

Chapter 22

Electronic Communications

1. General

As part of the harmonization of the national legal framework with the *acquis communautaire*, as well as considering the liberalization of the Romanian communications market beginning with January 1st, 2003, pursuant to the dissolution of the monopoly held by Romtelecom (the former national fixed telephony operator), a new regulatory framework on electronic communications was issued, basically consisting in two frame enactments: GEO no. 79/2002 on communications framework, which completely repealed the previous regulation (Telecommunications Law no. 74/1996), and GO no. 34/2002 on the access to public electronic communications networks and to the associated infrastructure, as well as their interconnection. The main novelty of GEO no. 79/2002 consists in the new independent regulatory authority established thereby in the electronic communications field, the licensing regime for the activities regarding electronic communications services and networks and defining the specific rules governing competition on the electronic communications networks and services market. The new legal framework introduces the “electronic communications” concept, which exceeds the area covered by the “telecommunications” concept, including signal transport through wire, radio, optic fibers or other electromagnetic means.

For the implementation of the enactments mentioned above, secondary legislation was adopted, so that, by the end of year 2003, Romania was among the first countries in Europe that had implemented the most important enactments of the *acquis communautaire* in the electronic communications field.

As a result of the new incoming regulatory framework, the Romanian electronic communications market has developed at an accelerated pace becoming one of the most attractive fields for the foreign investors.

2. Main Regulations

- Government Emergency Ordinance no. 79/2002 on the general regulatory framework for communications, as further amended and completed, (“GEO no. 79/2002”);
- Government Ordinance no. 34/2002 on the access to public electronic communications networks and to the associated infrastructure, as well as their interconnection, as further amended and completed, (“GO no. 34/2002”);
- Law no. 304/2003 on the universal service and users’ rights relating to the electronic communications networks and services (“Law no. 304/2003”);
- Government Decision no. 12/2009 on the organization and functioning of the Ministry of Communications and Informational Society, as further amended and completed, (“GD no. 12/2009”);

- Government Emergency Ordinance no. 22/2009 on the establishment of the National Authority for Management and Regulation in Communications, approved by Law. No. 113/2010 (“GEO no. 22/2009”);
- ANCOM Decision no. 338/2010 on the general authorisation regime for the provision of networks and electronic communication services (“Decision no. 338/2010”);

3. Competent public authorities in electronic communications sector

3.1. The Regulatory Authority

Under GEO no. 79/2002 corroborated with GEO no. 22/2009, the National Authority for Management and Regulation in Communications (“ANCOM”) was established as public institution subordinated to the Government, entirely financed from extra-budgetary revenues by replacing the former National Authority for Communications, having the main role to put into the national policy in the field of electronic communications, audio-visual communications and postal services, including through market regulation and technical regulation in these fields.

ANCOM is organized as an independent regulatory authority in the electronic communications radio frequency and information technology field, and is bound to maintain its operational and financial independence towards the electronic communications networks and services providers, as well as towards the producers or the authorized representatives of the producers of equipment meant for the supply of electronic communications networks and services, the importers or suppliers of such equipment.

One of the main goals of ANCOM’s activity is to protect the rights and interests of users. To achieve this goal, ANCOM may take all steps necessary to ensure users maximum benefits from a competitive environment in terms of offer diversity, tariffs and service quality.

The main powers and duties of ANCOM are:

- (i) enforce the sectorial policy and strategy elaborated by MCIS in the field of electronic communications, audio-visual communications and postal services, especially by ensuring the secondary sectorial regulations in the field, regulate the activities in the field of electronic communications and of postal services, by adopting and implementing normative and individual decisions, as well as functional, operational and financial procedures by which the compliance control and monitoring policies in the field are enforced;
- (ii) administrate and manage the limited resources, planning, allotting, monitoring and evaluating their use with a view to enforcing the policies in the field, by:
 - a) administration of the radio spectrum by planning, allocating, allotting the frequency bands, assigning and monitoring the radio frequencies in the frequency bands with non-governmental use, as well as by coordinating, at the national level, the radio frequency management in accordance with the National Table for Frequency Band Allocation,

- hereinafter referred to as NTFA, and with the international agreements in which Romania is a party;
- b) effective management of the radio frequency bands with non-governmental use in accordance with the NTFA, by allocation and/or assignation of radio frequencies, for the purpose of ensuring their rational and efficient use;
 - c) administration and allocation of the numbering resources and of the associated technical resources for electronic communications networks and services, including by elaborating the National Numbering Plan, as well as other similar plans;
 - d) management of the numbering resources at the national level, with a view to their rational and efficient use;
 - e) administration and management of other limited resources in the field of electronic communications;
- (iii) regulate the activities in the electronic communications field, audio-visual communications and postal services, by adopting and implementing normative and individual decisions, as well as functional, operational and financial procedures by which the compliance control and monitoring policies in the field are enforced;
 - (iv) elaborate and adopt of specific rules in the field of electronic communications and of postal services;
 - (v) ensure representation in the national, regional and international bodies and organisations, as a state authority for the field of electronic communications and of postal services, as well as communication with these;
 - (vi) ensure collaboration and communication with the other structures of the public administration, with the civil society and with the citizens, as well as with the providers of networks and services in the field of electronic communications, audio-visual communications and postal services;
 - (vii) decisional body in the settlement of disputes between the providers of networks and services in the electronic communications field, for the purpose of ensuring free competition and protecting the end-user's interest in the markets for these services;
 - (viii) survey and control of the limited resource users' compliance with the obligations incurred under the legal provisions and under the administrative acts which granted them the right of use;
 - (ix) elaborate technical procedures and rules specific to the ANCOM activity;
 - (x) survey the market of radio equipment and terminal telecommunication equipment;
 - (xi) control in view of fulfilling the essential requirements of electromagnetic compatibility and of the efficient use of the radio spectrum.

Under GEO no. 79/2002, authorized providers of electronic communications networks and services are bound to pay an annual monitoring tariff, calculated as a percentage of their aggregate turnover or of the incomes obtained from the electronic communications networks and services provision of each provider. This percentage is equal for all providers and is determined on an annual basis, according to the formula stipulated by the GEO no. 79/2002, yet not exceeding 0,4%. In order to determine the monitoring tariff according to the formula provided by GEO no. 79/2002, the providers of electronic communication networks and services must submit with ANCOM a copy of their annual financial statements, within 5 days as of the expiration of term provided for their submission to the territorial divisions of the public finances.

The annual monitoring tariff owed by the providers is established by decision of the president of ANCOM until July 15 of the relevant year. ANCOM has to convey to each provider the decision which establishes the quantum of the monitoring tariff owed for the relevant year. The provider must pay the tariff in two equal installments until the end of the year, within the terms provided by GEO no. 79/2002.

3.2. Ministry of Communications and Information Technology

Certain regulatory powers are retained by the Ministry of Communications and Informational Society, ("MCIS"), which, in its capacity of specialized body of the central public administration in the field of communications and information technology, has, among others, the following main role and responsibilities:

- (i) to ensure the development of strategies and unitary regulation in the sector of electronic communication, postal services, information technology and informational society services and of the knowledge based society;
- (ii) to define the strategic objectives in the field of electronic communication, postal services, information technology and informational society services and of the knowledge based society;
- (iii) to define, apply, monitor, evaluate and coordinate the sectorial policies; to define the regulatory, functional, operational and financial framework, necessary for the implementation of policies, and to monitor the harmonization of the national legislation with the legislation of the European Union and the *acquis communautaire*, in the field of electronic communication, postal services, information technology and informational society services and of the knowledge based society;
- (iv) to ensure the coordination of other public authorities in view of realization of coherent policies and implementing the governmental strategies in the field of electronic communication, postal services, information technology and informational society services and of the knowledge based society;
- (v) to encourage international partnerships.

4. General authorization regime and licenses

4.1. General authorization regime

One of the major changes introduced by the new electronic communications regulatory framework is the deregulation of the electronic communications network and services provision, which shall now be performed under the general authorization regime. Individual licenses are only required for the use of radio electric frequencies and numbering resources. Any individual or legal entity intending to provide electronic communications networks or services must submit with ANCOM a written notification on its intention at the latest in the day starting its activity. ANCOM establishes and updates the standard form of such notification, comprising the information which any person intending to provide electronic communications networks or services is bound to communicate in order to benefit from a general authorization.

The person complying with the notification procedure within the term and under the conditions stipulated by GEO no. 79/2002 and the ANCOM Decision 338/2010 is deemed as authorized to provide the types of networks or services indicated in the notification, and will have all the rights and obligations stipulated in the general authorization.

The general authorization for the network and services types is drawn up and updated by ANCOM, which thereby establishes the conditions for their supply and determines the rights and obligations incumbent on the providers for each type of network or service. ANCOM may change the general authorization, by observing the objectivity and proportionality principles, only after undergoing the consulting procedure (see Section 10 of this chapter), and only if such a decision is necessary under an international treaty Romania is part in, or if the circumstances based on which the general authorization was issued have changed.

The individuals or legal entities authorized under GEO no. 79/2002 and ANCOM Decision 338/2010 to operate public electronic communications networks or provide electronic communications services have the following rights:

4.1.1. Provision of electronic communications networks

4.1.1.2 A provider of public electronic communications networks has the right to make its network available only to a third party that is authorised to provide electronic communications networks or services, or to a third party authorised according to the specific legislation in the audio-visual field.

4.1.1.3. A provider of private electronic communications networks has the right to connect as an enduser to a public electronic communications network, using a connection means agreed upon together with the provider of public electronic communications network.

4.1.2. Provision of electronic communications services

A provider of publicly available electronic communications services may therefore use a network of a third provider of public electronic communications networks, upon the approval of such third provider, if the

respective network allows, from a technical point of view, the provision of the electronic communications service.

4.1.3. The access right

A provider of electronic communications networks may install, maintain, replace, or move any element of the network, including stands and other facilities necessary for their support, as well as the terminal points used for the provision of electronic communications services on, over, in or under immovables which are public or private property, as the case may be, in accordance with the legal provisions regulating the access right.

4.1.4. Access and interconnection

A provider of public electronic communications networks or of publicly available electronic communications services may negotiate and conclude access or interconnection agreements under the conditions set out by the GO no. 34/2002.

4.1.5. Designation as a Universal Service provider

A provider of public electronic communications networks or of publicly available electronic communications services has the right to be designated for providing any services within the scope of the Universal Service over the entire national territory or over regions of the national territory, in accordance with the provisions under Chapter II of the Law no. 304/2003.

4.1.6. Adjacent rights

4.1.6.1. A provider of publicly available electronic communications services has the right to publish subscribers' directories containing the identification data and telephone numbers of the subscribers, in written, electronic or any other form, with the observance of the provisions under the Law no. 677/2001 on Data Protection.

4.1.6.2 A provider of publicly available telephone services has the right to provide the directory enquiry services and the customer service. ANCOM will issue, within maximum 7 days, a standard certificate attesting that a certain entity has sent a notification in accordance with GEO no. 79/2002 and ANCOM Decision 338/2010, certificate which sets forth the terms under which such person enjoys the right of access to properties and the right to negotiate access or interconnection agreements.

Note that, the individuals or legal entities intending to provide electronic communication networks or services exclusively for personal needs do not have the obligation to submit with ANCOM a written notification with respect to such intention. Nonetheless, such entities shall have the rights and obligations set out under the general authorization.

4.2. Licenses

As the radio electric frequencies and numbering resources are limited, belonging to the state public property, their use is allowed only after obtaining a license granted under such conditions which should ensure their

efficient use. Where technically possible, and if the risk of producing disturbing interferences is reduced, ANCOM may designate certain categories of frequencies for free use, subject to the general authorization regime with respect to access and use conditions.

Licenses for the use of radio electric frequencies as well as licenses for the use of numbering resources are granted by ANCOM. Both the licenses for the use of radio electric frequencies and the licenses for the use of numbering resources are granted through an open, transparent and non-discriminating procedure, within at most 3 weeks, as the case may be, as of the receiving of a request in this respect, except for licenses for specific radio electric frequency bands (e.g. bands used by the 3rd generation mobile networks), that will be granted based on a procedure of competitive or comparative selection. The licenses shall establish the periods for which the right to use radio electric frequencies or the numbering resources is granted. The licenses to use radio electric frequencies or numbering resources may be assigned to a third party, authorized under GEO no. 79/2002 and ANCOM Decision 338/2010, only with the prior approval of ANCOM, as the case may be, and only if all the obligations arising from such licenses are undertaken and observed, including the clauses referring to the license assignment. Any license assignment agreement failing to comply with the terms above is void.

5. Rules applicable to network and services providers having significant power on the market

A provider of electronic communications networks or services shall be deemed as having significant power on a certain market if, either individually, or together with other such providers, enjoy on that market a position equivalent to a dominant position.

A dominant position on a certain market is the position of a provider of electronic communications networks or services which enable the latter, to a significant extent, to have an independent behavior as compared with its competitors, customers and consumers. Furthermore, if on a certain market there is only one provider of electronic communications networks or services, it is presumed that such provider has a significant power on that market.

According to GEO no. 79/2002, in case the regulations in force demand for certain obligations to be imposed, maintained, modified or withdrawn as a result of a market analysis, ANCOM shall determine whether real competition exists on the relevant market, based on such an analysis performed according to the provisions of the Regulation concerning the performance of market analysis and the determination of the significant power on the market, approved by the decision of ANCOM's President. In order to perform such market analysis ANCOM shall collaborate, as the case may be, with the Competition Council.

If, based on such market analysis, ANCOM finds that:

- (i) on that relevant market real competition exists, ANCOM will not impose either of the above mentioned obligations or will withdraw the same, in case such restrictions exist;

- (ii) if, on that relevant market there is no real competition, then, based on the same regulation, ANCOM will identify the providers of electronic communications networks or services having significant power on the market, and will impose them the above mentioned restrictions, or will maintain or modify such restrictions, where they already exist.

Any measures for the withdrawal, imposing, maintaining or modification of certain obligations, further to a market analysis, may only be taken after undergoing the consulting procedure (see Section 10 of this chapter).

In enforcing these rules, GO no. 34/2002 determines the obligations to be imposed by ANCOM to operators considered as having significant power on a certain relevant market (see Section 7 of this chapter).

6. Rules on settling disputes between providers

In case of disputes between providers of electronic communications networks or services in connection with any obligations imposed by law, the interested party will notify ANCOM accordingly, in order to settle such litigation. ANCOM, in its position of arbitrator and decision-making body, will settle the dispute through a jurisdiction- administrative procedure.

Within the administrative procedure, ANCOM's president will issue a binding decision settling the dispute, within 4 months from the date when ANCOM was notified, except for exceptional cases, when a longer period is necessary for proper settlement of the case.

The decision of ANCOM's president may be challenged before the administrative panel of the Court of Appeal in Bucharest, within 30 days from its communication to the parties.

The administrative procedure carried out before ANCOM is free of charges and is optional. Therefore, in case of a dispute between the providers of electronic communications networks or services, the interested party may address directly to the court of justice in order to settle their dispute.

7. Access to and interconnection of the electronic communications networks and the related infrastructure

Providers of electronic communications services and electronic communications network operators are entitled to negotiate and enter into access or interconnection agreements between themselves.

Additionally, in order to ensure supply and efficient operation of the electronic communications services destined to the public use, any public communications network operator has:

- (i) the right to negotiate an interconnection agreement with any other operator of a public communications network in order to provide electronic communications services to the public, including electronic communications services accessible to users through another public communications network interconnected with the network of any of the two operators;

- (ii) the obligation, upon request of a legally authorized third party, to negotiate an interconnection agreement with such party, for the provision of electronic communications services to the public, including electronic communications services accessible to users through another public communications network interconnected with the network of any of the parties.

GO no. 34/2002 establishes ANCOM's obligation of taking all the necessary steps to encourage and, where necessary, to ensure adequate access and interconnection, as well as interoperability of such services, being empowered to establish the conditions for enabling interconnection or access based on ANCOM's own initiative or, in case of disagreement between the parties, at the request of any of the parties.

Thus, ANCOM may impose operators deemed as having a significant power on a certain relevant market, one or several of the obligations below:

- (i) transparency obligations with respect to the interconnection of the communications networks or the access to such networks or their associated infrastructure, which may involve publication of certain information such as technical requirements, network characteristics, accounting information and tariffs applied;
- (ii) non-discrimination obligations, regarding the terms imposed to third parties, as well as the information and services made available to the same;
- (iii) obligations for granting access to and use of specific elements of the network or of the related infrastructure, which could involve, *inter alia*, granting to a third party the right of access to specific elements of the network or to related infrastructure, including the unconditioned access to the local loop, the provision of collocation or any other forms of divided use of the premises/equipments, network interconnection etc.;
- (iv) obligations with reference to cost recovering or to the tariff control, including obligations of grounding the tariffs depending on costs and obligations related to bookkeeping for the supply of certain access or interconnection modalities;
- (v) obligations to publish a reference offer for unconditional access to the local loop made of metal wires, optical fibers, coaxial cable, that may be imposed on the operator having significant power on the local loop supply market.

If, based on a market analysis, ANCOM establishes that, on a certain relevant market, real competition exists, ANCOM will withdraw or modify the obligations imposed.

8. Rights of access to properties

GEO no. 79/2002 establishes in article 22 the conditions whereby authorized providers of electronic communications networks may install, maintain, replace and remove any element of the electronic communications networks, including supports and other facilities necessary to support them, as well as the

terminal points used to provide electronic communications services, above, in or under buildings. Separate conditions are established for public and private property.

Thus, the authorized providers have the right to perform the above-mentioned works with respect to real estate belonging to the state public property or the administrative-territorial units, in case the following conditions are cumulatively met:

- (i) the exercise of this right is in line with the use or the public interest to which the real estates is destined;
- (ii) the works performance does not infringe the specific urbanism or territorial arrangement requirements or the environment, health or the public order protection;
- (iii) the conditions of exercising this right have been agreed by both parties, either through an authenticated contract or, in its absence, by court decision.

In case of private property, the following conditions have to be cumulatively fulfilled:

- (i) such property should not be affected or should be affected to an insignificant extent by performing such works or, if another authorized electronic communications networks supplier already performed such works on the same property, the usage right over such property should not have been permanently affected by an additional restriction as a result of performing of such new works;
- (ii) the works performance does not infringe the specific urbanism or territory arrangement requirements or requirements regarding the environment, health or the public order protection;
- (iii) the conditions of exercising this right were agreed by both parties, either through an authenticated contract or, in its absence, by court decision.

9. Universal service principle and users protection

Under Law no. 304/2003, the universal service principle refers to the right of every Romanian end user to benefit from the services that are falling within the scope of universal service at a certain quality level, irrespective of its geographical location in the country, and at accessible tariffs.

The following services are falling within the scope of universal service:

- (i) provision of the access to public telephone network, at a fixed location;
- (ii) directory enquiry services and making available the subscribers' directories;
- (iii) access to the public pay telephones.

For the services mentioned above at items a) and c) the universal services providers shall be designated by ANCOM's decision following a public auction, or exceptionally "ex officio". Secondary regulations adopted by ANCOM for the implementation of the universal service within the electronic communication field establish

the conditions and the procedure for the designation of the universal services providers and the mechanism of compensating the net costs for the provision of such services.

Law no. 304/2003 also includes mandatory provisions for the protection of end users. According to said law, contracts between providers of electronic communications services and end users must be executed in writing and should include at least the following clauses, as the article 19 provides:

- (i) the identification data of the provider;
- (ii) the services provided, the service quality levels offered and the duration of the initial connection;
- (iii) the types of maintenance and repair services offered;
- (iv) the prices and tariffs for each product or service covered by the contract and their computation, the methods for updating the information on the tariffs;
- (v) the duration of the contract, the conditions for renewal or termination of the contract, the conditions for suspending the service;
- (vi) the liquidated damages in case of contract breach; and
- (vii) the procedure for settlement of disputes.

Should the provider be allowed to unilaterally modify the contract, it shall be liable to notify such intention to the end user at least 30 days prior to operating the amendment (irrespective of the modification). The end user is entitled to unilaterally withdraw from the contract, without paying the liquidated damages, in case of disagreement with the proposed amendments. The notification send by the relevant provider should expressly specify the right of the end user to unilaterally withdraw from the contract.

10. Consultation procedure

Every time ANCOM intends to adopt measures for the application of the GEO no. 79/2002 or the special legislation in the field of electronic communications, measures which may have a significant impact on the relevant market, ANCOM must observe the consultation procedure provided by the GEO no. 79/2002.

The procedure consists of ANCOM's obligation to publish the issue subject to consultation on its own web site. Within minimum 30 days, or, in case of measures to be urgently adopted, at least 10 days after the date of their publication on the Internet, any interested person may submit written comments.

A measure subject to the consultation procedure may not be adopted before the expiration of a 10-day period following the deadline for the comments submission. ANCOM must publish a synopsis of the comments so gathered, no later than on the date of publication on ANCOM's web site of the decision approving the relevant measure. The published material will also contain ANCOM's position as to the comments received on same issue.