# The Dominance and Monopolies Review

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# Chapter 18

# ROMANIA

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## I INTRODUCTION

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 that 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.

The direct purpose that 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 that typically promotes consumer welfare in the long term. Sometimes, however, the subsequent objective serves as the underlying test, it being automatically considered, until recently, that the harm of competitors negatively affects the final consumers.

Given that there is no regulation that generally describes types of conduct caught by Article 6 of the Competition Law, an alleged abuse of dominant position is normally assessed from the perspective of the practice of the Competition Council and the jurisprudence of the Romanian courts. The competition authority also carried out sector inquiries into various industries, such as pharmaceuticals, brewery, energy, the most recent inquiries being launched in 2013 and focusing on electronic communications and pharmaceuticals. The sector inquiry reports eventually published by the Competition Council may serve as valuable guidelines both for legal practitioners and companies in respect of their market conducts.

It should be borne in mind that little secondary legislation has been passed by the Competition Council in relation to sector-specific conducts, such as the Instructions

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applicable to agreements providing access to electronic communications infrastructure, adopted in 2011.

Article 6 of the Competition Law applies to undertakings. An undertaking is an entity engaged in 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, insofar 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 Law whereby there are prohibited any actions of the central or local public bodies that have or may have as their object or effect the distortion, restriction or elimination of competition, particularly the following:

*a* limiting the free trade or the autonomy of the undertakings to freely compete in accordance with the laws; and

*b* establishing discriminatory conditions against some undertakings.

## II YEAR IN REVIEW

In 2012 the Competition Council dealt with eight cases involving a complaint against an abuse of a dominant position contrary to the Competition Law. These cases had in view excessive prices, discriminatory prices, exploitation of the economic dependence and refusal to grant access to an essential facility. However, no abusive conduct was found and therefore no sanction was imposed by the competition authority.

One of the most noteworthy cases is the *Prodgaz Campina* case, which dealt with excessive and discriminatory prices charged by a company holding a monopoly. What is interesting about this case is that the competition authority was willing to accept commitments and ended the case without finding an infringement, although the abusive conduct was more than obvious. Thus, for a number of years Prodgaz Campina will be subject to a monitoring process conducted by the Competition Council and any failure of the investigated company to fully implement the undertaken commitments may result in a fine of between 0.5 and 10 per cent of its total turnover.

A controversial case decided by the Competition Council in 2012 is the *Olanesti Riviera* case that dealt with the refusal to grant access to an essential facility. For a number of years, Olanesti Riviera has been the exclusive beneficiary of a licence granted by the state for the exploitation of water from the springs rich in particular minerals located in the Baile Olanesti geographic area. The existence of these springs and the possibility to benefit from balneotherapy were the main reasons for which the area developed. Olanesti Riviera entered into a number of contracts with various companies providing accommodation services for the purpose of granting access to these mineral waters to other tourists than its own. However, just before the public auctions Olanesti Riviera closed its offices and refused to enter into any negotiations for the renewal of the said contracts, knowing that in the absence of a valid contract with Olanesti Riviera its competitors on the upstream market could not have participated in the tender and therefore could not have been assigned any tourists for accommodation and treatment. Four complaints were lodged with the Competition Council against the said abusive conduct. Despite the findings

of the investigation report, the Competition Council found that the abusive conduct was not proven beyond any doubt. Nevertheless, the Council imposed an extensive list of binding recommendations upon the owner of the essential facility and requested the latter to submit annual reports regarding the compliance with such recommendations.

It is worth noting that an increasing number of formal and informal complaints are lodged with the Competition Council claiming abusive conduct on the part of the owners of infrastructure or communication networks amounting to an essential facility in a neighbouring market. As a result of such, the Council recently launched an inquiry into the electronic communications sector. However, the market players still expect the Romanian competition authority to seriously deal with the individual cases brought before it by various undertakings.

## III MARKET DEFINITION AND MARKET POWER

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 (currently Article 102 TFEU). However, the Council acknowledged that there are several criteria based on which dominance may be found and the market share is a clear indication of such. Other criteria 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 the *Heineken* case the Council authorised an economic concentration on the beer market despite the fact that as a result of such the acquirer gained 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.

It is noteworthy that one of the last amendments brought to the Competition Law sets out a presumption according to which any company holding a market share of 40 per cent or more is presumed to be dominant. This is a relative presumption that can be rebutted by providing evidence to the contrary. However, recent cases of the Competition Council showed that a market share of at least 40 per cent was sufficient for finding a dominant position. Thus, in the most recent decision of the Competition Council under Article 6 of the Competition Law, the Council found that despite the presence of 34 undertakings on the relevant market and despite the significant potential competition, the company against which the complaint was lodged held a dominant position merely because it held a market share of 46 per cent. Thus, although it is only a relative presumption, the 40 per cent threshold became the leading test in determining whether the company holds a dominant position.

The Competition Council refers to the same definitions of relevant markets (product and geographic) as those used by the European Commission. However, in some cases the Council took a controversial stance. For example, when it comes to public tenders, the Competition Council is more inclined to define the relevant market so as to include all the products requested in that tender although such products are not even similar, not to say interchangeable in terms of characteristics, prices or consumers' demand. In certain cases (especially in public tenders for the acquisition of

pharmaceutical products), the relevant market was defined per product requested in the tender. The consequence of that was that every producer became dominant, holding a 100 per cent market share.

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 as to provide equal opportunities to all private operators active on the market (e.g., the *CFR Marfa* case).

## IV ABUSE

### i Overview

As previously mentioned, Article 6 of the Romanian Competition Law provides for a non-exhaustive list of what amounts to an abuse of dominance. The most common forms of abuse refer to refusal to deal, refusal to supply, applying dissimilar conditions to equivalent transactions, refusal to give access to infrastructure, etc. All the aforementioned may constitute abuse of a dominant position if there is no commercial and objective justification. To what extent a conduct can be commercially and objectively justified is a matter of practice of the Competition Council.

There are no Block Exemption Regulations for Article 6 of the Law or a list of conducts that are considered to be of minor importance.

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

### ii Exclusionary abuses

The most encountered forms of exclusionary abuses are detailed below.

In order for a conduct to fall within the scope of Article 6(e), which incriminates predatory prices, there are four conditions that have to be concurrently met (*Cony Sat* case from 2004): (1) there is a dominant company; (2) the dominant company abused its position by charging predatory prices; (3) the abusive conduct's purpose was to make the competitors go out of business; and (4) 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 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 per cent (*Larex* case from 2004). Besides the level of costs applied by the dominant company, the Competition Council also looks 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.

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 squeeze may be assessed from two perspectives: 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 was because it did not have to pay for the use, maintenance and development of the network. Moreover, RCS also offered as part of its services the possibility for customers to acquire free fixed-line services (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: (1) RCS held a dominant position on the upstream market of services for TV programmes cable retransmission; (2) RCS abused its dominant position by recourse to an anti-competitive practice; and (3) 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.

Loyalty rebates and exclusivity should be carefully assessed by the dominant companies.

### iii Discrimination

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 by applying dissimilar conditions for equivalent transactions, or equal conditions for different transactions, as the case may be. In practice the competitive advantage was to a certain 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.

### iv Exploitative abuses

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 raise in the production costs. In a controversial decision, the Competition Council held that the increase by 62 per cent 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 that led to the 62 per cent increase in prices (decision No. 22/2004 in the *DALLI* case).

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

## V REMEDIES AND SANCTIONS

### i Sanctions

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 per cent 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 per cent 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.

### ii Behavioural and structural remedies

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.

## VI PROCEDURE

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 prerogative 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, land 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 on other premises, land or transport means, such as those 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 that has territorial jurisdiction over the place where the inspection is envisaged to be conducted.

Various fines have been imposed by the Competition Council for a company's refusal to submit itself to a dawn raid, as well as for a company's failure to provide the requested information within the time limits set by the Council.

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 listed above.

Once the investigation is started, 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.

## VII PRIVATE ENFORCEMENT

The legislation in the antitrust field can be enforced in private actions before the national courts and there is no precondition to first address the matter to the Competition Council before going to court. However, addressing the court for the first time normally triggers the assessment made by the court *prima facie*, meaning that the court would first have to determine the existence of a dominant position and the abusive conduct and then establish whether an action in damages is admissible. The advantage of first approaching the Competition Council is that the eventual decision of the Council finding an abuse of a dominant position serves as proof of an illegal act. The court would then have to only assess the damage and establish the causal link between the illegal act and the actual harm. However, this advantage is only available for undertakings. The final consumers who are the victims of the abusive conduct do not have the possibility of filing a complaint with

the Competition Council that would then strengthen their position in court. The final consumers may enforce their right to compensation only in court.

Thus, as a principle, third parties may 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 wrong are not expressly provided for by the law and therefore not available in Romania.

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. The lack of an effective legal framework (in Romania collective actions are not available), together with the passive role of the Competition Council in promoting legislative initiatives that would facilitate antitrust damages actions, led to an almost non-existent practice of domestic courts.

## VIII FUTURE DEVELOPMENTS

From the public information available, we do not expect at this stage any legislative amendments to the current legislative framework applicable to the abuse of a dominant position.

However, several economic sectors have been identified by the Competition Council in its annual reports as being under continuous scrutiny of the Council due to either their impact on the economy as a whole or their special importance to final consumers. Such economic sectors with an impact on the economy as a whole are the following:

*a* energy;
*b* financial and banking services;
*c* transport;
*d* constructions (including construction materials);
*e* telecommunications;
*f* insurance; and
*g* vehicle, tool and equipment production.

The economic sectors monitored by the competition authority for their impact on individual consumers are as follows:

*a* pharmaceuticals;
*b* medical services;
*c* food retail;
*d* media;
*e* liberal professions;
*f* real estate; and
*g* public utilities.

Although a great number of investigations and sector inquiries shed some light over the application of antitrust rules to the above-listed sectors, only a few cases on abuse of a dominant position have been dealt with by the Competition Council.

The long-awaited decision in the *Roche v. Relad* case is expected to clarify to what extent a producer holding a dominant position on a given market can implement a supply allocation policy in relation with its distributors. More precisely, the Competition Council will ascertain under what circumstances the oversized orders can be rejected by the dominant company.

The new cases brought to the attention of the Competition Council could also provide valuable guidance to all market players regarding the extent to which a holder of an infrastructure or electronic communications network may interfere with the competition that takes place in a neighbouring market.

## Appendix 1

# ABOUT THE AUTHORS

**ANCA BUTA MUŞAT**

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Anca Buta Mușat has coordinated the competition law practice of Mușat & Asociații for more than 10 years. She has impressive experience in dealing with the whole range of competition law issues such as merger control and anti-competitive practices and conduct, having represented clients both before the European Commission and the Romanian Competition Council. Her track record includes advising on exclusivity arrangements, cartels, enforcement mechanisms employed by the Competition Authority, negotiations on remedies endorsing antitrust approvals, compliance counselling (including training and dawn-raid simulations), as well as state aid-related issues and public services contracts.

Mrs Anca Buta Mușat is also an IP-certified attorney and one of Romania's leading practitioners in pharmaceutical and IP law, providing integrated legal assistance to major clients on the management of their IP portfolios and coordinating related disputes.

Mrs Anca Buta Mușat is constantly involved in promoting competition law initiatives, by means of public debates and position papers. She assisted clients in a wide variety of industries, including brewing, construction, pharmaceuticals, medical devices, software, internet infrastructure, retail services, food, cosmetics, mass media, banking, etc. Among her recent clients are major corporations such as Orange, Enel SpA, Generali Holding Vienna, Hoffman La Roche, Eli Lilly, Novartis, SABMiller, Colas, Gaz de France, Lundbeck, SBS Broadcasting, Electrolux, Sig Sauer GmbH, KBC Bank, Jones Apparel and Electrolux.

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