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Core principles of the Romanian antitrust law

The Romanian Competition Law (RCL) 21 applies only to anti-competitive practices and mergers, so the title of competition law may be too broad, as it was properly enacted as an antitrust law. Article 1 RCL is aimed “to protect, maintain and stimulate competition and a normal, competitive environment” and emphasises that the consumers’ interests should be protected. As a short-term goal, RCL tried to encourage and stimulate small- and medium-sized enterprises.

Article 6 of the RCL prohibits only the abuse of a dominant market position, not certain types of anti-competitive behaviour and unlike EC law uses the phrase “economic agent or agents” instead of “undertaking”. The responsible Romanian investigative and enforcement institution is the Competition Council (CC), which is set up as an autonomous administrative competition authority.

Under the RCL, abuse of dominance occurs when the three elements are found by the CC to exist simultaneously: one economic agent or more holds a dominant position on the Romanian market or on a substantial part of it; the economic agent or agents is abusing its dominant position by resorting to anti-competitive behaviours; and such behaviours have as an object, or may have as an effect, the distortion of commerce or the prejudice of consumers. The last condition contains two different elements from Art.82 EC. First, it is only fulfilled insofar as such behaviours have the object of distorting competition. Secondly, it emphasises the existence of an alternative to the “distortion of commerce”; namely the “prejudice of consumers”. The CC has applied these conditions inconsistently, as it identified not just three, but four, cumulative conditions, by splitting the last one in two.4

Article 6 of the RCL provides a non-exhaustive list of anti-competitive practices, which may, in particular, overlap with the examples of abuses in Art.82 EC. Article 6(a) to (d) are copied directly from Art.82. For this reason, it is only worthwhile to discuss the distinctive behaviours listed in art.6.

Article 6(a) includes a prohibition on imposing unfair fees, aside from pricing, but failed to expressly include rebates. The RCL uses the term “other unfair contractual clauses”, which might provide for a broader interpretation that allows more possible new cases, but does not define what clauses are considered unfair.1 It includes refusal to deal with certain suppliers or customers. Apparently, the legislators did not consider the possibility of firms refusing to supply or to grant access to facilities. But, art.6(f) does prohibit an economic agent from exploiting the economic dependence of another economic agent that does not have an equivalent alternative, which could be interpreted as a refusal to grant access to facilities or a withdrawal of supply. It still does not provide explicit examples of exploitation. However, these provisions

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1 Republished in [2005] OJ 742.
2 Since 2003, the CC’s decisions have been available at http://www.consiliulconcurentei.ro.
3 CC decision no.77, Atlas Telecom Network Romania v RDS & RCS, April 25, 2005, at [6].
4 CC decision no.46, Burtila & Co Electron v Astral Telecom, March 15, 2005, at [5].
5 Previously, the RCL had defined tying as an unfair practice.
are now made redundant by the specific rules of
the Framework Guidelines7 to access agreements in
telecommunications. In this context, art.6II(f) prohibits
the practice of breaking contractual relations solely
because a partner refuses to accept certain unjustified
commercial conditions.8

Article 6(e) explicitly mentions charging excessive
or predatory prices aimed at eliminating competitors,
while art.6II(e) defines a unique regulation prohibiting
the abusive practice of exporting at prices below
production costs and covering the difference through
deeper domestic prices. What could be the outcome
of this provision? The question of whether this could be a
cross-subsidy of low-priced exports with high domestic
prices, or a safeguard against monopoly pricing, still
needs to be carefully analysed.

Elements for establishing dominance

Unlike EC law, whose jurisprudential definition of dom-
inance still stands today,9 Romanian legislators have
adopted the second element of the legal test,10 defining
dominance as a situation where “an economic agent is
able, to a considerable extent, to behave independently”11
towards its actual and potential competitors.12

The definition of the relevant market is decisive,
because too narrow or an incorrect definition will result
in finding that there is no monopoly power. The relevant
product market is legally defined13 and depends on the
concept of demand substitution. Generally, the CC uses
the hypothetical monopolist test (“SSNIP” test) as for
mergers,14 where the key question is whether there are
close substitutes for the product(s) in question, if the
product’s price were raised above competitive levels by

6 Guidelines on the application of the competition rules to access
7 France Telecom SA (formerly Wanadoo) v Commission of the European Communities (T-340/03) [2007] 4 C.M.L.R. 21 at
[99].
9 Potential competitors are defined as economic agents who are able to penetrate the relevant market with products from other
geographical area, including imported products.
10 Regulation for the application of the provisions of arts 5 and
11 “Small but significant, non-transitory increase in relative prices”: see Notice on market definition in order to establish the
substantial relevant market art 3(4) [2004] OJ 248.
12 Regulation for the application of the provisions of arts 5 and
13 CC decision no.77, Atlas Telecom Network Romania, April 25, 2005, at [10(3)](2).
14 “Small but significant, non-transitory increase in relative prices”: see Notice on market definition in order to establish the
substantial relevant market Art 3(4)(b) [2004] OJ 248.
15 CC, decision no.135, December 21, 1998, not published. See
C. Butacu and A. Miu, “Aspecte teoretice și practice ale abuzului
Other difficulties measuring market power appear because of lack of economic data. The most important factors remain market shares and barriers to entry. However, the CC does not always consider market share alone as sufficient to assess dominance. It may be paradoxical to point out that the CC, by using a structural analysis of the relevant market, found Trafo, with a market share of only 18 per cent, to be dominant.\(^{17}\) When looking at the period of time over which the market power is exercised, these findings were quite exaggerated. In Atlas,\(^{18}\) the CC stated that a dominant position is “unlikely” to exist with a market share of 25 per cent. In Regisco,\(^{19}\) the CC found dominance in the market for registration of shareholders’ undertakings, by analysing only the market shares on the relevant market of 100 per cent, in 1997 and 96.4 per cent, in 1998. These were compared with the amount of shares owned by the shareholders of Regisco, without looking at the period of time of just one year.

In Astral,\(^{20}\) its share of the national market for cable services was compared to the shares of two competitors and to assess its capacity to behave independently, the existence of barriers to entry. Given the lack or insignificance of such barriers, as the market is completely liberalised and licenses\(^{21}\) for setting up cable networks are more freely granted, it concluded that market entry is not difficult. In assessing dominance, the essential premise\(^{22}\) was whether Astral had a dominant position, based on which the CC rejected the alleged infringement of art.6(e) of the RCL and avoided the difficult analysis of costs.

In order to evaluate the position held by RCS\(^{23}\) on the national cable TV market, the CC looked not only at the relative size of market shares owned by its competitors, but also at the exercise of its power, “over a specific period of time”, that time being its first entry into the market without a big market share, and at the characteristics of the telecommunications market, which is a dynamic one. The CC concluded that in such a market, preserving dominance is more difficult than it would be in a mature, stable market.

Barriers to entry are another key issue to determine whether entry is likely to be difficult and whether there are entry costs. In RCS\(^{24}\) no entry barriers were found as the telecommunications market is “completely liberalised” due to a simplified licensing system. The Gas Sud case\(^{25}\) concerned the monopoly policy regarding tariffs for connections to the gas distribution network in areas requiring a distribution license. According to the Gas Law\(^{26}\) the licensed distributors have exclusive access to markets in the areas specified in their licenses. The owner of such a license is obliged to build up the necessary infrastructure for bringing natural gas to consumers; afterwards, every consumer is free to apply for and obtain access to the network.\(^{27}\) Such an exclusive license was not considered a barrier in the sense of impeding access to the gas market. In the industrial waste market\(^{28}\) the CC examined whether the existence of two authorisations\(^{29}\) was a barrier to entry and as over 500 companies owned such authorisations no barriers to entry were found.

**Oligopoly and collective or joint dominance**

The concept of joint dominance refers to two or more economic agents possessing market power, even if no single agent is dominant.\(^{30}\) In the absence of a cartel, an oligopoly market in particular can induce independent firms jointly to exercise their power. Mere “conscious parallelism” is not sufficient to demonstrate joint dominance. The CC’s President initiated, ex officio, an investigation of the cement prices\(^{31}\) demanded by Romanian producers from December 31, 2000 to the first quarter of 2004 because of the producers’ “simultaneous and significant growth”. The CC examined whether Lafarge Romcim,

\(^{17}\) CC, decision no.20, November 7, 1997, not published, upheld by the administrative section of the Supreme Court of Justice, decision no.955/1998, Trafo (not published).

\(^{18}\) CC decision no.77, Atlas Telecom Network Romania, April 23, 2005, at [10(2)].

\(^{19}\) CC, decision no.247, October 29, 1999, [2000] OJ 54.

\(^{20}\) CC decision no.46, Burtila & Co Electron, March 15, 2005, at [7].

\(^{21}\) Every new provider has to notify the National Regulatory Authority for Communications and to demand broadcasting permission.

\(^{22}\) CC decision no.46, Burtila & Co Electron, March 15, 2005, at [8].

\(^{23}\) CC decision no.77, Atlas Telecom Network Romania, April 23, 2005, at [10(3)].

\(^{24}\) CC decision no.77, Atlas Telecom Network Romania, April 23, 2005.

\(^{25}\) CC decision no.92, Gas Sud Giurgiu-Mures, May 25, 2005, at [7].


\(^{27}\) CC decision no.92, Gas Sud Giurgiu-Mures, May 25, 2005, at [8].

\(^{28}\) CC decision no.8, Retmat Bucuresti Sud v Romcim, January 19, 2006, at [5].


\(^{30}\) For mergers, RCL refers to “two or more” for horizontal agreements and to “one or more” for vertical ones.

\(^{31}\) CC decision no.94, Lafarge Romcim, Holcim (Romania) & Carpenter Holding, May 26, 2005.
with a market share of 35 per cent, abused a dominant position, in coordination with Holcim (30 per cent) and Carpacement (33 per cent), by setting resale prices. The CC’s analysis of their market structure on the domestic market did not provide clear evidence of co-ordinated conduct, as it was relatively constant over the whole period analysed. But it did not focus sufficiently on the characteristics of the Romanian cement market, which is an oligopoly, as the parties did not dispute this fact and no joint dominance was found. The report also failed to present a detailed economic analysis, as it was difficult to quantify the abuse committed by fixing prices. However, the above-mentioned firms have been found guilty of concerted practices and operating a cartel.

Another case concerned the position of collective dominance held by the competitors of Condem Bucharest, branches of the foreign producers Rigips, Knauf, Obo Bettermann and Menarwork, which produce metallic profiles for gypsum board walls and false ceilings, where the CC gave a non-exhaustive list of general criteria applicable in cases of collective dominance. As none of them were fulfilled, the companies were not found to be dominant.

Defences, remedies and penalties

There is no longer a block or parallel exemption for attempts by small and medium-sized enterprises to attain monopoly power which results in a much more severe penalty for any firm abusing its dominant position. Previously, they were exempted if their turnover did not exceed a market share of less than five per cent in the relevant market. Article 6 of the Regulation for the application of Art.6 still condemns attempts to attain monopoly power by allowing a priori control through investigations of the CC. Such an investigation can no longer exist, as there are no exemptions that could justify such a demand. It is, obviously, one unintended consequence of the law.

As a general remedy, art.49 of the RCL stipulates the absolute nullity of “any agreements, conventions or contractual clauses” generated by prohibited practices. For such violations the CC applies administrative sanctions, which can be challenged by the Court of Appeal before they are applied. This provision is meant to ensure legal certainty and discipline among competitors and is beneficial in case of “serious damage to a major public interest”, when the CC may request, bearing the burden of proof, the Bucharest Court of Appeals to order additional measures. Public safety, a proliferation of independent economic agents, consumers’ welfare, and precautionary measures are deemed major public interests. The CC and economic agents may appeal any such decision to the High Court of Cassation and Review. Individuals and/or legal persons who are actually and directly affected may request an investigation by the CC and have the right to bring a civil action against the business concerned requesting a complete remedy for the damage caused.

Penalties include administrative fines of up to 10 per cent of the business’s total turnover and complimentary fines of up to 5 per cent of the business’ daily average turnover. The National Company for Freight Railway Transport, CFR Marfă SA, a former state monopoly, has been found to attain monopoly power and sanctioned with a fine.

Analysis of recent cases of abusive practices of the Competition Council

Pricing Practices

Monopoly pricing

The extent to which a monopoly can exercise its power depends on the structure of the market. The Gas Spot
case of a dominant firm could recoup its losses from pricing below cost by raising prices later on. The CC will analyse whether the dominant firm sets prices below its avoidable total costs (ATC), and if so, whether it aims at eliminating a competitor. Both conditions must be simultaneously fulfilled. By contrast, in EC law there is no need to show that the firm may recoup losses in order to find that it is acting predatory, nor is elimination of actual competitors required.

The flaw in the CC’s approach consists of the fact that it does not apply a constant two-step approach: recoupment of costs and price-cost analysis. When a price-cost analysis is undertaken, it is not sensible to apply the AKZO test. If prices are above AVC but below ATC, they are not presumed to be predatory, but may still be predatory if they intend to eliminate potential competitors. So, predation cannot be inferred from market and cost data alone; one needs to know the intentions of the firm and should look at its strategy and method. A price is also deemed predatory by law if it is below average long-run incremental costs. The CC made no reference at all to AVC in finding that both Rigips Romania and Menatwork charged sale prices higher than the level of ATC. As Rigips and Menatwork did not eliminate their competitor, Condem, which had even increased both its sales and market shares, the second condition was not fulfilled and none of them were found to be dominant. Unlike in AKZO, the emphasis is placed not only on the intention; the effect upon competitors is also considered. Inherently problematic, this cost analysis should have considered both ATC and AVC.

Cross-subsidisation

The RCL does not consider cross-subsidisation as a per se abuse. Atlas Telecom complained that RCS held a dominant position on the TV cable retransmission market, and cross-subsidised RDS, a member of the same group. The latter firm used the optical fibre networks that RCS had built to supply landline phone services, so RDS’s network costs were not included in its pricing decisions, and very low for consumers. Both had a competitive advantage: RCS on the fix phone market, where the ex-monopolist Romtelecom still held a significant market share until January 1, 2003.

47 See Art.14(d) of the Regulation on access to natural gas distribution systems.
49 CC decision no.92, Gaz Sud Ghermăneşti, May 25, 2005, at [13].
51 CC decision no.109, Condem Bucharest, May 9, 2006, at [26]-[27].
52 CC decision no.77, Atlas Telecom Network Romania, April 25, 2005, at [9]-[11].
by offering the “Connect 0” package to subscribers; and RDS, which owned the technology necessary for supplying its services. The CC did not consider cross-subsidisation to be per se abusive, because the essential test was dominance, and found that RCS did not hold a dominant position on both the TV cable retransmission market services and on the fix phone market. On the latter market, it was not dominant due to the existence of Romtelecom.

Exporting at prices below production costs

Article 6II(e) RCL mentions exporting at prices below production costs when it could harm domestic consumers who would have to pay increased prices to cover the difference. This provision seeks to ensure that firms and consumers do not pay higher prices thus permitting a dominant firm to sell its products at lower prices to foreign firms and consumers. This type of abuse arises when a firm is using its profits from domestic sales to cross-subsidise its lower-priced international sales. A low export price, as a fair indicator of the value of the product, would be clear evidence that the domestic price is higher than the real value. However, an international price is not affected by the domestic price; export sales do not need to be “subsidised”. Even if this provision would act as a safeguard against monopoly pricing, it remains difficult to determine the “right” price. Pittmann\(^{53}\) analysed two possible methods to determine that price, both of which may lead to price discrimination between domestic and foreign customers and would allow the CC to attack the prices charged to domestic customers by particular firms and seek to control them. RCL includes specific provisions allowing for price control\(^{54}\) but these are strict and may be challenged by the firms whose prices are to be controlled.

In Lafarge Romcim\(^{55}\), the CC’s Plenum stated that according to its investigation these companies were not dominant. Because each of the three held almost equal market shares the CC did not undertake a cost analysis for the exported products seeking to prove that they were sold at prices below those charged on the domestic market and did not question whether such a practice would represent a subsidy and harm internal consumers’ interests.

Tying

Article 6(d) of the RCL is identical to Art.82(d) EC and only a few cases were heard by the CC. In the Mitsubishi case\(^{56}\), an exclusive supplier of video equipment for printing and cartriges was found to be dominant on the market. Mitsubishi abused its position by requiring consumers who desire its services during the warranty period for video equipment purchased from another source to buy a minimum number of film papers.

In the NCNCA Constanța case\(^{57}\) a possible contractual tying imposed on Hidroelectrica was examined, as some contractual clauses were unrelated to a previous contract. As for whether this created new obligations for Hidroelectrica that might have had no connection with the subject of the contracts, the CC concluded that both of the contracts referred only to the water transit service in the third shipping lane of the Danube Channel. NCNCA Constanța argued that when the water level of the Danube River is high, Hidroelectrica must incur higher expenses than for normal transit.

Refusals

Refusal to deal

Article 6(a) of the RCL expressly condemns attempts to restrict firms’ ability to refuse to deal with certain suppliers or beneficiaries, as both can have exclusionary or discriminatory effects. This reflects the need to impose a legal framework onto a concept that lacks both legal certainty and economic rigour at the European level, but did not clearly foresee how the circumstances might occur in practice. The key tests used to determine abusive refusal to deal are the existence of two separate markets and the elimination of effective competition. The latter is necessary, but not sufficient\(^{58}\), as there may be objective reasons for refusal. Remayer\(^{59}\) complained that Remayer

\(^{53}\) For this view and a detailed economic analysis see R. Pittmann, “High Domestic Prices that Subsidises Low Export Prices under Romania’s Competition Law” [2005] E.C.L.R. 238.

\(^{54}\) See art.4(2) of the RCL, which states that the Government may, “in economic sectors or markets where competition is precluded or substantially restricted by law or by the existence of a monopolistic position”, impose by decree price controls for a period of up to three years.

\(^{55}\) CC decision no.94, Lafarge Romcim, Holcim (Romania) & Carpacement Holding, May 26, 2005, at [123].


\(^{57}\) CC decision no.99, National Company Navigable Channels Administration Constanța, April 26, 2006, at [51].

\(^{58}\) An obligation to share an essential facility with competitors could distort competition, as the business performance of the firm would be punished for competing on the merits.

\(^{59}\) CC decision no.8, Remat București Sud, January 19, 2006, at [5].
refused to collaborate in the industry of processing iron waste on shredder equipment, as well as in the organisation of auctions on the sale of its products. As both companies held insignificant market shares of less than 3 per cent, neither Romrecycling nor Remayer, which is controlled by Romrecycling, was deemed to have a dominant position and a further analysis was avoided.

**Refusal to supply**

The CC dealt with such a case where a producer of hard drawn steel wire and nails refused to provide raw material to another nail manufacturer by claiming that the wire was used only for its own production needs. In its investigation, the CC found that only a part of the wire was used for such purposes, and therefore, the producer’s practice was a refusal to supply. But the CC failed to examine whether there were alternative sources of supply, as required in Commercial Solvents. A manufacturing company refused to sell bearings to a commercial partner at wholesale prices by obliging it to pay a retail price of 15 per cent extra. As justification it argued that the partner did not fulfil its contractual obligations.

**Refusal to grant access to “essential facilities”**

The question is under what conditions and terms the dominant firm should be forced to share its facilities. The CC is required to identify the existing or potential market in its cases and to consider whether the dominant company has fulfilled its duty not to discriminate. Objective defences to a charge of refusal to supply could be the overriding difficulties of providing access or the need for a facility owner to have sufficient time to recover its investment or to use its facility in order to place a new product or service on the market.

CFR Marfa SA was found to have abused its dominant position in relation to bus depots by refusing to deal with private operators and to sign new service agreements. According to the CC, private operators have been denied access to services provided by CFR Marfa without objective justification as the only reason the company gave for its denial was that the company “had no obligation as such.” NCNCA Constanța, a state-owned company, administers and exploits the resources of the Danube Channel. Hidroelectrica claimed to have suffered an abusive behaviour of NCNCA Constanța, when they refused to discuss providing water transit services and imposed a fee three times higher than the price charged to railroad operators. The latter was obliged to ensure free access to and utilisation of its facilities, which are public property, and held a legal monopoly over administration of the Channel. The CC found the firm to be dominant but concluded that the company did not infringe Art.6(a) as it was forced to renegotiate its tariffs. Analysing the firm’s expenses the CC concluded that the price set for water transit was higher because it included additional costs for water dredging.

An ongoing investigation by the CC concerns possible abuse by Orange, Vodafone and Romtelecom Romania, which jointly enjoy a dominant position in their market, resulting from their refusal to grant the other national operators telephone services access to their networks.

**Discrimination**

Article 6(c) of the RCL, like Art.82 EC forbids any price discrimination by dominant firms. A company providing parking services demanded and took discriminatory fees for its services from beneficiaries. But the complaint was rejected by the CC because there was an objective justification for applying different tariffs to individuals and legal entities.

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60 CC decision no.14, October 6, 1997, not published; upheld by the SCJ, administrative section, decision no.955, April 13, 1998.
63 To do this, the CC may look for the simultaneous existence of the following conditions: access to the facility should be essential to compete; there is sufficient available capacity to provide access; the facility owner fails to satisfy demand in an existing market; blocks the emergence of a potential new service or product; or impedes competition on the market; the company seeking access is ready to pay a reasonable and non-discriminatory price. Guidelines on the application of the competition rules to access agreements in the telecommunications sector—framework, relevant markets and principles Art.73 [2004] OJ L288.
64 CC, decision no.119, CFR Marfa SA, May 15, 2006, at [27].
65 CC, decision no.119, CFR Marfa SA, May 15, 2006, at [22].
66 CC, decision no.99, National Company Navigable Channels Administration Constanța, April 26, 2006.
68 CC, decision no.99, National Company Navigable Channels Administration Constanța, April 26, 2006, at [49].
69 CC, Press Bureau, Notice of July 19, 2006 (no further notifications).
70 CC, Plenum decision no.85, September 5, 1998, not published.
The CC investigated alleged anti-competitive practices committed by CFR Marfă concerning “discriminatory and increased charges” to companies spun off from SNCFR, the ex-monopolist, and other fees up to 20 times higher than the reference level charged to railway operators. The relevant product market was identified as a duopoly; the beneficiaries had the freedom to choose between services provided by CFR Freight and CFR Passengers, but it then became a monopoly. The analysis of the price-cost ratio found a profit between 312 per cent and 1,458 per cent for charges applied to private operators, and a clear disadvantage to competitors. The CC found that CFR Freight infringed art.6(c) of the RCL by abusing its dominant position and setting unequal conditions for similar services to private firms.

Exploitation of economic dependency

Article 6(f) of the RCL, like art.l.420, the second point of the French Commercial Code, prohibits the exploitation of a state of economic dependency of another economic agent that does not have an alternative solution under equivalent conditions. Such a definition of abuse lacks consistency, because it was inspired by a former French regulation and therefore applies more to essential facilities than to discriminatory abuses. In NCNCA Constanța, the CC dealt with both exploitation of economic dependence and breach of contract, as provided for in art.6(f), but failed to analyse properly the concept of economic dependence. Moreover, it looked for objective justifications for discriminatory fees when identifying the abuse, finding that the new fee was justified and still profitable for the complainant.

Critical remarks and policy recommendations

Romania’s law on abuse of dominance tries to meet the goals already set by implementing Art.82 EC. A question still remains: could art.6 of the RCL lead to a better enforcement of the antitrust provisions? And if so, could the goals of institutional reform, which the Romanian antitrust authorities dealt with before EU accession, now be fulfilled?

Bringing Romanian antitrust law into conformity with EC law has been a challenge. Article 6 was copied directly from Art.82 EC. The use of art.6 incorporated the same problems as well as the benefits of the laws copied. Only art.6(f), whose economic purpose is controversial, is unique. One might still recommend the following future work for the CC:

- The CC should apply general antitrust principles instead of the specific rules that it uses in the telecommunications sector. Otherwise, enforcement will continue to be limited.
- The SSNIP test seems to be poorly suited to the CC’s recent cases. The CC should find a better way to analyse the characteristics of an oligopoly or duopoly domestic market and investigate joint dominance more thoroughly. The absence of a correct method for calculating market share under art.6 leads to a broad and mostly incorrect definition of the market and an erroneous identification of a lack of dominance in some cases.
- The approach of identifying local relevant markets is already established in the Framework Guidelines in Telecommunications and in the Notice on market definition. The CC should remedy its mistake, define the relevant geographic market on a case-by-case basis and recognise the existence of local markets as a major task of ensuring that the consumers’ interests are protected.
- The CC should make further efforts to do proper cost analyses, and inquiries into both AVC and ATC. The legal test for predation should focus on whether a firm can recoup its initial losses incurred by a predatory strategy by raising prices in the future. If so, this should be considered one premise for a finding of predation. Only in these cases should predation be considered profit-maximising.
- Given the inherent difficulties of regulating prices in domestic and foreign markets it is difficult for the CC to analyse properly the differences in setting those prices and determine the “fair” product...
price. Instead, the CC could develop a strategy for controlling domestic prices by effectively imposing price controls, without the benefit of the safeguards for extreme circumstances, as in art.4 of the RCL.

- The CC should use the following criteria to test for abusive tying practices: whether tying eliminates competition; whether the firm offers consumers no other way to obtain the tying product; and if so, whether there are objective justifications for the practice. This last test is, by its wording, contrary to art.6(d) and applies only in the telecommunications sector.

- It is unclear how the non-discrimination principle of the legal duty to deal would be applied in practice. Therefore, the CC should define such a duty. Applying such a principle could be problematic when an obligation to deal has been imposed on a firm in order to permit the emergence of a new product on the market, regardless of whether another rule would create the incentive to innovate.

- The CC should make a clear distinction between discrimination that creates disadvantages for customers who are in competition with each other and discrimination that bars competitors of the dominant firm from the market. It should do this in such a way that art.6(b) of the RCL would apply to consumer-related situations and to all exclusionary abuses, while art.6(c) would apply to competitor-related cases.

The overall evaluation of the CC should remain positive after its first 10 years of existence; the problems that the CC is facing are part of the inherent difficulties of harmonising with EC law. The key issue remains the focus on the need for creating more competition in the Romanian market, which could be beneficial for both firms and consumers. Therefore, much more severe rules should not be goals in themselves. For Romania, the law must take into account the needs of small firms acting in a domestic market whose mainly oligopoly character would require different rules and a more flexible interpretation of the law. From an economic point of view, a proper competitive business environment might need more freedom to allow innovation.

The following issues require further attention from the enforcers of antitrust laws:

- The authorities should reduce enforcement costs and create a predictable climate for competition. With only one decision finding market dominance from 2004 to 2007, but a large number of investigations, the CC's active role could be reconsidered.

- Whether to allow appeals of the CC's decisions in national courts is a sensitive political issue. The CC had imposed a record fine in a recent case in the cement industry, Lafarge, but the national court reversed it. This action shows the implications of creating legal uncertainty, under which enforcement remains illusory and enforcement costs only increase.

**Conclusion**

Romania had to make significant substantive and institutional changes to its competition laws and policies in order to join the European Union. However, the European Commission never explained the exact scope of Romania's obligation to harmonise its antitrust laws with the European Commission's. The present state of competition policy and law in Romania is a positive change for the country's legal system and laws. But the inherent difficulties in applying Romanian and EC competitive rules reflect that even if the beneficial effects of a more economic approach seem obvious, essential economic principles should be written into national competition laws and include general principles, rather than applying specific rules. Otherwise it would limit their own enforcement and, moreover, maximise enforcement costs.