

OVERVIEW: ROMANIA

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In the last few years the decision-making practice of the Competition Council has been constantly growing and diversifying, as well as the complexity of legal and economic analysis undertaken in each case. Still, the assessment of the Council has not yet become as sophisticated as to reach the European Commission's standards of investigation.

While the Romanian legislator provided for different solutions to certain matters, the business environment is increasingly pressuring the Competition Council to have regard to the European Commission's practice and the case law of the European Courts. Aligning to this trend, the Competition Council has also started to officially guide its decisions on the basis of the European precedents.

Economics in defining the relevant markets

Where a market definition is required, the Competition Council would look at similar analysis conducted by the European body and try to apply the criteria of market definition to the specificities of the Romanian market. This comparative technique is a usual tool deployed by the Romanian watchdog. However, no complex market studies were conducted by the case handlers as to delineate the relevant markets or the particularities of a certain industry. As arguments that may be used in defining a relevant market, the Council referred in its recent practice to basic concepts such as switching costs incurred by consumers, basic demand characteristics and substitutability, views of customers and competitors or supply substitutability.

Based on the Commission's notice of market definition, the Romanian competition authority sustained that there could be different approaches on the market definition, according to the context of the analysis: in merger cases, an ex ante assessment on the market could result in different views on the relevant market than in ex post analysis conducted in infringement cases. This distinction was upheld in a 2006 case on abuse of dominant position and market sharing on the TV cable services market.

However, a number of inconsistencies regarding the market definition between the older

and the more recent practice of the Council can be noticed. Trying to make use of more deep and refined economic models of analysis, the Council seems to contradict its previous practice as regards certain sectors. For instance, the TV cable services were traditionally seen, starting in 1998 and up to 2005, from the geographical perspective, as a national market. In 2006 the Council decided within its ruling in an infringement case, even for the past period, that in fact the TV cable services market has a local dimension, narrower than the borders of one city, ie, limited to each operator's network. Consequently, each operator could be seen as a monopolist for its operations area, investigated and even sanctioned for abuse of dominant position.

This is a typical case where the market power of the incumbent operator has not been assessed by applying the typical criteria, as the Council relied more on the network type industry investigated and the alleged lack of consumers' alternatives within a specific area cover by one operator. The lack of alternatives has also been upheld to establish a monopoly position of the dominant railways freight carrier on certain secondary services market.

In other sectors, however, the antitrust authority seems to rely on the classical factors considered also by the European Commission when assessing market position. The market power of a company is not evaluated only on the basis of the market share of such company, but a market share exceeding 40 per cent is a strong indication of dominant position. Other factors must also be taken into account such as the market shares of the nearby competitors; barriers to entry on the market; and other elements such as the competitors' capacity to react against the anti-competitive behaviour of the dominant company, the nature of the product, etc.

Also, the practice of the Council does not provide for clear guidelines as to economic analysis of prices versus costs structure that could reveal anti-competitive elements. If, as regards excessive or predatory prices, the EC practice could be used as a standard, apparently the Competition Council acknowledges a separate concept of "unfair pricing", that could substantiate an abuse, based on the specific provisions of the Romanian Competition law that adds to the EC concepts. In a recent case, the Council found as abusive and unfair the monthly

fees charged by a telecoms operator that were increased in certain months in the absence of corresponding costs increases. The case showed a very simplistic inference and left room for more erratic future assessments of the Council on the pricing policies of the market players.

There is still little practice developed by the Romanian Competition Council on the

economics side and the existing case law does not generate many appealing approaches but, rather, strong debates. However, more consistent, complex and precedent-value cases are expected, so as to allow more certainty for the business environment to perform valid assessments on their market behaviour.

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Tuca Zbârcea & Asociatii is one of the top three law firms in Romania. With over 50 lawyers in our Bucharest office, we offer full-range legal services in almost every area of practice, including corporate and commercial, M&A, banking and finance, capital markets, employment law, real estate, intellectual property, PPP and PFI and concessions, litigation and arbitration, environmental law, as well as competition.

Our lawyers in the competition department have over eight years of extensive expertise on the Romanian legal services market and have successfully assisted domestic and international clients in relation to a broad range of legal issues, including competition compliance, merger and antitrust clearances, competition investigation, state aid, etc.

Also, we have further developed our expertise with a view to providing integrated services that combine legal assistance and economic advice on virtually all aspects of competition law cases, drawing on robust economic analysis and quantitative techniques. As such, our expertise encompasses the economic analysis of competition law and, in this respect, our clients benefit from the highly-regarded expertise of George Musliu, a former vice president of the Romanian Competition Council, who acts as the exclusive of counsel on competition matters at Tuca Zbârcea & Asociatii.