

**BEREC advice on  
OPTA's request for assistance concerning Article 25 of the  
Universal Service Directive**

**7 March 2013**

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## 1. Introduction

At the beginning of January 2012, four disputes were referred to the Netherlands Independent Post and Telecommunications Authority (hereafter OPTA) under the “Framework Directive”<sup>1</sup>. All disputes related to article 25.2 of the “Universal Service Directive”<sup>2</sup>, hereafter referred to as Article 25.2 USD.

On the basis of those disputes, on 1 June 2012, OPTA sent the BEREC Chair a request for advice concerning the interpretation of Article 25.2 USD. In its request, OPTA indicated that it had suspended its dispute resolution procedures pending BEREC’s advice.

On 27 September 2012 the BEREC Board of Regulators (hereafter BoR) set up a task force within the Framework Implementation Expert Working Group, to draw up a response to OPTA<sup>3</sup>.

On 18 October 2012, a BEREC task force comprising representatives from CMT, UKE, EETT, OFCOM and AGCOM (as chair) was established. The task force asked BEREC members for inputs concerning similar cases and received information from CRC, CMT, ILR, UKE and ANACOM. The BEREC task force also sought feedback and views from the European Commission, in particular as regards the relevant provisions under the EU regulatory framework for electronic communications.

A draft response of the BEREC task force was finalized on 23 January 2013 and presented on 12 February 2013 to the BEREC BoR for comments. The final BEREC advice was presented and adopted by a majority of the BEREC Board of Regulators on 7 March 2013.

## 2. Background: EDA’s motions for dispute resolution and OPTA’s request to BEREC

The four disputes underlying OPTA’s request for advice by BEREC were submitted by the Belgian company European Directory Assistance (hereafter EDA).

In its complaint filed before OPTA, EDA declares to be a company running voice-based directory enquires and publishing web-based, paper and CD-ROM directories. Its services are provided solely to Belgian residents and are accessible only from Belgian territory<sup>4</sup>.

EDA has progressively built a comprehensive database of information relating to telephone subscribers located in Belgium. To do so, it has concluded a set of contracts with Belgian electronic communications providers which, on a regular basis, provide EDA with details of the phone numbers that they assign to their subscribers.

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<sup>1</sup> Directive 2002/21/EC, as amended by Directive 2009/140/EC

<sup>2</sup> Directive 2002/22/EC as amended by Directive 2009/136/EC

<sup>3</sup> BoR (12)102 and BoR (12) 114.

<sup>4</sup> EDA’s web-based directories are of course accessible from other countries, but the information is limited to Belgium subscribers - they do not provide international telephone information. EDA has also been allocated shortcodes in Ireland and the Netherlands but has yet to begin providing services in those Member States.

EDA is officially registered as a provider of directory enquiry services and publisher of directories before the Belgian regulator - BIPT, and is also registered as data controller before the Belgian Commission for the Protection of Privacy – CPP.<sup>5</sup>

Most of the demand for EDA's services and products derives from customers seeking details of telephone subscribers located in Belgium. However, due to demand for international telephone information from Belgian residents, EDA started offering its customers the ability to search for phone information related to subscribers located outside Belgium. Consequently EDA began building up an international database of directory information by contacting and contracting with electronic communications providers active in other European countries.

A number of the electronic communications providers located outside Belgium have refused to provide information concerning telephone numbers assigned to their subscribers and EDA has therefore submitted requests for dispute resolution before the relevant NRAs. Some of those disputes have been resolved while others - including the present OPTA case - remain pending.

In Poland, UKE has conducted an investigation of a dispute filed by EDA against the national incumbent. As a formal application was not received within the period prescribed by the President of UKE, the application remained unexamined.

In November 2010, CRC (the Bulgarian NRA) mediated<sup>6</sup> a dispute between EDA and several electronic communications providers. This dispute was treated as a cross-border dispute and CRC limited its intervention to mediation between EDA and each electronic communications provider.

CMT (the Spanish NRA) took a decision in May 2012 granting EDA access to the information requested from Spanish electronic communications providers. In order to adopt this decision, CMT obtained the positive opinion of the Spanish Data Protection Authority – AEPD -, and confirmed the proper registrations of EDA before BIPT and CPP in Belgium.

In Portugal, ANACOM received four similar dispute resolution requests from EDA concerning the provision of directory information from electronic communications providers in Portugal. ANACOM consulted CNPD (the Portuguese Data Protection Authority) for comments on the solution proposed in its draft determination. ANACOM considered the disputes to be cross-border in nature and submitted its draft determination to BIPT for comments. In April 2012 ANACOM issued four decisions requiring the communications service providers located in Portugal to present to EDA the conditions under which the company will provide relevant information on its subscribers, for the purpose of the provision of publicly available directory enquiry services and directories. This proposal should be reasonable, aim for the transmission of relevant information on the providers' subscribers and observe the format and conditions under which data must be supplied, which must be fair, objective, cost-oriented and non-discriminatory. Furthermore, ANACOM has decided the minimum set of subscriber data to which the principle of cost-orientation applies, meaning that the providers may only charge EDA for costs incurred with the actual transmission and provision. In Luxemburg, ILR took two decisions at the beginning of 2010 requiring the provision of

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<sup>5</sup> This registration has been done for the entire aggregated database, also for the ones related to international subscribers

<sup>6</sup> Under Bulgarian law this procedure does not lead to a binding decision of the CRC unless the parties ask to transform the procedure into a formal procedure in which the CRC issues obligatory directions to the parties.

directory information to EDA by communications providers located in Luxembourg. ILR considered that the dispute was cross-border in nature and that hence, in principle, both itself and BIPT were competent to resolve the dispute.

In the Netherlands, EDA submitted several requests to a number of communications providers for the provision of directory information of their subscribers. Some of those providers refused to provide the information and, in January 2012, EDA submitted four requests for dispute resolution to OPTA. EDA indicated that it considered the disputes to be cross-border disputes under article 21.2 of the Framework Directive and requested that OPTA: i) accept its motion as a valid motion for cross-border dispute resolution and accordingly declare itself competent to intervene; ii) request BEREC to adopt an opinion in relation to that motion; iii) require Dutch communications providers to provide EDA with the directory information already supplied to Dutch providers of directory enquiry services; iv) decide on the content and number of fields that must be remitted to EDA as basic directory information; v) require the provision of information in accordance with the European Court of Justice judgement C-109/03, that is "*paying only the cost of actual remittance of the relevant information*".

Following receipt of EDA's requests for dispute resolution, OPTA asked BEREC for advice on the interpretation of article 25 of the Universal Service Directive, in order to ensure a harmonised approach to the resolution of requests in relation to directory information in the EU. In this regard, OPTA asked 3 questions:

1. Is BEREC of the opinion that Article 25 of the Universal Service Directive in conjunction with art 5 of the Competition Directive<sup>7</sup> aims at encouraging the single market for suppliers of publicly available directory enquiry services and directories?
2. Does the obligation for undertakings that assign telephone numbers to meet all reasonable requests to make relevant information available for the purpose of the provision of directory enquiry services and directories, also apply to cross-border requests?
3. In addition, OPTA noted that, in responding to these questions, regard would need to be given to the provisions of Article 12 of the Privacy Directive<sup>8</sup> pursuant to which undertakings that assign telephone numbers to their subscribers must obtain consent from their subscribers to include personal data in directory enquiry services and directories. OPTA therefore enquired as to whether the consent given by a Dutch subscriber to the undertaking which assigned his telephone number is also given for passing on personal data to a third EU supplier of publicly available directory enquiry services, which is not active in the same Member State.

Finally, OPTA informed BEREC that it would be postponing its settlement procedure of the cross-border disputes until BEREC's advice were released.

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<sup>7</sup> Directive 2002/77/EC on competition in the markets for electronic communications networks and services.

<sup>8</sup> Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, as amended by Directive 2009/136/EC.

### 3. Legal basis for BEREC advice

BEREC has been requested by OPTA to give its advice as regards a number of provisions under EU law, notably Article 25 of Directive 2002/22/EC.

BEREC has consequently analyzed the legal basis for its advice, within the limits of its competence, and in accordance with its role and objectives set out in the BEREC Regulation.<sup>9</sup>

The assessment of the case is then outlined in the following sections of this document, through the identification of the main rights and obligations of the involved actors pursuant to the EU electronic communications regulatory framework; a response is then provided to the specific questions raised by OPTA concerning the interpretation of art. 25 USD and the settlement of the disputes filed by EDA.

BEREC considers that the legal basis for the provision of its advice to OPTA is found in art. 2b of the BEREC Regulation which provides that:

*“BEREC shall, on request, provide assistance to NRAs on regulatory issues”.*

For the sake of completeness, in accordance with the approach adopted by OPTA and in line with the position set out in the background document approved by the BEREC BoR at the plenary in Cyprus<sup>10</sup>, BEREC has also considered whether Articles 2(a) and 3(g) might provide the legal basis for the present advice. Those provisions state:

1. Art. 2 (a) of the BEREC Regulation:

*“BEREC shall develop and disseminate among NRAs regulatory best practice, such as common approaches, methodologies or guidelines on the implementation of the EU regulatory framework”.*

2. Art. 3 (g) of the BEREC Regulation:

*“The tasks of BEREC shall be to be consulted and to deliver opinions on cross-border disputes in accordance with Article 21 of Directive 2002/21/EC (Framework Directive)”.*

BEREC does not consider that, in this case, either of the provisions mentioned above should be relied upon as the legal basis for this advice.

Article 2(a) of the BEREC Regulation promotes the adoption of best practices among NRAs; such best practices should be based on the shared experience of NRAs in implementing the European regulatory Framework in individual MSs and on additional analysis undertaken by

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<sup>9</sup> Regulation (EC) 1211/2009, of 25 November 2009, establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office

<sup>10</sup> See footnote n. 3

BEREC. The adoption of BEREC guidelines or recommendations under Article 2(a) of the BEREC Regulation implies a decision about a harmonized set of criteria to be disseminated among NRAs.

However, BEREC's work in this case will not result in general BEREC guidelines addressed to all NRAs, whether in relation to past cases or other cases which are currently outstanding, but rather in providing ad hoc assistance regarding the regulatory issues laid out by OPTA, with a view to providing OPTA with support in the settlement of the disputes raised before it. BEREC is providing technical advice to OPTA which is particular to the facts of this specific case, although it is recognized that the approach set out in this document may influence the approach taken by other NRAs in similar disputes. This is consistent with the BEREC's objectives of ensuring the consistent application of the EU regulatory framework for electronic communications in all Member States and may therefore assist in regulatory harmonization.

Relying on Article 3 (g) of the BEREC Regulation as the legal basis for this BEREC work, would require BEREC to determine whether or not the dispute before OPTA is a cross-border dispute falling within Article 21 of the Framework Directive.

In the present case, BEREC does not consider that it is necessary to carry out such an assessment. OPTA has not sought BEREC's advice on the issue of whether or not the dispute before it is cross border in nature and BEREC does not consider it necessary to look into this aspect in order to provide the advice sought by OPTA. BEREC is able to provide assistance to OPTA under Article 2(b) of the BEREC Regulation in the context of the dispute and Article 3(g) offers no further assistance in this respect<sup>11</sup>.

BEREC's current advice on OPTA's request for assistance as regards Article 25 USD is therefore issued under Article 2(b) of the BEREC Regulation. This legal basis means that BEREC is in a position to provide assistance to NRAs on regulatory issues. This does, however, not imply that BEREC has the power to provide a binding legal interpretation of Article 25 USD.

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<sup>11</sup>In this regard, it is essential to take into account that Article 21 FD starts from the premise that the relevant dispute lies within the competence of NRAs from more than one Member State; BEREC notes that NRAs have adopted different approaches to date: while some NRAs have referred to cross-border disputes as disputes simply arising between parties located in different MS, others have treated disputes such as the one analyzed in this paper as purely national ones.

#### 4. BEREC assessment of OPTA's questions

This section sets out BEREC's response to OPTA's questions in relation to the disputes raised before it concerning the scope of Article 25 USD. This advice does not deal with national administrative processes for the tackling of OPTA's issues but is intended to ensure a common understanding of the legal framework in order to assist OPTA and potentially other NRAs in their approach to such cases.

##### 1. Article 25 of the Universal Service Directive

The first OPTA question asks whether BEREC considers that Article 25 of the Universal Service Directive, read in conjunction with Article 5 of the Competition Directive, can be interpreted as aiming at encouraging the single market for suppliers of publicly available directory enquiry services and directories.

Article 25.2 of the Universal Service Directive provides that Member States shall ensure that all undertakings which assign telephone numbers to subscribers will meet all reasonable requests to make available, for the purposes of the provision of publicly available directory enquiry services and directories, relevant information in an agreed format on terms which are fair, objective, cost oriented and non-discriminatory. Therefore, the Directive appears to establish a general obligation for Member States to ensure compliance with the requirements set out in Article 25.

Article 5 of the Competition Directive states that "*Member States shall ensure that all exclusive and/or special rights with regard to the establishment and provision of directory services on their territory, including both the publication of directories and directory enquiry services, are abolished.*"

BEREC considers that the primary objective of Article 25 is to ensure compliance and effective implementation of the universal service obligation as provided for in Article 5(1) of the Universal Service Directive. In accordance with this provision, Member States shall ensure that at least one comprehensive directory printed or electronic, or both, updated on a regular basis (at least once a year), and one comprehensive telephone directory enquiry service are made available to end-users.

However, in light of the policy objectives and regulatory principles of the Universal Service Directive and the overall regulatory framework, it can also be inferred that Article 25 Universal Service Directive also seeks to preserve competition in the provision of directory enquiry services and directories. This view seems to be supported by recital 35 of the Universal Service Directive which explicitly states that the provision of such services is already open to competition.

The relevant provisions of the Universal Service Directive therefore appear to be complementary to the provisions of the Competition Directive by giving subscribers a right to the inclusion of their personal data in a printed or electronic directory and also ensuring that all undertakings which assign telephone numbers to their subscribers make relevant



information available to other directory services providers in a fair, cost-oriented and non-discriminatory manner,<sup>12</sup>.

The Citizens' Rights Directive<sup>13</sup> (at recital 38) also provides further support for the objective of the promotion of competition by noting that directory enquiry services should be, and frequently are, provided under competitive market conditions, pursuant to Article 5 of the Competition Directive. In fact, the trend is that, in some Member States, these services are provided in competitive conditions and not under the universal service obligation regime. These two aspects (universal service goals to the benefit of end users and promotion of competition in the market for the provision of telephone directory enquiry services and directories) were considered by the Court of Justice of the European Union (the Court) in its judgment dated 5<sup>th</sup> of May of 2011 (Case C-543/09):

*“31. That interpretation is borne out by the objective pursued by Article 25(2) of the Universal Service Directive, which is to ensure compliance with the obligation of universal service as laid down in Article 5(1) of that directive, under which Member States are to ensure that at least one comprehensive directory or one comprehensive telephone directory enquiry service is made available to end-users. An obligation imposed on each undertaking which assigns telephone numbers to pass on data relating to its own subscribers enables the undertaking designated to provide the universal service in question to establish an exhaustive data base and, therefore, to ensure compliance with the obligation under Article 5(1).*

*35. Article 25(2) of the Universal Service Directive must be interpreted in the light of its specific objective, which is to ensure compliance with the universal service obligation laid down in Article 5(1) of that directive; (...)*

*36. (...) In a competitive market, the obligation under Article 25(2) of that directive for undertakings which assign telephone numbers to pass on data relating to their own subscribers in principle not only enables the designated undertaking to ensure compliance with the universal service obligation laid down in Article 5(1) of that directive, but also enables any provider of telephone services to establish an exhaustive data base and to become active in the market for telephone directory enquiry services and directories. In that connection, it is sufficient that the provider concerned ask each undertaking assigning telephone numbers for the relevant data relating to its subscribers.”*

The Court therefore considers that Article 25 of the Universal Service Directive has a dual objective. On the one hand, it aims to secure the achievement of the universal service objective set out in Article 5 Universal Service Directive while, on the other hand, it seeks to ensure effective competition and choice in the provision of directory services. This position is consistent with Article 1 of the Universal Service Directive which states the aim to be “to ensure the availability throughout the Community of good-quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market.”

In BEREC's view, the latter objective, the promotion of competition, has to be seen in the broader context of the revised EU regulatory framework and the policy objectives it pursues.

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<sup>12</sup> Under recital 35 of the Universal Service Directive, “*the provision of directory enquiry services and directories is already open to competition. The provisions of this Directive complement the provisions of Directive 97/66/EC by giving subscribers a right to have their personal data included in a printed or electronic directory. All service providers which assign telephone numbers to their subscribers are obliged to make relevant information available in a fair, cost-oriented and non-discriminatory manner.*”

<sup>13</sup> Directive 2009/136/EC (amending Directive 2002/22/EC and Directive 2002/58/EC).

In particular, Article 7 of the Framework Directive provides that, *“in carrying out their tasks under this Directive and the Specific Directives, national regulatory authorities shall take the utmost account of the objectives set out in Article 8, including in so far as they relate to the functioning of the internal market”*.

In this context, NRAs have to take reasonable measures to achieve the objectives laid down in Article 8, such as to contribute to the development of the internal market by, inter alia, *“removing remaining obstacles to the provision of electronic communications networks, associated facilities and services and electronic communications services at European level”*.

The removal of barriers “at European level” seeks to promote competition in the provision of services, including directory enquiry services, by ensuring that obstacles to the establishment of the internal market are removed. It is therefore BEREC’s opinion that article 25.2 USD should be considered to amount to a provision which has the intention of encouraging the single market for the supply of directory enquiry services.

In the context of the disputes before OPTA, BEREC further notes that Article 8.5 of the Framework Directive provides that NRAs shall apply objective, transparent, non-discriminatory and proportionate regulatory principles by, inter alia:

*“b) ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services;”*

This principle of non-discrimination also applies to discrimination based on nationality; NRAs should therefore consider the extent to which their approach is compliant with this principle.

In conclusion, it derives from all the above that Article 25 of the Universal Service Directive would encompass the above referred objectives. First, it aims at establishing rights for end-users and relevant obligations on Member States and undertakings as regards the provision of directory enquiry services and directories linked to the universal service obligations. Second, it aims at fostering the internal market for the provision of directory enquiry services and directories in a competitive manner, within which objective, the regulatory principle of non-discrimination plays an essential role.

## 2. Geographical scope of Article 25 USD

By its second question, OPTA asks whether the obligation established in Article 25.2 of the Universal Service Directive – to meet all reasonable requests to make relevant information available for the purpose of providing directory services - applies to cross-border requests where an undertaking in one Member State requests directory information from an undertaking located in another Member State.

In responding to this question, due consideration should also be given to the NRAs’ objectives and regulatory principles mentioned in the section above, i.e. prohibition of discrimination among companies and promotion of the internal market as well as to the principles contained in the Treaty on the Functioning of the European Union (TFEU).

The principle of non-discrimination constitutes a general objective of EU law, which is mentioned in different contexts in the TFEU and generally applied where there are cases of unequal treatment; it is expressly provided for in Article 18 TFEU on grounds of nationality.

Furthermore, Article 26 TFEU provides that:

*“The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.”*

In the context of the present assistance, the provisions relating to the free movement of services are relevant and Article 56 TFEU provides that:

*“Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.”*

Article 61 TFEU goes on to state that:

*“As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 56.”*

Without entering into a thorough analysis on the various applications and limits of the principle of non-discrimination and the freedom to provide services, which are not within BEREC’s remit, BEREC considers that the principles set out in the TFEU and Article 8 of the Framework Directive should be interpreted in such a way as to mean that a provider or recipient of services in one Member State should be treated in the same way as a provider or recipient who is not established in the Member State, considering a dispute between providers under the common regulatory framework<sup>14</sup>.

It therefore follows that undertakings providing telephone directory enquiry services and directories in one Member State should be able to benefit from the provisions of Article 25 Universal Service Directive in order to obtain access to relevant information from undertakings which assign telephone numbers to their subscribers in another Member State in the same way that the entities providing these services in the Member State where the information is requested, thus ensuring the promotion of the internal market and of competition for the provision of those services among entities operating in the Member States of the EU.

In summary, BEREC’s view is that Article 25 of the Universal Service Directive does not limit its scope of application to requests at national level and would also apply to requests by providers established in different Member States.

Another aspect that could arise when considering the request of EDA in a particular Member State is whether it needs to comply with the same administrative requirements that national undertakings have to comply with in order to obtain the information requested (for instance, the need to submit a notification for the national registry of operators).

In this context, it should be noted that Article 3.1 of the Access Directive states that:

*“1. Member States shall ensure that there are no restrictions which prevent undertakings in the same Member State or in different Member States from negotiating between themselves agreements on technical and commercial arrangements for access and/or interconnection, in accordance with Community law. The undertaking requesting access or interconnection does not need to be authorised*

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<sup>14</sup> Subject to any public interest considerations which might justify a derogation from the principles of non-discrimination and free movement of services as set out in the TFEU (mainly articles 52 and 62).

to operate in the Member State where access or interconnection is requested, if it is not providing services and does not operate a network in that Member State.”

In this regard, BEREC considers that the provider of telephone directory enquiry services and/or directories does not need to be authorised in the Member State where the undertakings assign telephone numbers to their subscribers, if it will not be providing services in this Member State.

This is an illustration of the mutual recognition principle, often applied to the recognition of professional qualifications and access of products to the markets of other Member States.

In view of the foregoing, in compliance with the policy objectives and the regulatory principles set out in the Framework Directive and in the TFEU, in BEREC's view, Article 25.2 USD should be considered as not being limited to requests for access at national level.

Consequently, the obligation for Member States to ensure that undertakings assigning telephone numbers meet all reasonable requests to make relevant information available for the purpose of the provision of publicly available directory enquiry services and directories would also apply where the request is made by an undertaking established in another Member State.

### 3. Article 12 of the ePrivacy Directive

Finally, in its request, OPTA refers to the requirements under Article 12 of the ePrivacy Directive<sup>15</sup>, in particular as regards the nature of the consent given by a national (Dutch) subscriber to the undertaking that assigned its telephone number and asks whether this would also be considered as given for passing on this personal data to a supplier from another EU Member State.

First, it should be noted that in accordance with Article 25(5) USD, the applicability of this provision is explicitly subject to the requirements under the data protection legislation, notably Article 12 of the ePrivacy Directive.

In this regard, BEREC notes that Article 1 of the ePrivacy Directive sets out that the aim of the Directive is to “*ensure an equivalent level of protection for fundamental rights and freedoms, and in particular the right to privacy and confidentiality, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community*”. Therefore, this Directive, as stated by Recital 51 of the Citizens' Rights Directive, and Directive 95/46/EC<sup>16</sup> provides that the data protection rules must be harmonised in Member States to ensure an equivalent level of protection of the rights of privacy and confidentiality of the subscribers (individual persons) in all Member States, and also enable the free movement of data in the internal market.

Article 12 of the ePrivacy Directive provides that Member States must ensure that subscribers are informed, before the first inclusion of their data in a public directory, of the purpose of that directory and of any further usage possibilities of such personal data.

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<sup>15</sup> Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector

<sup>16</sup> Directive 95/46/EC, of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Member States must further ensure that subscribers are given the opportunity to determine whether their personal data are included in a public directory and, if so, which data; in this sense, an explicit consent from subscribers to have their data published in directories is required.

BEREC notes that the Court of Justice of the European Union has considered the interpretation of Article 12 of the ePrivacy Directive in the *KPN* Case C-543/09, in which it stated that:

*“59. Recital 39 to the Directive on privacy and electronic communications states, with respect to the obligation of prior information for subscribers under Article 12(1) of that directive: ‘[w]here the [personal] data may be transmitted to one or more third parties, the subscriber should be informed of this possibility and of the recipient or the categories of possible recipients’.*

*60. However, after obtaining the information referred to in Article 12(1) of that directive, the subscriber may – as is clear from Article 12(2) – decide only whether his personal data may be included in a public directory and, if so, which personal data.*

*61. As the Advocate General observed in point 122 of her Opinion, it follows from a contextual and systematic interpretation of Article 12 of the Directive on privacy and electronic communications that the consent under Article 12(2) relates to the purpose of the publication of personal data in a public directory and not to the identity of any particular directory provider.”*

BEREC therefore considers that it derives from this interpretation by the Court that the subscriber's consent to the provision of his personal data to undertakings providing directory enquiry services and directories is linked to the publication of his/her personal data but not to any particular provider. This means that, if subscribers were informed before the first inclusion of their data in a public directory that such data could be communicated to another provider, and if they gave their consent to it, a renewed individual consent is not necessary.

On that basis, and in accordance with the principles of non-discrimination and free movement of services as set out above, there is appears to be no justification to adopt a different position when the undertaking requesting personal data is established in another Member State.

The possibility to pass subscribers' data to another provider, subject to its original consent, is not limited to providers established in the same country. In other words, according to the Court of Justice and considering the abovementioned principles of non-discrimination and free movement of services, the accessibility of such data would not seem to be limited to cases where the two providers are established in the same Member State, since the contrary would also go against the EU internal market objective. Furthermore, taking into account that the ePrivacy Directive and Directive 95/46 ensure the same level of privacy protection across Member States, it would not be consistent to apply different rules (more restrictive) in case the providers were established in different EU Member States<sup>17</sup>.

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<sup>17</sup>The national data protection authority from whose territory the data are transferred would be always able to request information about the data treatment and could request the relevant enforcement actions to the Belgian Authority if needed. OPTA might hence decide to request further information to the Dutch DPA.

## 5. Conclusions

On the basis of the analysis carried out in section 4 and in order to assist OPTA in relation to the questions raised in its request with a view to resolving the disputes before it, BEREC is of the view that:

1. Article 25 of the Universal Service Directive, read in conjunction with Article 5 of the Competition Directive, can be considered to have dual complementary objectives. First, to ensure and effectively implement the availability of directories and directory enquiry services as required by Article 5 USD.. Second, to promote the EU internal market and competition in the provision of directory enquiry services and directories.
2. With regard to the geographic scope of the obligations which Member States are required to ensure under Article 25 Universal Service Directive, BEREC considers this provision as not being limited to requests at national level.

Article 25 makes no such distinction and as a result, directory enquiry services and directories providers legitimately operating in a Member State of the EU benefit from the rights and obligations provided for in Article 25(2).

3. Lastly, regarding the geographic scope of a subscriber's consent to the provision of personal data for use in directories and, in particular, whether such consent would also cover the making available of such data to directory enquiry and directories providers in other EU Member States, Article 12 of the Privacy Directive does not seem to establish any specific restriction on the provision of such information on a cross-border basis.
4. Finally, BEREC notes that the purpose of this document is to assist OPTA, and not to provide binding legal interpretation which, in accordance with the EU Treaties<sup>18</sup>, falls into the competence of the Court of Justice of the European Union.

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<sup>18</sup> Treaty on European Union and the Treaty on the Functioning of the European Union:  
<http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML>