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Competition Law, Policy, and Enforcement  
The Romanian Experience

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# The German and Romanian Abuse of Market Dominance



## Recently Published



**The German and Romanian Abuse of Market Dominance in the Light of Article 102 TFEU**  
By Dr. Anca Daniela Chirijă  
2011, 395 pp., pb., € 98.00, ISBN 978-3-8329-6435-1  
*(Schriften des Europa-Instituts der Universität des Saarlandes – Rechtswissenschaft, vol. 82)*

The book approaches the substantive provisions on the abuse of dominance by undertakings, the relevant economic and historically rooted approaches, including EU competition policy goals after Lisbon, based on the German and Romanian legal context, competition enforcement and experience. It analyses the relevance of stricter national rules especially of non-dominant undertakings based on traders' performance as a distinct field of law focused on the exploitative abuse as unfair methods of competition. It highlights how the Commission's Guidance Paper included an incipient model of more effects-based competition law that departs from the static market structure focus on exclusionary abuse and focuses on harm and efficiencies. It also covers recent cases on the misuse of intellectual and industrial property rights, including unified standards and smaller businesses, and explains the thin borderline between free and fair competition based on open markets and public policy, with innovation balancing respectively. The book gradually advances new interpretations of Article 102 TFEU to include dynamic competition and concludes with a developing Union trading law in need of a Regulation governing aspects of fair competition and relevant administrative criteria.

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# Outline



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**RECENT AMENDMENT TO THE ROMANIAN  
COMPETITION LAW**

**RECENT DEVELOPMENTS: CASES**

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# Competition Policy Objectives: Legal Background



Art 45 Constitution: right of free initiative –free competition. Art. 1 RCL ‘To protect, maintain, and stimulate competition and a normal, competitive environment’ & ‘the furtherance of consumer interests’.

Art 135 Constitution: protection of fair competition. Therefore, Art 4(3) RCL no 21/96 empowers the CC to act where unfair competition acts (Unfair Competition Law no.11/91, as amended in 2007 to unfair commercial practices against consumers) cause significant distortions to the smooth functioning of competition in the market.

Thus, previously, both:

- ❑ Art 6 prohibited anti-competitive deeds that have as an object or may have as an effect the distortion of economic activity or the prejudice to consumers.
- ❑ Art 7 (4) exceptional measures by the CC where there is a public interest, such as consumer welfare and public safety. Serious damage to public policy interests!
- ❑ Parallel mechanism for certain anti-competitive and commercial practices, GO 99/00 and Law no 321/09.

# Past Experience



- ❑ Until 2007, focus on the adoption of competition rules and implementation of special regulations, guidelines, notices etc.
- Relatively fewer cases with a strong legal approach – cumulative conditions, object/effect.
- Establishing dominance: focus on too narrow (tobacco/chewing gum & sweets) relevant markets, recognition of local markets, lower market shares.
  
- ❑ After 2007, follow-on the Commission‘ decisions and 40% is now a legal presumption.
- Two landmark cases for abuse, but no *precedents*.
- Standard of economic analysis: SSNIP test, Herfindahl-Hirschman index in Wrigley. Based on product usage, Wrigley was not dominant in the secondary market for sweets.

# Recent Amendment to the RCL



GO no 75/2010 entered into force on 5 August 2010. From legislation uptake to complete harmonisation/competition compliance.

- ❑ CC can accept commitments from the concerned undertakings in order to eliminate competition concerns.
- Powers: to impose interim or corrective measures, order to cease the anti-competitive practice, withdraw the benefit of exemption, apply fines, including comminatory, for failure to submit or incomplete, inaccurate or misleading information.
- Fine level: 1% to 5% average daily turnover for refusals to allow an inspection, 7% after an investigation.
- ❑ No prior non-intervention approval by the CC (system of individual exemptions), i.e. undertakings must evaluate themselves the compliance with Art 5 RCL.

# Recent Amendment to the RCL



GO no. 75/2010 followed by soft law legislation released by order of the CC's president.

- ❑ Dominance test (risk of creation and consolidation of a dominant position) replaced by SIEC in economic concentrations.
- ❑ Procedure: CC's decisions may only be suspended by the Bucharest Court of Appeals against deposit payment of 30% of the fine amount.
- ❑ Previously, no leniency policy. Now, the CC can reduce the level of fine by 10-25% for express recognition.

Radio Taxi, 1<sup>st</sup> company to receive full-immunity.

Fine app. 80,026 Eur.

PowerUp 50% fine reduction.

# Public v private enforcement

## Competition law

- ❑ Anti-competitive practices by dominant undertakings harm the structure of the market.
- ❑ Objective concept:  
Abuse by making recourse to methods other than those that condition normal competition. Common feature: material capability to distort competition by abusive, not (unfair) practices.
- ❑ Duty not to abuse a dominant position
- ❑ Effects-based approach: material capability-harm-prejudice.

## Unfair competition law (litigation)

- ❑ Unfair practices by any traders harm the interests of the public in general, mostly consumers.
- ❑ Subjective concept:  
Unfair intention to materially distort the economic interests of consumers/businesses in general – economic torts delict/quasi delict: actions or omissions.
- ❑ Duty of good economic performance: good faith/professional business conduct fair commercial usage – trading terms and conditions in contracts.



# Overview of Recent Developments



In 2010, 20 out of 26 open investigations closed (80% ex officio):

- 16 out of 21 alleged anti-competitive infringements ended with 7 sanctions:
  - 4 on horizontal agreements, 1 illegal action by a public administration body, 2 economic concentrations, 3 major sectoral inquiries.

Due to the economic crisis:

- reduced number of investigation by 22% on infringements & 40% on sectoral inquiries (2009);
- M&A process decreased.

Increased fines x2.7 higher (2008), x 14 higher (2009).

Overall, 59 decisions, 1 on abuse, 39 (65%) authorisation of an economic concentration, only 12% sanctioning decisions.

# Overview of Recent Developments



- Investigations length: on average 52,7 months, whereas only economic concentrations are approved within 3,1 months, sectoral inquiries can take up to 16,7 months.
- 10 out of 60 investigations older than 3 yrs at the end of 2010.

Administrative law no 554/04 – no deadline for the finalisation of an investigation.

RCL – a decision cannot be taken within 30 days.

CA Bucharest September 2008 & High Court CJ, February 2009.

- ❑ HCCJ: *mere 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, which did not apply for competition investigations by the CC.*
- ❑ *Where the special law is silent, the reasonable time limit acknowledged by Art 6 ECHR applies.*

# Recent Developments: Cartels Dec. 39/2010



Art. 5 RCL and Art. 101 TFEU, investigation start 2007

Cartel on the administration of private pension funds market:

- Allocation of customers capable to restrict, limit or distort competition amongst 14 out of 18 active operators.
- Participants registered simultaneously with 2 pension funds (must be notified/approved by the NP&SI House), and then distributed alleatory.
- Pension funds managers agreement to share 50-50 registered participants.

Fine 1,226, 000 Eur.

# Recent Developments: Cartels Dec. 47/2010



- Cartel in the market for liberal professions
- An association of undertakings is one engaged in economic activities, irrespective of its legal status or the way it is financed.
- Since 2001, minimum/maximum of fees set out by the Association of Experts and Chartered Accountants (CECCAR)

CC notification 2001, investigation started late February 2009.

Fine 950, 000 Eur. –largest fine in terms of the 9% AT and aggravating circumstances – 9 yrs duration and continuation after start of the investigation as a sanction.

- Recently, a grocery provider, Interfruct, and Albinuta and Profi, as retailers, fined because of a 1 year price-fixing agreement - shelves price for the commercialisation of fresh fruits and vegetables (except bananas) with app. 4 mil. Eur.

Investigation start 2009, ended April 2011.

# Recent Developments: Bid-rigging



June 2009 *ex officio* investigation on alleged bid-rigging tenders by the National Pensions and Social Insurance Funds.

- Award of treatment tickets subsidied by the National House,
- By 7 companies of a resort area in Baile Olanesti on the setting of prices and number of seats, including a service contract on the mineral water supply for therapeutic purposes.
- Tender offers presented at auctioning where monitored and price-fixed, incl. manipulation of water supply.

Fine 950, 000 Eur. –largest fine in terms of the 9% and penalty as aggravating – 9 yrs duration of infringement and continuation after the start of the investigation.

# Recent Developments: Decision 25/2010



Investigation start 2007 against Bucharest General Council (public administration) prohibition of the construction of new oil stations in the city center and limitation of the number of available pumps.

- Administrative barrier to market entry
- CC restrictions on land use due to environmental concerns such as safety and security of citizens and air pollution!
- Thus, the prohibition was not proportionated with any possible negative effects – alternative to acquire existent oil stations.

Effective remedies: eliminate the ban.

# Parallelism



- General provision under RCL –public enforcement with public policy;
- Specific legislation on commercialisation (including specific policy objectives such as consumer welfare, transfer of welfare from producers via distribution chains, environmental concerns) on selling below the acquisition costs by producers. Trade margins.
- NACP and Ministry of Finance over anti-competitive & commercial practices – only if the general competition rules do not apply.
- ✓ Price-fixing on the commercialisation of products or commercial services;
- ✓ Abusive practices by dominant undertakings : imposition (directly/indirectly) sale or purchase pricing/non-pricing such as terms, conditions, payment delivery deadlines, any contractual clauses – economic theory of contracts – bargaining power, buyer power.
- ✓ Economic dependency: no available alternatives and the contractual breach Art. 6 (f)

# Parallelism



- Sectoral inquiry opened in 2009 as milk producers were not satisfied with the purchase prices charged by retailers/intermediaries, to inquiry specific factors that influence the individual price formation.
- This market segment is extremely regulated (EU policies).
- Domestic producers are placed at disadvantage due to weaker bargaining power along the supply chain.
- Supply contracts are concluded individually, producers do not own market shares.
- ❖ CC Report stated RCL applies to this market segment (commercialisation and food retail) as there are no exceptions. Thus, Law no. 321/09 must be interpreted based on the exceptions set out by GO 99/00 on the supply and terms of delivery etc.

Selling below the cost of acquisition (set out by milk producers).



# Private litigation: Concurrent use



Bucharest CA, Feb. 2010 requested to oblige the CC to start an investigation –basis Art 6 (f) RCL.

- Retail agent tried to obtain exclusivity, which was denied, followed by an unilateral breach of the contract. This is the aim of the above provision.
- Addresses non-dominant undertakings/any traders lowers the threshold of intervention.
- Law suit basis: Art 943, 1087 CC, GO 99/00 on commercialisation, Art 6 (a) general unfair competition rules, administrative law.
- ❖ Thus, under the GO, NACP nor public authorities are empowered to establish whether a trader is dominant, despite having some sort of market power/financial strength.
- ❖ Weaker bargaining power for dependent undertakings.
- ❖ Courts cannot establish dominance, only judicial review.  
No specialised tribunals.

Thank you very much



**FOR YOUR ATTENTION!**