

THE MANIFESTATION OF THE ABUSE OF DOMINANT POSITION IN THE CURRENT ROMANIAN ECONOMY

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ABSTRACT: *The abuse use of a dominant position constitutes an important form of manifestation of anti-competitive practices. Almost all competition laws have some provisions on the abuse of dominant position. Most European laws, including the one of the European Union, contain an express provision prohibiting the abuse of dominant position. However, they rarely include a definition of what constitutes abuse of dominant position, but most of them pass in review examples of behaviors that may be considered illegal. In countries with a developed market economy, the legal provisions regarding abuse of dominant position were not so important and so widely used as the provisioning governing mergers and the cartel behavior. The explanation is that in a developed economy, the markets are larger, firms are more numerous, and the entry on the market is relatively easy. As a result, there are few markets where a firm with a dominant position can exercise its market influence for longer periods without new entries being attracted. For this study we decided to present the most famous cases involving the abuse of dominant position registered on Romanian market of mobile phones in 2011 and sanctioned by the Romanian Competition Council.*

KEY WORDS: *economy; market; the dominant position; the abuse of dominant power; monopoly; monopolistic firms; legislation; Competition Council.*

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1. GENERAL CONSIDERATION REGARDING THE ABUSE OF DOMINANT POSITION

The dominant position can be played by an economic operator or more economic operators, and, when on the relevant market there are more economic operators, they may or may not be related one to another (Mihai, 2006, p.23).

The market, subject to domination, must be analyzed in its evolution, which means disposing of a series of technical, economic, commercial data, and information

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concerning the extent of the market and the “segments” in which it can be divided, according to users, products, and categories of buyers or marketing forms.

The dominant position is generally constant, when an economic operator occupies most of that particular market. This classical criterion of defining market dominance has been completed, since the ‘80s, with other criteria, to respond more properly to diversity, in terms of quality and market dominance.

These criteria are the following: analysis of economic power resulting from the use of illegal means of eliminating competitors; analysis of the natural superiority situation related to management; technical innovation or commercial action (including preferential access to certain sources of funding); the presence and position on the other markets; the importance and reputation of trademarks owned, which may constitute a barrier to entering on certain markets; conditions under which a trader implements its strategies towards competitors or other customers.

What is important is not the “dominant position” held by the company, but the “abuse” itself. Under most laws on competition, it is illegal for a company to hold a dominant position in the market or to be monopolistic.

The size of a monopoly does not imply the existence of immediate guilt; for it would have to exist attempts to eliminate competitors from the market, the growth to be “normal” or “natural,” respectively to be proven the existence of “real intentions” or some means designed and used in bad faith (Iancu, 2009, p.71).

Monopolistic firms, some of them can be found on this position, without having had any intention for this purpose, i.e. not having wanted to eliminate existent competition or prevent its occurrence, if it had not existed. For example, a market may be limited so that it is impossible to obtain a product or produce it at certain costs, if the factory is not large enough to cover the entire demand. However, changes may occur in consumers’ preferences or changes in the cost of obtaining products that can eliminate all sellers in the market, except one. This may be the survivor of a group of active competitors, who survived due to its superior qualification, caution, and hard work.

There are two types of behavior, which could be adopted by a firm, and that can be considered as abuse of dominant position. The first category includes behaviors through which a dominant firm exercises or uses its market power, such as the practice of monopoly prices or reducing output in order to create a shortage of goods. Such behavior is generally considered an “exploiting behavior” as the company exploits its power held on the market.

The second category includes behaviors through which a dominant firm creates or strengthens its power on the market by preventing other competitors to enter the market or to compete effectively. This behavior is called “excessive behavior” because it excludes competition or competitors.

In the legislation of European states, including the one of the European Union, such practices as well as exclusionary ones are usually prohibited. Unlike Europe, in the U.S. it is legal for a dominant firm to exploit its power on the market, practicing high prices and gaining large profits. In this respect, there are three reasons why the U.S. does not prohibit exploiting practices.

First, it is often difficult to determine whether a firm exercises its power on the market. When it does, it raises prices and reduces output to obtain monopolistic profits. However, it is difficult, even impossible, to determine whether the prices, profits, and output of a firm are monopolistic.

Secondly, it is considered that there must not be barriers against exploitation of power on the market, because companies manage to overcome them by using their dominant power. This is the natural effect of the existence of this power.

Price level, production, and normal profit in a particular branch cannot be determined, and when the price and volume decisions concerning production are taken by the government authorities instead of being governed by market, failures occur in their operation. On the other hand, if prices were set at a level too low, consumers would show a high demand, much greater than the one that could be satisfied at this price level, shortages of goods would appear on the market, and in order to survive firms would need state subsidies. The costs of under/over evaluating a competitive price are extremely high.

The third reason for which in the U.S behaviors of using power on the market are not prohibited, is that if they would be prohibited, in the long run, would appear a series of negative phenomena, more serious than the present use of power on the market.

It is well known that in a market economy prices play a crucial role, showing companies, which markets are not behaving competitive, and hence which markets offer the possibility to obtain profits above normal. Thus, it is considered that, if competition authorities intervene in price signals, limiting the prices a dominant firm can practice, they may actually discourage the entry of new firms, and thus perpetuate the dominant position of companies that practice them. At the same time, they can discourage entrepreneurs to invest in transition economies by increasing it.

The condemnation of dominant position is done only when it is used abusively “by turning to anti-competitive acts, which have as purpose or result in affecting commerce or harm consumers,” as stated in European regulations (Gheorghe, 2011, p.9).

Dominant position is a prerequisite for a trader to exercise abusive practices. Between the dominant position held by the economic operator/operators and abusive practices manifested in their behavior, there is a causal link. In any market there may be a dominant position, this being the result of the competition itself, which makes some stronger than others, which, over time, even disappear from the market. Mergers and concentrations influence the appearance of changes in the structure of the market.

Abusive practices that may be exercised by economic operator/operators under Law no. 21/1996 of Romania are: a. imposing directly or indirectly purchase or selling prices, tariffs or other unfair contract terms and the refuse to deal with certain suppliers or beneficiaries; b. limiting production, distribution or technical development to the detriment of users or consumers; c. applying dissimilar conditions at equivalent transactions to trading partners, thereby causing some of them, a competitive disadvantage; d. conditioning the conclusion of agreement contracts by partners, of some clauses stipulating additional benefits, which have no connection whatsoever with the subject of such contracts, either by their nature, nor according to commercial

usage; e. performing imports without competition of offers and usual technical-commercial negotiating for products and services that determine the general level of prices and tariffs in the economy; f. practicing excessive prices or predatory prices, below costs, in order to eliminate competitors, or selling for export trade at a price below the production costs, by covering differences through imposing increased prices to domestic consumer; g. exploiting the economic dependence estate in which a client or a supplier can be found towards such an operator or operators, and which does not have an alternative solution under equivalent conditions, as well as breaking contractual relations on the sole ground that the partner refuses to comply with certain unjustified trade conditions;

Abusive practices can sometimes be the result of arrangements between operators who hold together a dominant position on the market. An exclusionary behavior is the behavior of a dominant or monopolist firm, which creates or maintains its power on the market by eliminating competitors from a market or limit their ability to compete. The exclusionary behavior may be a unilateral behavior, which is practiced by a single dominant firm, or may involve arrangements between a dominant firm and suppliers, distributors, or customers. Unilateral behavior, which may be exclusionary, includes predatory pricing, refusal to deal or price discrimination.

Agreements, that may be exclusionary, include exclusive business agreements, business arrangement related and vertical restraints imposed by a manufacturer to its distributors, such as maintaining the resale price or exclusive territories.

2. CASE STUDY ON THE ABUSE OF DOMINANT POSITION OF THE VODAFONE AND ORANGE COMPANIES ON THE MOBILE SERVICES MARKET

Abuse of dominant position is a type of competition rules' violation, which implies the existence of two cumulative conditions: the undertaking(s) concerned to hold a dominant position on the market where it manifests such a behavior and, of course to abuse of this advantageous position on the market, to the detriment of other market participants.

Dominant position on a market is not necessarily a result of the market share achieved, but crucial is the extent to which the undertaking or undertakings are able to act independently on the market towards their suppliers, customers and competitors.

However, the national competition law stipulates that until proven otherwise, one or more undertakings are not in a dominant position, provided that the share or shares cumulated on the relevant market do not exceed 40%.

Among the forms of dominant position abuse (regarding either the exclusion from the market of other undertakings, or their economic exploitation by the dominant undertaking) can be found: direct or indirect imposing of unfair sale or purchase price, refusal to deal with certain suppliers or beneficiaries, the practice of excessive pricing or predatory pricing, in order to eliminate competitors.

To illustrate such cases of abuse of dominant position on the current Romanian market, we referred in this case study at a very recent case and extensively propagated through the media - mobile network operators- Vodafone and Orange.

Competition Council decided on 14th of March 2011 to amend the operators on the mobile network market - Orange and Vodafone - with 63.1 million Euros for abuse of dominant position, after an investigation started in 2006 at the request of the alternative provider of fixed telephony Netmaster Communications. Orange and Vodafone were fined with 3% of turnover in 2010, i.e. 34.8 million Euros and 28.3 million Euros.

This case was given extent media coverage, because in a top of penalties for abuse of dominant position, performed by the Competition Council, Vodafone and Orange occupy the first position.

According to the Competition Council, fine was given in a context where both Orange and Vodafone were obliged to grant Netmaster access to their networks for call termination and to comply with regulations of the authority in the field, including the one concerning the maximum charge for those services (regardless of their initial place, outside or inside Romania). The analysis of Competition Council showed that, until January 1st, 2007, Vodafone and Orange have set higher tariffs for the service of call termination for calls performed internationally, without taking into account regulations in the field, which set a maximum tariff that should have been respected. According to the Council, if Vodafone and Orange would have granted Netmaster access to the maximum tariff regulated, as provided by the non-discrimination obligation, they should have applied the same tariff to all operators requesting this service, including to those with who they concluded contracts. At the same time, the two companies did not grant Netmaster access to their telephone networks for the termination of calls originated internationally and those originated in the networks of other providers in Romania, for a period of one year and a half in Vodafone network and two years and four months in Orange network. Furthermore, for a short period of time, the two companies have limited the termination of national calls coming from Netmaster network.

In 2006, Netmaster Communications Company filed a complaint with the Competition Council against Orange, Vodafone and Romtelecom operators, accusing them of anti-competitive practices in terms of interconnection obligations. Netmaster Communications accused the refusal of two operators - Vodafone and Orange to provide access to their networks.

In the period of 2004-2006, Orange and Vodafone have blocked the access to their networks for the alternative provider of fixed telephony Netmaster Communications. Practically, Netmaster Communications users' could not call the users of the two large operators. The investigation established that in this period, Orange and Vodafone have charged an interconnection tariff higher than the one regulated by the regulation authority in the field of communications.

Thus, in that period, the regulated tariff was 10 cents/minute, while Orange and Vodafone were practicing interconnection rates of 15-18 cents/minute. More specifically, it is about interconnection rates charged for international calls. On this issue, the two operators have litigated with the regulation authority in the field of communications, and at the end of 2006 – beginning of 2007, a Court decision ruled in the favor of this institution. As a result, the two operators have corrected their behavior on the market.

The complaint made by Netmaster Communications Ltd. in 2006 was pointing not only the behavior of Orange and Vodafone operators, but also a possible abuse of Romtelecom by refusing to grant access to its network for the complainant, the fix telephony operator. Consequently, the Competition Council opened three investigations.

This investigation was initiated following the complaint submitted by Netmaster Communications. However, the Competition Council decided to initiate the second legal proceedings *ex officio*, targeting possible anti-competitive practices of the major mobile operators in Romania - Orange, Vodafone and Cosmote. During these investigations, the Competition Council carried out unforeseen inspections at the premises of the three telephony operators and of some distributors of prepaid mobile products.

During the investigations started in 2006, and following some complaints made by SC Netmaster Communications Ltd., the competition authority found that the two telephony companies refused to grant Netmaster Company access to their telephony networks for international and national call termination routed by this operator. Netmaster requested interconnection at the tariff regulated by ANCOM, tariff lower than that practiced by Orange and Vodafone.

The interconnection of operators' networks and unassailably the purchase of call termination services give subscribers from different networks the opportunity to call each other. Thus, the implementation of these services involves answering calls coming from, or routed from/through the networks of other operators (Netmaster in this case) and their delivery to the final destination point (end-users of Orange and Vodafone networks). For alternative telephony operators (Netmaster type), these services are essential facilities, in order to enter and operate on the market.

Vodafone and Orange abuses occurred on the markets of call termination services in own telephony networks, markets on which each of these operators hold a monopoly position. Under competition law, in the absence of an objective justification, a refusal is an abuse of dominant position on access market. Orange and Vodafone were not only obliged to grant Netmaster access to their networks for call termination, but also to comply with the regulations of the regulation authority in the field, including that of practicing a maximum tariff for those services (regardless of their initiation point, outside or inside Romania).

The analysis of Competition Council showed that, until 1st of January 2007, Vodafone and Orange have set higher tariffs for the service of call termination, for calls performed internationally, without regard to regulations in the field, which set a maximum tariff that should have been respected.

If Vodafone and Orange would have granted Netmaster access to the maximum tariff regulated, as provided by the non-discrimination obligation, they should have applied the same tariff to all operators requesting this service, including to those with who they concluded contracts. The two companies did not grant Netmaster access to their telephone networks for the termination of calls originated internationally and those originated in the networks of other providers in Romania, for a period of one year and a half in Vodafone network and two years and four months in Orange network. Furthermore, for a short period of time, the two companies have limited the

termination of national calls coming from Netmaster network, according to the competition authority.

Additional revenues obtained by the two companies in this market represent, in fact, additional costs of operators who have terminated calls in Vodafone and Orange networks. This translates into paying higher prices by final consumers.

Therefore, after approximately 5 years of investigation, this year the Competition Council decided to fine the mobile network market - Orange and Vodafone - with 63.1 million Euros for abuse of dominant position, following an investigation started in 2006 at the request of the alternative provider of fixed telephony Netmaster Communications. Orange and Vodafone were fined with 3% of turnover in 2010, i.e. 34.8 million Euros and 28.3 million Euros.

Orange and Vodafone have expressed their surprise towards the decision of the Competition Council, and announced they would appeal the decision in Court.

Typically, over 95% of such decisions issued by the Competition Council are appealed in Court. Companies first appeal for the remission of the penalty and then follows the trial on the merits, i.e. appealing the decision of the Court.

According to the latest changes brought to competition law, decisions issued by the Competition Council can be brought before administrative Court at Bucharest Court of Appeal within 30 days of communication. The Court may order, upon request, the remission of the decision appealed. The remission will be ordered only upon payment of a bond in the amount of 30% of the fine set by the appealed decision. If the Court decides not to remit the fine, the company shall be obliged to pay the full fine and the trial continues. If the Court decides to remit the fines, Orange and Vodafone will be required to pay in advance 30% of their amount.

3. CONCLUSIONS

One of the major economic concerns in EU countries is to ensure adequate competition, which contributes to improving the design and quality of products and services, to maintain fair prices and to secure purchase facilities, as well as the global development of commerce within the European single market. In the context of such a competitive pressure, companies must continually develop innovative strategies and a continuous diversification of activity deployed, products offered, prices and information necessary for the dialogue with consumers.

In the context of the Romanian economy integration into the European Union, Romania has applied methods and instruments, which should lead to the development of the Romanian economy, the strong recovery of production, stimulation of investment, increasing competitiveness, acceleration of the reform process, restructuring and privatization, modernization, to ensure a sustainable macro-stabilization and elimination of fundamental imbalances existing in the economy; at the same time, our country has adopted a series of legislative measures that reflect the principles of market economy, such as legal acts adopted in the field of consumer protection or imposing the conduct of commercial activities in the boundaries of fair competition.

Drastic changes imposed to competition law by Romania's accession to the EU have brought us a clearer definition of fair behavior rules and the defense modalities against anti-competitive practices. Unfortunately, countries even less developed than Romania, apparently have succeeded a more efficient implementation, say the report elaborated by the World Economic Forum in 2007.

By analyzing the example of abuse of dominant position, one of the most extensively propagated through the media and penalized cases in recent years, as well as international reports, we observe that the process of liberalization and normalization of behaviors in the Romanian economy is slow and anfractuoso.

Starting with the perception of the business environment on the flexibility and the efficiency of promoting real competition, the World Economic Forum places Romania on the 67th place in the world (of 139 countries, Global Competitiveness Report 2010). Despite our 15 years of experience in regulating anti-competitive practices, legislative reformulations at European standards, of a significant reduction of institutional weaknesses in the last five years, and even despite the positive economic dynamics in recent years, the efficiency of the implementation of competition law proves relatively low.

REFERENCES:

- [1]. **Butacu, C.** (2005) *Legislația concurenței. Comentarii și explicații*, Editura All Beck, București
- [2]. **Cotuțiu, A.; Sabău, G.V.** (2008) *Drept român și comunitar al concurenței*, Ed. C. H. Beck, București
- [3]. **Gheorghe, G.** (2011) *Dreptul concurenței interne și europene*, Ed. Universul juridic, București
- [4]. **Iancu, V.** (2009) *Dreptul concurenței comerciale*, Editura Sitech, București
- [5]. **Moșteanu, T.** (2000) *Concurența. Abordări teoretice și practice*, Ed. Economică, București
- [6]. **Moșteanu, T., coord.** (2000) *Prețuri și concurență*, Ed. Didactică și pedagogică, București
- [7]. **Moșteanu, T.; Dumitrescu, D.; Alexandru, F.; Vuță, M.; Obreja, L.; Șerbănescu, C.; Stoian, A.** (2005) *Prețuri și concurență*, Ed. Universitară, București
- [8]. **Mihai, E.** (2006) *Dreptul concurenței*, Editura All Beck, București