

Dominance

The regulation of dominant firm conduct in 39 jurisdictions worldwide

2009

Contributing editors: Thomas Janssens and Thomas Wessely



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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, since 1 January 2007, by article 82 of the EC Treaty.

Article 6 expressly forbids the abusive use of a dominant position held by one or more undertakings on the Romanian market or on a substantial part of it, by resorting to anti-competitive practices that have as their object or may have as their effect the distortion of economic activities or the prejudice of consumers. These anti-competitive practices may refer to:

- directly or indirectly imposing unfair selling or purchase prices, tariffs or other unfair trading conditions and the refusal to deal with specific suppliers or beneficiaries;
- limiting production, distribution or technical development to the prejudice of the users or the consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage;
- 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;
- using excessive or predatory prices for the purpose to exclude the competitors or selling to export below the production cost by covering the differences through imposing higher prices to internal consumers; or
- exploiting the economic dependence of an undertaking, which does not have an alternative solution under equivalent conditions and terminating the contractual relations for the sole reason that the partner refuses to obey to unjustified trade conditions.

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 RCL, article 12, the Romanian Competition Council (RCC) may prohibit the economic concentrations that lead or might lead to a significant restriction of the competition on the Romanian market or on part of it, 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?

The 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 recent case, couple of cable TV operators were found abusive for non-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 dominant position.

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 82?

The RCL provides no sanctions for the unilateral conduct of non-dominant companies. Beyond the level of dominance and independently 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.

When dealing with cases of abuse affecting solely the domestic market, the RCC seems to rely on article 3(2) of Regulation 1/2003, assuming that it is not bound to apply article 82 concepts or the interpretations of different forms of abuse given by the EC bodies and may impose stricter national rules.

This translates in rather original approaches taken by the RCC on different forms of abuse. Article 6 of the RCL provides for a list of potential forms of abuse more detailed than the correspondent article 82 of the EC Treaty. For example, in addition to a case similarly regulated by both article 6 and article 82(a) ('directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions'), RCL, article 6(e) incriminates separately the application of excessive or predatory pricing. The RCC interpreted this distinction, inferring that 'unfair prices' is a stand-alone concept under the RCL, different from 'excessive prices or predatory prices' as traditionally perceived under EC practice.

5 Sector-specific control

Is dominance controlled 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.

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 negate the competence of the RCC to deal with the same case on abuse of dominance 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.

7 Enforcement record

How frequently is the legislation used in practice?

During its 12 years' existence, the RCC completed just a few cases with a finding an abuse of dominant position. Many investigations were opened following a complaint on both abuse of dominant position and collusion grounds, but the authority sanctioned more often the anti-competitive agreements (cartels). In the past two years, while the authority dismissed quite many complaints on dominance abuse, it also applied record fines in the two cases where abuse was found: the 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 the case of unfair pricing applied by TV cable operators located in Bucharest.

8 Economics

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

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

However, the more sophisticated and refined economic analysis on dominance submitted by the alleged dominant companies forces the RCC to refine its assessment as well.

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 decisional practice of the RCC does not offer guidance in this respect, public entities could be subject to abuse of dominant position allegations, to the extent that their activities qualify as economic activities.

10 Definition of dominance

How is dominance defined?

The RCC regulations 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.

11 Market definition

What is the test for market definition?

Based on the Commission's Notice of market definition, the RCC 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. 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 TV cable services market. In merger cases this market was traditionally seen from 1998 to 2005 as a national market from the geographic perspective. In 2006, the RCC decided in its ruling in a case on abuse of dominant position that the TV cable services market has a local dimension, narrower than the borders of one city, thus limited to each operator's network location. As a result, each operator could be seen as monopolist for its operations area (as narrow as one street in a locality) 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 relied more on the network type industry investigated and the alleged lack of consumers' alternatives within a specific area cover by just one operator. The lack of alternatives has also been upheld to establish a monopolistic position of the dominant railways freight carrier on certain secondary services markets.

12 Market-share threshold

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

The RCC seems to rely within its case law on the classical factors considered also by the European Commission when assessing market position. The market power of a company is not evaluated solely on the basis of its market share; however, a market share exceeding 40 per cent is a strong indication of dominant position. Other factors, such as the market shares of the nearby competitors, the barriers to entry on the market, the competitors' capacity to react against the anti-competitive behaviour, and the nature of the product, are also taken into account for the analysis. For instance, the RCC rejected the complaint on abuse against Unilever South Central Europe, concluding that the investigated company was not dominant since it could not act independently on the market for detergents against its closest competitor, Procter & Gamble. By the same token, in 2008, the RCC dismissed a complaint filed by a distributor against Michelin Romania due to a potential discrimination, concluding that the company does not hold a dominant position given that the market for the distribution services of car tyres is characterised by a large number of competitors and that there are no entry barriers on this market.

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.

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 which may exercise market power, the buyer or the

supplier, it could be assumed that powerful buyers' abusive behaviours could also be caught under the provisions on abuse.

Abuse in general

15 Definition

How is abuse defined?

Article 6 of the RCL provides for a list of potential abusive practices and also for the expected negative effects on the market (damage to consumers welfare). The RCC seems however not to follow an effects-based approach but rather to uphold the abuse, without quantifying its 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 mandatory that dominance and abuse occur on the same market. Abuse could be manifested on 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?

Neither the RCL nor the practice of the RCC provides for general types of defences to be used in abuse of dominant position cases. It could be expected that defence arguments accepted by decisional practice of the EC bodies would work in similar cases at 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 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 had found justifiable the differentiation between the two channels since they were not found as competing on the same market, in early 2007 the RCC reopened the case on the same grounds. The investigation is currently pending.

A substantial fine of approximately €7.2 million has been already applied by the RCC in 2006 for an abuse of dominant position in the form of applying of dissimilar conditions to trade partners in the case concerning the activity of the National Company for Freight Railway Transport.

20 Exploitative prices or terms of supply

The practice of the RCC does not provide for clear guidelines regarding the economic analysis of prices versus costs structure that could reveal anti-competitive elements. If with respect to excessive or predatory prices, the EC practice could be used as a standard, apparently the RCC acknowledges a separate concept of 'unfair pricing', that could substantiate an abuse, based on the specific provisions of the

RCL that adds to the EC concepts. In a recent case, the RCC found as abusive and unfair the monthly fees charged by a telecoms operator that were increased in the absence of corresponding costs increases for the same months. 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 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 EC level, the RCC has not made use of predatory price concept. The authority is, however, expected to follow common standards used at EC level.

23 Price squeezes

The RCC's record shows no findings of margin or price squeeze.

24 Refusal 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 round houses in its property to other private carriers.

25 Exclusive dealing, non-compete provisions and single branding

The guidelines on vertical restraints provide for clear indication that single branding obligations imposed by a dominant undertaking could be qualified as an abuse of dominant position and are unlikely to be individually exempted.

26 Tying and leveraging

The RCL prohibits under article 6(d) tying practices (conditioning the conclusion of an agreement on acceptance of additional obligations unrelated, by their nature or according to commercial use, to the subject of such agreement).

27 Limiting production, markets or technical development

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

28 Abuse of intellectual property rights

The RCC has not applied so far the more developed EC standard of analysis on abuse of intellectual property rights, but it could be expected that the general guidelines recently developed in the EC case law to 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 we do not exclude that such abusive conduct could be sanctioned under national law in cases similar to the precedents at EC level.

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 to the merging parties (assets sale, trademark licence or assignment etc). For instance, in a recent merger case between the first two players on the Romanian additive oil production market, the RCC conditioned the approval of the economic concentration to a trademark assignment allowing Agricovert, the second largest player, to maintain its presence on the market. By the same token, when analysing the intended merger between two players on the Romanian market for raw and coated particle boards, the RCC gave its the approval conditional on the renunciation by Kronospan Group of the acquisition of the commercial division of raw and coated particle board manufacturer FunderMax GmbH Austria, with a view to rendering the operation compatible with the market.

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 conducts of a dominant undertaking, which affect the competition on the market or the consumer welfare. Conduct that is contrary to article 82 of the EC Treaty is also likely to fall within the prohibition of article 6 of the RCL.

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 82 of the EC Treaty. Nonetheless, because of the incipient jurisprudence in applying antitrust rules, Romanian courts might feel reluctant in accepting damages actions based on tort law in the absence of a decision of the RCC establishing the abuse of dominant position. As such, it could be assumed 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, who are assisted in their activity by competition inspectors, public officials with specific attributions. The RCC is entitled to initiate an investigation on abuse of dominant position ex officio or upon complaint.

During an investigation, the RCC's inspectors can:

- 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 the dawn raid.

Refusal to supply the required documents could trigger fines up to 1 per cent of the turnover achieved by the company during the previous year. Also, comminatory 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 an inspection is submitted to.

34 Sanctions and remedies

Which sanctions and remedies may they impose?

For practices qualifying as abuse of dominant position, the RCC can apply fines up to 10 per cent of the turnover achieved by the defendant in the previous financial year. The highest fine imposed by the RCC for abuse of dominance has been the one applied to the National Company of Railway Freight Transport, approximately €7.2. million.

If the dissuasive effect of fines and restoration of the competitive environment are not achieved, the RCC may request the Bucharest Court of Appeal to liquidate the dominant position, based on major public interest grounds. The RCC must indicate one of the following measures to be decided upon by the court:

- annulment of agreements or contractual clauses;
- annulment of any agreement establishing an economic concentration that generates a dominant position;
- limitation or prohibition to enter the market;
- assets sale; and
- spin-off of the dominant undertaking.

35 Impact on contracts

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

Article 49 of the RCL provides that any commitment, agreement or contractual clauses related to an anti-competitive practice prohibited by article 6 is 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 the domestic competition rules, the national courts can rule on the validity of agreements that could substantiate an abuse of dominant position and to award damages to the dominant's clients or competitors that have a causal link to the abuse. To our knowledge, there is no jurisprudence in the national courts compelling the dominant 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?

According to article 61 of the RCL, 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

Update and trends

As regards legislative improvements or guidelines on article 6 of the RCL, no particular changes are expected in the near future. The RCC is currently conducting several investigations either targeting or that might cover potential forms of abuse of dominant position in the following markets: fast-moving consumer goods, telecoms, steel sector, postal services and distribution of utilities (natural gas,

distribution of electric energy and hot water). The authority is usually open to all signals from the market as regards potential abusive conduct, with most investigations being opened further to complaints filed by the allegedly infringed competitors or the clients of the dominant undertaking.

best 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.

38 Recent enforcement action

What is the most recent high-profile dominance case?

The most recent decision of the RCC penalising an abuse of dominant position is related to the TV cable operators pricing practices in Bucharest. After almost five years of investigation, the RCC ruled at the end of 2006 that in Bucharest, two of the four market players are guilty of abuse of dominant position by 'imposing increased tariffs not justified by the costs growth'. Besides the fact that each operator acting on cable TV services market in Bucharest was considered as

a dominant player (See question 11 for the market definition in this case), the particularity of this case lies in the way that 'unfair' pricing was assessed. The authority investigated the tariffs policy during a four-year period and compared, on monthly basis, the prices charged to customers and the related costs incurred by the supplier. For the months when the prices went up while the costs went down or in any case were not correspondingly increased (that is, lack of synchronisation between costs and price increase, despite the provisions in the subscribers' agreements allowing price increases in case of costs increases), the Council found this sufficient as to characterise as 'unfair' the prices charged by the operators and issue the accusation of abuse of dominant position. The RCC's decision was challenged in court and the case is currently pending.

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