



On grounds of the provisions under art.32(1) letter a) and of art.38 paragraph (1), (3) and (5) of Government Emergency Ordinance no.79/2002 on the general regulatory framework for communications, approved, with amendments and completions, by Law no.591/2002,

**THE PRESIDENT OF THE
NATIONAL REGULATORY AUTHORITY FOR COMMUNICATIONS**

issues the following:

**DECISION
on the rules for the identification of the relevant markets
within the electronic communications sector**

Unique article. – Hereby are approved the rules for the identification of the relevant markets within the electronic communications sector under the annex which is part of this decision.

**PRESIDENT,
ION SMEEIANU**

Bucharest, December 12, 2002
No. 136

ANNEX

RULES FOR THE IDENTIFICATION OF THE RELEVANT MARKETS WITHIN THE ELECTRONIC COMMUNICATIONS SECTOR

Chapter I General provisions

Art.1 – The scope of this regulation is to set out the criteria and instruments for the identification of those products and services markets from the electronic communications sector whose characteristics may justify the imposing, by the National Regulatory Authority for Communications, hereinafter referred to as *ANRC*, of specific obligations to the electronic communications services or networks providers with significant market power, as well as to identify these markets, hereinafter referred to as *specific relevant markets*.

Art.2 – Within the meaning of this decision, the terms below are defined as follows:

- a) **product** – a product or a service within the electronic communications sector;
- b) **provider** – a provider of electronic communications networks or services, within the meaning of Government Emergency Ordinance no.79/2002 on the general regulatory framework for communications, approved, with amendments and completions, by Law no.591/2002, or an operator, within the meaning of Government Ordinance no.34/2002 on the access to, and interconnection of, public electronic communications networks and the associated facilities, approved, with amendments and modifications, by Law no.527/2002, who offers a product;
- c) **the relevant product market** – the market of products/services the users consider they can change or substitute, due to their destination, physical and operational features, and price;
- d) **the relevant geographic market** - the area where the providers of the products on the relevant market are located, where the competition conditions are homogeneous enough, and that can be differentiated from neighboring geographic areas due to different competition conditions;
- e) **the relevant market** – determined by comparing the relevant product market to the relevant geographic market;
- f) **the specific relevant market** – the relevant market within the electronic communications sector whose characteristics may justify the imposing by *ANRC* of specific obligations to providers with significant market power;
- g) **effective competition** – the situation where the competition mechanisms of the market lead to an efficient allocation of resources and a high level of social benefits;
- h) **retail market** – the market of products destined to end users;
- i) **wholesale market** – the market of products destined to be used for the purpose of resale;
- j) **fixed public telephone network** – the electronic communications network through which the publicly available telephony service is provided at fixed locations;
- k) **mobile public telephone network** – the electronic communications network through which the publicly available telephony service is provided at non-fixed locations.

Chapter II

The identification of the product relevant market

Art.3 - (1) The analysis of the relevant product market starts with the segmentation of the electronic communications sector according to the following categories:

- a) public electronic communications networks and publicly available electronic communications services and electronic communications services provided for own needs;
- b) retail markets/wholesale markets;
- c) provision of electronic communications networks and services/provision of associated facilities;
- d) provision at fixed locations/provision at non-fixed locations;
- e) publicly available telephony services/other services;
- f) services provided to consumers/services provided to the other end users.

(2) Within each segment of the electronic communications sector identified in paragraph 1, ANRC shall identify the relevant product markets starting from a product or group of products to which other products shall be added according to the criteria under paragraph 4. Considering the convergence of technology in the electronic communications sector, ANRC shall determine the situations where products that belong to different segments are part of the same relevant product market.

Art.4 – Criteria used for the identification of the relevant product market:

- a) the possibility to substitute demand;
- b) the possibility to substitute supply.

Art.5 – Demand-side substitution criteria is used to determine those products the users consider they can change or substitute due to their destination, physical and operational features, and price.

(2) Demand-side substitution is determined based upon users' behavior in case of a price fluctuation in the past and upon the probable behavior users' behavior in case of a hypothetical price fluctuation.

(3) The evaluation of the demand-side substitution shall take into account the degree of the consumer's willingness to take over the prices afferent to changing one product with another and the necessary time for this change.

(4) The relevant product market shall contain all the products that may be substituted from the demand point of view.

Art.6 – (1) The supply-side substitution criterion is used to determine those products the users consider they can change or substitute due to their destination, physical and operational features, and price, which can be offered by the providers who may enter the relevant market, during a reasonable period of time and without significant costs or risks.

(2) The supply-side substitution shall be considered when its effects over the stability of the market price are equivalent to those of the demand-side substitution.

(3) When the provision of products likely to be substituted involves significant modifications of the existing network facilities, important supplementary investments, or longer duration, such products shall not be included in the relevant market.

(4) The relevant product market shall contain all products which can be substituted from the supply point of view.

Chapter III

Identification of relevant geographical market

Art.7 – (1) The relevant geographical market shall be identified based upon the following criteria:

- a) the area covered by the network or by elements of the associated facilities;
- b) the existence of geographical restrictions imposed by law or administrative acts;
- c) the analysis of access and interconnection agreements.

(2) The appliance of the criteria under paragraph 1 shall be completed, as the case may be, with the following criteria:

- a) the demand-side substitution;
- b) the supply-side substitution.

Art.8 – The area covered by the network or by elements of the associated facilities, as the case may be, usually surrounds the area where the product whose provision depends on the network support or the respective associated facilities is offered.

(2) The area covered by the network or by elements of the associated facilities is usually similar to the geographical restrictions imposed by law or by administrative acts.

(3) The analysis of access and interconnection agreements may provide indications over the extension of the provision area of the product whose supply depends on certain networks or associated facilities.

Art.9 – (1) The demand-side substitution criterion is used to determine the area where are provided products the users consider they can change or substitute due to their destination, physical and operational features, and price.

(2) The provisions under art.5 paragraphs 2 and 3 shall apply accordingly.

(3) The relevant geographical market shall include all areas where are provided the products likely to be substituted from the point of view of the demand.

Art.10 - (1) The supply-side substitution criteria is used to determine the area where are located the providers who may enter the respective relevant market, during a reasonable period of time and without significant costs or risks, with products the users consider they can change or substitute due to their destination, physical and operational features, and price.

(2) The provisions under art. 5 paragraphs 2 and 3 shall apply accordingly.

(3) The relevant geographical market shall include all areas where are provided the products likely to be substituted from the point of view of the supply.

Chapter IV

The Hypothetical Monopolistic Test

Art.11 – (1) The evaluation of the demand- and supply-side substitution may be conducted using the hypothetical monopolistic test.

(2) The hypothetical monopolistic test analyses whether a unique hypothetical provider of a product can apply, in a profitable manner, a small but significant and non-transitory price increase, under condition that prices of all other products remain at the same level. A small but significant price increase represents a 5-10% change of price. Should this price increase be not profitable due to the fact that the product may be substituted with other products from the demand or supply point of view, then these products and the areas where their providers are located shall be included in the relevant market. This procedure shall be repeated for the new group of products and the new geographic area, until within the relevant market can no longer be included other products or areas.

Art.12 – (1) The hypothetical monopolistic test is usually relevant and shall be applied in case of products whose price is freely established on competitive basis and is not subject to the regulatory regime.

(2) – Therefore, should the price level be too high as a result of the market power exerted by one provider or by a group of providers, the evaluation of the demand or supply substitution starting from this price level, by applying the hypothetical monopolistic test, may lead to the introduction on the relevant market of certain products which might not have been substituted if the initial price had been established on competitive basis. Otherwise, should the price level be too low due to regulation or to certain anticompetitive practices, the evaluation of the demand or supply side substitution starting from this price level, by applying the hypothetical monopolistic test, may lead to the exclusion from the relevant market of certain products which might have been substituted if the initial price had been established on competitive basis.

(3) In situations under paragraph 2, *ANRC* shall analyse whether the hypothetical monopolistic test may be applied when defining the relevant market.

Chapter 5

Identification of specific relevant market

Art.13 – When identifying specific relevant market shall be taken into consideration specific existing conditions on the relevant market as well as the global estimate of the future evolutions in the market structure and movement, starting with the characteristics and evolution of the markets of the European countries where the regulatory framework is based on similar principles.

Art.14 – (1) Starting with the relevant market, the identification of the relevant market shall be mainly conducted based upon the following criteria:

- a) entry market barriers;
- b) market dynamics;
- c) efficiency of competition law.

(2) Choosing the criteria shall depend on the features of the relevant market.

Art.15 – (1) the existence of high market entry barriers represents a sign for the identification of the respective relevant market as a specific relevant market. The presence of such barriers is not sufficient for the identification of one specific relevant market. Due to the dynamic character of the electronic communications sector, will be taken into consideration the possibility that the respective relevant market strives to an effective competition, despite high entry market barriers.

(2) there are two types of entry market barriers:

- a) structural barriers
- b) legal barriers.

Art.16 – (1) Structural barriers exist at the market entry when the level of technology, the structure of its associated costs, and the level of the demand are capable to create unbalanced conditions between the existing providers and the potential competitors, likely to cause the foreclosure or the delay of market entrance of the latter.

(2) Structural barriers may represent the existence of certain substantial scale, scope and density economies, as well as of high sunk costs and are supposed to exist at the market entrance.

(3) Scale economies appear when the total average cost per product unit of a provider diminishes at the same time with the sales increase, for a production level correlated to the market demand. Scale economies are influenced by technological and managerial factors and result from the decrease of fixed costs per product unit that follows an increase of the sales volume.

(4) Scope economies appear as the result of the cost advantage of a provider who manufactures two or more products by using the same means compared to those who manufacture one single product. The scope economies can exist separately from, or together with, the scale economies.

(5) Density economies appear as the result of the cost advantage of a provider that benefits from a high density of users.

(6) Sunk costs are those fixed costs that can not be avoided or recovered even in case of total production cease.

Art.17 – (1) Legal market entry barriers result from the provisions under the law or under administrative acts that have a direct effect on the entry conditions and the position of providers on the relevant market, irrespective of economic conditions.

(2) A significant legal barrier may exist when the entrance on a certain market become not feasible as a result of certain measures imposed by law or by administrative acts, under the estimate that such situation will continue for a certain period of time.

(3) The existence of certain legal barriers in the past, namely special or exclusive rights, may foster the impact of certain structural barriers, namely scale of scope economies, vertical integration, the control over a network and the associated facilities that are hard to duplicate, control over certain technical standards which competitors must adapt to, practice of cross-subsidies between services, or users' inertia.

Art.18 - (1) The dynamic market criteria analyses whether the relevant market has or does not have features that may determine the market evolution towards an effective

competition, without being necessary to impose *ex-ante* regulatory obligations (with a preemptive character), even when certain high market entry barriers exist.

(2) The impact of the market entry barriers may become lower on those markets with a rapid technological progress where there is strong pressure from the potential competitors.

(3) As a rule, there shall not be identified as specific relevant market those newly appeared, emerging and with high dynamics relevant markets. The identification of those markets as specific relevant markets shall be made when there are indications that market power obtained by first new entrants may impede over the development of effective competition in the future.

Art. 19 – (1) When identifying a specific relevant market shall be assessed the extent to which competition law can determine an effective competition in the absence of *ex-ante* regulations.

(2) *Ex-ante* regulations shall be applied complementary to the general legislation on competition, when the experience accumulated on the national and international market proves not to be sufficient to ensure the existence of effective competition. Therefore, *ex-ante* regulation shall operate when it is necessary to impose complex measures on the relevant market, which may for example comprise accounting separation, implementation of a certain accounting system of the costs, or the screening of technical parameters, or when prompt and frequent intervention is mandatory.

Art.20 - Specific relevant markets identified according to the provisions herein shall usually correspond to the relevant markets defined according to the competition law, due to the use of similar methodologies. Nevertheless, the fact that global estimate of the future evolutions in the structure and function of the market always are the basis for identifying specific relevant markets may lead to certain differences between these markets and the relevant markets defined according to competition law. In all cases, specific relevant markets do not prejudice the markets defined by the responsible authorities in accordance with competition law.

Art.21 – The providers are bound to provide, upon ANRC motivated request, all necessary information in order for the present regulation to be applied, subject to the penalty under art.56 of Government Emergency Ordinance no.79/2002 on the general regulatory framework for communications, approved, with amendments and completions, by Law no.591/2002.

Art.22 – (1) Specific relevant markets identified by ANRC according to the provisions herein are listed in the annex.

(2) ANRC shall review the markets listed in the annex in order to take into account the evolution of the electronic communications sector with respect to changing the markets or adding new markets, whose characteristics may justify the specific obligations to be imposed to the providers with significant market powers on these markets.

(3) The annex is part of this regulation.

ANNEX

to the regulation

SPECIFIC RELEVANT MARKETS

1. a) Relevant product market

The market of access to the fixed public telephone network for call origination, termination, and transit, comprising the access to fixed public telephone networks for origination at fixed locations, termination at fixed locations, and commuted transit of the calls for the publicly available telephony services and for dial-up, ISDN and fax services.

The identified market is a wholesale market, submitted to the provision of Government Ordinance no.34/2002 on the access to, and interconnection of, public electronic communications networks, and associated facilities, approved, with amendments and completions, by Law no.527/2002.

b) Relevant geographical market

National market determined by the Romanian territory.

2. a) Relevant product market

The market of access to the mobile public telephone network operated by "Cosmorom" S.A. for call termination, comprising the access to this network for call termination to non-fixed locations for those publicly available telephony services originated in other networks.

The identified market is a wholesale market, submitted to the provision of Government Ordinance no.34/2002 on the access to, and interconnection of, public electronic communications networks, and associated facilities, approved, with amendments and completions, by Law no.527/2002.

b) Relevant geographic market

National market, determined by the Romanian territory.

3. a) Relevant product market

Access market to the mobile public telephone network operated by "Mobifon" S.A. for call termination, comprising the access to this network for call termination to non-fixed locations for those publicly available telephony services originated in other networks.

The identified market is a wholesale market, submitted to the provision of Government Ordinance no.34/2002 on the access to, and interconnection of, public electronic communications networks, and associated facilities, approved, with amendments and completions, by Law no.527/2002.

b) Relevant geographical market

National market, determined by the Romanian territory.

4. a) Relevant product market

Access market to the mobile public telephone network operated by "Telemobil" S.A. for call termination, comprising the access to this network for call termination to non-fixed locations for those publicly available telephony services originated in other networks.

The identified market is a wholesale market, submitted to the provision of Government Ordinance no.34/2002 on the access to, and interconnection of, public electronic communications networks, and associated facilities, approved, with amendments and completions, by Law no.527/2002.

b) Relevant geographical market

National market, determined by the Romanian territory.