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Overview

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Assessment of exploitative behaviour

The enforcement record of the Romanian Competition Council (RCC) has proved rather poor throughout the past year, no major “catch” being penalised since the drug distributors cartels on the insulin and dialyse markets were fined in the first quarter of 2008. The Romanian antitrust watchdog in 2008 opened investigations targeting potential cartels in the banking sector, the real estate market and the pharmaceutical distribution sector. Additionally, sector reviews in the food retail and pharmaceutical industry are on the authority’s plate at present given the concerns of high prices on such markets.

Within the current economic context, when some industries are facing decreasing demand one could expect that the market players are more tempted to secretly collude or to exploit their strong market shares. Several practices such as termination of the existing contracts, renegotiations of contractual terms, increasing prices are particularly likely to occur given the circumstances of short demand or supply, input cost cutting policies, financial difficulties, and so on.

Although not easy to evaluate in practice, charging excessive prices to buyers or extorting too low prices from suppliers may be qualified as an abuse of dominant position given the special “liability” attached to market power holders. Based on the complaints examined throughout the years, it seems that the RCC has a bigger appetite to investigate such exploitative behaviour than the European Commission which showed more interest in exclusionary practices.

Some older decisional practices of the RCC may be worth mentioning for the specific way the authority assessed “unreasonable pricing” affecting final consumers. Dealing with a consumer complaint on the repeated increases of prices in the cable television industry, the RCC concluded that two of the four providers active on the cable television services market in Bucharest were guilty of infringing article 6 (a) of Competition Law No. 21/1996, which specifically prohibits charging of unreasonable prices by dominant players to the detriment of consumers. The RCC found that the

abuse amounted in “imposing increased tariffs not justified by the costs growth”.

The authority investigated the tariffs policy during a four-year period and compared, on a monthly basis, the prices charged by each provider and the related costs. This comparison was deemed relevant by the RCC given a certain provision in the subscribers contracts, by which tariffs should be increased in line with costs. By extracting the months when the prices went up but the costs went down, the RCC characterised as unfair the price increases that were not justified by a simultaneous cost rise. The parties argued that the costs analysis conducted by the RCC on a monthly basis was irrelevant and that simply a lack of monthly synchronisation between costs and price increases could not define an abuse. Moreover, the investigated parties argued that, even under Romanian competition law, it should not be distinguished between inequitable and excessive prices (separately regulated by the legal text) and that the RCC had not substantiated a case of exploitative supra-competitive prices. Same prices in competitive areas versus monopoly areas are clear evidence of reasonable market prices and “normal” rates of profit comparable with the industry average the cable TV suppliers claimed. This argument has not been sufficiently assessed by the RCC although the comparison between the monopolist price (in areas where no actual competition existed) with the competitive price (in the areas where the providers’ networks overlapped), fraught with difficulties in most cases, was straightforward in the case at hand.

The RCC did not apply any of the criteria usually considered for determining excessive pricing, as explained by the authority in its guidelines applicable for the electronic communications and telecoms sector (ie, comparison with the competitors’ prices, with the usual industry profit margin, etc), but relied exclusively on the comparison of monthly basis of prices versus costs and attached it to the concept of unfair prices. In our opinion, the RCC intervention in this case leaves room for a high degree of arbitrariness. First, it does not clarify the distinction under

the Romanian antitrust law between unfair and excessive prices and the economic rationale behind each of these concepts. Second, it may create a false impression that, under the domestic antitrust rules, a dominant player is under an obligation to take a cost-based approach and only increase prices to its customers when such increase is justified by a corresponding cost increase, irrespective of any assessment of the excessive level of the new

tariffs. An economic effects-based approach would show that the increase of prices by a monopolist above the competitive level and the ability to earn supra-competitive profits could in fact attract new entrants to the market and thus favour the competitive structure of the market. The regulatory intervention to sanction and control price increases would thus be unnecessary and have the reverse effect of distorting this process.

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Tuca Zbârcea & Asociatii is the leading law firm in Romania. With over 80 lawyers in our Bucharest office, we offer full-range legal services in almost every area of practice, including competition, corporate/commercial, M&A, litigation & arbitration, real estate, banking & finance, capital markets, employment law, intellectual property, PPP/PFI and concessions, environmental law.

Our lawyers in the competition department have over 10 years of extensive expertise on the Romanian legal services market and have assisted in relation to a broad range of legal issues, including competition compliance, merger & antitrust clearances, competition investigation, State Aid, as well as with relation to the application of competition/antitrust law in various domestic and cross-border transactions (mergers, acquisitions, joint ventures etc.).

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Raluca Vasilache is a competition partner with Tuca Zbârcea & Asociatii.

For over nine years she has covered a wide array of legal issues in the field of competition law, as well as intellectual property.

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Raluca has also advised in relation to investigations with the Romanian Competition Council, dawn raids of the authority and state aid matters, as well as on litigation involving competition law issues. She also has wide experience in privatisation and post-privatisation matters of major state-owned companies.

Raluca Vasilache is also a regular lecturer at various local and international conferences on competition, state aid and intellectual property matters. She is also the local correspondent for *Global Competition Review* and has contributed numerous articles in leading local and international publications.

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For the past six years, she has been a competition lawyer dealing mostly with antitrust matters impacting on domestic and international transactions. Also, she has provided legal support in front of the Romanian Competition Council in relation to complex merger and antitrust clearances, investigations and dawn raids. Additionally, she has advised private companies, public companies and the Romanian government with regard to a variety of state aid issues.

Other areas of expertise include intellectual property law, having advised on all aspects related to the registration, protection, licensing and transfer of patents, trademarks, copyrights, designs and software, as well as personal data protection, electronic commerce transactions, distance sales, advertising and unfair competition practices.