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Autoritatea Națională pentru
Administrare și Reglementare în
Comunicații (ANCOM)
Delea Noua 2
030925 Bucharest
Romania

For the attention of:
Mr Marius Catalin Marinescu
President

Fax: +40 372 845 402

Dear Mr Marinescu,

Subject: Commission Decision concerning:

Case RO/2015/1804: Wholesale local access provided at a fixed location in Romania

Case RO/2015/1805: Wholesale central access provided at a fixed location for mass-market products in Romania

Article 7(3) of Directive 2002/21/EC: No comments

1. PROCEDURE

On 16 November 2015, the Commission registered a notification from the Romanian national regulatory authority, *Autoritatea Națională pentru Administrare și Reglementare în Comunicații* (ANCOM)¹, concerning the markets for wholesale local access provided at a fixed location² and for wholesale central access provided at a fixed location for mass-

¹ Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

² Corresponding to Market 3a in Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 295, 11.10.2014, p. 79.

market products³ in Romania.

The national consultation⁴ ran from 13 August to 25 September 2015.

On 26 November 2015, a request for information⁵ was sent to ANCOM and a response was received on 3 December 2015.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

The markets for wholesale (physical) network infrastructure access and for wholesale broadband access (WBA) in Romania were previously notified to and assessed by the Commission under cases RO/2010/1101-1102⁶.

ANCOM defined the underlying retail market as comprising the provision of asymmetric broadband internet access services over all fixed access technologies (xDSL, coaxial cable, UTP/FTP cable, FTTx) and over radio-based technologies, at all transmission speeds above narrowband dial-up speeds (144 kbit/s) and to both residential and non-residential customers. Broadband access services provided at mobile location were excluded from the relevant market. The geographic scope of the market was defined as national.

The market for wholesale (physical) network infrastructure access included access services to copper, FTTx and UTP/FTP cable loops. Self-supply was also included in the relevant market. ANCOM designated Romtelecom (now Telekom Romania) as having SMP on the market and imposed a full set of remedies.⁷

The WBA market included non-physical or virtual network access including bitstream access at a fixed location. ANCOM considered that in view of the particular national competitive circumstances in Romania and given the presence of regulation on the wholesale network infrastructure access market, it was neither necessary nor justified to regulate WBA. ANCOM stated that it would monitor the developments occurring on the market and revise its conclusions if necessary.

In its comments, the Commission urged ANCOM to: i) impose access to the SMP operator's FTTH lines, ii) monitor whether any changes in the competitive conditions may lead ANCOM to consider regulation differentiated by geographic area, iii) re-assess the need to mandate access to ducts, iv) consider an extension of the migration period at the cabinets from copper to fibre, v) regularly assess all relevant structural and behavioural factors which would raise barriers to entry into the retail broadband market, especially in rural areas, and would require a regulatory

³ Corresponding to Market 3b in the Commission Recommendation on Relevant Markets.

⁴ In accordance with Article 6 of the Framework Directive.

⁵ In accordance with Article 5(2) of the Framework Directive.

⁶ C(2010) 5809.

⁷ However, ANCOM did not mandate unbundled access to the incumbent's fibre loops at the MDF in a FTTC/FTTN architecture, nor access to its FTTH lines. Access to ducts was not mandated either.

intervention at wholesale level, and vi) in its next review, take into account the Commission's NGA Recommendation.

2.2. Context of the Romanian broadband market

ANCOM points out that the national circumstances of the Romanian broadband market are significantly different from the ones in other EU Member States. The retail market is characterised by a low market share of the incumbent⁸ and by a very dynamic competitive environment characterized by more than 750 operators competing intensely over a range of different EU network infrastructures. Average broadband speeds are among the highest in the EU⁹, while the retail prices charged to end-users are the second lowest in the EU. Unlike other Member States, the competition in the retail market is infrastructure-based¹⁰ and has developed in the absence of regulation on the wholesale broadband access market, which was never regulated in Romania, and despite low and decreasing demand for access provided through local loop unbundling¹¹, coupled with no demand for sub loop unbundling.

According to ANCOM's analysis, in 2014 66% of the Romanian population lived in areas where at least three operators had deployed their fixed infrastructure, while 84% lived in areas covered by at least two fixed networks¹². Only 3% of the population is not covered by any broadband provider.¹³

The penetration rate of broadband internet access connections among the population, despite reasonable network coverage levels¹⁴, is still one of the lowest in the EU¹⁵. Therefore, it is clear that the market for retail broadband services is far from being saturated; this fact offers interesting investment prospects to operators and leads ANCOM to predict that competitive conditions will remain intense for the foreseeable future.

⁸ Telekom Romania, with a market share of around 30% in December 2014, is the second largest player on the retail market. Only one other incumbent operator in the EU, in Bulgaria, has a lower market share.

⁹ Over 50% of the connections are above 100 Mbits/s and over 60% are above 30 Mbit/s (NGA).

¹⁰ ANCOM explains that most operators rely on providing services through their own access networks, and their business plans are not based on purchasing broadband access services from other operators.

¹¹ Only 174 local loops were unbundled to 8 operators at the end of 2014 (down from 1.960 in 2008).

¹² ANCOM shows that in 2008 only 58% of the population lived in areas covered by at least three fixed operators (i.e. an increase of 8 percentage points between 2008 and 2014), while 66% of the population lived in areas covered by at least two fixed networks (i.e. an increase of 18 percentage points between 2008 and 2014).

¹³ The broadband national (urban and rural) coverage of households by the three main operators at end-2014 is the following: Telekom Romania 83.3%, RCS & RDS 59.2%, UPC 28.8%. As for urban areas, the household coverage is the following: Telekom Romania 99.3%, RCS & RDS 95%, UPC 50.5%.

¹⁴ 90% of the population has access to broadband connections.

¹⁵ In June 2014, the penetration was 19.5%, well below the EU average of 31%. These poor results are mainly due to a number of exogenous factors, such as the share of households with access to a PC (only 56% in 2013), literacy levels and average income, which are particularly low in rural areas.

Given the specific national circumstances which characterize the market in Romania, ANCOM considers appropriate to begin the analysis with the assessment of the level and effectiveness of competition at retail market level, in order to establish whether the introduction of *ex ante* regulatory measures on the wholesale markets is appropriate.

2.3. Market definition

2.3.1. Retail broadband market

ANCOM includes in the retail market for fixed broadband asymmetrical internet access all services delivered by fixed point access networks (xDSL, coaxial cable, UTP/FTP cable, FTTx) and over radio-based technologies. Broadband access services provided at mobile location continue to be excluded from the relevant product market.¹⁶ Bundles of services are also excluded¹⁷.

ANCOM performed a thorough analysis¹⁸ of the geographic market. The analysis reveals that the Romanian market is volatile and that its structure and competitive conditions at local level are constantly changing. The number of localities with zero or only one active operator, a situation which occurs in certain rural areas, is significantly decreasing.¹⁹ Moreover, the regulator points out that the localities with potential competition issues are in fragmented and unattractive areas from a commercial point of view. In these localities, ANCOM did not identify any competition issues such as excessive rates.²⁰ Given the significant variations of

¹⁶ The exclusion is due to the limitation of mobile terminals for the reception of Internet access and the fact that mobile broadband use - including the reception of mobile Internet access through a data card or a USB modem connected to a personal computer (laptop/PC) - is considered by end-users as complementary rather than as a substitute to the broadband internet access at a fixed location.

¹⁷ As in other EU member states, the role of bundles is gaining importance in Romania. According to ANCOM, in 2014 34% of residential customers subscribed to a "double-play" bundle (including internet and either fixed telephony or audio-visual content), 28% subscribed to a "triple-play" bundle and 9% to a "quad-play" bundle. ANCOM concluded they should not be included in the relevant market as, by increasing bundle prices, operators would lose customers who could simply purchase the different services they require from other operators.

¹⁸ The analysis is based on a number of operators present in localities (which is the chosen geographic unit), their evolution between 2008 and 2014, market shares, barriers to entry in these localities, coverage of the fixed broadband network of the main operators at a national level as well as urban/rural level, services provided (offers/transmission speeds), and price strategies.

¹⁹ The number of localities not covered by any broadband internet access networks at fixed locations decreased from 9,315 in 2008 to 3,439 on in 2014. Similarly, the number of localities with one provider decreased from 5,215 in 2012, to 4,422 in 2014. It should also be noted that the "Ro-NET" project, approved by the Commission under the EU State aid broadband guidelines with an overall amount of EUR 84 million and carried out by the Ministry for the Information Society, supports the deployment of a backhaul network in certain areas of Romania where broadband is currently not available and where there are no plans for broadband rollout by market players over the next three years (783 localities in total). Moreover, the Ministry of Agriculture is carrying out another project aimed at modernising the last mile as well as backhaul segments where these are not present or do not meet certain parameters (overall budget of EUR 20.38 million, covering 188 localities).

²⁰ In general, the rates for internet access services in these localities are found to be similar to the rates charged by providers who supply services on a national level. Furthermore, where applicable, the local operators have uniform pricing policies, as they charge the same tariffs in all localities in which they are present.

competitive conditions and the inability to set clear and stable boundaries over time, ANCOM concludes that a possible geographic delimitation into sub-national areas is not justified and confirms the national dimension of the market.²¹ ANCOM underlines that it will continue to closely monitor the evolution of the competitive conditions on the entire territory of the country.

2.3.2 Wholesale local access provided at a fixed location

ANCOM maintains the conclusions of the previous market analysis, according to which the market for local access provided at a fixed location includes full or shared access to the copper local loop and sub-loop, as well as to FTTx loops (point-to-point and point-to-multipoint) and UTP/FTP cable loops (all including self-supplied services). The VULA technology is included in the market²². ANCOM did not include coaxial cable networks²³ in the relevant market, since wholesale offers are not possible on this infrastructure.²⁴ Co-location and access services to passive infrastructure such as ducts continue to be excluded²⁵. For the reasons explained above for the retail market, the geographic scope of the wholesale market for local access provided at a fixed location is considered to be national.

2.3.3 Wholesale central access provided at a fixed location for mass-market products

The market for wholesale central access provided at a fixed location for mass-market products includes non-physical network access, such as bitstream access at a fixed location. For the reasons explained above for the retail market, the geographic scope of the wholesale market for central access provided at a fixed location for mass-market products is considered to be national.

²¹ Furthermore, it should be noted that even if a sub-national geographical segmentation was performed, the localities in which *ex ante* LLU regulation would potentially be maintained would generate very little commercial interest, since they are mainly situated in rural areas. On 31 December 2014, there were 162 potential market leaders in these localities.

²² Telekom Romania stated that it will invest exclusively in FTTB/FTTH technologies and will not be using the vectoring technology. The inclusion of VULA in the relevant market is based solely on theoretical considerations, in case the unbundled access to the local loop is not technically or economically viable.

²³ 95% of the coaxial cable connections are based on DOCSIS 3.0 technology.

²⁴ ANCOM underlines that irrespective of the inclusion of cable based on direct constraints, or eventually indirect constraints coming from the retail market, the regulatory outcome would be unchanged. It should be noted that coaxial cable is not present on the whole Romanian territory. UPC, the main operator competing through this technology, has a 28.8% coverage of households, while RCS & RDS only uses coaxial cables to a limited extent.

²⁵ In the reply to the RFI, ANCOM pointed out that Telekom Romania has concluded multiple commercial agreements with alternative operators related to the access to its i) ducts/mini-ducts (including with [...]), ii) poles or iii) dark fibre (e.g. with [...]).

2.4. Finding of significant market power

2.4.1 Retail broadband market

ANCOM concludes that no operator holds individual SMP on the retail market. The regulator reached this conclusion after analysing a series of factors, including: i) market shares²⁶, ii) barriers to entry²⁷, iii) high degree of innovation, characterised by steadily decreasing tariffs and increasing best-effort speeds, iv) low costs for end-users when changing providers, v) economies of scale and scope, vi) lack of privileged access to finance, vii) control of an infrastructure that is difficult to duplicate, viii) degree of vertical integration, and ix) competitive constraints from mobile broadband access.

ANCOM also assessed whether the two main providers, RCS & RDS and Telekom Romania are susceptible of having joint SMP and concluded that the criteria for finding collective dominance (e.g. coordination incentives, market transparency and deterrence mechanism) are not met.²⁸

2.4.2 Wholesale local access provided at a fixed location

ANCOM concludes that no operator holds individual SMP on the market for wholesale local access provided at a fixed location. The regulator reached this conclusion after analysing a series of factors, including: i) market shares²⁹, ii)

²⁶ In December 2014, the leader on the retail market in terms of number of lines was cable and fibre operator RCS & RDS, which had a [...] market share [...]. The market share of RDS&RCS is not exclusively due to customer base growth but also acquisitions of numerous small providers. Historical operator Telekom Romania and its subsidiaries had a market share of [...] [...], while coaxial cable operator UPC served [...] of the retail broadband market [...]. Other operators have a relevant market share, including Digital Cable Systems ([...] in 2014) and Akta Telecom [...]. In the reply to the RFI, ANCOM clarified that in term of revenues the market shares are almost identical [...] RCS&RDS, [...] Telekom Romania, [...] UPC Romania and [...] for Digital Cable Systems and Akta Telecom combined). It should also be noted that Telekom Romania has invested significantly in upgrading its copper network to fibre and will continue to represent a strong competitive constraint for RCS&RDS in urban areas where their networks largely overlap. UPC has invested in recent years to upgrade its cable network to the DOCSIS 3.0 standard. In the reply to the RFI, ANCOM clarified that the market volume has grown steadily and all main operators experience growth in absolute terms. As regards the prospective development of the market shares, ANCOM stated that the two main operators should at least maintain their market shares. ANCOM states it will continue to monitor the operators' market shares, as well as other relevant factors, and that it will intervene should RCS & RDS' market power increase at a level deemed to be significant.

²⁷ 59 new operators entered the market in 2014 alone. ANCOM points out that there are more than 250 TV cable networks, which can be easily developed to provide broadband internet access services.

²⁸ ANCOM's position is based on the following arguments: i) although the market seems to be characterized by a relatively high degree of concentration, the market shares are fluctuating and asymmetric; ii) the market is growing and the low penetration rate of broadband access creates the potential for significant developments of this market; iii) the commercial offers of both operators are constantly evolving; iv) although there are some elements of transparency in the market so that operators can monitor each other's actions in the market, they are not used to reach a common goal; v) given that at the retail market level the competition is strong enough, the existence of joint SMP is unlikely.

²⁹ In December 2014, including self-supply, the leader on Market 3a was Telekom Romania, with a [...] market share [...]. RCS & RDS had a market share of [...] [...], while all other operators combined had a market share of [...] ([...] in 2009). ANCOM expects that in the time horizon of the market analysis, the market shares of Telekom Romania will continue to decrease and that the

barriers to entry³⁰, iii) economies of scale and scope³¹, and iv) the competitive situation on the retail market³².

ANCOM points out that only 174 local loops were unbundled to 8 operators³³ at the end of 2014 (down from 1.960 in 2008).³⁴ ANCOM also highlights that some of the major operators are in the process of concluding commercial deals that would allow operators not owning their own fixed infrastructure to be able to actively compete on the market.³⁵

Moreover, the provisions of Directive 2014/61/EU, which should help to reduce the cost of deploying high-speed electronic communications networks across the EU, are going to be transposed into the national legislation in the near future and are expected to further boost the deployment of high-speed networks.³⁶

2.4.3 Wholesale central access provided at a fixed location for mass-market products

Given that the wholesale market for central access provided at a fixed location for mass-market products was never regulated in Romania and that the retail market for broadband internet access is considered to be competitive absent wholesale

market share of RCS & RDS will not significantly increase.

³⁰ According to ANCOM, despite the fact that Telekom Romania is currently the only operator supplying wholesale access services to its local loop, a series of commercial agreements to provide access to infrastructure elements are currently being negotiated between operators. The existence of these deals, as well as the evidence of continued development of alternative network infrastructures, lead ANCOM to conclude that Telekom Romania's control of its own network no longer represents a barrier to market entry. Moreover, the regulator explains that no other operator has an absolute competitive advantage due to the ownership of an infrastructure which is difficult to duplicate.

³¹ ANCOM explains that a number of operators already have national networks whose cumulative coverage is comparable with the coverage of Telekom Romania's network and which could also benefit from economies of scale and scope.

³² See section 2.3.1 above.

³³ ANCOM explains that the small number of operators who rely on the services of unbundled access to the local loop are concentrating their efforts on the delivery of services to the users in urban areas, mainly because of the high profit margins they can generate in these areas.

³⁴ Despite the regulated tariffs (€6.02 for full access to the local loop, and €1.11 for shared access) imposed by ANCOM through a Bottom-Up model in 2010 to stimulate the demand of alternative operators, the demand for LLU has continued to decrease significantly. Throughout 2012, Telekom Romania registered only 8 new requests for access to the local loop, while no new requests were registered between 2013 and 2014.

³⁵ ANCOM explains that the strong competition at retail level and the main operators' interest to offer bundles of services, requiring the provision of both fixed and mobile broadband connections, supports the conclusion that there should not be any economic motivations for individual network operators to refuse access or to attempt entering into anticompetitive agreements with other operators.

³⁶ The Directive aims to i) improve the use of the existing passive infrastructures to extend high-speed electronic communications networks, ii) improve the planning and coordination of civil engineering works, iii) make the administrative procedures for granting building permits more flexible, and iv) reduce the costs of developing high-speed internet networks.

regulation, ANCOM believes that the introduction of *ex ante* regulation is not justified in the time horizon of the market analysis. As explained above, competition on the broadband access market in Romania is based on ownership of infrastructure, not on use of bitstream services.

While underlining that retail market conditions appear rather uniform throughout the country and that investment in competing networks continues to be very dynamic, ANCOM also explains that the demand for wholesale broadband access services in Romania, when this appeared, was limited to the more competitive urban areas, or, to a lesser extent, to less urbanised areas that are currently already covered by more than one provider. ANCOM considers that there is essentially no demand for bitstream access in the more challenging rural areas where competitive network investment is less developed.

The regulator also concludes that the introduction of *ex-ante* regulatory measures on the downstream wholesale central access market is not justified in the time horizon of the current market analysis, even when considering the proposed deregulation of the upstream wholesale market for local access, or other factors such as the prohibition to deploy aerial cables in urban areas³⁷.

2.5. Regulatory remedies

ANCOM explains that the current analysis did not reveal competition concerns at retail level that could justify maintaining or imposing additional regulation at the level of wholesale markets or retail markets. Therefore, ANCOM proposes to withdraw all the remedies currently imposed on the market for wholesale local access provided at a fixed location.

ANCOM has determined a one year transition period from the entry into force of the final decision, during which the obligations will temporarily remain in place. In its notification, the regulator states it will monitor the developments occurring on the market and revise its conclusions if deemed necessary.

3. NO COMMENTS

The Commission has examined the notifications and the additional information provided by ANCOM and has no comments.³⁸

Pursuant to Article 7(7) of the Framework Directive, ANCOM may adopt the draft measure and, where it does so, shall communicate it to the Commission.

³⁷ Building underground networks is significantly more expensive than deploying aerial cables. ANCOM highlights that, despite the restrictions on the deployment of aerial cables in urban areas, where the presence of at least three network operators is the norm, this practice is still often used by operators because of the delays by municipalities to effectively implement the measure, or the time-consuming administrative procedures for granting building permits. The option of deploying aerial cables still remains available in the rural areas, where network coverage is lower. ANCOM points out *inter alia* that since 2011, when the legislation prohibiting aerial cables was adopted, 85 new operators entered the market both in rural and urban areas while the existing operators further invested in urban areas.

³⁸ In accordance with Article 7(3) of the Framework Directive.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC³⁹ the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission⁴⁰ within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.⁴¹ You should give reasons for any such request.

Yours sincerely,

For the Commission,
Roberto Viola
Director-General

³⁹ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

⁴⁰ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

⁴¹ The Commission may inform the public of the result of its assessment before the end of this three-day period.