



On grounds of the provisions under art.32(1) letter b) and art.38(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 present:

**DECISION
on the approval of rules for conducting market analyses and identifying the
significant market power**

Unique articol. – Hereby are approved the rules for conducting market analyses and identifying the significant market power under the annex to this decision.

**PRESIDENT ,
ION SMEEIANU**

Bucharest, December 12, 2002
Nr.137

ANNEX

RULES FOR CONDUCTING MARKET ANALYSES AND IDENTIFYING THE SIGNIFICANT MARKET POWER

CHAPTER I General provisions

Art.1. – (1) This regulation comprises the rules based upon which the National Regulatory Authority for Communications, hereinafter referred to as *ANRC*, shall conduct the analyses of the markets identified according to the “Rules for the identification of the relevant markets within the electronic communications sector” and establishes whether one or more providers of electronic communications services and networks have significant power on a specific relevant market.

(2) Definitions under art.2 of the Rules for the identification of the relevant markets within the electronic communications sector shall apply herein.

Art.2. – (1) A provider is considered to have significant power on a certain specific relevant market when he benefits, individually or together with other providers, from a position equivalent to a dominant position on that particular market.

(2) A *dominant position on a certain market* represents the situation when a provider of electronic communications networks or services is able, to a significant extent, to behave independently from his competitors, clients and users.

(3) A provider with significant market power can be considered as having significant power on a market strongly related to the first market, if the links between the two markets allow the market power to be also used on the adjacent market.

(4) For the assessments of a provider’s significant power on a specific relevant market shall be taken into consideration the market power of the entire group the provider belongs to.

CHAPTER II Criteria for the determination of the significant power

Art.3. – (1) In order to determine the significant power on a specific relevant market, the following criteria shall be taken into account:

- a) market share and its stability;
- b) vertical integration;
- c) number of competitors;
- d) users’ countervailing power;
- e) price evolution and profit level;
- f) degree of products’ diversity;
- g) providers’ size;
- h) absence of potential competitors;
- i) control over a network or infrastructure that is difficult to duplicate;
- j) scale economies;

- k) scope economies;
- l) technological advantage;
- m) easy or privileged access to financial resources;
- n) existence of a developed distribution network.

(2) The list under paragraph (1) is not exhaustive and choosing the criteria shall depend on the features of the specific relevant market.

Art.4. – (1) If there is only one provider on a specific relevant market, it is presumed to have significant power on that particular market and shall be therefore designated by ANRC.

(2) A provider with a market share larger or equal to 40% shall be presumed to have significant power on a specific relevant market when, after applying all other criteria under art.3, ANRC does not notice the contrary.

(3) A provider with a market share smaller than 40% shall be identified as not having significant power on a specific relevant market when, after applying all other criteria under art.3, ANRC does not notice the contrary.

Art.5. – (1) The main criteria that may be used to identify providers' market shares are:

- a) turnover;
- b) number of users;
- c) traffic volume;
- d) installed capacity;
- e) traffic value.

(2) The list under paragraph (1) is not exhaustive and choosing the criteria shall depend on the features of the specific relevant markets.

Art.6. – (1) The market share stability in time offers an indication over the existence of significant market power, while market share fluctuations in time can indicate the absence of providers with significant market power.

(2) The gradual decrease of the market share of a provider with significant power suggests that the market becomes more competitive, but does not necessarily determine the loss of significant power on a specific relevant market.

Art.7. - When analysing specific relevant markets shall be taken into account the fact that the upstream or downstream integration of a provider of electronic communications networks or services with significant power on a specific relevant market may negatively affect the competition on that market.

Art.8. – When conducting market analyses shall be taken into consideration the number of existing providers on the market, as well as the ratio between their market shares. A large number of providers may represent an indication over the effective competition on the market.

Art.9. – (1) The market power of a provider can be diminished due to the users' countervailing power.

(2) The user's countervailing power usually manifests when one or more of the following conditions are met:

- a) the user buys an important volume of the total of products or services offered by the provider;
- b) the user can migrate, with low costs, to alternative sources in order to purchase the respective products;
- c) the user may produce the respective products himself.

(3) The user's countervailing power increases when the value of the acquired products offered by the provider represents an important part of the user's total expenditures or when the provider made significant investments in order to provide the respective products.

Art.10. - When conducting market analyses shall be considered whether the prices are established based upon competition mechanisms or if they are determined by the pricing policies of the provider with significant market power, the other competitors adjusting their pricing policies to the former.

Art.11. - The profit level of a provider may also indicate the competition level on the specific relevant market. Although large profits may be achieved by the provider through efficient activity, these profits indicate a lack of price competition and the existence of certain high entry barriers.

Art.12. – When conducting market analyses ANRC shall take into consideration the fact that a provider who offers a diversified range of products may consolidate his position on the market by offering them as a package.

Art.13. – When conducting market analyses shall be taken into account the fact that an important provider, as compared to his competitors, may obtain and maintain over time certain advantages in relation to these competitors, such advantages being gained from scale economies, financial power, power to negotiate with his providers, production capacity, distribution network and marketing policy.

Art.14. – (1) Absence of potential competitors may indicate the existence of high entry barriers.

(2) The potential competitors are those providers who, under given economic circumstances, have the capacity to enter the specific relevant market with the products he provides on other geographical areas or by rapidly adapting their technology, under acceptable efficiency conditions.

Art.15. – The control over a network or associated facilities which a competitor may only duplicate during a long period of time and with considerable costs may represent a high entry barrier.

Art.16. – 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.

Art.17. – 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.

Art.18. – Having a technological advantage allows the respective provider to obtain low costs, at the same time creating an entry barrier for the potential competitors.

Art.19. – The situation when the providers have easy or privileged access to the financial resources can prevent new competitors from entering on the specific relevant market.

Art.20. – A developed distribution system that can be achieved only during a long period of time and with considerable costs represents a competitive advantage for the provider who owns it.

CHAPTER III **Collective significant power**

Art.21 – (1) In order for two or more providers to enjoy together the significant power on a certain market (significant collective power) it is necessary for them to be legally and economically independent and to behave towards users and competitors as one entity with significant power on the specific relevant market.

(2) In order for the behavior of two or more providers towards users and competitors to be the same as the behavior of one entity, it is necessary that the following conditions are cumulatively met:

a) there exists no effective competition between the said providers on the specific relevant market;

b) the said providers shall adopt a uniform behavior or a unitary policy on the specific relevant market.

Art.22. – In order to determine the existence of collective significant market on a specific relevant market, ANRC shall cumulatively analyse:

a) if there are market features that are favorable to a tacit coordination of the two or more providers' market behavior;

b) if this type of coordination is viable, this meaning that:

- none of the participants is able or motivated to approach a divergent behavior, considering that the other participants are capable and motivated to apply countervailing measures, and
- the competitors and users are not able or motivated to oppose to the result of this coordination.

Art.23. – (1) When conducting the analysis under art.22, ANRC shall apply one or more of the following criteria:

- a) market concentration – a high market concentration may indicate the existence of collective significant power;
- b) market transparency – collective significant power may appear when providers can easily obtain information on competitors' prices and clients;
- c) market maturity degree – a high maturity degree of the specific relevant market renders the entry on the market and the fostering of new clients difficult;
- d) stagnation and moderate increase of the demand – a rapid increase of the demand stimulates the competition on the specific relevant market, the providers being able to increase their market share and profits;
- e) low demand elasticity – if the demand does not significantly change as a response to changes of prices, providers are less motivated to reduce their prices in order to increase their market share;
- f) products' homogeneity – the stronger the products homogeneity is, or is perceived as such by the users, the more shall providers be motivated to adopt a similar behavior on the market, in order to avoid price competition or the decrease of profits;
- g) similar costs structure – for a given price, a similar costs structure shall determine a similar level of profits, possibly leading to agreements on the prices between the providers;
- h) similar market shares – adopting a similar market behavior towards the providers may be favored by the existence of similar market shares;
- i) the lack of technical innovations and the technology maturity – the higher the technology maturity, the more competition through technological innovation shall decrease;
- j) lack of excess capacities – the existence of excess capacities may prevent the appearance or maintenance of agreements between the providers who may be stimulated to use supplementary capacities in order to raise the profits;
- k) high entry barriers – the existence of significant collective power on a specific relevant market is favored by high entry barriers;
- l) users' power to countervail – a high users' countervailing power may prevent the appearance of significant collective power on a specific relevant market;
- m) lack of potential competitors – the perspective of new competitors entering a specific relevant market limits the possibility of significant collective power to appear on that market;
- n) different types of informal relations between providers susceptible to have significant collective power – even though the establishment of informal relations between providers may have the legitimate purpose to solve certain common problems raised by their activity, the existence of this kind of relations may indicate a concentrated action on the market;
- o) existence of countervailing mechanisms – the providers shall be encouraged to maintain market agreements if countervailing measures from the competitors are expected should these agreements be broken;

p) lack of competition or a low degree of prices competition – should providers anticipate a strong prices competition, they may try to avoid effective competition by concluding agreements on market prices. The stability of prices or their reduced fluctuation over time may indicate the existence of such type of agreements.

(2) The list under paragraph (1) is not exhaustive, and choosing the criteria shall depend on the specific relevant market features.

CHAPTER IV

Final dispositions

Art.24. – (1) Where the law requires that the imposing, maintenance, changing or withdrawal of obligations shall be made following a legally conducted market analysis, ANRC shall establish, based upon the market analysis conducted according to the provisions under this regulation, whether there is effective competition on the relevant market.

(2) Should ANRC establish, based upon such conducted market analysis, that there exists real competition on the specific relevant market, ANRC shall not impose to the providers any of the obligations under paragraph (1) or shall withdraw these obligations where they exist.

(3) Should ANRC establish, based upon such conducted market analysis, that there does not exist real competition on the specific relevant market, ANRC shall identify, by applying the provisions herein, the providers with significant market power, shall therefore designate them, and shall accordingly impose them one or more of the obligations under paragraph (1), or shall maintain or modify these obligations where they already exist.

(4) Measures under paragraph (2) and (3) may be taken only after the procedure under art.50 of Government Emergency Ordinance no.79/2002 on the general regulatory framework for communications, approved, with amendments and completions, by Law no.591/2002, is fulfilled.

Art.25. – The providers are bound to make available to ANRC, upon motivated request from ANRC, all necessary information in order for this 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.