Recent abuse of dominance and cartel cases

Anca Daniela Chirita
European Competition Law Review

Recent abuse of dominance and cartel cases

Anca Daniela Chirita

Subject: Competition law

Keywords: Abuse of dominant position; Cartels; Competition policy; EU law; Economics; Fines; Presumptions; Public policy; Romania

Legislation: Competition Law 21/1996 (Romania) art.5, art.6
Treaty on the Functioning of the European Union art.102
Law 11/1991 against Unfair Competition (Romania)
Law 149/2011 (Romania)

*E.C.L.R. 227 Brief overview of the enforcement of the prohibition of abuse of dominance

Between 1997 and 2010, the Competition Council (CC) issued relatively few decisions on the abuse of a dominant position with a thorough and complex economic analysis. Rather, the national application of the Competition Law art.6 (CL), which corresponds to TFEU art.102, had been based on a legal approach that relied on cumulative conditions of establishing dominance and on narrow definitions of the relevant market. Therefore, in past decisions, an economic analysis had been missing. This happened, however, despite other areas of competition such as mergers, where economic analysis has been the rule before an improvement of the economics of dominance. It is also worth noting that the Civil Procedure Code does not foresee specialised competition tribunals, and nor therefore is economic expertise regarded any differently than other relevant expertise which a judge may require as a means of evidentiary proof.

The first case to undergo a more serious analysis and economic scrutiny is the decision on Astral Telecom. Yet another comprehensive decision, issued in December 2010, concerns the national mail monopolist, Poşta Română. Previously, the CC had opened three in-depth investigations; namely, in 2005 on a possible abuse in the service market for commercial mail; in 2006 another on an alleged infringement of art.6(c), later extended to a parallel application of ex ante EC art.82. Finally, a third ex officio investigation inquired into potentially anti-competitive conduct in the delivery market of commercial advertising and non-priority mails by intermediaries. It is, however, interesting that in 2009, following its extension of the second investigation on a parallel application of art.102, the CC already enforced a novel concept, i.e. a presumption of relative market power with 40 per cent of the market share, which entered into force only early August 2010. The definition of abuse has been maintained as based upon an objective concept irrespective of the intention of a dominant undertaking.

Heavy fines on dominance: Orange and Vodafone and the Romanian mail company

In accordance with the EU Commission's fine levels, the national fines on the abuse of dominance reached an outstanding level of approximately €62 million for two telecoms operators, Orange and Vodafone. Previously, a heavy fine of €24.61 million had been imposed on the Romanian mail monopolist. The increase in the level of fines for unilateral conduct also comes in light of the lengthy
investigations concluded by the CC, where the analysis of dominance has been, more thoroughly, substantiated.

The separate fining of both Orange and Vodafone, early this year, followed a complaint by Netmaster Communications who had been denied access to the national and international market for termination calls. The plaintiff demanded access at a lower tariff, in accordance with those set by the National Authority for Management and Regulation in Communications, in order to enable the exchange of calls amongst users from different networks. The CC considered the access to a call termination facility to be essential because an alternative provider such as Netmaster would then be able to enter the market and compete effectively, unless there was an objective justification for its refusal.

Until January 1, 2007, both companies had imposed higher fees than those legally provided by the competent regulator, thereby infringing the obligation of non-discrimination against other operators by denial of access for one-and-a-half year and two years and four months respectively. The CC's president held that, through recourse to such anti-competitive practices, network operators incurred additional costs that have, ultimately, led to higher tariffs for the final consumers.

The other record fine was imposed on the Romanian mail company, which held a dominant position in the service market for mail advertising due to the nature of its services, infrastructure, and legal monopoly position. On April 18, 2005, the company had increased its fees without any distinction between regular or express mail delivery for both internal intermediaries and international deliveries. This was followed by various complaints from publishing houses such as Direct Marketing, Reader's Digest and Mailers.

The Romanian mail monopolist: a case analysis

*The anti-competitive rebate scheme*

The infringement at stake consisted in directly imposing higher fees and a new rebate scheme (art.6(a)); a price increase at an unreasonable economic level which may result in the further elimination of competitors from the market (art.6(e), ex ante (f)); and the abuse of economic dependence (art.6(f), ex ante (g)). According to the latter, those competitors depend economically on the mail monopolist. In the medium or long term, therefore, a new market entry would be practically impossible due to its privileged position and because there are no alternative possibilities.

Mailers claimed an infringement of both art.6(c) and art.102(c), through the application of unequal conditions to equivalent transactions with commercial partners, thereby placing some of them at a competitive disadvantage, and granting them preferential contractual conditions. As a result of this anti-competitive conduct, Mailers incurred prejudice as its business partners ended their business relationship in favour of Infopress, who enjoyed preferential treatment on the part of the monopolist. The CC found therefore the monopolist's commercial policy likely to have as an effect a possible extension of its dominant position in the upstream market for mail services to advertising and priority mail delivery in the downstream market.

The geographical boundaries affected are indeed national, but upon consideration of their effect on the inter-Member States' trade, wider in scope. The temporal local and Union market analysed the period from April 18-December 31, 2009 and January 1, 2007-December 31, 2009 respectively.

As noted earlier, the CC found this unilateral price increase to be anti-competitive, including the rebate scheme for regular delivery of advertising and mail return service, the imposition of contractual pricing conditions in contracts concluded with beneficiaries, the preferential treatment applied to Infopress, and, based on the volume of mail delivery, the discriminatory treatment of intermediaries vis-à-vis their
own preferred customers. The rebate scheme consisted of a minimum number of priority mail delivery, which did not, otherwise, apply to Infradres’ mail deliveries, and of a reduced number of post offices for marketing purposes. Thus the CC regarded commercial advertising as an internal mail delivery service.

The relevant markets, shares and presumption of dominance

The complex analysis of the relevant markets in this case devoted particular consideration to a variety of legal and economic criteria such as:

• Based on the relevant temporal market, during 2005-2010 the CC identified the relevant markets for mail delivery and commercial services. A non-priority commercial mail service of access points, including a return service, operated for intermediaries and/or legal persons, independently of Infadres that is the internal standard service. First, the CC distinguished an independent mail service, including direct marketing to consumers, and an internal postal service. However, based on a market survey, the CC had found that before 2009 door-to-door deliveries had no substitutes such as fax, voice mail, or email in the downstream market.  

• Based on the nature of economic activity, the downstream relevant market for the preparation of mail delivery, including graphics, copy-editing, printing, etc. the mail collection, sorting and handling as well as those activities involving product distribution, were vertically integrated by the monopolist, but offered as separate services. However, Infadres was not exposed to any competitive constraints. Therefore, during 2005-2009, no distinction had been made between internal mail delivery and other postal services.

• Based on the mail delivery’s addresses, the character of this service, utility and pricing policy, the market for regular or express delivery.

• Based on the utility of the supply service for its final users, the CC distinguished commercial deliveries of economies of scale based on a volume range from 200 up to 500 deliveries, where the concerned undertakings were obliged to conclude service contracts for their allocation.

**E.C.L.R. 229** • Based on their demand substitutability, a regular mail by competing undertakings and Infadres were not interchangeable, as they covered distinct needs of traders and the general public.

• Based on the pricing policy before April 18, 2005, reduced advertising fees applied to a smaller volume of deliveries than thereafter. From March 3, 2008 onwards, Infadres enjoyed financial advantages through a volume rebate scheme based upon the nature of delivery. Thus, the CC found that potential competitors were active as alternative operators for express mail delivery in return for higher prices, but being a sole alternative they were still unable to exert any significant competitive constraints.

• There are also structural barriers to market entry as the monopolist owns a large infrastructure nationally, whilst its competitors possess only a local coverage and any future investments cannot be recovered within a reasonable period of time. This has led the CC to conclude that this monopoly had been a major legal barrier.

• Based on the utility of the service, there were no competitive constraints for the return mail service other than excessive pricing for the internal mail. The CC regarded primarily the method of payment rather than the addressees, thereby leaving the criterion of usage untouched.
Based on the economic value of the service, after August 15, 2005 prices for mail services by intermediaries increased by 12.9 per cent\textsuperscript{22}; based on the same service availability fees were seven times higher in rural areas.\textsuperscript{23}

As noted earlier, the CC applied, surprisingly, a relative presumption of dominance, as introduced by the recent amendment. \textit{Per a contrario}, a market share over 40 per cent is a first indication of dominance.\textsuperscript{24} The decision made it clear that during 2005-2009 the monopolist held a significant market position, with 91.28 per cent as its lowest and 98.39 per cent as its highest in the internal service market. It, therefore, clearly dominated competitors through constant higher shares. In contrast competitors’ market share was between 1.61 per cent, the lowest, and 8.72 per cent.\textsuperscript{25}

\textit{The economic dependence and excessive pricing}

The analysis of economic dependency emphasised that an anti-competitive practice occurs in a situation of dependency amongst undertakings where the concerned undertaking/s has no alternative solution under similar conditions, i.e. the monopolist is an \textit{unavoidable business partner}, which is later exploited.\textsuperscript{26} Very interesting, however, is the CC’s express recognition that particular anti-competitive practices included in art.6(a)-(e) would qualify to be applied in this case, but are absorbed by the concept of economic dependence. Therefore, only the breach of contractual relations in art.6(f) remains as a \textit{distinctive} anti-competitive practice. This is to say that excessive or discriminatory pricing already includes an exploitative abuse which may also amount to economic dependency that is, in fact, an aggravating circumstance.

The CC concluded that the abusive practices engaged in by the monopolist are the result of its high and disproportionate bargaining, i.e. negotiating, power in commercial contracts concluded with its trading partners, such as intermediaries, publishing houses, or those directly involved in marketing.\textsuperscript{27} Based on the continental jurisprudence, the CC then referred to other factual circumstances of economic dependence due to a famous brand name, long-established commercial relationships, higher costs or reduced possibilities to switch to another commercial partner.

Put simply, where there is already a dominant position and the undertaking has entered into business agreements with other trading partners, it is forbidden to exploit the economic dependency for itself. A similar situation is where the duty to deal with “certain” suppliers or beneficiaries included in art.6(a) must not infringe the obligation of non-discrimination. A fortiori, a monopolist’s disproportionate bargaining power over competitors could result in the imposition of excessive prices.\textsuperscript{28}

\textit{The rebate system and costs analysis}

\textit{In casu}, after April 18, 2005, fees increased by 106.6 per cent for postal advertising deliveries of an established delivery volume and by 246.6 per cent for a volume five *E.C.L.R. 230* times higher than the former.\textsuperscript{29} The CC confirmed that during July 2004-April 2005, the costs increased only by 22 per cent, whereas the telecommunication fees had even decreased. Having regard to the actual buyer power and domestic prices in relation to the euro, the fees had actually increased by 89 per cent and by 203 per cent based on the weight of delivery.

The CC undertook a price/cost analysis based on the data the monopolist had revealed. It concluded that the price increase was below the relevant service costs.\textsuperscript{30} The analysis of the costs structure had found Infadres to be vertically integrated, thus, not in the monopolist’s universal postal system. The aim had actually been to align the pricing for mail delivery with those fees the monopolist charged for commercial advertising. In this way Infadres enjoyed preferential treatment based on the volume of
deliveries, thereby violating the obligation of providing affordable, transparent, non-discriminatory prices and in accordance with the costs it had incurred.

The discriminatory conduct had been proven by the grant of rebates to Infadres based on a lower volume scheme for its internal mail and regular delivery. The monopolist company defended itself by stating that for a certain threshold of deliveries it applies a 10 per cent rebate scheme for any commercial mail. Therefore, the CC considered that the second step of the analysis of excessive pricing was not met due to the similarities in the service cost. In regard to the return mail, the cost analysis by the CC revealed an increase by 40.69 per cent during January 2004-December 2006, whereas the average increase was by 12.07 per cent. The data only included employees' costs, but no banking fees. Thus the costs increase was not constant over the whole period, a significant cost reduction followed thereafter.

The CC applied then the second step of the excessive pricing test when it analysed the economic value for the service compared to other relevant factors, such as the existing infrastructure in terms of capacity, coverage, frequency, service notoriety and attractiveness, including home payments. The demand for mail delivery had been significantly higher than for internal mail. This had been correlated with the fact that, under monopoly conditions, on a stable and mature market the imposition of excessive pricing would have resulted in a significant decrease in demand. Therefore, no excessive pricing was found.

In conclusion, the CC applied a two-step test on excessive pricing: one based on a price-cost analysis complemented by another evaluation of whether the price itself is reasonable or not, by comparison with competitors' pricing.

The discriminatory and preferential rebate

The CC interpreted art.6(a)'s prohibition of "unequal conditions applied to trading partners" as referring to pricing terms and payment conditions regarding fees or rebates, as well as to non-pricing ones such as the quality of the product. Such unequal conditions may result in a discriminatory treatment that creates a competitive disadvantage for other trading partners. Therefore, the CC regarded primary-line discrimination by exclusionary conduct on the dominant undertakings' competitors and the market-foreclosure-effect, whilst the secondary-line discrimination focused on the exploitation of other trading partners. The CC held that undoubtedly, the rebates, pricing and payment terms offered to Infadres had been more advantageous than Mailers'. Infadres had benefited from volume rebates 5 per cent, 32.5 per cent and up to 37.5 per cent higher than those concluded under public contracts during 2005, due to its competitive advantage.

However, Infadres's significant advantage was granted for longer periods of time in the form of maximum rebates irrespective of their monthly volume and without any further obligations. In contrast, Mailers had been obliged to meet a minimum volume of deliveries during the performance of the contract and imposed a shorter payment term for invoicing. Therefore, the CC concluded that the monopolist did not observe the duty of non-discrimination through its additional agreement with Infadres of July 14, 2005.

Even after the company had ceased to charge discriminatory fees, during December 2008-August 2009, Infopress Group benefited from advantages that were not at the disposal of other competitors, thereby distorting competition. During May 1-August 1, 2009, the monopolist infringed art.6(c), thereby granting Infopress preferential treatment. The CC distinguished a direct marketing mail service,
whereby Infopress was integrated in the downstream market for mail preparation and Infadres, which was active in the upstream relevant market.  

*E.C.L.R. 231* Finally, the CC considered the length of infringement, which had lasted from July 14, 2005 until August 1, 2009. It held that the rebate system granted to Infopress was not based on economic efficiency, but had a merely “loyalty-inducing effect” and the monopolist’s intention was to award such advantages solely based on long-standing business relationships as a loyalty reward. This per se prohibition of fidelity or loyalty rebates has as justification the market-foreclosure-effect with an artificial maintenance of the monopoly and, above all, the distortion of competition and the exclusionary effect on competitors. An interesting remark in this notable lengthy decision is that the CC may dispense with proving all the conditions for the finding of price discrimination on the basis of Regulation 1/2003 which allows Member States to adopt or apply stricter rules.  

Paragraph 308 states that:

“[T]he commercial policy of an economic agent holding a dominant position may infringe the Competition Law by offering customers rebates, discounts and boni, e.g. fidelity rebates, which do not reflect any low-cost pricing and having as an object, or as an effect to exclude or restrict competition.”

This is, however, against the wording of the text of art.6, which does not expressly prohibit rebates, and, even more so, fidelity rewarding rebates. Thus, the CC found that the monopolist enjoyed a competitive advantage in the downstream market because its regular mail service had been exempted from VAT.  

On the infringement of art.6(c) and art.102, based on its national market coverage and dominance in each relevant market, the monopolist held a de facto monopoly being an unavoidable trading partner during 2005-2009 based on its 4 per cent of annual turnover. The four-year duration of preferential treatment in favour of Infopress and one year and six months for discriminatory rebates was aggravated by the continuation of the infringement on two distinct relevant markets. This had led to an extension of the initial investigations because of the monopolist’s lack of co-operation. The anti-competitive conduct justified a 7.2 per cent fine of annual turnover in 2009 by the CC, followed by the obligation of non-discrimination against commercial partners and price transparency.  

**Brief overview of the CC’s recent practice**

As a brief overview, during 2010, 80 per cent of the investigations started ex officio and 20 out of a total of 26 open investigations were closed. As usual, the vast majority of the decisions taken by the CC (54) concerned anti-competitive practices (21), of which 16 imposed sanctions, amongst which four on horizontal agreements, one illegal action performed by a public administrative body, and two on economic concentrations. This relatively low number of investigations, including mergers and acquisitions, has been caused by the economic crisis, whereas since 2009 the CC has, as a consequence reduced its overall number of open investigations by 22 per cent on infringements and by 40 per cent on its sector inquiries. This trend is somewhat visible during 2011, whereas based on investigations carried out in previous years there are nearly 17 decisions.

There are other notable remarks that need to be made. First, one may notice an increased trend in the level of fines, which had been already in 2008 2.7 times higher than the previous year, with an abrupt climb to 14 times higher in 2009. As noted earlier, the most successful area for the CC’s budgetary resources has been dominance with the imposition of one heavy fine. Furthermore, this record fine of 7.2 per cent of the annual turnover is the first of its kind, whereas the fine imposed on the telecom companies, Orange and Vodafone, did not exceed 3.60 per cent and 3.45 per cent of the annual...
turnover respectively. These developments in late 2010 and early 2011 come in compensation somewhat for the lack of decisions on the abuse of dominance over the past few years, whilst some 65 per cent of the cases dealt with had been based on the authorisation of economic concentrations.

The level of economic and legal analysis undertaken by the CC has also improved significantly whereas lapse decisions without reference to EU competition law and practice remain now history.

The second remark that must be made is consequent on the overall length of investigations which is 52.7 months on average. Only economic concentrations may be approved within 3.1 months, whilst sector inquiries could take up to nearly 16.7 months. One may say that there is a clear correlation between the greater use of cogent economic analysis and more lengthy investigations. In fact, by the end of 2010, one-sixth of all the investigations were older than three years. The point in law is that too lengthy investigations do not imply that the CC has absolute leeway to delay proceedings. In *E.C.L.R. 232* recent years, this issue had been highlighted in judgements by the Bucharest Court of Appeals and High Court of Cassation and Justice. Even if the basic administrative rule contained in Law 554/04 failed to give any deadline for the finalisation of an investigation, whereas the Competition Law 21/1996 says that a decision cannot be taken within 30 days, it does not follow that no deadline applies. In particular, the High Court of Cassation and Justice made it clear that the: 

“[M]ere fact that the course of an investigation is lengthy does not discharge the competent authority itself from having any time constraints based on the lack of legal compliance with the deadline foreseen by the administrative law.”

Because even the notice given by the latter law did not comply with the special situation of an investigation started by the CC, the court ruled that where the special law is silent with regard to any specific deadline for the finalisation of such an investigation, then the reasonable time limit acknowledged by art.6 of the European Convention of Human Rights applies. This judgment has had an influential impact on speeding up some investigations. It is also worth mentioning that before the fining of the postal monopolist in December 2010, the CC had previously been accused of failure to finalise its investigation “within a reasonable time and in accordance with the gravity of the infringement”. In conclusion, insofar as the sophistication of the economic analysis is met, the likelihood increases that the efficient time allocation needed to finalise the instrumented case will result in complaints from private parties interested in a faster handling and concrete case outcome.

**Recent developments in cartel cases: private pensions, expert and chartered accountants**

Some of the recent cartel cases applied in parallel the national provisions of art.5(1) and TFEU art.101 (1). One of the investigations, which had started in 2007, ended with the finding of a cartel on the market administration of private pension funds. The anti-competitive practice consisted in the allocation of customers amongst 14 out of the 18 active operators in the relevant market. This conduct had as an object or as an effect to restrict competition. Initially, those employees no older than 35 years who had been state-insured were obliged to join any of the private pension memberships being offered. Otherwise, those who did not opt for a private one had to be distributed at random. Thus some participants had already registered simultaneously with two pension funds. As a legal requirement, the registration process had to be notified and further approved by the National Pensions & Insurance Health House. However, certain pension funds managers agreed to share 50:50 those registered participants who, according to the data provided by the above House, were actually acting as “duplicate”, having been registered with two pension funds. Therefore, there was no competition on
the market, but only a customer-share agreement under which 14 pension managers controlled 90 per cent of the relevant market. For this reason, the CC fined the responsible pension funds companies with the equivalent of ₦1,226,000, i.e. 4 per cent of their annual turnover. As evidence, the CC had analysed the emails of various pension funds companies involved in the anti-competitive agreement.

Another notable cartel was found in the service market of liberal professions where, by passing its own regulation, the Association of Experts and Chartered Accountants (CECCAR) had been involved in charging collusive price-fixing service fees. Therefore, as early as 2000, the CC had notified CECCAR not to implement this internal regulation, which allegedly set out minimum and maximum fees, thereby infringing art.5(1). Furthermore, the members of this professional association engaged in economic activities were regarded as economic agents. The CC established that by publishing the regulation in the AECA's own journal and the Official Journal, the association intended to impose imperatively the service fees and to co-ordinate the member's behaviour in the relevant market, which could thereby potentially align those prices and restrict competition, and not, as the association maintained, solely to provide guidelines for individual customers. There is no legal obligation on the part of the professional association to impose any fees. The internal regulation was, however, binding upon its members and those fees compulsory for them. In fact, throughout this decision, the reference to the professional association's intention was reiterated since the AECA monitored the way those fees had been *E.C.L.R. 233 charged by its members. Therefore, it is not surprising that a potentially "unfair competition" is likely on the part of those members who had charged less than the professional fees agreed by the respective internal regulation.

The above regulation was initially based upon the provisions of the Code of Professional Ethics, which had actually prohibited charging excessively high or low service fees. Thus, in contrast to the regulation, the Code leaves considerable leeway when conducting negotiations in charging fees in accordance with the service provided. The CC also confirmed that even if not obliged to establish the actual effects in the relevant market such as whether it had restricted or limited competition, given that customers were charged those fees, they had resulted in higher fees than those which could have arisen under normal competition.

One interesting remark, however, is where the CC made it clear that the association concerned owned a "legal monopoly" over professional access to practise as an accountant. This is to highlight that decisions taken by its members may have a significant impact upon the entire market for accountancy services. There is no doubt that this decision challenges only one of those liberal professions where minimum or maximum charges apply.

In the end, the CC imposed one of its largest fines of approximately ₦950,000 which amounts to 9.2 per cent of the association's annual turnover. Rightly so, as there were aggravating circumstances in its duration over a nine-year period, with continuation of the infringement even after the start of the investigation.

Another ex officio investigation which started in 2009, ended up with a decision by the CC on bid-rigging tenders on the award of treatment tickets subsidised by the National Pensions and Social Insurance Funds House. The CC found seven companies of a resort area in Băile Olăneşti set prices and the number of seats, including a service contract on the mineral water supply for therapeutic purposes, thereby infringing art.5(1)(f). Olăneşti Riviera, a service provider of tourist accommodation and medical treatment, also owned a licence to exploit the potential of mineral and therapeutic water resources. It actually required tender participants to prove their technical capability to provide the treatment services included in their own tourist package. Proof was found of a written agreement to
offer the same price and number of seats at auction and to not enter into further agreements with other offerors of therapeutic treatments. Even if the parties involved were smaller businesses, their combined market share was above 10 per cent, whereas they divided the number of bids, shared the market and fixed the price.

By another decision, against a public administration body this time, the CC prohibited the General Council of the city of Bucharest from constructing new oil stations in the city centre, and limited the number of available pumps. The CC balanced the consideration of whether this prohibition may prevent the market entry of potential competitors against the restrictions on land use due to environmental concerns such as the safety and security of citizens and air pollution. Since there was the alternative of acquiring existing oil stations, the prohibition was not disproportionate due to any possible negative effects. It is one decision taken under art.9(1) for actions by public administration having as an object or as an effect the restriction, hindering or distortion of competition if they limit free trade and the autonomy of the economic activity.

The issue of parallel application of market rules and competition: The *Ordre Publique* --public policy objectives of competition law

As noted earlier, one particular issue underlines those exceptional circumstances that may justify the CC's intervention based on public policy grounds where public health or safety is concerned. That is to say an instance where the CC is called upon to ensure that business freedom is proportionate with any public policy grounds, thereby preserving a merely consumer-protection function. Before its amendment, Law 21/1996 had contained ex ante in art.7(4) a reference to public safety and consumer welfare as major public interests. Unfortunately, there is now no explicit mention of them, other than in art.1 on the promotion of consumers' interests, which falls short of a public policy consideration. However, following this amendment, which will be, briefly, detailed in the next section, the most notable challenge for the CC is to enforce the Law against Unfair Competition 11/1991. Particularly since its harmonisation in 2007, this law serves more the enforcement of business-to-consumer unfair practices, such as misleading advertising or forms of aggressive competition, and it is therefore consumer-oriented. In contrast, initially the Law against Unfair Competition has been enacted to include a larger catalogue of potentially unfair business-to-business commercial practices. Thus the primary objective of this law is to maintain good business ethics amongst commercial partners, who will then be able to enter into business deals in observance with fair commercial practice. This is to say that business ethics in the civil form of good professional conduct safeguards wider public policy considerations, but it certainly addresses those practices which have a direct impact upon competitors, such as forms of aggressive competition by using pressuring techniques, or conspiracy. But there is no public policy objective because the enforcement of business rivalry has been confined to the national courts.

But what is really meant by public policy? One cannot confuse its meaning as a fundamental choice of consumer protection, or at times even of unfair methods of competition on consumers, with the public interest in enforcing competition law. It therefore seems that the CC has decided to take the role of the national court and, based on its competition expertise, to ensure the "public" enforcement of unfair practices which have previously resulted in private litigation, or where the competent authorities issued injunctions or imposed fines.

Thus a common policy objective is the welfare of consumers; both health and safety imply rather the well-being of the consumer than an economic welfare. No mention of welfare is made in the Law against Unfair Competition. This does not mean that the general framework of unfair commercial practices should be interpreted in isolation. There are other provisions that govern specific market...
rules, which fulfil a consumer-protection function, such as the Governmental Ordinance 99/2000. The ordinance governs market rules of both products and services and focuses on various objectives such as to stimulate commercialisation or marketing, to ensure fair competition, the right to information and the protection of consumers' interests, to develop distribution chains, and to stimulate SMEs.

Therefore, specific legislation of this kind, which deals with the commercialisation or sale of products and services, is further concerned with the transfer of economic welfare from producers to final consumers via efficient distribution chains. In fact, the governmental ordinance is very specific and ambitious in what it purports in its first art.1 by stating that:

“[I]t sets out the general principles regarding trade and aims at the development of distribution chains of products and services in the market in accordance with the principle of free competition, at the protection of life, health, safety and the economic interest of consumers, as well as the environment.”

It is therefore justified to state that both the general competition law and the special ordinance have common objectives such as the economic interest of consumers and their welfare. Thus, in promoting free competition as a constitutional right, the public enforcement acted as a guardian of fair competition where the ex ante art.4(3) CL empowered the CC to act “where unfair competition acts cause significant distortions to the smooth functioning of competition in the market”. It obviously appears that the commercialisation of products and services in the market overlaps significantly the competition law of distribution and agreements prohibited by their effect, which may cause significant distortions of competition in the market and thereby affect trade. However, the law of distribution and of developing chains to supply consumers is understood in a broader context, whereas commercialisation in the market place also includes the marketing of products and services. One cannot ignore the fact that competition rules meet wider public policy considerations by means of a parallel mechanism for certain anti-competitive and commercial practices in both the above ordinance as well as, on a sector level, the Law 321/2009 governing the commercialisation of food products.

The food trade law, as it is known, distinguishes between practices that afford protection against specific anti-competitive practices such as sales below the acquisition costs and marketing of food products as unfair competition, and other unfair commercial practices engaged in under consumer contracts. For example, similar to a “re-sale price maintenance”, the concerned parties cannot buy or sell, directly or indirectly, products or services from or to a third party. There is an obvious interest in reducing the pricing of trade margins to an affordable level for the final consumers and narrowing the margins of intermediaries.

In practice, under distribution agreements, both price-fixing and re-sale maintenance are the most notable examples of commercialisation in the market place. Added to this, the abusive practices engaged in by dominant undertakings on the imposition, directly or indirectly, of unfair sale or purchase price or other trading conditions complete the former category of agreements. Thus the latter catalogue of abusive practices belongs to unfair competition in the sense that there is a clear contractual basis on what exactly such trading conditions include in those distribution contracts concluded by a dominant undertaking with its trading partners. This enhances the focus on the economics of contracts and the imbalance in the relative bargaining power of the monopolist and its distributors.

*E.C.L.R. 235 In terms of efficient enforcement of the above prohibition, a monopolist is more likely to escape on the grounds of public policy considerations because the law does not detail what kind of other trading conditions, or even trading terms, may complement the understanding when enforced in practice. Article 6 has therefore treated the concept of economic dependency as a relative imbalance in the parties' bargaining power where there are no available alternatives to the breach of contractual relations in art.6(f). It is more or less clear that if the economic dependence exists, and there may be a
breach of contractual obligations without sufficient notice given to distributors or suppliers by the monopolist, then there is an infringement of what is actually unfair competition between competitors.

It remains open to further discussion the way the general competition and the special unfair competition, or market commercialisation law, complete or complement each other. At the least, the special law puts in place a common safeguarding mechanism of enforcement where the National Authority for Consumer Protection and the Ministry of Finance are competent to impose fines for any anti-competitive and commercial practices included in the special law only if the general competition rules do not apply to the conduct in question. That is to say, the CC should therefore intervene on economic welfare considerations and, if and where any health, safety, or environmental concerns of distribution law as well as the protection of SMEs exist, they also ought to be observed in the case at issue.

The issues explained above are not without practical significance, particularly in one of the CC's investigations, opened in 2009, into the dairy sector, because milk producers were not satisfied with the purchase prices charged by retailers or intermediaries. The CC aimed to inquire into specific factors that influence the individual price formation on a market segment which is, however, extremely regulated by various EU agricultural policies. In effect, domestic producers are placed at a competitive disadvantage due to a relatively weaker bargaining power along the supply chain. This is explained by the fact that those producers do not own market shares, but are engaged in supply contracts that are concluded individually with retailers and intermediaries who impose the price due to their superior bargaining power. Again, the issue is in the economics of contractual relations where freedom of contract must not be an absolute right that causes imbalances on the weaker parties’ rights and inflicts economic harm by unfair disadvantage in market relations. In its *Annual Report on Competition Policy* on competition developments of the year 2010, published in April 2011, the CC has mentioned, however, that the general CL also applies to the market segment of commercialisation in the food retail sector, as there are no exceptions. Thus, Law 321/2009 should be interpreted as an exception, particularly since the unfair competition exceptions are already mentioned by Ordinance 99/2000 on the conditions of supply and the specific terms of delivery, etc. The sector regulation comes to stipulate specific anti-competitive and unfair commercial practices only, by observing the prohibitions on commercialisation already in place. In fact, the above Ordinance respects the right of domestic producers by offering them the possibility of directly selling their own products to individual consumers in art.29. Therefore, a sale below the cost of acquisition from the milk producers by distributors, or above the competitive level, results in an unfair trade margin affecting producers and indirectly consumers. Several taxation issues may also be relevant.

Perhaps a more succinct example on the relationship between the abuse of economic dependency and unfair competition is a recent litigation outcome. There, the court was requested to oblige the CC to open an investigation based on art.6(f). It held that an economic retail agent attempted to obtain exclusivity in order to avoid pricing problems with competitors, thereby exploiting its supplier. There was no exclusivity clause in the agreement concluded which had as a consequence its unilateral breach under art.6(f). The plaintiff argued that this provision's aim is to prevent the exclusive exploitation of the supply of products. Furthermore, one has to notice that since the addressees of economic dependency are not dominant undertakings, this concept followed by a distinct infringement of a breach of contractual relations has been included to be enforced by the CC. In fact, there is a litigation clause which is to be interpreted by the courts, and therefore it belongs to unfair competition. Why this has had to happen in the general context of abuse of dominance is not entirely clear. It must be said that even if the prohibition is specifically addressed to dominant undertakings, the substantive form of abusive conduct affects a different kind of exploitative rather than exclusionary abuse. If not included at all, the risk is that the provision makes dominant players escape anti-competitive practice of this kind,
especially since national courts do not have judges trained in economics of competition and mostly courts do not re-judge the substance of the case with regard to the investigation on market power. Certainly, this does not need to be the case for contractual terms or conditions but it is often an excuse to explain that the court cannot assess the respective market power when in fact the bargaining or negotiating power is the source of injustice.

It is therefore not surprising that the plaintiff had introduced a law suit based on art.1087 of the Civil Code on contracts, various provisions on certain marketing and sales of Ordinance 99/2000 on the commercialisation of products and market services, art.6(a) which is the general unfair competition rule,89 art.6(d) on supplementary obligations in contractual clauses and art.6(f) on economic dependency. Previously, the CC dismissed the claim *E.C.L.R. 236 because of the lack of dominance. This is contrary to the purpose of the ordinance on commercialisation or marketing of products, according to which the CC may also enforce its general rule on unfair anti-competitive practices of art.6 (a). The latter being engaged in by dominant undertakings, lowering the threshold of intervention would have been possible for any undertakings dependent on similar undertakings, and not only for those found to be dominant.

This development of private litigation raises a further concern not only with regard to the fact that national courts cannot establish dominance, but only perform a limited judicial review, and since there are no specialised tribunals, it is not surprising that we are in a situation, which is currently more or less addressed, where there is, indeed, a significant imbalance in the aptitude of courts to undertake the sophisticated economic analysis required for competition cases by the CC. This is particularly important as it potentially creates the risk that the courts would decide in favour of the administrative authority, being unable to re-check themselves. On the other hand, the CC is less well equipped in the legal analysis of contracts.

It remains therefore extremely interesting to see and to demand from the CC to incorporate in its legal and economic analysis secondary provisions that are challenging substantially the former Law 11/1991 with a more extensive set of policy objectives.

The recent amendment approved by Law 149/2011

The amendment to the CL 26/1996 by Ordinance 75 of June 2010 has recently been approved by Law 149/2011.90 It proves to be another step from the past legislation uptake to a better compliance of competition rules with EU competition law. As noted earlier, the national competition authority will extend its powers in public enforcement of consumer protection, and partially business-to-business, even against aggressive competition. This may prove correct since it is, at times, better to intervene where action is really needed than to wait for private litigation. It is also a recognition that in order to serve the individual consumer, for infringements of competition rules, registered associations of consumer protection may introduce law suits on their behalf as a class action.91

At first, one of the most notable changes is that the CC can now accept commitments from the concerned undertakings in order to eliminate competition concerns. Following this amendment, the CC’s powers have been considerably extended. The CC can, inter alia, impose interim or corrective measures; it can order an undertaking to cease an anti-competitive practice, or withdraw the benefit of an exemption. Finally, the CC can apply fines, including comminatory fines, for failure to submit or for incomplete, inaccurate, or misleading information.

Another challenge concerns the introduction of leniency according to which the CC can reduce the level of fine by 10-25 per cent for any express recognition of participation. The first company to receive impunity is Radio Taxi, active in the service market for taxi transportation in the city of Timişoara,
where 11 operators were found guilty of operating a price-fixing cartel since 2007.\textsuperscript{92} The fine imposed on them was approximately the equivalent of $80,026.

However, in merger cases, the substantial challenge has been to replace the old dominance test on the risk of creation and consolidation of a dominant position by SIEC. The system of individual exemptions is also fully harmonised with the EU competition law criteria and categories of block agreements, whilst soft law guidelines have also been amended.

An earlier draft was presented at the 7th Annual Competition and Regulation Meeting on Competition Policy for Emerging Economies, Amsterdam Center for Law & Economics, on May 20, 2011.

E.C.L.R. 2012, 33(5), 227-236

1. For an exhaustive enforcement overview on the abuse of dominance, see Dr Anca Daniela Chiriţă, The German and Romanian Abuse of Market Dominance in the Light of Article 102 (Baden-Baden: Nomos, 2011); Dr Anca Daniela Chiriţă, “The Abuse of Dominant Market Position under Romanian Antitrust Law in Light of European Antitrust Law” [2008] 29 E.C.L.R. 162.
4. CC Decision of December 16, 2010 (52--Romanian mail), by ord.175, August 1, 2005.
8. According to the CC’s press release of February 2011 the fine amounted to approximately $34.8 and $28.3 million on Orange and Vodafone respectively. Recently, the two decisions have been released: see CC Decision February 14, 2011 (1--Vodafone Romania SA); CC Decision of February 14, 2011 (2--Orange Romania SA).
11. Romanian mail Decision para.18.
12. Romanian mail Decision para.24.
13. Romanian mail Decision paras 30-33.
14. Romanian mail Decision para.37.
15. Romanian mail Decision para.51.
16. Romanian mail Decision paras 54-5.
17. Romanian mail Decision para.66.
18. Romanian mail Decision para.73.
19. Romanian mail Decision para.77.
20. Romanian mail Decision para.80.
21. Romanian mail Decision para.104.
22. Romanian mail Decision para.166.
23. Romanian mail Decision para.129.
24. Romanian mail Decision para.181.
25. Romanian mail Decision para.51.
26. Romanian mail Decision para.196.
27. Romanian mail Decision paras 197-8.
28. Romanian mail Decision para.199.
29. Romanian mail Decision para.208.
30. Romanian mail Decision para.212.
31. Romanian mail Decision paras 213-4.
32. Romanian mail Decision para.216.
33. Romanian mail Decision para.223.
34. Romanian mail Decision para.229.
35. Romanian mail Decision para.373.
36. Romanian mail Decision para.232.
37. Romanian mail Decision paras 247-8; 251.
38. Romanian mail Decision para.253.
39. Romanian mail Decision para.262.
Romanian mail Decision para.269.
Romanian mail Decision para.273.
Romanian mail Decision para.280.
Romanian mail Decision para.284.
Romanian mail Decision para.285.
Romanian mail Decision para.290.
Romanian mail Decision para.293.
Romanian mail Decision para.311.
Romanian mail Decision para.385.
Romanian mail Decision para.389.
The case will be further detailed.
This is noted in the CC's Annual Report on 2010 (Bucharest: 2011).
HCCJ, civil sentence 752, February 12, 2009. Previously, see Bucharest CA civil sentence 2106, September 2, 2008.
Dr Anca Daniela Chiriţă, The German and Romanian Abuse of Market Dominance in the Light of Article 102 (2011), see Bucharest CA civil sentence 4021, N. SERV SRL v Competition Council Unreported November 18, 2009 VIII. administrative and fiscal section.
Private Pensions Funds Market Decision para.166.
Private Pensions Funds Market Decision paras 27; 54-8.
CC Decision 47 (Association of Experts and Chartered Accountants (ARCA)) November 2, 2010.
ARCA Decision para.37.
ARCA Decision para.125.
ARCA Decision para.94.
ARCA Decision para.98.
ARCA Decision para.100.
ARCA Decision paras 129-30; for proven intention see, para.143.
ARCA Decision paras 62 and 133.
ARCA Decision para.123.
ARCA Decision para.153.
ARCA Decision para.178.
See art.2, at p.50 of the fining decision.
CC Decision 49 (SC Olăneşti Riviera, SC SIND et.an) November 18, 2010 para.22.
See SC Olăneşti Riviera, SC SIND Decision paras 4 and 105.
SC Olăneşti Riviera, SC SIND Decision paras 30-1.
SC Olăneşti Riviera, SC SIND Decision para.117.
CC Decision 25, General Council of the City of Bucharest, June 21, 2010.
CC Decision 25 Para.65.
Governmental Ordinance 99/2000 regarding the commercialisation of products and market services, as further amended [2008] OJ I-736.
Governmental Ordinance 99/2000 art.2.
S.C. E.-D.U. SRL v Competition Council (civil sentence 855) Unreported February 17, 2010 CA Bucharest, VIII administrative and fiscal section.
S.C. E.-D.U. SRL v Competition Council (civil sentence 855) Unreported February 17, 2010 at [315]-[316].
S.C. E.-D.U. SRL v Competition Council (civil sentence 855) Unreported February 17, 2010 at [315]-[316].
91. Following the amended art.61 CL through art.42 of Law 149/2011.

© 2014 Sweet & Maxwell and its Contributors