Dominance

Contributing editors
Thomas Janssens and Thomas Wessely

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GETTING THE DEAL THROUGH

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CONTENTS

Romania

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General

1 Legislation

What is the legislation applying specifically to the behaviour of dominant firms?

The abusive behaviour of dominant firms is prohibited by article 6 of the Romanian Competition Law No. 21/1996 (RCL) and article 102 of the Treaty on the Functioning of the European Union (TFEU).

Article 6 expressly prohibits the abuse of a dominant position held by one or more undertakings on the Romanian market or on a substantial part of it. According to the RCL, abusive practices may, inter alia, consist of:

- directly or indirectly imposing unfair selling or purchase prices, tariffs or other unfair trading conditions;
- limiting production, trade or technical development to the prejudice of the consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage; and
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which neither by their nature nor according to commercial usage, have any connection with the subject of such contracts.

2 Non-dominant to dominant firm

Does the law cover conduct through which a non-dominant company becomes dominant?

The attempts of a non-dominant player to gain market shares through an aggressive M&A strategy would normally be subject to merger control and censured, if necessary, within this context. Under the RCL, article 11, the Romanian Competition Council (RCC) may prohibit economic concentrations that lead or might lead to a significant restriction of effective competition on the Romanian market or any part thereof, in particular, by creating or strengthening a dominant position. The authority has, however, made limited use of this provision, preferring to impose remedies on the merging parties.

3 Object of legislation

Is the object of the legislation and the underlying standard a strictly economic one or does it protect other interests?

Romanian legislature states as primary objectives of the antitrust law the protection and growth of competition on the market and the support of consumers' welfare. The RCC's practice showed an increased focus on consumers. In one case, a couple of cable-TV operators were found to have been abusive for not complying with the contracts concluded with their subscribers.

Sustaining the market position of small and medium-sized businesses, although not specifically reiterated under article 6 of the RCL, could be considered as an objective to be protected within the context of control on abuse of a dominant position. In the recent *Telecoms* case, the RCC severely fined the two major mobile operators for blocking the market access of a small operator in the early stages of its market development. The case is pending before the Romanian courts.

4 Non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms? Is your national law relating to the unilateral conduct of firms stricter than article 102?

The RCL provides no sanctions for the unilateral conduct of non-dominant companies. Beyond the level of dominance and independent of antitrust control, certain commercial practices of non-dominant players (sale at loss, tying sale, etc) could be fined in a softer manner, by the consumers' protection offices or fiscal authorities under separate enactments.

5 Sector-specific control

Is dominance regulated according to sector?

Network industries such as telecommunications, postal services, energy, and railway transport are regulated by specific rules to facilitate market liberalisation and ensure a competitive environment. These specific rules are directly applied by the relevant sector regulatory bodies. Nevertheless, topics concerning access to infrastructure or other anti-competitive practices of the incumbent operators in the specific sectors could also be dealt with by the RCC under the general rules on abuse of dominant position.

Relatively recently, the RCC applied significant fines to operators acting in the postal services, as well as in the telecommunications sector.

6 Status of sector-specific provisions

What is the relationship between the sector-specific provisions and the general abuse of dominance legislation?

The application of specific remedies provided by the sector regulatory framework does not exclude the subsequent intervention of the RCC dealing with the same case on abuse of dominant position grounds. While the regulatory bodies mainly act as mediators between the market players and industry regulators, they may also apply some fines; the fines with the greatest dissuasive effect are still those under the power of the RCC.

As a matter of principle, the relevant regulatory bodies generally benefit from ex ante rights related to market behaviour, while the RCC intervenes ex post. The RCC has recently taken over the role of arbitrator in the railway sector, supervising potential disputes between the incumbent operator and new entrants.

7 Enforcement record

How frequently is the legislation used in practice?

During its nearly 19-year existence, the RCC has concluded just a few cases with a finding of an abuse of dominant position. Many investigations have been opened following complaints on the grounds of both abuse of dominance and collusion, but the authority has more often penalised entities for anti-competitive agreements (cartels) or closed investigations on grounds that no infringement was identified.

Although in past years the authority has dismissed many complaints regarding abuse of dominance, it has also applied record fines in abuse cases, for instance:

- in the latest case against two major players in mobile telecommunications for refusal to grant a small operator network access for termination of calls originated from international sources or from networks

operated by competing operators, as well as traffic limitation for interconnection calls generated in the network of the small operator (in the case of one sanctioned undertaking such limitation was applied for a few hours during one day);
- in a recent abuse case against the National Company of Romanian Mail for applying dissimilar conditions to its commercial partners;
- in a case of abusive refusal to deal and discriminatory pricing applied by the national freight railway operator to private operators for access to sleeping and maintenance premises; and
- in unfair pricing applied by cable-TV operators located in Bucharest.

Recently, the RCC closed several investigations on potential abuse of dominance by accepting commitments (in energy distribution and the telecom sector).

8 Economics

What is the role of economics in the application of the dominance provisions?

There is still little practice developed by the RCC regarding economics and the abuse of a dominant position, and the existing case law does not offer many complex and precedential cases as to allow more certainty for the business environment to perform valid economic assessments of their market behaviour.

However, the increasingly sophisticated and refined economic analysis on dominance submitted by the allegedly dominant companies may force the RCC to refine its assessment. The RCC is showing signs that it is moving in this direction.

9 Scope of application of dominance provisions

To whom do the dominance provisions apply? To what extent do they apply to public entities?

Although the case law of the RCC does not offer guidance in this respect, public entities could be subject to allegations of abuse of dominance, to the extent that their activities qualify as economic activities.

On the other hand, article 8 of the RCL bans any actions or omissions of central or local public authorities or institutions (or entities delegated by such bodies) that prevent, restrict or distort competition, for instance, by limiting free trade or undertakings' independence, or by setting discriminatory conditions for undertakings' market activities. If the respective authority fails to comply with the RCC decision in the following six months, the competition authority may request in court for a binding decision on the administrative authority breaching article 8 RCL.

10 Definition of dominance

How is dominance defined?

The RCC practice has defined dominance by referring to cases where an undertaking is able to behave, to an appreciable extent, independently towards its competitors or clients on the relevant market.

Nevertheless, as of July 2011, the RCL introduced a threshold for market dominance. See the comments related to the presumption of dominance in question 12.

11 Market definition

What is the test for market definition?

Based on the European Commission's notice of market definition (substantially implemented at national level), the RCC has upheld the notion that there could be different approaches to 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. Consequently, the authority takes a broader view of the market in merger cases than in dominance cases.

This distinction was upheld in a 2006 case on abuse of dominant position in the cable TV market. In merger cases this market was traditionally seen from 1998 to 2005 as a national market from the geographical perspective. In 2006, however, the RCC decided in a case on abuse of dominant position that the cable TV market has a local dimension, smaller than the borders of one city, limited to each operator's network location. As a result, each operator could be seen as monopolist for its area of operations (even as small as one street in a given area) where no other competitor has a parallel infrastructure.

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

However, in the recent case in the mobile telecommunications sector, the RCC did not seem to depart from the principles established by the European Commission on the relevant markets applicable to electronic communications products and services under ex ante assessment, as well as the views expressed by the regulatory body in the sector on the definition of the relevant market.

12 Market-share threshold

Is there a market-share threshold above which a company will be presumed to be dominant?

Pursuant to its latest amendment, the RCL establishes a relative presumption of dominance above a market share threshold of 40 per cent. Therefore, if such a market share is exceeded, the burden of proof on the absence of a dominant position is transferred to the undertakings under investigation. In overturning the presumption of dominance, undertakings may use economic market arguments such as the market shares of nearby competitors, actual barriers to entry on the market, competitors' capacity to react against the anti-competitive behaviour and the nature of the product.

13 Collective dominance

Is collective dominance covered by the legislation? If so, how is it defined?

Article 6 of the RCL covers the abusive behaviour of one or more undertakings holding a dominant position. No further guidance is provided as to the elements indicating collective dominance. In a 2005 case, the RCC investigated a potential collective dominance on the cement market, but finally upheld a price-fixing agreement between the three competitors each holding market shares between 30 and 35 per cent.

In the recent case against the two most important players in the mobile telecommunications sector, the authority did not withhold a collective dominance position, but instead issued two separate abuse decisions against each sanctioned undertaking.

14 Dominant purchasers

Does the legislation also apply to dominant purchasers? If so, are there any differences compared with the application of the law to dominant suppliers?

Since the RCL does not distinguish between the parties in a supply relationship that may exercise market power, it could be assumed that abusive behaviour by a powerful buyer could also be caught under the provisions on abuse.

Abuse in general

15 Definition

How is abuse defined? Does your law follow an effects-based or a form-based approach to identifying anti-competitive conduct?

Article 6 of the RCL stipulates a list of potentially abusive practices and the expected negative effects on the market (damage to consumers' welfare). The RCC does not appear to follow an effects-based approach, but rather to consider such practices as per se abusive without quantifying their actual market effects.

16 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Both exploitative and exclusionary practices are covered by the concept of abuse under the RCL.

17 Link between dominance and abuse

What link must be shown between dominance and abuse?

It is not obligatory that dominance and abuse occur in the same market. Abuse could be manifested in a neighbouring market from the one in which the undertaking is dominant.

18 Defences

What defences may be raised to allegations of abuse of dominance? Is it possible to invoke efficiency gains?

Neither the RCL nor the practice of the RCC provides for general types of defences to be used in abuse of dominant position cases. Nevertheless, it could be expected that defence arguments accepted by the EC decision-making bodies (including efficiency gains) would work in similar cases at the national level.

Specific forms of abuse

19 Price and non-price discrimination

The application of dissimilar conditions to equivalent transactions with other trading parties is sanctioned by the RCL, article 6(c). In a 2005 case, the RCC rejected the discrimination allegations lodged by one distributor against Colgate Palmolive. The plaintiff invoked the non-equal terms granted to Cash & Carry Channel versus the traditional distributors. Although in 2005 the authority found the differentiation between the two channels justifiable since they were not found as competing on the same market, in early 2007 the RCC reopened the case on the same grounds. However, the order of the RCC on the opening of this investigation has been recently annulled in court, which is considered to be a highlight as a first in the Romanian courts' practice.

A substantial fine of approximately €7.2 million has already been imposed by the RCC in 2006 for an abuse of dominant position in the form of applying dissimilar conditions to trade partners in the case concerning the activity of the National Company for Freight Railway Transport. More recently, at the end of 2010, the RCC imposed a fine of around €24.06 million on the National Company of Romanian Mail, namely 7.2 per cent of its 2009 turnover, for similar behaviour (ie, applying dissimilar conditions to its trading partners).

In 2012, the RCC rejected the interim measures proposed by an airline operator concerning the reduction of the transfer and transit fees imposed by an airport, as well as the elimination of discriminatory criteria for granting discounts on airport charges and finally closed the case with commitments.

In 2015, RCC accepted commitments made by four telecom operators in order to eliminate the competition concerns regarding the possible discrimination in relation to the fee level for on-net and off-net calls (calls initiated and terminated in the same network, and calls initiated in one network and terminated in a different network).

20 Exploitative prices or terms of supply

With respect to excessive pricing, the EC practice should be used as a standard. In its previous practice, the RCC acknowledged a separate concept of 'unfair pricing' that could substantiate an abuse, based on the specific provisions of the RCL that added to the EC concepts and that have now been repealed. In one case, the RCC found the monthly fees charged by a telecoms operator that were increased in the absence of a corresponding cost increase for the same months as abusive and unfair. The case showed a very simplistic inference and left room for more erratic future assessments of the RCC on the pricing policies of market players.

21 Rebate schemes

No clear-cut guidance is found in the RCC's practice related to rebate schemes. The guidelines for vertical restraints provide, however, that quantity forcing, English clauses or similar non-compete obligations applied by dominant players are likely to be caught under the rules on abuse of dominant position.

22 Predatory pricing

Except for the guidelines on competition rules applicable to the telecoms sector, where predatory pricing is defined on a cost basis similar to that applied at the EC level, the RCC has not made use of the predatory price concept. The authority is, however, expected to follow common standards used at the EC level.

23 Price squeezes

The RCC's record shows a potential margin squeeze case in the telecom sector where major mobile operators were investigated for potential discrimination between the on-net and off-net tariffs. The case was closed with commitments (see question 38).

24 Refusals to deal and access to essential facilities

Both refusal to deal and refusal of access to essential facilities are covered in article 6 of the RCL. In a 2006 decision of the authority, the national railway freight carrier was sanctioned for refusing to grant access to the roundhouses within its property to other private carriers.

In 2011, the two major mobile telecommunications operators were fined for refusing call termination access to their respective networks.

The fine applied by the RCC in its 2011 abuse case on the refusal to grant access tops the authority's fine record in terms of overall value. Such circumstances are generated by the large turnover of the sanctioned undertakings.

25 Exclusive dealing, non-compete provisions and single branding

Single branding obligations imposed by a dominant undertaking could be qualified as an abuse of dominant position.

26 Tying and leveraging

The RCL prohibits tying practices (making the conclusion of an agreement conditional upon acceptance of additional obligations that are unrelated by their nature or according to commercial use to the subject of such an agreement) under article 6(d).

27 Limiting production, markets or technical development

The limitation of production, distribution and technical development is covered by the prohibitions stipulated under article 6(b) of the RCL. In a 1997 decision concerning Trafo SA, the RCC decided that the decision of the undertaking not to supply raw materials to competitors, thus limiting distribution to the prejudice of consumers, was abusive.

28 Abuse of intellectual property rights

The RCC has not yet applied the more developed EC standard of analysis on abuse of intellectual property rights, but it could be expected that the general guidelines developed in EC case law would be followed by the domestic authority.

29 Abuse of government process

There is no reference in the RCL on the abuse of government process or in the competition authority's practice, but it is possible that such abusive conduct could be penalised under national law in cases similar to precedents at EC level.

As indicated in question 9, the RCL bans any actions or omissions of central or local public authorities or institutions preventing, restricting or distorting competition.

30 'Structural abuses' – mergers and acquisitions as exclusionary practices

To prevent the creation or consolidation of a dominant position within the context of merger control rules, the RCC may impose remedies on the merging parties (sale of assets, trademark licensing or assignment, etc).

In a recent case on the dialysis services market, Fresenius Medical Care Beteiligungsgesellschaft's acquisition of Nefromed SRL and Nefromed Dialysis Centers SRL was authorised subject to Fresenius's undertaking to divest two dialysis centres. Also, in a 2014 case, where Auchan acquired 20 hypermarkets from Real, the RCC approved the merger conditional upon

the fact that Auchan would not open new stores in two relevant markets in the next five years and that the prices to the consumer in two cities would not rise above 5 per cent for a period of three years.

31 Other types of abuse

The RCL lists only the most common abusive practices. The list is not exhaustive and the RCC is competent to assess all potential abusive conduct of a dominant undertaking that may affect competition on the market or consumer welfare. Conduct that is contrary to article 102 TFEU is also likely to fall within the prohibition of article 6 of the RCL. The most recent cases are listed in question 38.

Enforcement proceedings

32 Prohibition of abusive practices

Is there a directly applicable prohibition of abusive practices or does the law only empower the regulatory authorities to take remedial actions against companies abusing their dominant position?

Private parties could directly seek compensation or other remedies before the domestic courts based on both article 6 of the RCL and article 102 of the TFEU. Nevertheless, because jurisprudence concerning applying antitrust rules is comparatively undeveloped, Romanian courts might feel reluctant to accept damages actions based on tort law in the absence of a decision of the RCC establishing the abuse of dominant position. It could be assumed, then, that the success of damages claims before the courts would increase significantly if the alleged infringement was previously established by the RCC.

33 Enforcement authorities

Which authorities are responsible for enforcement and what powers of investigation do they have?

The RCL is primarily enforced by the RCC. Its decision-making structure consists of seven members appointed by the President of Romania at the government's proposal, who are assisted in their activity by competition inspectors who are public officials with specific attributions. The RCC may initiate an investigation on abuse of dominant position ex officio or upon complaint.

During a dawn raid, the RCC's inspectors can, acting upon judiciary mandate:

- conduct on-site inspections and access premises or vehicles belonging to defendants;
- examine any documents, registers, accountancy and commercial papers, irrespective of the premises where they are held;
- interview representatives and employees of the defendant;
- copy or seize documents and registers of the company under investigation; and
- seal premises, documents or computers during a dawn raid.

Refusal to supply the required documents could trigger fines of up to 1 per cent of the turnover achieved by the company during the previous year. Also, punitive penalties of up to 5 per cent of the average daily turnover achieved in the previous year may be imposed until the documents requested are produced in a complete and correct way or until the defendants submit to an inspection.

34 Sanctions and remedies

What sanctions and remedies may they impose?

For practices qualifying as abuse of dominant position, the RCC can apply fines ranging from 0.5 to 10 per cent of the turnover achieved by the defendant in the previous financial year. The highest fines imposed by the RCC for abuse of a dominant position were applied recently, namely at the end of 2010 against the National Company of Romanian Mail, amounting to approximately €24.06 million, and at the beginning of 2011 against the two major mobile telecommunications operators, Orange and Vodafone, amounting to approximately €34.8 million and €28.3 million respectively.

35 Impact on contracts

What are the consequences of an infringement for the validity of contracts entered into by dominant companies?

Article 50 of the RCL provides that any commitment, agreement or contractual clauses relating to an anti-competitive practice prohibited by article 6 of the RCL and article 102 TFEU are null and void.

36 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or authority to order a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract?

According to domestic competition rules, the national courts can rule on the validity of agreements that could substantiate an abuse of dominant position and award damages to the dominant party's clients or competitors for losses that have a causal link to the abuse. To our knowledge, there is no jurisprudence in the national courts compelling the dominant entity to grant access to different technologies, to supply goods or to conclude a specific contract.

37 Availability of damages

Do companies harmed by abusive practices have a claim for damages?

Irrespective of the administrative fines or other remedies applied by the RCC, the injured parties are entitled to damages caused by the abusive conduct. However, to our knowledge, in the absence of a decision of the RCC ruling on the existence of an abuse of dominance, there is no relevant jurisprudence on damages awarded by domestic courts.

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38 Recent enforcement action

What is the most recent high-profile dominance case?

In its latest high-profile case, the authority applied record fines totalling €63.18 million on the two major mobile telecommunications operators for refusing access to their networks for call termination, exceeding the record of €24.06 million set in the previous abuse case against the National Company of Romanian Mail. The sanctioned undertakings appealed the RCC's decision. The cases are still before the courts and the decision is pending.

Recently, the RCC closed some major cases of potential abuse on commitments made by the players in various industries. In the telecom *on-net/off-net* case mentioned above, the major mobile operators committed to refrain from discriminating between the wholesale termination tariff applied to the interconnected operators and the tariff set internally for the termination of self supplied service in view of the provision of on-net calls.

In the *Cez Distributie* case, the RCC accepted commitments and closed a potential refusal to supply case. The electricity distributor committed to a specific procedure aimed at detecting fraudulent consumption and increase public awareness with respect to the fraud phenomenon.

The commitments proposed by GlaxoSmithKline (GSK) in response to concerns expressed by the authority on a potential abuse of dominant position by refusal to supply and by implementing a quota system preventing parallel trade by the direct-to-pharma system are currently under public consultation (October 2015).

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