

Roundtable

**between National Competition Authorities
from the Black Sea, Caspian Sea and West
Balkans region**

***Competition in the telecommunication sector –
RO experience and recent case law***

Competition issues in telecom sector stemmed from recent antitrust closed cases

- Context:
 - fixed telephony services were liberalized in 01.01.2003 – fixed *infant markets*
 - EU new regulatory framework for electronic communications (“Telecommunications Package” - 2002) transposed in Romanian sector specific legislation in order to open telecom markets
 - Competition between infrastructures and technological platforms
- Anticompetitive practices against new entrants – telecom operators:
 - Refusal to supply the access to network:
 - access and interconnection for call termination,
 - access rights to the utility poles
 - Collusion between incumbents – providers of the access services

The set of tools used in competitive assessment

- Relevant markets:
 - essential facility
 - competitive constraints on price
- Dominant position:
 - market shares
 - barriers to entry
 - countervailing buyer power
- Intervention of the regulatory authorities (ANCOM and the municipalities)
- “Effects-Based” approach of RCC to the application of Article 6 para.1 to Exclusionary Abuses

The Netmaster cases

- The cases were opened in 2006 following a complaint submitted by Netmaster (alternative operator of a fixed line network)
- The legal basis - Art.5 and Art.6 (1) of national competition law (before Romania's accession to EU)
- The alleged anticompetitive behaviour:
 - Abuse of dominant position from the two major mobile operators Vodafone and Orange in the Romanian market by refusing access to their network for call termination;
 - Abuse of dominant position of the incumbent by refusing to supply (i.e. refusing the increase of the capacity of interconnection link between Romtelecom and Netmaster)
 - Anticompetitive collusion between Orange and Vodafone on one hand, and between Orange and Romtelecom on the other hand.

The Netmaster cases

- The relevant markets are the markets of mobile call termination services irrespective of their origin (national or international) – essential facilities
- The affected markets are the call transit services market and the fixed telephony services market; the scope of the geographical market is national;
- Orange and Vodafone refused to conclude agreements regarding the termination of the international and national call transited through the Netmaster network, rejecting the offers of Netmaster to acquire the call termination services for international calls on the same conditions as for national calls, including the tariff
- As a part of anticompetitive strategy, Orange and Vodafone diminished severely the capacity of interconnection links with Netmaster, rejecting in a certain period of time the majority of calls which comes from Netmaster irrespective of their origins

The Netmaster cases

- The mobile call termination rates applied to international calls by Orange and Vodafone during the infringement of national competition law were significantly higher than the regulated tariffs (aprox.50% higher)
- The refusal of the access to their mobile network for international calls (and for the calls originated in other national networks) transited by Netmaster was a part of a broader strategy of the defendants aimed to maintain as much as possible a higher profitability level of the revenue from the supply of the mobile call termination services.
- These strategies affected the consumers and distorted competition on the markets of national and international call transit services.

The Netmaster cases

- RCC decided that the defendants abused their dominant position (Orange - from 06.12.2004 until 02.04.2007 and Vodafone - from 09.12.2004 until 29.06.2006) and applied fines to both undertakings:
 - Orange 34.8 mil. EURO representing 3,60% from total 2010 turnover and
 - Vodafone 28.3 mil. EURO representing 3,45% from total 2010 turnover
- No need to impose corrective measures
- No evidence was found (including during the dawn raid) to support the allegations regarding the anticompetitive collusions between Orange and Vodafone on one hand and between Orange and Romtelecom on the other hand and the case was closed.
- No evidence was found (including during the dawn raids) to support the allegations regarding the anticompetitive behaviour of Romtelecom and the case was closed.
- RCC decisions (Decision no.1/2011 and no.2/2011) are subject to judicial review.

The access to utility poles case

- The case was opened in 2005 following a complaint lodged by *S.C. ASTRAL TELECOM S.A.* (*ASTRAL* was controlled by *UPC*) - alternative operator of a fixed line network
- Defendants: the incumbent telecom operator *S.C. ROMTELECOM S.A. (RTc – member of DTAG group)* and regional electricity distributor *D.F.E.E. ELECTRICA DOBROGEA S.A. (ED)*
- The alleged anticompetitive behaviour - refusal to extend the contracts granting access rights to the utility poles and thus preventing any new cables to be mounted on their poles:
 - abuse of a collective dominant position on the market of access to utility poles services
 - anticompetitive collusion between *RTc* and *ED*
- The legal basis - Art.5 and Art.6 (1) of national competition law (before Romania's accession to EU)

The access to utility poles case

- Context:
 - Both *RTc* and *ED* operated their own networks of utility poles. *RTc* was using the poles for the fixed telephony services; *ED* – for distribution of electricity
 - *ASTRAL* required access to the poles for its telecom services: cable TV and Internet
 - utility poles and cable canalization did not fall into the category of network infrastructure with regulated access rights
- The relevant product market – access to utility poles:
 - technical characteristics of utility poles (materials and/or technology used in their production) were not relevant to their primary function: supporting the cable lines
 - utility poles and cable canalization were not in the same market because the latter was available only in certain urban areas
- The relevant geographic market - each utility poles network represented a distinct product market:
 - diverging opinions of the parties: *ED* argued that the geographic market was regional covering the counties where *ED* was licensed for distribution of electricity. *RT* considered that the market was national based on its country-wide coverage of its utility poles network
 - No overlaps and no competitive constraint on pricing between utility poles networks

The access to utility poles case

- Dominance - ECJ jurisprudence on the matter:
 - each undertaking that operates an utility poles network holds a monopoly in the area covered by its network
 - Barriers to entry - high and non transitory:
 - Legal - the actions of the municipalities
 - Structural : high sunk costs
 - No countervailing buyer power: no alternative and no possibility of self supply
- Collective dominance:
 - No economic incentives of the parties to adopt common commercial policies in relation to the third party access rights to their utility poles
 - there was no competition between *RTc* and *Astral* on retail markets

The access to utility poles case

- RCC's decision - no infringement of national competition law:
 - RCC rejected the allegation regarding abuse of dominance:
 - the absence of any anti-competitive effect of the *RT*'s actions - despite the fact that in 2005 *RTc* refused to extend the contract with *ASTRAL*, the latter continued to use *RTc*'s infrastructure until 2010 when the new contract was concluded between the parties
 - there was no interest of *ED* to exclude *Astral* from the telecom services market – *ED*'s main activity was distribution of electricity and was not competing with *ASTRAL* on the telecom markets
 - RCC could not find any economic justification for *ED* to enter into an anti-competitive agreement with *RTc* with the aim to disadvantage third party telecom operators:
 - even though *RTc* could be interested in excluding a competitor, there was no obvious interest of *ED* who was not competing with either *RTc* or *ASTRAL* on the telecom services market
- All the parties agreed with the conclusion of investigation and didn't challenge in court RCC's decision

Other competition issues in telecom sector

- Context:
 - The fast development of IP technologies – broadband services (fixed and mobile)
 - Vertical integration – telecom services (especially access to the network and to the customers) and content (TV)
 - Bundled services
 - Reduction of MTR and FTR levels, but the possibility for *margin squeeze* or *predatory pricing* of on-net and off-net tariffs persists
- Anticompetitive practices against content suppliers:
 - refusal to supply access to the network and to the customers
- Anticompetitive practices against telecom operators
 - On-net and off-net discrimination (mobile-to-mobile and fixed-to-mobile services): Asymmetric pricing of dominant, vertically-integrated operators for connecting and terminating services (MTR) for on-net and off-net calls resulting in higher rates applicable to competitors as compared to the operators' downstream division



Thank you for your attention