



## OPINION

### **On the Draft of Government Emergency Ordinance on the establishment of the “Common electronic communication infrastructure”**

By analyzing the Draft of *Government Emergency Ordinance on the establishment of the “Common electronic communication infrastructure”*, submitted by the Ministry of Communication and Informational society (hereby named the MCIS) by the address no. 3450/25.08.2011, registered at the Competition Council with no. RG/12381/26.08.2011,

## COMPETITION COUNCIL

Based on art. 20 recital (4) letter c) and art. 26 recital (1) letter l) in the *Competition Law no. 21/1996, republished*, with the subsequent amendments and completions<sup>1</sup>, in the Plenum meeting from 05.09.2011,

**Issues a favourable Opinion** on the Draft of *Government Emergency Ordinance on the establishment of the “Common electronic communication infrastructure”*.

This Opinion is based on the following cumulative prerequisites:

1. The set up of the *Common electronic communication Infrastructure* of the Romanian state (hereby named the Common Infrastructure or CECI) represents a major public interest objective having as aim the fulfilment of a *major public interest*, namely the implementation on national level of the electronic government services as mean to ensure the exercise of authority by the executive power, which is necessary in the present social and economic conditions;
2. The measures provisioned by this draft of normative act on the establishment of the CECI are necessary and proportional with the above-mentioned aimed purpose, as: (i) the creation of the *Common Infrastructure* is more efficient from an economic (but also operational) point of view by integrating certain resources within the patrimony of the Romanian state than the situation in which it would have acquired those services<sup>2</sup> from the market (namely,

<sup>1</sup> Brought by the Emergency Ordinance no. 75/2010 approved, with amendments and completions, by the Law no. 149/2011;

<sup>2</sup> We mention that the integration of the infrastructure elements within CECI implies actually the supply, by the specialized companies, of services of access to those (available) infrastructure elements they own;

services of access to the infrastructure elements as defined in the draft of normative act, as well as other services) and (ii) no economic advantage of such a nature as to influence their behaviour on the market is being granted in the favor of the specialised companies, these measures being compatible also with the legal provisions in the State aid field;

3. The measures provisioned for by the present draft of Emergency Ordinance do not cumulatively fulfill all the four criteria necessary in order to be considered as State aid<sup>3</sup>, taking into account that, as mentioned by the initiator of the legal act, no economic advantage is being granted to the *specialised companies*, as, in accordance with the provisions from art. 9 recital (4) in the draft of normative act submitted for Opinion:
  - a) The only costs to be beared from the state budget (namely the budget of the integrator) are the specialised companies' costs of amortization and exploitation of the infrastructure elements functionally integrated in the common infrastructure, costs that must be separately shown in the companies' accountability;
  - b) Those costs shall be calculated by the specialised companies, in accordance with the legal provisions in force and shall be established at the same level with those similar costs beared by the specialised companies for the infrastructure elements which are not made available for the common infrastructure and
  - c) Those costs shall be subject to the control of the Interministerial Coordination Council as well as of the Romanian Court of Accounts and the other bodies provisioned by the law;
4. The set up/development, operation and use of the *Common Infrastructure* must be done with the fulfilment of the principle of separation of the regulatory function (as mean to exercise the power) from the operational function that implies the performance of economic activities. For that purpose, the activity of the Interministerial Coordination Council must be carried on with the fulfilment of the decisional independency of the four *specialised companies* defined in this draft of normative act, namely: C.N.T.E.E. Transelectrica S.A., S.C. Teletrans S.A, S.C. Telecomunicații CFR S.A. and the National Company of Radiocommunications S.A.;
5. The electronic communication services ensured by the Common Infrastructure do not have a commercial character. The Common Infrastructure will not be used in order to meet the communication needs of the national companies, autonomous regions and undertakings under the authority, coordination or subordination of the domestic or foreign public authorities or institutions, other than those between them and the authorities/institutions that control them. For this purpose, the Common Infrastructure itself nor any element within it shall be used in order to support any economic activities carried on by the undertakings controlled by public authorities and/or institutions;

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<sup>3</sup> The four criteria included in the definition of a State aid, as stipulated at art. 107 in the European Union Functioning Treaty;

6. The undertakings (with capital majority or totally owned by the state) which benefit from the Common Infrastructure, have a strategical importance from the national security point of view or are *de facto* part of the public administration (due to the entrustment with activities specific to the public administration).

At the same time, based on the legal provisions previously appealed, the Competition Council recommends the amendment of the *Law no.92/1996 on the organisation and functioning of the Special Telecommunication Service*<sup>4</sup> (*Law no.92/1996*), namely the abolishment of the provisions<sup>5</sup> of art. 11 letter.n) and of<sup>6</sup> art. 17 recital (3) in this normative act, with the maintenance of the possibility that the Special Telecommunication Service can lease the goods it administrates, except from the infrastructure elements used to set up and operate the electronic communication networks provisioned for in the *List of special and cooperating networks within the administration of the Special telecommunication Service* from Annex no.2, including the *Common Infrastructure*.

This recommendation is reasoned by the fact that, in accordance with the normative provisions presented<sup>7</sup> above, the Special Telecommunication Service (STS) may act as an *undertaking*<sup>8</sup> on the market by supplying electronic communication services, as well as other services<sup>9</sup> towards the legal public and/or private persons. Having in mind the new attributions<sup>10</sup> to be granted to the STS through this draft of normative act the Competition Council considers that a possible action of this authority on the market of supply with networks and services of electronic communications is susceptible to distort or restrain the competition on the market.

In accordance with the information submitted<sup>11</sup> by MCIS, this normative act will be followed by other drafts of normative acts that will regulate: (i) the set up and function of the network „the state’s Intranet” on a communication support ensured by the *Common Infrastructure* and (ii) the list of beneficiaries of the *Common Infrastructure* from the category of national companies, autonomous regies and undertakings under the authority, coordination or subordination of the public authorities and institutions. Therefore, based on the provisions of art. 26 recital (1) letter.l) in the *Law on competition no.21/1996, republished*, the Competition Council requests MCIS to submit those specific drafts of normative acts (as well as of other drafts of subsequent normative acts, if the case may be), in order to receive an Opinion from our institution.

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<sup>4</sup> modificată și completată prin OUG nr.7/2002;

<sup>5</sup> „The Special Telecommunication Service can make extra-budgetary incomes from performing telecommunication services in accordance with the law, incomes that will be used for developing the special telecommunication system.”

<sup>6</sup> „Serviciul de Telecomunicații Speciale primește și administrează bunuri proprietate publică și privată a statului, putând să le închirieze în funcție de regimul lor juridic, reținând o cotă-parte de 50% din valoarea chiriei, și poate efectua, în condițiile legii, prestații de servicii de telecomunicații pentru persoane juridice publice sau private.”

<sup>7</sup> în speță, art. 11 lit.n) și art. 17 alin. (3) teza I din *Legea nr.92/1996*;

<sup>8</sup> în înțelesul acestei noțiuni prevăzut la art.2 alin.(2) din *Legea concurenței nr.21/1996, republicată* modificată și completată prin OUG nr.75/2010, aprobată prin *Legea nr.149/2011*;

<sup>9</sup> de închiriere a unor spații deținute/administrate de STS;

<sup>10</sup> ca urmare a desemnării acestei instituții ca *Integrator tehnic al Infrastructurii comune*;

<sup>11</sup> Inclusiv potrivit Notei de Fundamentare a acestui proiect de act normativ.