

## Competition - Romania

New rules for access agreements and telecommunications sector

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### Introduction

On March 4 2011 the Competition Council published a new set of rules with a view to enhancing competition in the telecommunications sector and harmonising Romania's legal framework with EU rules. In particular, it has sought to:

- determine the competition law principles applicable to access agreements with a view to creating or maintaining a competitive market;
- define and clarify the relationship between competition law and sector-specific rules and regulations, with special attention to the relationship between competition law and the laws on access and interconnection to electronic communications networks; and
- explain the application of competition rules to the provision of new electronic communications services, particularly as they affect access.

### Competition law and sector regulation

In recent years the council has faced a serious problem regarding the precedence of norms - that is, the potential conflict between competition laws and sector-specific regulations. On several occasions enforcement of the Competition Law (21/1996) has been challenged by parties in regulated industries, such as gas or private pensions. In order to avoid potential stalemates in future, the guidelines provide that sector-specific regulations issued by the National Authority for Management and Regulation in Communications (ANCOM) must be submitted to the council in order to obtain a definitive opinion on their compatibility with current competition provisions. This rule aims to avoid subsequent conflicts or challenges regarding inconsistencies between telecommunications rules and general competition regulations. However, the guidelines unfortunately fail to specify what happens if ANCOM enacts sector-specific rules without the council's opinion.

### Assessing access agreements

The guidelines set out the course of action that the council will adopt when assessing an access agreement. It will:

- launch an investigation following receipt of a complaint against:
  - a restrictive access agreement; or
  - an undertaking in a dominant position in respect of the latter's refusal to grant access (or the terms on which access is granted);
- initiate an *ex officio* investigation concerning the refusal (or the terms on which access is granted); and
- start a sector inquiry.

In light of the structure of the telecommunications sector, the guidelines acknowledge that two types of relevant market may be defined: one for services provided to end consumers and one for access to essential facilities for the provision of such services. Considering the particular features of the markets, the council has stated that in each case under assessment, it will be necessary to define both access and services

markets.

The guidelines define the market for services provided to end consumers as comprising the provision of any electronic communications service to end users. The market for access is defined by reference to circumstances that may arise in situations where access is sought by potential competitors and where dominant undertakings retain an element of control in respect of such access.

### Existence of dominance

On the question of applying competition principles in the telecommunications sector, the guidelines refer to the provisions on enforcement in Articles 5, 6 and 9 of the law. In order for an undertaking to be considered dominant, it is insufficient merely to consider its rights. Similarly, a dominant position is not deemed to be eliminated by the mere termination of a legal monopoly.

The guidelines also set forth the following minimum conditions that must be satisfied in ascertaining the existence of collective dominance and a non-compete agreement between parties:

- Each member of an oligopoly must be able to ascertain the other members' behaviour in order to monitor whether they are adopting a common policy.
- This tacit coordination must be sustainable over time (ie, there must be an incentive to comply with a common market policy).
- The results of enforcing such a policy must be unaffected by the potential reactions of competitors or consumers.

### Effects of restrictive access agreements

On the enforcement of Article 5 of the law - the equivalent of Article 101 of the Treaty on the Functioning of the European Union - the guidelines state that restrictions of competition included in access agreements (or resulting therefrom) may have two distinct effects: the restriction of competition between the two parties to the agreement and the restriction of competition for third parties. Moreover, when a party to the agreement enjoys a dominant position, the clauses therein which restrict competition may lead to the consolidation of a dominant position (or the extension thereof) or the unlawful exploitation of a dominant position through the imposition of unfair conditions.

Access agreements do not constitute restrictions of competition in themselves. However, when exclusivity obligations are contained in agreements for access provision, such provisions may amount to restrictions of competition if they limit access to infrastructure for other companies. Although such agreements may provide competition benefits, such as improved access in downstream markets, they may also be used as instruments for anti-competitive practices, such as price fixing, market sharing, the exclusion of third parties and the exchange of sensitive information.

### Comment

On the basis of the guidelines, competition rules and sector-specific regulations make up a unified and coherent set of norms, aimed at ensuring a competitive environment within the Romanian markets for electronic communications.

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