

## **DRAFT DECISION**

### **Settlement of a crossborder dispute between EDA and ZON 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 ZON TV CABO Portugal, S.A. (ZON)<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 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 2010112176

<sup>2</sup> Document recorded under number 2011020224

- 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 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 opinion, 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 ZON.

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 does not conform 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 ZON to immediately conclude a contract with EDA for the transmission of its database 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).

- 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;
- Oblige ZON 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 ZON**

- 2.1. Through letter of 16 March 2011<sup>5</sup>, ICP-ANACOM notified ZON 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. ZON presented its reply on 30 March 2011<sup>7</sup>.
- 2.3. This operator considers that ICP-ANACOM should abstain from hearing and deciding on the application of EDA because the assumptions of applicability of article 12 of the LCE are not fulfilled.

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<sup>5</sup> ANACOM-S026207/2011

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

<sup>7</sup> Document recorded under number 2011047731

- 2.4. In the first place, it considers that the subject matter object of the dispute does not fall under the scope of the regulatory framework relative to electronic communications and that there is a no existence of two companies subject to the obligations arising therein.
- 2.5. This position is based on the fact that EDA provides services that do not consist of electronic communications services, as defined in the Framework Directive and in sub-paragraph cc) of article 3 of the LCE.
- 2.6. Without prejudice, ZON also claims that there is no dispute opposing it to the applicant, since it has not even had the opportunity to formally analyse the request addressed to it by EDA.
- 2.7. According to ZON, this request was not addressed correctly to the competent body for its assessment, which implied that the departments competent for its analysis were unaware of the details.
- 2.8. Hence, the lack of response of ZON cannot, according to ZON, be considered as an explicit refusal of the company to assess EDA's request, whereby ZON expresses its willingness to analyse an appropriate new request on this matter.
- 2.9. For these reasons, ZON argues that there is no dispute, as required by article 12 of the LCE.
- 2.10. At the same time as the formal issues presented above, ZON questions the competence of ICP-ANACOM to assess the present application, in the first instance.
- 2.11. In view of the fact that EDA is based in Belgium and is registered at the respective regulatory authority, and does not exercise the activity of offer of electronic communication networks and services in Portugal, ZON considers that the request should have been submitted to the Belgian regulator which, for its assessment, should have requested the collaboration of ICP-ANACOM.
- 2.12. Without prejudice to considering that the request should be rejected for the motives presented in the previous points, ZON argues that, should ICP-ANACOM not deem this to be the case, it should declare it unfounded.

- 2.13. In principle, ZON considers that EDA's request is not reasonable due to the fact that it is a request for unconditional and unlimited access to the information contained in the database of its customers, without any type of restrictions, which is not in conformity with the provisions in number 4 of article 50 of the LCE.
- 2.14. Therefore, ZON claims that access without any limitation regarding the type of data and respective format is not only excessive and inadmissible, and is not clearly limited to the information considered pertinent, as is required by the law, but also ignores the importance of the information in question as a strategic asset of the company.
- 2.15. The respondent emphasises that the obligation to provide the customers' data, contained in the aforementioned legal rule, seeks to assure the subscriber's right to have his data published in different telephone lists accessible to the public, without this right being converted into an absolute right of other companies accessing this information.
- 2.16. Consequently, ZON classifies the way that EDA expresses its right of access to the customers' data as "manifestly abusive", which may, in its perspective, result in a situation of the abusive exercise of rights prohibited by article 334 of the Civil Code.
- 2.17. ZON adds that the set of personal data that EDA wishes to access is neither suitable nor pertinent in view of the purpose for which it is intended, and does not comply with the requirement relative to the quality of the data established in the legislation for the protection of personal data, nor does it comply with the provisions in Judgement C-109/03 of the Court of Justice of the European Union, quoted by EDA, in accordance with which pertinent information corresponds to sufficient data to permit the users of a list to identify the customers they seek.
- 2.18. ZON also considers that, even if, under universal service obligations, there was need for ICP-ANACOM to establish the conditions for the subscribers' information to be provided to third parties, it is not

admissible that this information could be assigned now without limitations and the adoption of an objective and pertinent model which includes the establishment of adequate remuneration for the access to the data.

2.19. Regarding the remuneration, ZON considers that the reference to the Judgement quoted above with respect to the remuneration model must be duly placed within a framework, because the qualification of costs relative to the provision of access to the information, as well as the supplementary costs, require detailed explanation by ICP-ANACOM since they must include costs relative to the implementation and maintenance of the module/structure of access to the information.

2.20. ZON also shows concern for the provision of adequate guarantees of respect for the confidentiality and for the principle of the purpose of the transmitted personal data, an aspect regarding which EDA offers no information.

2.21. To conclude, ZON considers that this Authority should:

- (i) Not admit EDA's request, due to the assumptions of application of article 12 of the LCE not being fulfilled and the nonexistence of a dispute; and/or
- (ii) State itself territorially not competent to assess the application; or, in the event of this not being deemed;
- (iii) Dismiss EDA's application, due to its lack of grounds.

## 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 questions: verification of the requirements for the intervention of ICPANACOM established in article 12 of the LCE**

### **1.1. Subject matter and territorial competence**

As described above in points I – 2.4 and 2.5, ZON considers that ICP-ANACOM does not have competence on the subject matter to assess this dispute due to the fact that its object does not fall within the scope of the regulatory framework applicable to electronic communications and the fact that EDA is not subject to the obligations arising therein.

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 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

matter 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 ZON 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 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 information and lists accessible to the public, a category in which EDA is placed<sup>8</sup>.

Regarding territorial competence, the dispute in question involves two companies established in different Member States - Belgium (where EDA is based) and Portugal (where ZON is based). Both the Belgian regulator (BIPT) and ICP-ANACOM are competent to settle this dispute, whereby the parties may request the intervention of either authorities, since neither the LCE nor the Framework Directive lays down any specific requirement on the filing of the application at any particular regulatory authority based on territoriality.

In the present case, since the applicant chose to submit the dispute to the assessment of this Authority, it is this Authority which is competent for its settlement, without prejudice to promoting the collaboration of the Belgian regulator, which, in this phase, will be carried out through the sending of the present draft decision.

In view of the above, it is concluded that ICP-ANACOM is competent for the settlement of the present dispute.

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<sup>8</sup> Although this does not alter the conclusion presented above, it should be noted that, in the letter sent by EDA to ZON 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.

## **1.2. Existence of a dispute**

As presented above in points I – 2.6 to 2.9, ZON claims that there is no dispute opposing it to the applicant, since it has not even formally analysed the request addressed to it by EDA and expresses its willingness to assess any adequate new request presented to it.

Further ahead, as is also described above (cf. I – 2.12 and following), ZON objects to EDA's application and argues that it should be declared unfounded.

Now, the whereases drawn up by ZON demonstrate that, even if it had carried out the formal analysis to which it refers, it would have resulted in the refusal of EDA's application, at least under the exact terms in which it was presented on 29 January 2010.

Therefore, it should be considered that there is a dispute between the parties regarding the satisfaction of the abovementioned specific request presented by EDA to ZON.

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

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

Indeed, the objective of the contact established by EDA with ZON, 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 accordance with the applicable rules on privacy, and never for the effect of marketing or for transmission to third parties, including competitors of ZON.

For this purpose, EDA requested that ZON, 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>9</sup>.

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 ZON 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>10</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.

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 oriented and non-discriminatory".

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<sup>9</sup> As an alternative, it suggested the possibility of sending its template contract.

<sup>10</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>11</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) ZON, 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) ZON 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

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<sup>11</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.

well as regarding its quality, amongst which the collection of data which is appropriate, pertinent and not excessive in relation to the 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).

Notwithstanding the conclusions presented above relative to the prior issues, in particular regarding the existence of a dispute (point II – 1.2), ICP-ANACOM in the present analysis cannot, nor should it, be unaware that ZON states that it did not have the opportunity to formally examine the request addressed to it by EDA and expresses its willingness to analyse a new appropriate request in relation to this matter.

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.

This approach is consistent with the rules referred to above, in particular with the provisions in number 4 of article 50 of the LCE, which implies 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.

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

For this purpose, ZON 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 ZON, 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 ZON'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 ZON, 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