

Disclaimer: This is a Romanian to English translation meant to facilitate the understanding of this document. Should differences appear between the Romanian version and the English version, following translation, the Romanian version shall prevail

Specifications regarding the interpretation and application of some provisions of Law no. 159/2016¹ and of ANCOM Decision no. 997/2018² on setting tariffs for access on public property

1. Law no. 159/2016 establishes a coherent legal framework regarding the regime of physical infrastructure of communications networks, thus contributing to fostering the development of electronic communications networks and of the physical infrastructure elements necessary to support these networks, by setting measures to accelerate the exercise of the right of access on properties and access to the physical infrastructure of the network operators, while also seeking to remedy the inefficiencies that affect the roll-out of electronic communications networks.

The provisions of this normative act establish, among others, the conditions under which access on public or private property (including in spaces of joint tenancy in condominium buildings) is achieved for the construction, installation, maintenance, replacement or relocation of electronic communications networks or of the physical infrastructure elements necessary to support these networks.

Prior to the entry into force of Law no. 159/2016, the above-mentioned aspects were regulated by the provisions of Law no. 154/2012 regarding the regime of electronic communications networks infrastructure.

Thus, according to the provisions of Art. 4 of Law no. 159/2016, the providers of electronic communications networks benefit from the right of access on, above, in or under the buildings that are public or private property, if all of the conditions listed in indent 1 items a) and b) are met.

According to the provisions of Art. 3 indent (3) of Law no. 159/2016, the right of access to properties ensures the use of the private or public property for which it has been established. This right may be established and exercised by way of a lease, easement, another right in rem of creditor's right, under the provisions set by Law no. 159/2016 and in accordance with the provisions of the common law. Unlike the provisions of Law no. 154/2012, the new provisions no longer qualify the right of access as an easement right, the establishment of such a right in rem being more difficult due to the necessity of concluding an authentic contract and of carrying out the registration formalities in the land register. Moreover, the lack of a general land register at national level often made it impossible to establish a right of easement. In the case of the right of access, the use implies - within the limits established by the law and by the parties' agreement - the use of the real estate under public or private property for the construction, installation, maintenance, replacement or relocation of electronic communications networks and of the associated physical infrastructure elements, as well as the use of any accessories necessary for such use (access to the building for the persons empowered by the provider of electronic communications networks, removal of the vegetation that would impede access, at the access beneficiary's expense, etc.).

Regarding the tariffs for access on public property, according to the provisions of Art. 6 (4) of Law no. 159/2016, their amount is capped at the level of a maximum tariff established by ANCOM President's Decision, based on a detailed methodology, on the principles and criteria set out in Art. 6 indents (5) and (6) of the above-mentioned normative act.

¹ Law no. 159/2016 on the regime of physical infrastructure of electronic communications networks and on setting measures for reducing the cost of electronic communications networks roll-out, with the subsequent completions, is available [here](#).

² ANCOM President's Decision no. 997/2018 was published in the Romanian Official Journal, Part I, no. 1013/29.11.2018 and is available [here](#).

ANCOM President's Decision no. 997/2018 is the normative act provided under Art. 6 (4) of Law no. 159/2016, which lays down the maximum tariffs for the access on, over, in or under the public property real estate.

The above-mentioned ANCOM decision applies to public institutions, including central or local public administration authorities, as well as to any other entities that exercise the right of administration on real estate in the public property of the state or of the administrative-territorial units and that do not use such real estate as infrastructure to provide public utilities or transport services, as economic operators.

The normative act issued by ANCOM sets maximum positive tariffs only for the 48 types of access listed in the Annex, while for the others the provisions of Art. 1 (2) of the ANCOM President's Decision no. 997/2018 shall apply. These provisions establish that *"(2) For the elements of electronic communications networks and physical infrastructure elements not included in the annex, respectively antennas, cabinets, technical rooms, drawing rooms, ducts, base stations, poles, pillars, towers, other associated equipment and physical infrastructure, as well as for the cables and boxes for which one exercises other type of access than provided in the Annex, the tariff for exercising the right of access on, over, in or under public property real estate cannot exceed the value of **zero lei**."* [emphasis added]. The maximum tariffs set out in the Annex to ANCOM's Decision no. 997/2018 do not include VAT.

Therefore, for the types of equipment and physical infrastructure specified in the provision above - antennas, cabinets, technical rooms, drawing rooms, ducts, base stations, poles, pillars, towers, other associated equipment and physical infrastructure, as well as for the cables and boxes for which one exercises other type of access than provided in the Annex to ANCOM President's Decision no. 997/2018, the tariff for access on, over or under public property real estate cannot exceed the value of zero lei. This value is based on the fact that, according to the provisions of the primary legislation, the tariffs for access on public property must cover only the value of the deprivation of the right of use and the compensation for the direct and certain damages caused by the works performed and by the existence and functioning of the electronic communications networks and of the associated infrastructure elements, taking into account also the tangible and intangible benefits brought by the installation of electronic communications networks. In the case of the types of access that are not mentioned in the Annex to the ANCOM President's Decision no. 997/2018, the tangible and intangible benefits brought by the installation of the electronic communications networks exceed the value of the deprivation of the right of use and the direct and certain damages caused by the works performed and by the existence and functioning of the electronic communications networks and the associated infrastructure elements. This maximum rate applies to any provider of electronic communications networks.

The tangible and intangible benefits enumerated by the provisions of Art. 6 (6) of Law no. 159/2016, consist, among others, of:

a) fostering improved digital competences and infrastructure for the national e-government system, as well as enhanced access to the public infrastructure and applications;

b) added value for the real estate in the public property of the state or of the administrative-territorial units that have electronic communications networks installed, compared to real estate that do not benefit from electronic communications infrastructure;

c) launch of new public services, including increased efficiency due to computerization;

d) facilitating social inclusion and reducing the economic disparity between developed and undeveloped localities, by increasing the added value of the electronic communications sector over the other sectors of the economy;

e) facilitating the implementation of intelligent systems, such as smart traffic lights or intelligent traffic systems, with direct effect on the reduction of the expenses on utilities;

f) fostering the development of technology parks or research centres, as well as other facilities with similar purpose.

The tangible and intangible benefits generated by the installation of new equipment or associated physical infrastructure were quantified by estimating the impact of the investment added to the existing asset on the penetration rate of electronic communications services, which determines the surplus of economic growth.

Existing studies have indicated that **investments in the infrastructure needed to provide broadband internet access services have a strong positive impact on economic development**³. Investments in the roll-out of the infrastructure for electronic communications services and implicitly the increasing penetration rate of such services foster the growing productivity of the labour force and a higher number of jobs created in the national economy. These effects can be observed in quantitative terms in the statistics on the historical evolution of the gross domestic product, of the net average income in the economy, as well as on the evolution of the active labour force, in relation to the degree of connectivity of the population.

Access to means of electronic communication significantly contribute to improving the degree of social cohesion, reducing the economic disparities between urban and rural environments, as well as to increasing the quality of public services, especially in education, health or local administration. Directive 2014/61/EU⁴ states among its considerations that *"A high quality digital infrastructure underpins virtually all sectors of a modern and innovative economy and is of strategic importance to social and territorial cohesion. Therefore, all citizens as well as the private and public sectors must have the opportunity to be part of the digital economy."*

As a result, the existence of electronic communications networks on public property should no longer be seen as a source of income, but as a public utility that is absolutely necessary for economic and social development both locally and nationally.

In order to strike a balance between the need to exploit the public domain, on the one hand, and the need to develop electronic communications networks, on the other hand, the public decision maker that set the maximum tariffs for access on public property had to consider also these tangible and intangible benefits listed as an example above.

Regarding the implementation of these maximum tariffs, according to the provisions of Art. 6 (9) of Law no. 159/2016 ***"For the occupancy and use of public real estate property by the providers of electronic communications networks, or considering the carrying on by them of other activities related to the exercise of the right of access to property, regulated by the present law, the central or local public administration authorities, as well as and any other entity may charge only the amounts determined under this law."*** [editor's emphasis].

Therefore, the above-mentioned mandatory rule prohibits the authorities of central or local public administration, as well any other entities entitled to request the payment of access tariffs, to establish and collect as access tariffs other amounts than those established in accordance with the provisions of Law no. 159/2016.

In this respect, until 27 January 2019, the entities referred to in Art. 6 (1) of Law no. 159/2016, including the local public administration authorities, had to modify or complete the conditions under which the right of access (including maximum tariffs) to the public property real estate is achieved.

³ "Economic Impact of Broadband" in Information and Communications for Development 2009: Extending Reach and Increasing Impact, 35-50. Washington, DC: World Bank

⁴ Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks

Pursuant to the provisions of Art. 47 (1) of Law no. 159/2016, until 26 February 2019, the entities referred to in Art. 6 (1) of the same normative act, including local public administration authorities, had to align the contracts for exercising the right of access on public property in force on the date of publication in the Romanian Official Journal of ANCOM President's Decision no. 997/2018 with the provisions of Law no. 159/2016 and of ANCOM President's Decision no. 997/2018. Therefore, the above-mentioned legal provision does not require the termination of the access contracts in force, but their modification in the sense of updating with the new provisions of the legal framework in the field, as well as with the ANCOM regulation issued under these provisions.

2. In the particular case of the **installation of network elements or of associated physical infrastructure elements for electronic communications networks through the use of county roads**, the application of the methodology for setting maximum tariffs for access on public property detailed in the Explanatory Memorandum to the ANCOM President's Decision no. 997/2018 revealed that the tangible and intangible benefits related to the installation of electronic communications networks and associated infrastructure elements exceed the value of the deprivation of the right of use and the direct and certain damages caused by the works performed and by the existence and functioning of the electronic communications networks and of the physical infrastructure elements and consequently the applicable tariff is "zero lei".

Following the application of the methodology mentioned in indent 1 above, positive tariffs for access resulted only for certain types of access to the main categories of urban streets: category I (highway) and category II (connection). For the rest of the categories "Road" and "Street", the value of the tangible and intangible benefits brought by the installation of the electronic communications networks or of the associated physical infrastructure elements, exceeded the value of the deprivation of use and the compensation for the direct and certain damages caused by the works and by the existence and functioning of the electronic communications networks, and the resulting tariff was "zero lei".

The provisions of Government Ordinance no. 43/1997 regarding the road regime, republished, with the subsequent amendments and completions, does not preclude the application of the access tariffs established by ANCOM under the provisions of Law no. 159/2016.

Thus, in accordance with the provisions of Art. 46 (9) of Government Ordinance no. 43/1997, *"For installation works and access in the road area, the beneficiary has the obligation to conclude a contract for use and access in the public road area with the public road administrator and to pay the corresponding tariffs"* [editor's emphasis].

According to Art. 46 (10) of the same normative act, *"The contract provided under item (9) shall be concluded along with the issuance of the authorization of installation and/or access in the public road area, except where the user is exempted from the payment of the tariffs for installation and access in the road area"*.

Furthermore, under the conditions of Art. 47 (7) of Government Ordinance no. 43/1997, *"For the use of the road reserve area and of the safety area of public roads by placing overground or underground constructions, installations and/or advertising panels, by achieving access ways to the public road, with the associated facilities, parking, car shelters, road and control platforms, as well as for access in the public road area for carrying out works approved by the road administrator, tariffs for use and access in the road area are applied"* [editor's emphasis].

According to Art. 47 (11) of the same normative act, *"For the installation of cables, devices or other similar elements on the pillars in the road area, for other purposes than the distribution of electricity, it is compulsory to obtain the approval and the authorization of installation and/or access in the road area from the road administrator. In order to obtain the approval and the authorization,*

the beneficiary must submit, in the accompanying technical documentation, the agreement of the pillar's owner".

The tariffs for use and access in the road area are established by the road administrator, in accordance with Art. 47 (10) of Government Ordinance no. 43/1997. Moreover, according to the same legal provisions, the road administrator can also establish exceptions from the payment of these tariffs.

On the other hand, in addition to this mechanism of exemption from the payment of tariffs, the legislator itself - through the provisions of indent (9) under Art. 47 of Government Ordinance no. 43/1997 - introduces certain exceptions from the payment of tariffs.

Therefore, analysing the legal mechanism by which exceptions from the payment of the tariffs for use and access in road area can be provided, one can see that the road administrator is not the only entity that can provide exceptions, so the legislator may also provide such exceptions by legal provisions in the same normative act – such as Art. 47 (9) of Government Ordinance no. 43/1997, or by means of a different normative act.

Thus, in this particular access scenario, both the requirements regarding the installation in the road area of certain constructions or elements – as regulated by Government Ordinance no. 43/1997 –, as well as the corresponding provisions of Law no. 159/2016 must be taken into consideration. Consequently, one can say that the two normative acts complement each other, completing the legal regime applicable to electronic communications networks installed in road area.

Moreover, the fact that several distinct normative acts jointly produce effects on a factual situation, results, for example, from the provisions of Art. 46 (1) of Government Ordinance no. 43/1997 according to which *"for the installation or placement - in the area of a public road – of advertising panels, of any constructions or commercial activities, access ways, facilities or installations for any purpose, without jeopardizing the safety of the traffic, the building permit must be accompanied, as applicable, by the prior approval and the authorization for installation and/or access in the public road area, issued by the respective road administrator"*. [editor's emphasis].

The analysis of the legal text above shows that for the installation or placement in the area of a public road of some constructions or installations - in addition to observing the requirements established by the Government Ordinance no. 43/1997 -, it is necessary to comply with the provisions of the legislation regarding the authorization for carrying out construction works, respectively of Law no. 50/1991 regarding the authorization for carrying out construction works, republished, with the subsequent amendments and completions.

Therefore, having met the conditions imposed by the above-mentioned legal regime, the providers of electronic communications networks benefit from the particular form of access provided by Law no. 159/2016, in full observance of the provisions of Art. 4 (1) letter a) from the same normative act. In this case, access is not in conflict with the special legislation in the field of roads, this legislation allowing such access by itself, and such access will be exercised under modified conditions as a result of the entry into force of Law no. 159/2016.

Regarding the installation of an electronic communications network on a pole network situated in the area of public roads, the Law no. 159/2016 establishes, by the provisions of Art. 6 (12) that *"The providers of electronic communications networks that install networks on masts, pillars or on other physical infrastructure elements, including along roadways, will conclude – in compliance with the regulations on authorizing the performance of construction works – only contracts for exercising the right of access to the physical infrastructure with persons that own or administrate infrastructure elements, under the provisions of this law, and will owe tariffs only to these persons"*.

Interpreting the aforementioned rule, we consider that it establishes for the providers of electronic communications networks that install networks on poles, pillars or other infrastructure elements on public property (including roads) the obligation to pay tariffs only to the person who owns or administrates the respective public property.

Where a provider of electronic communications networks installs networks on poles belonging to companies that transport or distribute electricity, poles which are on public property - including roads – this situation is governed, according to ANCOM, by the provisions of Art. 6 (12) of Law no. 159/2016.

Moreover, by interpreting the provisions of indent (9) corroborated with the provisions of indent (12) of Art. 6 of Law no. 159/2016, mentioned above, we consider that from the date of entry into force of Law no. 159/2016, the central or local public administration authorities can no longer establish and charge tariffs for the installation of electronic communications networks in county roads area, where the installation uses pole networks owned or administrated by other persons than the holders of the public property right over the real estate on which these pole networks are situated.

Where the holder of the right of administration, concession, rental or commodatum of the road is also the entity who owns or administrates the physical infrastructure elements on which the electronic communications network is installed, the provider of electronic communications networks owes a tariff to the respective holder, due to the latter quality of this holder. In this case, if the respective network of poles belongs to the public property and the above-mentioned holder who administrates or owns the physical infrastructure elements on which the electronic communications network is installed does not have the quality of a network operator, the maximum applicable rates are those established by the ANCOM President's Decision no. 997/2018, respectively "zero lei".

3. Where there is a municipal duct system in place, rolled out under a physical infrastructure project for the installation of public electronic communications networks or of dark fibre, which is - for example - owned by a local public authority or carried out with the participation, support or financing of such an authority, the applicable legal provisions are those established by Art. 25 and – as the case may be – by Art. 47 paragraphs (6) and (9) of Law no. 159/2016, instead of those of Art. 6 of the same normative act.

Therefore, where – for example – an authority of the local public administration owns such physical infrastructure (e.g. an underground duct for the installation of electronic communications cables), it must ask ANCOM to issue an approval regarding the technical and economic conditions for access to the physical infrastructure, as well as any amendments or completions of previously issued ones. The individual or normative administrative acts establishing the technical and economic conditions for access will produce legal effects only upon ANCOM's approval of these conditions.

The economic conditions concern, first of all, the tariffs charged on the providers of public electronic communications networks for access to the physical infrastructure owned by the respective local public administration authority.

Considering that the provisions of Law no. 159/2016 establish a special legal regime regarding the approval of the technical and economic conditions for access to the physical infrastructure designed for the installation of electronic communications networks or of dark fibre, deployed with the participation or the support of the central or local administration authorities or financed, fully or partially, from public funds, these conditions must be set in a separate document that exclusively concerns the physical infrastructure to which the electronic communications network providers have or are to have access.

If a physical infrastructure deployed with the participation or support of central or local public administration authorities or financed, fully or partially, from public funds and designed for the installation of public electronic communications networks, has been installed in the underground of public property, the rules for access to such infrastructure differs from the mere access to the same underground system for the roll-out by the providers of electronic communications networks of their own physical infrastructure. In this respect, the provisions of Art. 25 (4) of Law no. 159/2016 also establish that ANCOM shall be sent "[...] *the document containing proposals on the technical and economic conditions for access* [...]."

In order to draft specific rules regarding the physical infrastructure designed for the installation of public electronic communications networks, one can view the approvals issued by ANCOM regarding the physical infrastructure deployed directly by the municipality of Timisoara⁵ or carried out with the participation and support of the local public administration authorities, in the case of the municipalities of Oradea⁶ and Bucharest⁷.

Given that these technical and economic conditions must be sufficiently detailed, including as regards the rental price and the rules of judicious allocation of the available space, in order for ANCOM to issue the approval of the conditions, we deem it necessary that in addition to the **document containing proposals regarding these conditions**, the applicant should also submit the following **information and documents**:

- a) a brief history of the physical infrastructure project(s) designed for the installation of public electronic communications networks for which the approval of the technical and economic access conditions is requested, specifying the financing method and the entities participating in these projects;
- b) the current stage of implementation of the physical infrastructure project(s) for which the approval of the technical and economic access conditions is requested, including the completion date;
- c) a description of the physical infrastructure built and its capacity (detailing information related to the capacity of the physical infrastructure installed underground: the length of the duct system, the type and dimensions of the channels, ducts and pipes and their numbers), including regarding the infrastructure built for connections, as well as data regarding the number of buildings served in the areas where the physical infrastructure projects are implemented;
- d) the technical specifications and the rules/instructions for the use of the installed infrastructure elements, as well as - where applicable -, the characteristics of the ducts or pipes that could be later installed in the infrastructure;
- e) the feasibility studies carried out in the process of substantiating the physical infrastructure project(s) or, in their absence, the way in which the necessary capacity of the underground physical infrastructure was estimated;

⁵ <http://www.ancom.org.ro/formdata-1130-48-1811>

⁶ http://www.ancom.org.ro/decizii-ancom_1130

⁷ <http://www.ancom.org.ro/formdata-1130-48-2199>

e) the categories of beneficiaries of the access to the physical infrastructure deployed within the project(s) and the access services that are made available to the beneficiaries, with their complete description, including by specifying the volume occupied or the number of elements made available (e.g. pipes) and/or the number and types of cables that can be installed (fibre optic, coaxial cable, twisted copper wires, etc.), in the case of services for renting infrastructure elements;

f) the method of setting the proposed tariffs and the existing documents based on which the prices were determined, such as the relevant market studies, documents regarding the investment costs and the operating costs, as well as the justified conditions for applying the tariffs.