

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Competition Issues in Aftermarkets - Note from Romania

21-23 June 2017

This document reproduces a written contribution from Romania submitted for Item 4 of the 127th OECD Competition committee on 21-23 June 2017.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/aftermarkets-competition-issues.htm

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

JT03414019

Romania

1. Enforcement experiences - General aspects

1. The Romanian competition authority has analyzed a relatively small number of cases related to aftermarket.
2. The analysis has been conducted with reference to each case without using any particular tools and it also hasn't been influenced by any economic theories. Consequently, the Romanian competition authority has not adopted, until now, a good practice guide (or other instructions/regulations) regarding the aftermarket domain.
3. In what follows, we shall concentrate on analyzing two antitrust cases:
 - a case involving vertical agreements in relation to the distribution of mobile communication prepaid products; and
 - another case involving an abuse of dominant position in the distribution of printer-related consumable products.

2. Market definition in aftermarket cases

2.1. The investigation concerning the distribution of mobile communication prepaid products

4. In 2009, the Competition Council has initiated an *ex officio* investigation regarding the possible infringement of art. 5 (1) of the Competition Law and of art. 101 of the Treaty on the Functioning of the European Union (TFEU) by the mobile communication operators (Orange, Vodafone, Cosmote – Telekom at the moment) and the undertakings involved throughout their entire supply chain of prepaid mobile communication products in Romania. This particular investigation was finalized in 2012 by means of accepting commitments undertaken by all the mobile communication operators (Orange, Vodafone and Cosmote) and the undertakings involved throughout their entire supply chain of prepaid mobile communication products (146 undertakings).
5. The initiation of this particular investigation was based on clues in relation to the existing contracts concluded throughout the entire supply chain regarding prepaid mobile communication products of provisions that lead or could lead to:
 - establishing resale prices;
 - sharing the market by applying territorial or client categories criteria;
 - non-competition between undertakings.
6. In Romania, the market of mobile communication services represents an oligopolistic market on which, presently, the following 4 undertakings are being active: Orange, Vodafone, Telekom and Digi (during the investigation, only 3 undertakings were active: Orange, Vodafone and Cosmote).
7. The mobile communication services are being traded by either concluding a postpaid subscription or by purchasing a prepaid mobile SIM card that can be topped up by periodically acquiring certain voucher codes.

8. The object of the initiated investigation has been the supply chain of prepaid mobile communication products. These products are being distributed in 2 possible ways: either by purchasing a physical scraping card, or by buying an electronic voucher code. Regarding the pyphysical scraping card, the distribution is being realised in the usual manner for physical goods – the mobile communication operator sells physical scraping cards to a single or multiple authorised distributors that, afterwards, sells these products to subsequent distributors and/or to certain points of sale.

9. Regarding the prepaid voucher codes, the system in place involves the existence of certain terminals that are being used by the mobile communication operators to sell their prepaid products. In this electronic system, the first supply chain is represented by the IT platform owners (also called ‘solution provider’). They conclude agreements with all the mobile communication operators, agreements that also involve selling all the prepaid products to the different subsequent distributors. Therefore, the solution provider provides management services to the mobile communication operator in relation to the virtual stock in order to ensure the distribution of electronic prepaid services by the distributors to the end users.

10. Therefore, with reference to defining the relevant market, the undertakings’ activity mainly consists in the distribution of certain voucher codes that enable the user of a prepaid SIM card to utilize the voice services of the mobile communication operator that provided that particular SIM card. In consequence, during the investigation, the relevant market has been defined as the national market of trading prepaid products and services (both physical scraping cards and electronic voucher codes).

11. The results of monitoring the commitments undertaken by the undertakings (in order to re-establish a normal competitive environment) showed that an entire market can function better after implementing the competition rules.

12. By means of regulating certain domains and the procedures of concluding contracts in order to sell the analyzed services (for example, by imposing particular products’ features), one can identify the important elements in defining a single market or different markets.

2.2. The investigation concerning the distribution of printer-related consumable products

13. In 2012, after receiving a complaint from one of the distributors of Hewlett-Packard (HP) products, the Romanian competition authority initiated an investigation regarding the possible infringement of art. 6 of the Competition Law and of art. 102 of the TFEU by SC Hewlett-Packard (Romania) SRL with reference to the national market of trading HP consumable printer-related products in relation to corporate clients and related services.

14. Considering the fact that the object of the submitted complaint is related to an abuse of dominant position, the analysis of the Romanian competition authority has started with the products involved in the trading relationship between Hewlett-Packard and that particular distributor, and also, it has encompassed the market and the clients targeted by the distributor. The contract concluded by the two parties concerned the HP consumable printer-related products traded to a corporate business client.

15. In this particular case, the primary market is represented by the printers' market, while the aftermarket is represented by the market of consumable printer-related products.

3. Market power in the aftermarkets:

16. When the undertakings are active both on the primary market and the aftermarket, calculating the market share is an important element for establishing the market power. However, market power in the aftermarkets has to be determined with reference to each case, due to the fact that each domain implies specific circumstances and the market power analysis presents a high degree of complexity.

17. The Romanian competition authority considers that the effects resulted from anticompetitive practices must be analyzed both on the primary market and the aftermarket. The market share related to the primary market must also be regarded in correlation to the possible effects of practices conducted in the aftermarket. With reference to the prepaid case, although each analyzed operator held a monopoly position on the analyzed market, the implemented practices also concerned the strengthening of their position in relation to the primary market.

18. In relation to both cases presented in this paper, each of the concerned parties practically holds a monopoly position on the aftermarket.

19. Therefore, with reference to the prepay case, the prepay voucher products can only be used in the mobile communication network in relation to which the user has chosen to purchase a mobile number, while in the second case, a certain type of printer-related consumables can only be used for certain printers (in this case, HP printers).

20. In consequence, in both cases, the competition regarding the aftermarkets is strongly related to the intra-brand competition among the distributors of the aforementioned products. The end users would only purchase these products, although they have the possibility of choosing the best offer of a particular distributor.

21. Considering the fact that the prepaid case has been finalized by means of commitments, a detailed analysis of the mobile communication operators' market power on the primary market has not been necessary.

22. In the Hewlett-Packard (HP) case, HP's market power has been analyzed with reference to its position on the primary market (the printers' market), while the antitrust effects have been analyzed in relation to the aftermarket.

23. In this particular case, the Romanian competition authority has considered that due to the fact that the supplier of the secondary products has the possibility to hold consumers captive by increasing the price over the competitive level on this particular aftermarket, this can, in fact, be regarded as an indicator of market power. However, the extent to which the supplier can implement this particular price increase depends on the competitive constraints the supplier experiences on the primary market. When purchasing the main product, a rational consumer will take into consideration the price of necessary future secondary products, especially when the price of the secondary product influences the price of the main product and also when these particular products must be frequently replaced.

24. Considering the fact that the main and secondary products are complementary, an increase of the secondary product's price will decrease the demand on the market of the

main product, due to the fact that consumers have access to a broad pallet of substitutable products and also, due to the fact that the competitive degree in relation to the market of the main product is high. In other words, a high price on the secondary products' market can act as a competitive constraint when purchasing the main product. It is unlikely that a supplier would increase the price of the secondary product if the consumers choose the main product with reference to the price of the secondary product, and consequently, a higher price on this particular aftermarket determines a change in choosing the main product. In this situation, the manufacturer of the main product cannot exercise its market power in relation to the aftermarket and, in consequence, there is a strong relationship between the two markets.

25. In conclusion, the experience gathered by Romanian Competition Council in these two cases shows that the analysis of market power must be realized with reference to each individual case.

26. In the HP case, the market power has been analyzed with reference to HP position on the primary market, since a price increase on the aftermarket can determine the client to purchase a product on the primary market.

27. In the prepaid case, an ex-post analysis of efficiency of the commitments implemented by involved undertakings based on the acquired information show that it was essential for distributors to trade the products of all the mobile communication operators. The traders (final points of sale) were interested in concluding a single contract with a single distributor in order to purchase all types of prepay products. Therefore, if the distributor was in the position of not having a certain brand in its portfolio, this particular distributor would not be able to withstand on the market.

4. Exclusionary and exploitative behaviour:

28. In the HP case, starting with 2017, a corporate client was being supplied with HP consumables by 4 suppliers. Based on the contract concluded with HP, these undertakings were delivering consumables at special prices. According to the documents related to the case, this contract had validity until November 2009. Despite this fact, in June 2009, HP decided to cease the contract regarding the distribution of consumables realized through its 4 partners to that particular client and HP also decided to conclude a new contract with only one of those 4 partners.

29. In order to illustrate the way the ceasing of contract has impacted the market, an analysis of the impact has been conducted with reference to both the distributors and the end user.

30. Also, the analysis of the market effects caused by ceasing that particular contract has been conducted by taking into consideration the two majors aspects related to the processes involved in the impact on competition:

- impacting the inter-brand competition in relation to the distribution market of printing and imaging equipment and its consumable products;
- impacting the intra-brand competition on the following 3 analysis levels:
 - the total value of sales regarding HP consumables;
 - the total value of sales regarding HP consumables for corporate clients;
 - the total value of sales regarding HP consumables for the end user.

31. Taking as an example the HP case where all these aspects were considered, we argue that in relation to aftermarkets, the effects analysis of should be conducted on a

case by case basis and it shouldn't be limited to solely analyzing the aftermarket, the primary market, or only effects over the end user.

5. Efficiency gains and other objective justifications

32. An anticompetitive behaviour in this domain can be justified if the exceptional conditions of the legislation into force are met (according to the Regulation in relation to vertical restrictions). These cases can be analyzed according to the general legislation on competition.

33. Taking as an example the prepaid case, the efficiency issue has been determined by analyzing the processes of monitoring the commitments.

34. Besides the mobile communication operators (Orange, Vodafone and Cosmote), all their direct distributors of prepay mobile communication products (146 distributors) have participated at the commitment procedures. Furthermore, all these undertakings have transmitted to the Competition Council individual commitments. The commitments are related to all the prepay mobile communication products, regardless of their distribution pattern (physical or electronic) and the direct distributors have committed themselves to implement the principles presented in the submitted commitments in relation to their own subsequent distribution chains, thus ensuring the spreading of pro-competitive effects over the entire supply chain.

35. The proposed commitments mainly regarded the modification/completion of the existing contractual framework in the distribution system of prepay mobile communication products, so as to eliminate the competitive concerns present at the initiation of the investigation.

36. Regarding the competition concern covering the establishing of resale prices, the commitments have targeted the elimination of contract provisions relating to the resale price (fixed, minimum or recommended price) and to the foreign exchange rate (which is an important element in determining the final price of these products).

37. In relation to the competition concern that refers to sharing the market by applying territorial or client categories criteria, the following practices have been undertaken:

- the elimination of the authorizing and reporting system for selling points;
- setting up the possibility for acquiring any amount of prepaid products by utilizing payment on spot;
- the establishing of credit limits in a transparent, uniform and non-discriminatory manner;
- the withdrawal/modification of credit limits will be performed on non-discriminatory and transparent bases by indicating the circumstances or situations in relation to which the solution will be adopted, for example: the market evolution, the specific predicament of the distributor and so on.

38. With reference to the competition concern covering non-competition clauses, the commitments have targeted the removal of contract provisions that restrict competition between distributors of the same mobile communication operator. Additionally, the concerned parties have undertaken a supply obligation, according to which, when choosing distributors or subsequent distributors, they would apply a set of rules and principles that are transparent and non-discriminatory (equal benefits for undertakings that experience equal situations). These rules are to be included in a public procedure

and/or be provided upon request to each solicitant that desires to become a part of the supply chain.

39. The undertaken commitments cover the entire contractual framework in place (the relationship between mobile communication operator-distributor-subsequent distributor) for the distribution of prepay mobile communication products (both physical and electronic).

40. The concerned parties of the investigation have had a maximum period of 3 months from the announcing date of the decision regarding the commitments, to implement them in relation to the relationship between mobile operators and their direct distributors and a maximum period of 9 months, to implement the undertaken commitments with reference to the rest of the supply chain.

41. In this particular case, the competition authority has considered that in order to achieve a complete evaluation in the aftermath of implementing the aforementioned commitments, an analysis of the end users' perception of the market is also required.

42. Moreover, the monitoring of the undertaken commitments has lasted for 2 years and it has been conducted by 3 monitoring agents, one for each mobile communication operator and its distributors. Furthermore, every six months, the monitoring agents have conducted reports in order to inform the competition authority in relation to the status of the commitments' implementation, respectively whether or not the commitments were being put into practice. The monitoring agents have presented a report and a market study conducted in order to show the consumers' perception in relation to pricing levels and competition throughout the distribution chain of prepaid products.

43. By analyzing the data provided by the monitoring agents and the market studies in relation to the consumers' perception, the following facts have resulted:

- both the number of direct distributors and the number of subsequent distributors have increased during the monitoring period; this fact proves that the adopted selection procedures have not represented entry barriers of the supply chain, thus contributing to the strengthening of the competition in the domain by increasing the number of undertakings of the supply system;
- the distribution systems are dynamic, considering the fact that, on the one hand, distributors and subsequent distributors are entering the market and are realizing important purchasing volumes and, on the other hand, some undertakings are leaving the analyzed market; in consequence, the mobile communication operators or their direct distributors are not able to keep captive their direct distributors or their subsequent distributors, respectively, due to the fact that the distributors or the subsequent distributors have the possibility to easily change their provider of prepay products when it suits them;
- the implementation of the undertaken commitments has led to an improved access of the undertakings on the distribution market of prepay products and to other beneficial practices such as: informing the distributors regarding their right to independently establish their business strategy and regarding the negotiation limits with reference to their contractual relations with the providers;
- the data resulted from the monitoring reports show that the prices of prepay products are susceptible to changes due to the undertakings' own policy regarding their entire supply chain.

44. Therefore, the analysis of data provided in the monitoring process has shown that the commitments have achieved the effects anticipated at the time of their acceptance.

Moreover, the entire contractual framework has been modified throughout the supply chain (mobile communication operator - retail endpoint) and the mobile communication operators and their direct distributors have made their own selection of distributors/subsequent distributors procedures public. Also, based on the monitoring reports, the Romanian Competition Council has noticed that two distributors have not implemented the commitments within the agreed timeframe and fines have been imposed accordingly.

45. Consequently, the implementation of the commitments undertaken by the concerned parties has led to an improved market access, considering the fact that, at the present moment, distributors are aware of their right to independently establish their business strategy being fully aware of the contractual limits in relation to which providers can negotiate. Therefore, based on the data provided by the monitoring reports, the Romanian competition authority has noticed that the undertaken commitments have been put into practice by both the mobile communication operators and their direct distributors, the procompetitive effects being spread over the entire supply chain.