

Romania

A. Objectives of unilateral conduct laws

1. With regard to your jurisdiction's unilateral conduct rules – *e.g.*, rules concerning the prohibition of abuse of dominance or monopolization - please state the objectives of these rules (*e.g.*, consumer welfare, efficiency, protecting the competitive process), and identify the source from the following, as applicable:

- a. Constitution
- b. Statutes
- c. Regulations
- d. Agency enforcement policy (*e.g.*, guidelines, speeches)
- e. Case law
- f. Other (please identify)

a) Constitution:

The general principles that shape the framework for any competitive objectives are set out by the Romanian Constitution, under the article 135, as follows:

(1) Romania's economy is a free market economy, based on free enterprise and competition.

(2) The State must secure:

a) a free trade, **protection of fair competition**, provision of a favorable framework in order to stimulate and value every factor of production;”

The constitutional legislator fixed as a paramount and leading objective the protection of fair competition. Consequently, the analysis of all the anticompetitive conducts, including the unilateral behaviors, will be driven by the aim of the protection of competition.

b) Statutes:

As it is set out under the art. 1 of the Competition Law no 21/1996 (hereinafter referred to as Competition Law), the general scope of this normative act is “to protect, maintain and stimulate competition and a normal, competitive environment, with a view towards promoting consumers' interests.” Therefore, all the rules concerning the anticompetitive practices comprised by the Competition Law must be interpreted in the light of these aims that circumvent too the actions concerning the unilateral conduct.

Besides, the art. 6 of the Romanian Competition Law, which provides for the prohibition of certain unilateral conducts, adds: “Any abuse of a dominant position held by one or more undertakings on the Romanian market or on a substantial part of it, by resorting to anticompetitive practices, which have as object or may have as effect the distortion of the economic activity or the prejudice of consumers, is prohibited.” Therefore the prohibition of the unilateral anticompetitive practices is intended to protect the **economic activity** and the **welfare of consumers**.

c) Regulations and guidelines:

The same wording is reiterated by our Regulations and guidelines that provides the procedural rules concerning the anticompetitive practices - agreements and abuse of dominance (*Regulation for the application of the provisions of art 5 and 6 of the Competition Law regarding anticompetitive practices* and the *Regulation for the application of art 5 and 6 of the Competition Law regarding anticompetitive practices, in cases of complaints, Regulation for mergers' authorization*).

2. Are non-competition influences (such as promotion of industrial policy or distributive welfare) incorporated in these objectives? Please describe any such influences.

Not applicable.

3. If there are multiple objectives, how are these balanced or reconciled?

Even our law consecrates two objectives in assessing any anticompetitive practice, they don't impede each other; on contrary, they are linked and interdependent concepts. Thus, the *protection of a normal, competitive environment* set as an objective the protection of competition. But in assessing whether a particular unilateral conduct is detrimental to "competition", the authority will not consider only a given stage of the market (which would be the stage prior to the occurrence of the conduct in question) as the sole standard to be considered. In that sense, the allegedly competitive harm of a unilateral conduct will be assessed in correlation with the consumers' interest objective, by assessing the final effect on consumers. In promoting the competitive principle, the assessment of a unilateral conduct is driven by the end to protect *consumers' welfare*.

4. How has your jurisdiction balanced the risks associated with over-deterrence (detering efficient, pro-competitive conduct as a result of excessive intervention) with the risks associated with under-deterrence (permitting anti-competitive conduct as a result of too little enforcement) in choosing its objectives for unilateral conduct rules? Is this choice affected by the nature of your economy?

As the main objective pursued in the unilateral conduct is to protect a competitive environment, the over-detering or under-detering effects cannot be brought about by the objectives set. Moreover these effects could be triggered in the process of the assessment of the alleged dominant cases.

5. With regard to exemptions or exceptions to your laws specific to unilateral conduct (for example, for regulated sectors, government entities, purchasers, or exercise of intellectual property rights), please identify the exemption or exception and explain whether and how its goals differ from the objectives of your general unilateral conduct law and how the jurisdiction balances or reconciles these factors.

There are no exceptions under the art 6 of the Competition Law with regard to the applicability of this article to a special category of entities (such as government entities, undertakings acting in a regulated sector, etc). However, there are two general exemptions regarding the scope of the Romanian Competition Law. According to the art 2 (4):

“(4) This law shall not apply to:

a) the labor market and labor relations;

b) the monetary market and the securities market, to the extent that free competition in these markets is subject to special regulations.”

Enacting this provision, the legislator established the sphere of applicability of the Competition Law which includes all the markets, apart from the labor market and the monetary and security market. With regard to the monetary and the security market, these markets are not entirely closed to the competition rules, the Competition Law being applicable to them, provided that there are not any similar competitive provisions under special laws.

6. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules are influenced by the nature of your economy (*e.g.*, small, transition, or recently-liberalized), please explain.

The objectives of, or exemptions or exceptions, to our unilateral conduct rules are not influenced by the nature of the national economy, being set only with respect to a free market principle. In addition they are set in close convergence with the European Community's competitive objectives.

7. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules have been substantially reviewed or revised, please describe any change and the reason.

Not applicable.

8. Are there institutional features (*e.g.*, the possibility for a ministry to overrule competition agency decisions or the requirement the competition agency consult with other governmental agencies) that affect your agency's ability to achieve the objectives of the unilateral conduct rules? If so, please explain.

Not applicable.

9. Please describe any difficulties that your jurisdiction has experienced with its objectives for unilateral conduct rules. Based on your experience, what, if any, suggestions (including selection of other objectives) would you have for your or other jurisdictions, and why?

In pursuing the objectives described, our authority was confronted with the necessity to precisely assess the consumer harm following an economic approach. Thus, the main difficulty would be to apply an economic-based analysis focused on the anticompetitive

effects that harm consumers, in the detriment of a form-oriented approach that could offer the comfort of predictability to undertakings.

B. Assessment of Dominance/Substantial Market Power

1. Please provide a brief description of single-firm dominance/substantial market power as defined in the provisions of your jurisdiction's general competition law, relevant agency policy statements (e.g. guidelines, speeches) and/or case law that pertain to unilateral conduct. As appropriate, please also explain whether and how your agency categorizes different levels of dominance/substantial market power (e.g., "super dominance").

The definition used by the Romanian Competition Council for dominant position is: an undertaking which is able, to an appreciable extent, to behave independently of its competitors and its customers on that market. The definition includes potential competitors too, as stated in *Regulation for the application of the provisions of art.5 and 6 of the Competition Law no. 21/1996 regarding anticompetitive practices*:

"A dominant position on the relevant market stands for the case when an undertaking is able, to a considerable extent, to behave independently towards his competitors and customers on this market. Among the competitors, the potential competitors will also be included, i.e. the undertakings who, under given economic circumstances, are able to penetrate the relevant market with products from other geographical areas, including imported products, or by fast adaptation to the production capacities they own, under acceptable conditions of efficiency."

In applying the provisions regarding the dominant position, the Romanian competition authority will seek to evaluate if an undertaking holds market power, meaning the possibility of limiting output and raising prices above the competitive level. The ability of the firm to reduce output or to raise prices derives from its independence or from the lack of competitive constraints.

2. Under your general competition law governing unilateral conduct, at which stage(s) can your competition agency intervene against potentially abusive unilateral conduct?

- If dominance/substantial market power is present **yes**
- Acquisition or creation of dominance/substantial market power **yes/no**
- Attempt to acquire or create dominance/substantial market power **yes/no**
- Other (please identify)

Why did your jurisdiction choose these stages?

Competition Council qualifies an undertaking's behavior as an abuse only after detailed examination of the market concerned and only after the dominant position is found. This

is due to the fact that the Competition Law does not prohibit a dominant position; only the abuse of dominance is prohibited under Romanian competition law.

The decision to choose a more mature stage for the intervention of the competition authority against a potentially abusive unilateral conduct was underpinned by the reasoning that the determination of the abuse of dominance is a complex process during which the antitrust authority must consider all the factors characterizing the given market, in order to assess their conjoint effect.

Thus, an intervention triggered by the acquisition or creation of dominance does not allow following the evolution in time of the so called dominant undertaking. For instance, even if an undertaking enjoys a high market share, the defendant can prove that market shares have fluctuated significantly over time as a result of rivalry between undertakings on the market.

However, this stage of intervention is valid only for the abuse of dominant position cases, the Competition Council having the right to intervene in order to prevent the creation of a dominant position on the Romanian market that could lead to the distortion of the competition in merger cases. Therefore, according to the Competition Law, the *“economic concentrations which, having the effect of creating or consolidating a dominant position, lead to or are likely to lead to a significant restriction, prevention or distortion of competition on the Romanian market or on a part of it, are illegal.”*

3. Does your law contain or do you use a market share threshold at which you presume single-firm dominance/substantial market power and/or as a “safe harbour”? yes/**no**

If so, please respond as applicable:

- What is the market share level of the dominance presumption? 40%
- Is the dominance presumption rebuttable? yes/no
- What is the market share level of the safe harbour? _____
- Is the safe harbour absolute (*i.e.*, dominance/substantial market power cannot be found below the specified percentage level)? yes/no
- What is the legal basis of the presumption statute /case law/guidelines
- What is the legal basis for the safe harbor? statute /case law/guidelines

Generally, the starting point in assessing market power is the market share held by the undertaking on the relevant market. Even if, according to Romanian practice, the market share does not in itself determine whether an undertaking possesses market power, this represents a very important point in investigating a case of dominance. Obviously, the larger the market share is, the more likely is the finding of dominance.

It is important to stress out that Romanian legislation does not provide a specific level of market share that indicates a company's dominance. Anyway, according to the practice, dominance is presumable when a firm has a market share of at least 40-45%.

However, the strength of any indication based on market share depends on the fact of each individual case: it is also necessary to consider the position of other undertakings operating in the same market and the historical evolution of the market shares. An undertaking is more likely to be dominant if its competitors enjoy relatively weak positions or if it has enjoyed both a high, and relatively stable, market share.

4. Does your competition law enable the competition agency to intervene against unilateral conduct at a level below the dominance/substantial market power threshold ?
yes/**no**

If so, please explain why and in which circumstances.

5. Does your jurisdiction's analysis of dominance/substantial market power first require that a relevant product and geographic market be defined? **yes/no**

As set forth by art 6 of the Competition Law, the article related to the abuse of dominant position's prohibition, dominance is assumed to exist in relation to a particular market: "Any abuse of a dominant position **held** by one or more undertakings on the **Romanian market** or on a substantial part of it... ". Hence, in establishing the dominance of a firm, the Romanian Competition Council will focus on precisely determining the relevant product and geographic market, taking into consideration that the relevant market provides the entire framework for analyzing whether the undertaking concerned holds a dominant position and, therefore, whether its conduct may be abusive.

6. Which of the following criteria do you use for the assessment of single-firm dominance/substantial market power?¹

- Market share of the firm and its competitors **yes/no**
- Market position and market behavior of competitors **yes/no**
- Durability of market power **yes/no**
- Barriers to entry or expansion **yes/no**
 - Economies of scale and scope/network effects **yes/no**
 - Buyer power **yes/no**
 - Access to upstream markets/vertical integration **yes/no**
 - Access to essential facilities **yes/no**
 - Market maturity/vitality **yes/no**
 - Financial resources of the firm and its competitors **yes/no**
 - Profits of the firm **yes/no**
 - High prices (at absolute or comparative level) **yes/no**

¹ The answer "yes" should be provided if you use this criterion (amongst other criteria) at least in some of your cases. Conversely, the answer "no" should be provided if in practice you have not ever used that criterion.

Please specify any other criteria that you use to assess single-firm dominance/substantial market power. _____

In order to determine whether an undertaking occupies a dominant position, it is necessary to apply a two-stage test: first, to identify the relevant market and second, to assess the market strength of an undertaking alleged to be dominant therein. Market strength constitutive of dominance turns upon a number of indicators, no one of which may necessarily be determinative in itself.

On a given relevant market, a dominant company can be identified through the degree of its exposure to competitive constraints. Thus, a large market share, the overall size and strength of the undertaking, distribution networks, small competition, barriers to entry or to expansion, can be indications of lack of constraints. In general, the behavior of a firm on a certain market may be in itself an indicative of substantial market power, for instance when an undertaking increases its prices while benefiting from falling costs. A cautious approach will be required for particular circumstances such as a network activity or a recently liberalized industry.

However, the determination of the dominance is a complex process during which the antitrust authority must consider all the factors characterizing the given market, in order to assess their conjoint effect.

7. Of the criteria that you use to assess single-firm dominance/substantial market power, which are the most important criteria?

As there are no legal provisions setting forth the criteria to be considered in the abuse of dominance cases, the Romanian Competition Council will seek to identify whether there are sufficient competitive constraint on the market analyzed on a case-by-case basis. In assessing the potential position of dominance held by a firm, the Competition Council will determine the synergetic effects of all the factors mentioned under the point 6 of this questionnaire and will not consider a single criterion as being sufficiently indicative for establishing a dominant position.

However, the starting point in assessing market power is generally the market share held by the undertaking on the relevant market. In addition or alternatively to high market shares, in our practice we analyze barriers to entry on a market as a determinative test of dominance and the market position of buyers. Only afterwards, there are other factors to be considered as conducive to a market power: relations of the market leader with competitors, suppliers and customers, time scale over which the leading position has been enjoyed, the possession of material technology.

8. Please explain how your authority evaluates each of the criteria that you use, and also how it weighs the different factors.

In evaluating the market power, a market share of at least 40-45% can be indicative of dominance, as above outlined.

As regards barriers to entry, they can have a number of origins relating to the legal or economic environment that pertains to the relevant market: legal barriers, capacity constraints (competitors may have to commit large sunk investments in order to expand capacity), absolute cost advantages (these include preferential access to essential facilities, natural resources, intellectual property rights, etc.), privileged access to supply, a highly developed distribution and sales network, economy of scale or scope, reputation effects and high sunk costs. So, in assessing the existence of barriers to entry or expansion, the last entries or the possibility of the undertakings already present on the market to expand or adapt the technology are valuable indicators. The appropriate period of time needed for an undertaking already on the market to adjust its capacity and not to be considered a barrier depends on the characteristics of the market. Frequent and successful examples of entry are also evidence of lack of barriers to entry. On the other hand, if previous attempts to expand in or enter into the market have been unsuccessful, then expansion and entry would seem less likely to have constituted an effective constraint.

Finally, the effect of barriers to entry is a cumulative one. So, in conducting its analysis of the market, the Competition Council will always assess the joint effect of the barriers found, taking account of the particular market they act on.

Market position of buyers provides also evidence of the extent to which they are likely to put competitive pressure on the allegedly dominant undertaking. However, a high buyer power will serve as an offset only if it is likely to lead to effective new entry as a response to a significant increase in prices. Otherwise, the presence of strong buyers on the market, that only protect themselves, has not a counterweighing effect to the abusive unilateral conduct.

Likewise, the analysis of establishing whether an undertaking is in a position to have an appreciable influence on the conditions in the relevant market will pursue other yardsticks, as well: financial strength and profitability of the undertaking or the group of undertakings, the trends in their development, vertical integration, economies of scale and scope and the potential network effects. In assessing the potential position of dominance held by a firm, the Competition Council will determine the synergetic effects of all the factors already mentioned and will not consider a single criterion as being sufficiently indicative for establishing a dominant position.

9. How do you evaluate the competitive significance, if any, of intellectual property rights (patents, trademarks, copyrights, etc.) in assessing dominance/substantial market power?

Intellectual property rights may preclude expansion and entry. Notwithstanding, intellectual property rights do not as such confer dominance on the holder. The competitive impact of intellectual property rights on the market depends on the nature

and actual strength of the intellectual property right held by the allegedly dominant undertaking, being assessed on a case-by-case basis.

There is a clear difference between the ability to exclude others recognized to the owner of an intellectual property right and the notion of market power, intended as the ability to fix and maintain prices above the competitive level for a significant period of time.

Market power depends on demand and supply substitutability. The position of exclusivity granted to an intellectual property owner does not preclude the existence of actual or potential substitutes to prevent the exercise of market power.

Even where the ownership of intellectual property rights creates market power, this situation is not detrimental by itself to competition, if this is the result of a superior skill and foresight.

In some circumstances, however, the exercise of an intellectual property right could amount to an instrument to pursue anti-competitive strategies. This could happen, for example, when market power is used to restrict competition between technologies that are economic substitutes or to exclude new technologies from the market. In these cases, the key question is to establish when the exercise of an intellectual property right ceases to be legitimate and becomes anti-competitive.

Is intellectual property presumed to create dominance/substantial market power in your jurisdiction? yes/no

As said above, concerning the relationship between intellectual property and market power, we generally recognize that the mere possession of an intellectual property right does not necessarily guarantee the possibility to exercise market power and that there is a need for an in-depth assessment of the individual case-by-case circumstances.

In this regard, in our jurisdiction the assessment of market power stemming from the possession of an intellectual property right is not different from that applied in other contexts.

Insofar, the national competition authority did not pronounce itself on cases of abuse of dominance facilitated by possession of IPR.

10. Does the assessment of dominance/substantial market power differ in a small or isolated economy from the assessment in a large or integrated economy? For example, might dominance in small markets be presumed at lower (or higher) levels of market share than in other jurisdictions? Do free trade agreements alter the assessment of dominance/substantial market power? If so, please explain why. [**NB:** Jurisdictions that do not consider themselves “small” economies are welcome to skip this question.]

Taking into account the imminence of the Romania’s accession in the European Community and thus the integration in the European Single market, we consider this question not applicable.

11. Please explain briefly the link between the definition and assessment of dominance/substantial market power in your jurisdiction and the objectives of your unilateral conduct laws.

The essential objective of Romanian Competition Council when analyzing allegedly abusive unilateral conducts is the protection of competition on the market as a means of enhancing consumer welfare. Furthermore, the purpose of art. 6 of the Competition Law is not to protect competitors from a dominant company's competition that may be founded on quality, innovation or better performance, but to ensure that these competitors are also able to compete on the merits.