

Romania

Musat & Asociatii

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1 Legislation

1.1 Please set out the basic elements of the offence(s) under your relevant laws?

The primary legal provisions dealing with the abuse of a dominant position are to be found in Article 6 of the Romanian Competition Law no. 21/1996, as further amended and republished. Article 6 of the law prohibits any abuse of dominance held by one or more undertakings on the Romanian market or on a substantial part thereof which may affect the economic activity on the market or the consumers. The said Article provides for a non-exhaustive list of actions that may amount to an abuse of dominance (detailed at question 3.1 below). An alleged abuse of dominant position is normally assessed also from the perspective of the practice of the Competition Council and the jurisprudence of the Romanian courts.

1.2 What is the underlying purpose of the competition legislation that applies to the conduct of dominant undertakings?

The direct purpose which dictates the application of Article 6 of the law is the protection of the final consumers, whereas the indirect objective is the maintenance of a competitive environment which typically promotes consumer welfare in the long-run. However, sometimes the subsequent objective serves as the underlying test, being automatically considered, until recently, that the harm of competitors negatively impacts upon the final consumers. The distortion, restriction or elimination of competition is still the only test applied in most cases of abuse of dominance leading to the presumption that a harm of consumers is imminent.

1.3 Does the legislation also apply to public bodies?

Article 6 of the Competition Law applies to undertakings. An undertaking is an entity engaged in the economic activity by putting products or services on the market, regardless of the way it is funded or whether it is a natural or legal person. The fact that a company is financed by the state does not remove it from the ambit of Article 6. However, the public undertakings, in so far as they do not act as undertakings, do not fall within the personal scope of Article 6 of the Competition Law. Their conduct may be assessed and rectified by the competition authority under Article 9 of the same law whereby there are prohibited any actions of the central or local public bodies which have as object or might have as effect the distortion, restriction or elimination of competition, particularly the following:

- limiting the free trade or the autonomy of the undertakings to freely compete in accordance with the laws; and
- establishing discriminatory conditions against some undertakings.

1.4 Does the legislation apply to: (i) unilateral conduct of a non-dominant firm whereby such a firm seeks to acquire a position of dominance; (ii) collectively dominant undertakings; and (iii) dominant buyers as well as suppliers?

A firm may be found to have abused its dominant position only if at the moment when the alleged abuse took place, the firm in fact held a dominant position, either *de facto* or *de iure* (i.e. by virtue of State's intervention). However, the Competition Council acknowledged the possibility of a dominant firm to abuse of its position on a separate neighbouring market on which it is not dominant (e.g. case *TREFO* from 1997, and case *ATLAS Telecom* from 2005). The Competition Council has never held the existence of a collective dominance, without however excluding such possibility. In a case from 2006 based on a complaint of *Condem*, the council listed the criteria had in view for assessing whether a collective dominance existed. The buyers are subject to the same rules as the suppliers, provided that they put the products on the market and act as distributors and not as genuine agents.

1.5 Are there sector-specific regulations which apply to unilateral conduct and how do these relate to the general prohibition of abuse of dominance?

Before finding an infringement of Article 6, the Competition Council checks the sector-specific regulations which apply to unilateral conduct and regardless of whether the conduct is deemed to be lawful under such regulations, the council applies a fine every time it determines an abuse. Should the sector-specific regulations have favoured the unlawful behaviour, under the same decision the council requires the public authority that enacted the regulation to amend it based on the council's suggestions (e.g. joined cases *UPC* and *Astral* from 2006 and case *National Forestry Authority* from 1999 whereby a number of 41 national public authorities were found guilty for infringing Article 9 of the law by favouring the abusive conduct).

2 Dominance

2.1 How is dominance, or your equivalent concept, defined under national law?

Dominance is not defined by the law or any regulation subsequently issued by the Competition Council. The latter referred to the definition applied by the European Court of Justice for Article 82 EC. However, the council acknowledged that there are several criteria based on which dominance may be found and the market share is an indication of such, rather than a certainty. Other criteria had in view are the market shares of competitors and the difference between those and the market share of the company alleged to be holding a dominant position. An even more important criterion is the existence of entry barriers. In case *Heineken* the council authorised an economic concentration on the beer market despite the fact that the acquirer gained as a result of such the "market leader position". Given the competitive environment and the lack of entry barriers, the council held that no dominant position was created notwithstanding the high cumulated market share.

2.2 How is dominance established / proven and what type of evidence is used?

Dominance is established based on several criteria which might be applicable depending on the specifics of the case and/or the market. The most important factors are the market shares and the entry barriers as can be inferred from case *Interbrew Romania* 2006, case *Astral Telecom* 2005 and case *Kraft Foods* 2004. But the essential issue is the ability to act independently on the market. It is noteworthy that in the first case dealing with an abuse of dominance, the Competition Council found that a company was dominant despite its low market share of 18% due to the fact that the dominant company had the ability to act independently (case *TREFO* mentioned above). However, since then, the council clarified in many occasions that the existence of dominance in the absence of a market share of at least 40% is unlikely. The extent to which the buyer power may countervail that of the seller is also important for the above assessment (case *Heineken*).

2.3 How is the relevant market established to assess market power?

The definition of the relevant market, both the product's and geographic, is crucial in finding a dominant position, as the market share (i.e. the first indicative of dominance) is determined in direct connection with the relevant market. The Guidelines of the Competition Council regarding the definition of the relevant market for the purpose of establishing the substantial part of the market, as issued in 2004, define the relevant product and geographic markets in cases involving anti-competitive practices, abuse of dominant position and economic concentrations. The Council constantly held that the definition of the relevant markets is different in cases dealing with abuse of dominance as opposed to cases dealing with economic concentration.

Therefore, for the purpose of Article 6 the product market is defined as comprising all the products which the consumers find them interchangeable or substitutable according to their characteristics, price and intended use. The elasticity in demand based on the products' price is an important factor for establishing whether products having different prices may be included in the same market. Last but not least, certain industries require specific definition, like the pharmaceutical products which market is

defined at the level of ATC 3. In exceptional circumstances specific to the case under assessment, the council defined the product market as narrowly as possible as to include only one product of only one producer (e.g. case *Eli Lilly and Others*, where due to explicit specification in the tender documentation each producer participated in the tender via its distributors only for their own products excluding the inter-brand competition).

The geographic market is confined to the area where all the undertakings involved in the delivery of goods are established and in which the conditions of competition are sufficiently homogenous.

2.4 Is a safe harbour provided for low market shares and/or is there a presumption of dominance for high market shares? If so, what are the relevant market share thresholds?

In its recent case, the Competition Council constantly held that the finding of a dominant position at a market share of less than 40% is unlikely. However, as the market shares are not conclusive, the ability to act independently being the essential test, it is not excluded for a dominance to be found in the future despite the market share being lower than 40%.

2.5 How is dominance assessed in relation to after-markets?

There were few cases where an abuse of dominant position was found and even fewer where the abuse took place on a secondary market. *TREFO* was found to abuse its dominant position on the market of hard matte wire by not supplying and prohibiting its distributors to supply this product to its competitors who used it as a raw material for a different product. The council held that an abusive conduct on a primary market may have anti-competitive consequences on the secondary market. Therefore, it should be remembered that when an undertaking that is the only producer of the raw material of a product decides to vertically integrate its operations and introduce its own product, it has to continue to supply the raw material to its downstream competitors. The council imposed certain obligations on *TREFO*, among which to satisfy under reasonable and non-discriminatory conditions all its competitors' demands, including that of the company who filed the complaint.

Eight years later, the Competition Council took a different approach by deciding that there is no abusive conduct in providing fixed line communication services free of charge by a company dominant on the market of cable broadcasting services. In order to provide the fixed line communication services RDS employed the fibre optic network of RCS, which was a company belonging to the same group. The costs associated with the network use, maintenance and development were not reflected in the final costs for the fixed line services. Moreover, RCS offered for the purchasers of its cable broadcasting services the possibility of acquiring the services for the fixed line communication free of charge. The Council found that due to the long-lasting monopoly of Romtelecom on the market of fixed line communication, the offer of RCS was in the benefit of consumers who proved to be reluctant to switch to a different operator if such switch would incur any kind of costs. In this case, the interests of consumers prevailed.

3 Abuse

3.1 How is abuse defined? Is there a general standard? Is there a closed list of abuses?

Article 6 of the Competition Law defines the abuse of dominance as the recourse by the dominant company to an anticompetitive behaviour that either has as the object or effect the distortion of the economic activity or the harm of consumers. The said article provides for a list of actions that are primarily deemed to constitute an abuse of dominance, as follows:

- directly or indirectly imposing the purchase or resale price, tariffs or other unfair trading conditions and the refusal to trade with certain undertakings;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
- applying excessive or predatory prices for the purpose of eliminating competition, or exporting goods below the production costs and covering the loss by imposing excessive prices inside the country; and
- taking advantage of the economic dependency of a different undertaking due to lack of viable alternative under equivalent conditions, as well as terminating the contractual relationship for the sole reason that the other party refuses to comply with unjustified commercial restrictions.

Article 6 does not contain an exhaustive list of the matters within its mischief.

3.2 What connection must be demonstrated between dominance and the abuse?

The abuse must take place on the same relevant market on which a dominant position was evidenced, or on a closely related market in cases involving essential facilities, tying or bundling as explained below. Apart from the existence of a dominant company and the abusive behaviour, the council, in accordance with the law, requires that the economic activity or the consumers to have been negatively affected as a result of such behaviour (joined cases *UPC* and *Astral* from 2006). The alleged abusive conduct of a supplier that prohibited a number of its distributors to distribute a competing brand was not contrary to Article 6 as the distributors subject to the foregoing restriction amounted to 2% of the retail distribution market and the producer of the competing brand had viable alternatives. The council found that the economic activity was not affected and the consumers were not prejudiced by the supplier's conduct (case *Wrigley*).

3.3 Does certain conduct benefit from a safe harbour?

There are no Block Exemption Regulations for Article 6 of the law or a list of conducts which are considered to be of minor importance. However, market shares are an important factor in determining a dominant position.

3.4 Are certain types of conduct considered *per se* illegal, without a need to demonstrate actual negative effects on competition?

Not provided by the law. However, the Competition Council distinguishes between the abuse of dominance by object and the abuse of dominance by effect, without elaborating on the practical consequences in terms of applying the law between these two types of abuses. Usually the Competition Council looks at the effects before finding an abuse (please see question 3.2 above). Some actions, like significantly increasing the price without incurring additional production costs, are deemed to harm the consumers and is therefore prohibited under Article 6 of the law.

3.5 Can the unilateral conduct of a non-dominant firm be abusive, e.g. does your national law provide for special obligations where a particular customer is in a relationship of dependency?

The Competition Law prohibits any acts by which a dominant company exploits a customer who is in a relationship of dependency by imposing severe conditions and obligations upon the customer who cannot refuse due to the lack of a viable alternative. The infringement of Article 6 within this context requires the existence of a dominant company (case *National Forestry Authority* mentioned above, question 1.5). If the company is non-dominant, the Competition Council will only look whether there is an anti-competitive practice contrary to Article 5 of the said law.

4 Types of Abuse

4.1 Does the definition of abuse include both exclusionary and exploitative conduct?

Yes, Article 6 prohibits both types of abusive conducts aimed at harming the consumers (i.e. exploitative) and/or driving the competitors out of the market (i.e. exclusionary) which eliminates competition on the market and in the long-run negatively affects the final consumers.

4.2 To what extent is excessive pricing considered to be abusive?

Excessive prices are considered to be abusive if they are applied by a dominant company and if they are unjustified. In joined cases *UPC* and *Astral* from 2006, the dominant companies were found in breach of Article 6 by increasing their prices where there was no previous or simultaneous rise in the production costs. In a controversial decision, the Competition Council held that the increase by 62% in prices charged by the acquirer of a previously independent company for parking lots during the first two months after the acquisition did not amount to an abuse of dominance although the company held a dominant position on the relevant market as defined regionally. The council argued that the company undertook a substantial investment plan which led to the 62% increase in prices (decision no. 22/2004 in case *DALLI*).

By contrast, predatory prices are defined as prices applied by a dominant company which are so low that they cannot cover the average production costs (case *CONDEM SA* from 2006).

Predatory Pricing

4.3 Is there a price/cost test for evaluating predatory pricing? If so, what is the relevant measure of cost?

In order for a conduct to fall within the scope of Article 6 let. e) which incriminates predatory prices, there are four conditions that have to be concurrently met (case *Cony Sat* from 2004): (i) there is a dominant company; (ii) the dominant company abused its position by charging predatory prices; (iii) the abusive conduct's purpose was to make the competitors go out of business; (iv) by charging the predatory prices the trade or consumers were negatively affected. The prices are considered to be predatory if they are below the average production costs of the dominant company itself. The prices charged by a dominant State-owned company on the market of lab testing market in the agri-food field, which were significantly below the production costs incurred by competitors were not regarded by the Competition Council as predatory given that the difference was due to the fact that the dominant company was not bound to pay the VAT of 19% (case *Larex* from 2004). Besides the level of costs applied by the dominant company, the Competition Council looks also at whether the competitors were affected by the alleged conduct. The market foreclosure was not proved where the complainant and its competitors increased their revenues and market shares during the period covered by the alleged abusive behaviour. Nevertheless, the council has not explained why the revenues, rather than profits, should be taken into account and why no comparison was drawn between the increase in the market shares of competitors and the dominant company respectively. Other decisive aspects that might have indicated a future market foreclosure, such as the market's potential based on which the increase in market shares proves to be slow and insignificant evidencing in fact a weak market position held by competitors, did not play a role in the above outcome.

4.4 To what extent is recoupment relevant to the evaluation of predatory pricing?

The recoupment is achieved at a later stage and it does not exonerate the dominant company of the presumption that its conduct is abusive.

4.5 Is there a specific abuse of margin squeezing?

The margin squeeze is a form of exclusionary abuse by a vertically integrated entity that holds a dominant position at one level of the supply chain and by the prices that it applies it attempts to eliminate the competition it faces at a different level of the supply chain. Therefore, the margin squeezing may be assessed from two perspectives, namely: predatory prices; or refusal to supply.

In 2005, *ATLAS TELECOM* claimed a predatory abuse by RCS and RDS, two companies belonging to the same group. RCS was the operator that allegedly held a dominant position on the market of cable retransmission services and granted free access to RDS to its fibre optic network. The latter was active on the market of fixed line communication services and applied prices below the production costs of any other competitor, arguing that this is due to the fact that it had not have to pay for the use, maintenance and development of the network. Moreover, RCS offered for its services also the possibility of the customers to acquire fixed line services for free (including the actual telephone, free connection services and a number of free minutes for the entire duration of the contract covering the cable TV retransmission services). The

Competition Council was ready to apply Article 6 of the law if the following conditions were concurrently satisfied: (i) RCS held a dominant position on the upstream market of services for TV programmes cable retransmission; (ii) RCS abused its dominant position by recourse to an anticompetitive practice; and (iii) these practices had negatively affected the economic activity or the consumers on the fixed line services market on which RDS is present. Given that RCS did not hold a dominant position on the upstream market, the council found no abuse of dominance contrary to Article 6.

Rebates

4.6 Does the law distinguish between different categories of rebates? Are there certain legal presumptions that apply to particular types of rebates?

The law does not distinguish between different categories of rebates. The rebates and/or discounts were assessed by the Competition Council under Article 6 let. c) which prohibits the dominant company to apply dissimilar conditions at equivalent transactions, or equal conditions to different transactions, without an objective justification (case *Romanian Shareholders Registry* from 1999).

If the rebates are economically justified and granted in a non-discriminatory fashion, usually they are not caught under Article 6 (case *Galic vs Unilever* from 2007). However, loyalty rebates and/or target rebates (i.e. linked to certain volume targets which serve as a reward for the volume purchased during a reference period) are usually assessed by the Competition Council under Article 5 (prohibiting the anti-competitive practices) and based on the rules applicable to non-compete obligations.

4.7 Does the law recognise a "meeting competition" defence?

A company cannot be deprived of its right to protect its own commercial interests just because it is in a dominant position. A dominant company has the right to take such reasonable steps as it deems appropriate to protect its legitimate commercial interests taking due account of the special obligation incumbent on all dominant companies to refrain from further distorting competition by strengthening its position.

Refusal to Deal

4.8 In what circumstances is a refusal to deal considered abusive and is there a concept of an "essential facility" under your national law?

There is little practice by the Competition Council in this area and therefore the concept of essential facilities is not yet defined. However, when it had to deal with this concept, the council referred to and used the practice of the European Commission as guidelines. In one of its decisions (re. case *Romanian Shareholders Registry*), the Competition Council stated that the unjustified refusal to supply, to buy, to grant certain licences or to guarantee the access to certain essential facilities amounts to an abuse of dominance. In this case, the Romanian Shareholders Registry (RSR) had been for a long period of time the only provider of services related to shareholders' registries for companies that were under the legal obligation to keep such updated internal documents. After the National Securities Commission (NSC) authorised another 10 private companies to provide the same services, RSR attempted to

hinder the transfer and infringed Article 6 by (i) imposing more conditions than required by the law for such transfer to operate, (ii) requiring the beneficiaries that opted for the transfer to pay for services allegedly provided before the signing of the agreement, (iii) withdrawing all the facilities granted under the agreement and asking for immediate payment thereof, etc. In the absence of any of the foregoing, RSR would refuse to hand over the shareholders registry held until that time by it, thus preventing the transfer to any of the private companies previously authorised by NSC. The Competition Council found the attempt abusive as it was not justified and prevented an effective competition being restored on the monopolistic market.

In a subsequent case from 2004 the Competition Council found that ceasing the supply of two components essential for the production of a pharmaceutical product named *piafen* where there were no other substitutes for the aforesaid components was contrary to the Competition Law due to the lack of a reasonable economic justification. The producer of the two components entered into individual supply agreements with two undertakings producing *piafen* and it subsequently ceased the supply only in relation with one of them. Although the council underlined the monopolistic characteristics of the relevant market providing further arguments which are typically used in relation with an abuse of dominance, it incriminated the supplier and the remaining buyer under Article 5 of the Competition Law (dealing with anti-competitive practices).

4.9 Is a distinction drawn between termination of supply and *de novo* refusal of supply?

Normally there is no distinction made between termination of supply and the refusal to supply a newcomer. Both conducts are deemed to be abusive if there are no economic grounds that justify the conduct. However, in practice it proved to be more difficult to justify the cease of supply rather than turning down a new offer.

4.10 Is a distinction drawn between a refusal to supply involving intellectual property rights and other refusal to deal cases?

The Competition Council applies the indispensability case according to which the refusal to supply is deemed abusive if there is no alternative under equivalent conditions. Whether the conditions are equivalent or not is determined on a case-by-case basis taking due account of legal and factual issues.

Tying and Bundling

4.11 Does the law distinguish between different forms of tying and bundling?

No. The Competition Law does not expressly prohibit any of the above forms of abuses as such, but it incriminates the predatory behaviour by applying prices which are lower than the average production costs, as well as making the conclusion of a contract subject to commercially unjustifiable obligations. The competition authority also acknowledged that the abuse of a dominant position may take place on a different market than the market on which the dominance was evidenced.

The Government Ordinance no. 99/2000 regarding the sale and advertising of products and services on the market expressly prohibits the conditional sale which is defined as conditioning the sale of one product upon the purchase of a certain quantity of that product or the simultaneous purchase of a different product or

service. It is assimilated to a conditional sale also the provision of a service conditioned upon the provision of a different service or the purchase of a different product. The authority competent to investigate tying practices and apply sanctions under the aforesaid legal provisions is the National Authority for Consumer Protection. Additionally, the Competition Council has the possibility to apply Article 6 of the Competition Law, should the selling company be dominant, and impose fines if the conduct is abusive.

Therefore, whereas tying is prohibited *per se* irrespective of the market share of the company involved into tying, the bundling is normally permitted as it is a mere inducement rather than a compulsion to buy a product/service along with another product/service.

4.12 Does the law adopt a form or effects-based approach? Are there any tests which are used to determine legality?

The law prohibits the abusive conduct of a dominant company which either has as object or effect the distortion of competition on a relevant market. However, in all the cases decided by it, the Competition Council looked at the effects of the incriminated conduct and only where the competitors or the final consumers were negatively affected, the council made use of Article 6. It is noteworthy that there is no universal test applied by the Competition Council in relation to all types of tying or bundling practices. The market specifics played a decisive role in case *RCS/RDS vs. Atlas* (please see question 2.5 above) where the council chose not to oppose the tying practice of RCS in order to promote competition on a monopolistic market.

4.13 In what circumstances would bundling and tying be objectively justified?

Under Article 6, tying and bundling may be objectively justified for various reasons, such as safety and quality, product improvement, costs saving, technically satisfactory exploitation of the tied product, etc.

Discrimination

4.14 Does the mere fact that parties are being treated differently render such conduct abusive or otherwise unlawful in Romania or does the law require demonstration of actual or likely anti-competitive effects?

The law requires for the party treated differently to be placed at a competitive disadvantage on the market and therefore the effects normally have to be demonstrated along with the dominant position held by the company alleged to have infringed Article 6 and the dissimilar conditions for equivalent transactions, or the equal conditions for different transactions, as the case may be. In practice the competitive advantage was to a great extent presumed to exist every time the party subject to a different treatment was bound to comply with more onerous contractual provisions, either in terms of guarantees required, payments, quantities imposed, etc.

Other Abuses

4.15 Are there examples where systemic abuses of administrative or regulatory processes and/or aggressive litigation strategies have been characterised as abusive?

Not under Article 6 of the Competition Law.

4.16 Are there any examples where a misuse of the standard setting process has been characterised as abusive?

The approach of the Competition Council in cases similar to *Rambus* or *Qualcomm* has not yet been determined. When confronted with cases as the aforesaid, the council will most probably refer to the practice of the European Commission in this area.

4.17 Please provide brief details of other noteworthy abuses not covered above.

The Competition Council has not been reluctant in finding a dominant position held by a (previously) state-owned company on a given market merely by virtue of special or exclusive rights conferred upon it under special enactments. Where the exclusive rights were exercised in a manner contrary to Article 6 of the Competition Law, the council asked the competent public authority to amend the enactment so as to provide equal opportunities to all private operators active on the market (e.g. case *CFR Marfa*).

5 Public Enforcement

5.1 Which authorities enforce the legislation against abuse of dominance? What is the role of sector-specific regulators?

Any undertaking that is prejudiced by the abusive conduct of a dominant company may either file a complaint with the Competition Council or directly address the court. The sector-specific regulators may not override the legal requirements established under Article 6 of the Competition Law.

5.2 What investigatory powers do the enforcement authorities have?

To enforce antitrust legislation and restore the normal competitive environment the Competition Council was empowered with various investigative powers. The council may undertake investigations upon its own initiative (*ex officio*) or following a complaint lodged to that effect by a natural or legal person, or by a public authority. In its investigatory work, the Competition Council was delegated the power to require information, having the prerogatives to apply a fine for incorrect or false information. The Council may use information that is already available to it, information that is provided voluntarily, information that the parties were compelled to provide based on a specific request, as well as documentary evidence seized during a dawn raid.

Apart from requiring the production of specified information, based on an order issued by the chairman, the Competition Council may carry out on-site unannounced inspections at the business premises of the investigated company where it has unlimited access to information and it can seize documents that are relevant for the case under assessment. The dawn raid may cover all the offices, lands and transport means belonging to the investigated undertaking. During the dawn raid the council may also interview the representatives and employees of the investigated company in connection with any relevant facts and documents. If a reasonable suspicion exists that relevant documents related to the subject-matter of the investigation are being kept in other premises, lands, or transport means, such as the ones belonging to the managers, directors or employees of the investigated company, the Competition Council may enter and search such other places based on an order issued by the chairman of the council and a court

warrant issued by the president or the delegated judge of the tribunal which has territorial jurisdiction over the place where the inspection is envisaged to be conducted.

The Competition Council may also launch sector inquiries when it does not have specific information about anti-competitive conduct but is concerned that the market is not operating as it should. A sector inquiry can only be initiated if it can be related to Articles 5 or 6 of the law. During a sector inquiry the council has the same powers as above-listed.

5.3 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions? What are the timescales?

The Competition Council is not restricted by any time-limits in conducting and completing its investigation. The right of defence of the investigated undertaking is guaranteed in all cases and consequently the latter typically has access to the file and can make copies of all the documents that may serve at building a proper defence. If the investigation leads to the conclusion that there is no infringement of Article 6, the Competition Council will close the investigation by an order of its chairman. Provided that the investigation was not opened based on a third party's complaint, the Competition Council may close the file even without giving the complainant the opportunity to be heard. By contrast, if the investigation reveals a breach of Article 6, an investigation report is drawn up and communicated to the parties involved 30 days before the oral hearing is scheduled to take place. During and after the hearing, the participants may raise new aspects and provide new evidence. The investigation normally results in a decision of the council whereby the abuse conduct is incriminated and an adequate fine is imposed, together with other measures as the case may be, or no abuse of dominance is found and the investigation is consequently closed.

5.4 What are the sanctions and remedies that may be imposed in an abuse of dominance case? Do these include structural remedies?

Any dominant company that abused its market position contrary to Article 6 of the Competition Law is subject to a fine of up to 10% of the turnover achieved in the preceding business year. The fine may be applied either by the Competition Council or directly by the court and will have in view the entire turnover and not only the turnover achieved on the relevant market. The Competition Council may also apply periodic penalty payments not exceeding 5% of the average daily turnover in the preceding year per day and calculated from the day of the decision, in order to compel the infringing party to comply with the decision and bring the infringement to an end, produce the required information and/or submit to an inspection.

In addition to the foregoing, the Competition Council may request the Bucharest Court of Appeal to eradicate the dominant position by taking one of the following measures suggested by the council:

- annulling the contracts that facilitate the abusive conduct, entirely or partially;
- limiting or prohibiting the access on the market;
- the sale of assets; or
- the spin-off or restructuring of the dominant company.

It is noteworthy that to date no such structural remedies were pursued by the competition authority.

Last but not least, it is worth mentioning that in the wake of the Romania's accession to the EU, the Competition Council and the

domestic courts may directly apply Article 82 EC and impose sanctions triggered by the application of the aforesaid Community provisions.

5.5 Can abusive conduct amount to a criminal offence?

According to Article 60 of the Competition Law, the abuse of dominance amounts to criminal offence and might trigger the imprisonment of the persons involved in the abusive behaviour for a period between 6 months and 4 years or a fine.

5.6 How often is the legislation enforced in practice?

During the last five years the Competition Council reviewed around 30 cases of abuse of dominance, out of which only 3 cases led to a decision finding an infringement and imposing the appropriate sanctions (i.e. one in 2004 and two in 2006).

6 Private Enforcement

6.1 Can the legislation be enforced in private actions before your national courts?

Yes, and there is no pre-condition to first address the matter to the Competition Council before going to court.

6.2 To what extent is interim relief available?

The interim relief may be awarded by the court in accordance with the applicable provisions of the Civil Proceedings Code. Before taking any decision under Article 6 of the law, if the practice is manifestly unlawful the Competition Council may impose any interim measures aimed at restoring the *status quo* and preventing a severe and certain prejudice.

6.3 To what extent are private damages available and can punitive damages be awarded?

The Competition Law provides for the right of third parties to seek damages in court that would recover the loss incurred as a result of the abusive conduct. Damages awarded to third parties beyond the actual loss, imposed as a punishment for the defendant's wrongdoing are not expressly provided for by the law and therefore not available in Romania.

6.4 How frequent are private enforcement actions before your national courts?

The jurisprudence of the national courts in connection with private actions is rather scarce and non-conclusive given the difficulty in determining and proving the actual loss and the time and costs required by a trial.

7 Defences

7.1 What defences are available to a firm accused of abusing its dominant position and to what extent are efficiencies taken into account?

Article 6 of the Competition Law does not exempt any abusive behaviour from its application. No other official document summarising the official stance of the Competition Council towards possible defences that a dominant company may invoke has been drafted so far. Thus, the arguments that a dominant company may use in its defence depend to a large extent on the type of the abuse, the specific of the case and the previous decisions of the competition authority (see for example question 2.5 above).

8 Recent Developments

8.1 Please provide brief details of significant recent or imminent developments not covered by the above in relation to Romania.

There are no developments made recently or expected to be achieved in the near future. However, there is a manifest need of the market players for the Competition Council to review its Regulations and Guidelines issued the last time in 2004. There were few decisions of the Competition Council under Article 6 of the law that may serve in fact as guidelines to the market players. Although some of them touched important aspects and concepts such as essential facilities, or rebates, the circumstances under which they may be deemed lawful have been scarcely elaborated by the Competition Council and therefore they cannot provide the expected level of legal certainty. An official stance of the Competition Council towards the most recent key developments of the European Commission in the field of Article 82 EC is increasingly required.



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Ms Anca Buta Musat, Partner, coordinates Musat & Asociatii's long recognised Competition practice. She has an extensive experience in dealing with the whole array of competition issues, covering merger control, agreements between competitors, restrictive vertical agreements such as licensing and distribution, abuse of dominant position, exclusivity arrangements, technology transfer agreements and category management contracts. Ms Buta Musat has substantial knowledge and expertise in assisting the clients both before the European Commission and the Romanian antitrust authority for obtaining the requisite approvals, such as merger control authorisations or individual exemptions in connection with various agreements or transactions across a wide range of industries, including automotive, aviation, food and beverages, biotechnology, pharmaceutical, broadcasting and communication, chemicals, consumer products, energy, forest products manufacturing, packaging and telecommunications. The expertise of Ms Buta Musat also covers cartel investigations and related damage claims, leniency filings, sector inquiries, dawn raids, compliance programmes, State aid, public procurement and liberalisation.

Ms Buta Musat also specialises in Intellectual Property law, with particular focus on patents and technology litigation, industrial designs and trademarks registrations, as well as designing programmes for ensuring transnational protection.

Ms Buta Musat holds an LLM in Transnational Business Practice from the University of Salzburg/University of the Pacific and a PGD in Competition from King's College in London. She speaks Romanian, English, French and Greek and is a member of the Bucharest and Romanian Bar Associations.

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Musat & Asociatii's name stands for a high level of expertise in business matters and is therefore a leading law firm in Romania.

For almost 20 years, Musat & Asociatii has acted on behalf of multinational investors, banks and other financial institutions, venture capital funds, major Romanian public and private companies and government agencies. The firm focuses on providing value-added legal services, having proven to contribute full capacity and resources to properly understand and address its clients' goals and demands.

The practice covers the entire spectrum of business activities, the firm being the undisputed market leader in the fields of commercial and corporate law, competition, project finance, banking / finance and capital markets, mergers / acquisitions and privatisation, communications and information technology, and intellectual property law, delivering a broad and unparalleled expertise in all these areas. Musat & Asociatii has developed particular expertise in areas as pharmaceutical industry, broadcasting and communication, aviation, IT technology and financial services, as well as food industry. The firm has excellent litigation resources as well, extending to dispute management and arbitration.

Musat & Asociatii is the exclusive TerraLex representative in Romania, and has close contacts and alliances with some of the most prestigious law firms in the European Union and US, enabling the provision of a fully global client service.