCE which oblige the companies which attribute telephone numbers to subscribers to provide the data of the subscribers who have given their consent for inclusion in telephone lists and/or list information services to providers of these services which present duly founded requests. On this issue, EDA explains the various European models for the transmission of subscriber databases for the publication of telephone lists.

1.10. EDA also describes the processes for the preparation of an integrated database, emphasising that they cannot be carried out without the provision, by the operators, of all the databases of subscribers who have given their explicit consent for their data to be published in telephone lists or list information services.

1.11. Passing on to the facts of the dispute, EDA notes that, in order to deal with the growing number of searches on Portuguese companies and private telephone numbers made through its international service of list information, it contacted all the telephone service providers publicly accessible in Portugal which attribute telephone numbers to its subscribers, including Optimus.

1.12. This contact was made in a letter sent on 29 January 2010 and by electronic mail, through which the applicant, invoking the provisions in the 2nd paragraph of article 25 of Directive 2002/22/EC, requested the provision of a database for the preparation of the telephone list of the respective operator for the effect of its inclusion in the Portuguese integrated database of EDA.

1.13. According to the applicant, up to 30 November 2010 it had not yet received any reply to its request, which it considers to be not in conformity with the applicable Community and Portuguese legislation.

1.14. Hence, based on the provisions of article 21 of Directive 2002/21/EC<sup>4</sup> and article 12 of the LCE, as well as the 2nd paragraph of article 25 of Directive 2002/22/EC and number 4 of article 50 of the LCE, EDA requests ICPANACOM to:

- Admit its request as a valid request for the settlement of a crossborder dispute and to state the scope of its competence in relation to the present dispute;
- Coordinate its opinion with the Belgian Regulator (BIPT) in order to take its decision in conformity with the provisions in article 8 of Directive 2002/21/EC and number 2 of article 12 of the LCE;
- If possible, request the Body of European Regulators for Electronic Communications (BEREC) for an opinion in relation to the present application;
- Oblige Optimus to immediately conclude a contract with EDA for the transmission of its database for the preparation of telephone lists;
- Decide, unequivocally, on the content and number of attributes that should be supplied to EDA, contained in the databases for the preparation of telephone lists;

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<sup>4</sup> Directive 2002/21/EC of the European Parliament and Council, of 7 March 2002, relative to a common regulatory framework for electronic communications networks and services (Framework Directive).

- Optimus to provide access to the abovementioned databases in conformity with the content of Judgement C-109/03 of the Court of Justice of the European Union, that is, EDA should pay only the effective expenses relative to the provision of the information necessary to the preparation of telephone lists, and indicate, explicitly, the respective sum in the event of deciding that there should be payment;
- Complementarily to the request described in the previous point and taking into account Community jurisprudence, the settlement of the dispute should take into consideration the spirit of Community legislation and put aside any provision of national law that might prevent the application of the directives.

## **2. The reply of Optimus**

2.1. Through letter of 16 March 2011<sup>5</sup>, ICP-ANACOM notified Optimus of the application for the settlement of the dispute presented by EDA so that it could express its opinion on the matter, and, on that same date, informed the applicant of this letter<sup>6</sup>.

2.2. Optimus presented its reply on 1 de April de 2011<sup>7</sup>.

2.3. Above all, Optimus considers that ICP-ANACOM should state itself incompetent to decide on the application, due to the provisions in number 1 of article 12 of the LCE not being applicable, since its requirements are not met.

2.4. For the effect, Optimus argues that, on the one hand, EDA is not a company subject to the regulatory framework of electronic communications, since it neither provides nor supplies these types of services and, on the other hand, the subject matter in question refers exclusively to the regulatory framework relative to the protection of personal data and privacy.

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<sup>5</sup> ANACOM-S025720/2011

<sup>6</sup> ANACOM-S026213/2011

<sup>7</sup> Document recorded under number 2011048230.

- 2.5. Without prejudice and in the event of ICP-ANACOM deeming this is not so, Optimus considers that, in view of the rules in force, it cannot possibly meet the demands of EDA.
- 2.6. Optimus argues that, in contrast to EDA's intentions, the reference to number 1 of article 50 of the LCE to sub-paragraph a) of number 1 of article 89 of the same diploma is made explicitly and exclusively for the obligation imposed in the universal service provider.
- 2.7. Furthermore, it considers that the requirement established in number 4 of the said article 50 can be seen only as an obligation imposed on companies which attribute telephone numbers in situations involving the fulfilment of requests whose objective is the inclusion of the data in the lists referred to in sub-paragraph a) of number 1 of article 89, that is, under the obligations of the universal service, in order to assure all users a minimum set of services, amongst which the service of lists.
- 2.8. Since the present case does not involve a request of this type underlying a public interest, but rather a request aimed at an eminently commercial objective, Optimus considers that it cannot be forced to provide the data of its customers to any third parties, which would, in its opinion, be a "completely outrageous, disproportional and onerous obligation".
- 2.9. In addition to the above, Optimus notes that the response to all applications and requests, such as the present, must always observe the applicable rules on matters of data protection, as results from number 5 of article 50 of the LCE.
- 2.10. Therefore, in accordance with the provisions in article 6 of Law number 67/98, of 26 October, and in number 1 of article 13 of Law number 41/2004, of 18 August, the inclusion of any customers' data in a public list always, and necessarily, requires the expression of their explicit willingness to be included in the telephone lists and the non-observance of this condition constitutes an illicitude creating a penal liability, administrative offence and civil liability.

2.11. Optimus notes that in view of the provisions in sub-paragraph i) of number 1 of article 48 of the LCE, it only has authorisation from its customers to include the respective data in the universal service lists or in its own lists, created by Optimus. Moreover, it is forbidden to use the data for any other purposes, therefore, even if it were obliged to supply the data to EDA, it would always be required to obtain prior and explicit authorisation from the owners of the data.

2.12. To conclude, Optimus considers that all the applications made by EDA to ICP-ANACOM lack legal grounds, and that it cannot be forced to conclude any contract for the transmission of its database, or to provide EDA with access to this database for the preparation of telephone lists.

## II

### ANALYSIS

Having described the relevant facts, below is an analysis of the questions and matters raised in the present proceedings, beginning, necessarily, with the verification of the requirements for the intervention of the Regulator under article 12 of the LCE.

#### **1. Prior question: verification of the subject matter competence of ICP-ANACOM under article 12 of the LCE**

As described above in points I – 2.3 and 2.4, Optimus considers that ICP-ANACOM is not competent on the subject matter to assess this dispute due to the fact that EDA does not provide electronic communications services and because the subject matter in question refers exclusively to the framework relative to the protection of personal data and privacy.

Number 1 of article 12 of the LCE establishes the applicability of the mechanism for the settlement of crossborder disputes when what is in question is a dispute which has arisen in the context of the obligations arising from the regulatory framework relative to electronic

communications, between companies subject to these obligations and established in different Member States.

This provision transposes number 1 of article 21 of the Framework Directive<sup>8</sup> which establishes the applicability of this procedure "in the case of crossborder disputes on matters of the scope of the present directive or specific directives, arising between parties established in different Member States".

The content of the whereas (32) of the Framework Directive is equally elucidative, according to which "In the case of disputes between companies of the same Member State, in an area covered by the present directive or by specific directives, related, for example, with obligations of access and interconnection or with the means of transfer of lists of subscribers, the injured party which has negotiated in good faith without having managed to reach an agreement, should be able to appeal to the national regulatory authority for the settlement of the dispute". What is explained herein is also applicable to crossborder disputes, whose scope of subject matter application coincides with that defined for disputes arising between companies of the same State.

This means that what is relevant for the application of the procedure for the settlement of crossborder disputes is the fact that the dispute refers to matters regulated by the framework relative to electronic communications, in particular compliance with obligations established for the sector, by the companies subject to them, and to the fulfilment of the corresponding rights that the law may establish in favour of companies that do not offer electronic communications networks or services. Now, the present dispute refers to compliance by Optimus with the obligation established in number 4 of article 50 of the LCE, pursuant to number 2 of article 25 of the Universal Service Directive<sup>9</sup> which is one of the specific directives referred to in the aforementioned article 21 of the Framework Directive. This obligation falls on companies that attribute telephone numbers to subscribers, where the beneficiaries are the companies that offer services relative to list

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<sup>8</sup> Directive 2002/21/EC of the European Parliament and Council, of 7 March 2002, relative to a common regulatory framework for electronic communications networks and services.

<sup>9</sup> Directive 2002/22/EC of the European Parliament and Council, of 7 March 2002, relative to the universal service and to user rights on matters of electronic communications networks and services.



information and lists accessible to the public, a category in which EDA is placed<sup>10</sup>.

As a consequence of the above, it is also unfounded that this dispute refers exclusively to the rules applicable to the protection of personal data and privacy, without prejudice, naturally, to the actual LCE guaranteeing their observance (cf. number 5 of article 50).

Therefore, it is thus concluded that ICP-ANACOM is competent for the settlement of the present dispute.

## **2. EDA's request for access to Optimus' database**

In the present analysis, ICP-ANACOM considers that it is relevant to assess the terms of EDA's initial request to Optimus.

Indeed, the objective of the contact established by EDA with Optimus, where the company explicitly invoked the Community rules contained in article 25 of the Universal Service Directive, was the conclusion of a contract for the use of its database of subscribers (fixed and mobile numbers), including, at least, the following data: first name and surname or corporate name, address and telephone number, postal code, locality, etc.

According to EDA, this data would be used only in connection with the services relative to list information and, possibly, online universal lists, in conformity with the applicable rules on privacy, and never for the effect of marketing or for transmission to third parties, including competitors of Optimus.

For this purpose, EDA requested that Optimus, during the month of February 2010, send it a proposal similar to the one based on which it already transmits its database to other editors of lists in Portugal and under conditions that are fair, objective, cost oriented and non-discriminatory<sup>11</sup>.

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<sup>10</sup> Although this does not alter the conclusion presented above, it should be noted that, in the letter sent by EDA to Optimus in January 2011, the former company refers to also being registered as a provider of electronic communications services, an activity which is not mentioned in the application for the settlement of disputes presented to ICP-ANACOM.

<sup>11</sup> As an alternative, it suggested the possibility of sending its template contract.

It is important to retain the following aspect: EDA made its request under the terms of the Universal Service Directive, establishing a first contact whereby it requested that Optimus present a proposal to provide the data of its subscribers, and to repeat, under conditions that are fair, objective, cost oriented and non-discriminatory.

This request is, therefore, based legitimately on the provisions of number 4 of article 50 of the LCE which proceeds in conformity with the transposition of number 2 of article 25 of the Universal Service Directive.

It should be recalled that the offer of lists and list information services is open to competition<sup>12</sup>, therefore the Universal Service Directive scheme , on the one hand, gave subscribers the right for their personal data to be included in a printed or electronic list, and on the other hand, guaranteed that all service providers which attribute telephone numbers to their subscribers are obliged to provide pertinent information under fair conditions that are based on costs and non-discriminatory, as detailed in the whereas (35) of the abovementioned Directive.

There is, therefore, no doubt, in contrast to that claimed by Optimus, that the provisions in number 4 of article 50 of the LCE do not fall within the scope of the universal service provision. In fact, it is sufficient to note the fact that article 89 of the LCE, relative to the list and service relative to information on lists of the universal service, establishes that companies offering telephone services accessible to the public are subject to specific obligations regarding the transmission of information on their subscribers to the universal service provider (cf. numbers 2 and 3 of the said article).

Returning to the present issue, according to the provisions in number 4 of article 50 of the LCE, "companies that attribute telephone numbers to subscribers must satisfy all reasonable requests to supply pertinent information on the respective subscribers, made for the purpose of offering services relative to list information and lists accessible to the public, through an agreed format and under conditions that are fair, objective, cost orientated and non-discriminatory".

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<sup>12</sup> Cf. article 5 of Directive 2002/77/EC of the Commission of 16 September 2002, relative to competition in the markets of electronic communications networks and services.

This matter is also subject to the rules applicable to the protection of personal data and privacy (cf. number 5 of article 50 of the LCE), in particular article 13 of Law number 41/2004, of 18 August<sup>13</sup>, as well as the provisions in subparagraph i) of number 1 of article 48 of the LCE, in accordance with which the subscribers must explicitly express their willingness to have, or not to have, their personal data included in telephone lists and being disseminated through information services, involving, or not, their transmission to third parties. In the affirmative case, these subscribers must decide which data to include, according to whether they are pertinent for the purposes for which the lists are intended.

Applying this legal framework to the present case, the following is concluded:

- a) Optimus, as a company offering a telephone service which is accessible to the public where it attributes numbers to its subscribers, is subject to the obligation to supply EDA with pertinent information on the respective subscribers so that it can offer services relative to list information and lists accessible to the public;
- b) Compliance with this obligation is dependent on the presentation, by EDA, of a reasonable request;
- c) The subscribers' data should be transmitted in a format agreed between the companies, under conditions that are fair, objective, cost oriented and non-discriminatory;
- d) Optimus can only supply the pertinent data of subscribers who have expressed or express their prior willingness to figure in telephone lists and informative services such as those offered by EDA;
- e) In turn, EDA is subject to a series of obligations relative to the security and confidentiality of the treatment of the collected data, as well as regarding its quality, amongst which the collection of data which is appropriate, pertinent and not excessive in relation to the

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<sup>13</sup> Transposes to the national legal system Directive number 2002/58/EC, of the European Parliament and Council, of 12 July, relative to the treatment of personal data and protection of privacy in the electronic communications sector.

respective purposes and its use only for the defined purpose (cf. articles 5 and 14 and following of Law number 67/98, of 26 October - Law on the Protection of Personal Data).

Now, the rules referred to above, in particular the provisions in number 4 of article 50 of the LCE, imply the predominance in this area of agreements of a markedly commercial nature through which the wishes of subscribers are met relative to having their data published in lists, other than the list prepared by the universal service provider.

In this context, ICP-ANACOM considers that at this stage, priority should be given to negotiation between the parties, to the detriment of a unilateral establishment by the Regulator of the format and conditions for the transmission of the data in question.

Hence, and since the letter addressed by EDA to Optimus was merely a first contact with this company which was not followed up, Optimus should promote the establishment of negotiations between the parties.

For this purpose, Optimus should present EDA with a proposal which specifically indicates the information it considers that it may transmit within the reasonableness and pertinence referred to in number 4 of article 50 of the LCE, proposing the rest of the contractual conditions, including remunerative, in accordance with the rules imposed by this provision.

### **III**

#### **DELIBERATION**

Therefore, taking into account the presentation made above, the Board of Directors of ICP-ANACOM, in performing the duty entrusted by subparagraph q) of number 1 of article 6 of its Articles of Association, published in the annex to Decree-Law number 309/2001, of 7 December, in pursuit of the regulatory objectives established in number 1 of article 5 of Law number 5/2004, of 10 February, and under article 12 of this Law, deliberates:

1. The decision that Optimus, in response to the request addressed to it by EDA in January 2010 and in compliance with the provisions in number 4 of article 50 of the LCE, should present EDA with the conditions under which it supplies pertinent information on its subscribers for the effect of the offer of services relative to list information and lists accessible to the public;
2. For the effect of the provisions in the previous number, the proposal to be presented should be reasonable, aimed at the transmission of pertinent information on Optimus's subscribers, contain the format and conditions which the supply of data should follow, and these conditions should be fair, objective, cost orientated and non-discriminatory;
3. The submission of points 1 and 2 of the present deliberation to the prior hearing of the interested parties, under the terms of the provisions in articles 100 and 101 of the Code of Administrative Procedure, establishing the period of time of 10 business days for EDA and Optimus, should they so wish, to issue an opinion in writing;
4. The sending, for the effect of the provisions in number 2 of article 12 of the LCE, of the present decision to BIPT, establishing the period of 10 business days for BIPT, should it so wish, to issue an opinion in writing;
5. The sending, under the duty of cooperation established in article 7 of the LCE and in article 8 of the Articles of Association of ICP-ANACOM, of the present decision to the National Committee for Data Protection (CNPD) providing for a period of 10 business days for the CNPD, should it so wish, to issue an opinion in writing.

Lisbon, 28 July 2011