

Infrastructure Law or when the telecom and energy sectors cross paths

1. Background

Recently, a decision following a dispute resolution between an electronic communication provider and an electricity distribution provider was issued in Romania. This is a premiere and its origins sit with the provisions of the Directive 2014/61/EU of the European Parliament and of the Council on measures to reduce the cost of deploying high-speed electronic communications networks (“**Directive 2014/61/EU**”).

Directive 2014/61/EU was adopted with the aim to facilitate and incentivize the deployment of high-speed electronic communications networks by reducing the cost of such deployment, by creating the conditions for sharing and re-using the existing physical infrastructure.

Romania transposed the above-mentioned directive into the national legislation, by adopting the Law no. 159/2016 on the regime of the physical infrastructure of electronic communications, as well as for the setting certain measures for reducing the installation costs for electronic communications networks (“**Infrastructure Law**”).

In line with Directive 2014/61/EU, the Infrastructure Law focus, among other things, on regulating and facilitating, for electronic communication network providers that intend to deploy high speed broadband networks, the access to existing physical infrastructure (such as ducts, poles or masts) including the infrastructure belonging to electricity distribution providers (“**Network Operators**”).

For the same purpose, the Romanian National Regulatory Authority - The National Authority for Management and Regulation in Communications (the “**NRA**”) was appointed as a dispute settlement body to resolve the disputes between the Network Operators and the electronic communication network providers, in case the negotiation to gain access to the existing physical infrastructure failed.

2. Access tariffs and a reason for dispute

Infrastructure Law states that the Network Operators are required to grant access to their physical infrastructure to the electronic communication network providers, under objective, transparent, proportionate and non-discriminatory conditions, including price, unless access is refused for one of the reasons provided expressly and exhaustively by the law.

The tariffs for access to the physical infrastructure allows the Network Operator to recover its costs, by taking into account:

- (i) the investments from its own contributions in rolling out the physical infrastructure that is subject to access;
- (ii) the costs incurred with providing the access;
- (iii) the impact of the access on its business plan, in particular in relation with the investments in the physical infrastructure that is subject to access.

At the same time, the access tariffs need to reflect the improvements brought to the physical infrastructure by the electronic communication network provider, to the extent that such improvements also benefit the Network Operator.

In case the access is refused or agreement on specific terms and conditions, including tariffs, has not been reached within two months from the date of receipt of the request for access, the interested party has the possibility to submit a request to the NRA to settle the dispute. The NRA will decide, where appropriate, on the terms and conditions, including tariffs, applicable in case of the access to the physical infrastructure of the Network Operator. The same applies when the electronic communication network provider and the Network Operator fail to agree on the amendments to be brought to the contractual clauses that set the terms and conditions, including tariffs, for access to the physical infrastructure. When assessing on the access tariffs, the NRA will consider the Network Operator's right to recover its costs and the improvements brought to the physical infrastructure following the electronic communication network provider's access on the same.

In the case at hand, Digital CATV S.R.L. ("**Digital CATV**"), an electronic communication network provider, opened a dispute against an electricity distribution company, Societatea de Distribuție a Energiei Electrice Muntenia Nord S.A. ("**Electrica Muntenia Nord**"), requesting the NRA to oblige the latter to allow the former to continue to have access to Electrica Muntenia Nord poles, in the same conditions and at the same tariffs as currently applicable between the parties. The obligation should remain in force up until the NRA will adopt the indicative tariffs for access to physical infrastructure, in line with the Infrastructure Law.

The dispute between the parties started when Electrica Muntenia Nord asked Digital CATV to amend the conditions for access, in order to reflect the new access tariffs, that resulted from a study commissioned by the former, called „Market study and substantiation of tariffs

regarding the use of electricity poles as a support for electronic communication infrastructure”(the “**Study**”). Electrica Muntenia Nord argued that the need to renew the access tariffs came as a result of the entry into force of the Infrastructure Law and of the necessity for such tariffs to reflect the following:

- (i) the specificity of the electricity distribution networks (configuration, investments level, maintenance costs);
- (ii) the legislation applicable to the distribution of electricity;
- (iii) the possibility for the distribution operator to recover its costs, generated by the existence of the electronic communication networks on its poles, in accordance with the relevant legislation.

3. The decision

On March 10, 2020, the NRA’s President issued the Decision no. 387 on the settlement of the dispute between Digital CATV and Electrica Muntenia Nord¹.

NRA analysed the arguments of the parties in dispute and investigated the methodology used for setting the access by identifying:

- (i) the costs associated to the provision of access to the Network Operator’s physical infrastructure, by considering both its investments in rolling out the physical infrastructure subject to access and the costs incurred with providing the access. The NRA’s answer: no depreciation of fixed assets is justified to be included in the access tariffs and only the 2016 operating costs will be taken into account;
- (ii) the impact of the access on the Network Operator’s business plan and if such impact is already reflected in the access tariffs. The NRA’s answer: there is no cost component generated by a potential impact on the Electrica Muntenia Nord’s business plan and the costs generated by the risks on the distribution are reflected in the exploitation costs and therefore included in the access tariffs. As for the unmaterialized risks, the such are recovered from the electricity distribution tariffs;
- (iii) the improvements brought to the physical infrastructure by the electronic communication network provider, to the extent that such improvements also benefit the Network Operator. The NRA’s answer: no benefits associated to the improvements to the physical infrastructure were identified.

¹ The Decision is available on the NRA’s website here: https://www.ancom.ro/litigiu-digital-catv-societatea-de-distributie-a-energiei-electrice-muntenia-nord-sa-_6254 (in Romanian only).

Based on the elements presented during the dispute and the data reflected in the Study, the NRA opined that, when setting the access tariffs, Electrica Muntenia Nord failed to correctly observe the principles set by the relevant legislation.

Therefore, the NRA ruled that the access tariffs (for the poles in the rural and urban areas), as initially agreed by the parties, allow Electrica Muntenia Nord to recover its costs. In this respect, the initial access tariffs will be maintained between Digital CATV and Electrica Muntenia Nord up until the NRA will adopt the indicative tariffs for access to the physical infrastructure, in accordance with the Infrastructure Law.

4. Conclusion

Why it is important? Because it is the first decision that settles a dispute regarding the access of electronic communication networks on the poles of an electricity company and rules on the tariffs applicable for such access. Most probably similar cases will follow since the subject of access to the physical infrastructure of the Network Operators and the price for the same has a long and intensely debated history. What both electronic communication network providers and Network Operators should keep in mind when setting and negotiating the access conditions, including the tariffs? That the Infrastructure Law provisions should be followed and that the reasoning behind the NRA's decision should be observed when granting the access and negotiating the price.



Cristina Crețu

Senior Privacy & Technology Consultant

cristina.cretu@mprpartners.com