

## 2015 LIDC Congress

### Question A: Abuse of a Dominant Position and Globalization

Is there any consistency between the recent approaches of the different jurisdictions to the notion of abuse? Are there too many restrictions on legal rights and business opportunities?

#### National Report: Republic of Moldova

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#### 1. Introduction

The development of market competition and limitation of monopolistic activities has been declared as one of the major principles of the national economic policy even prior to the declaration of independence in 1991<sup>1</sup> and official recognition<sup>2</sup> of the Republic of Moldova as a sovereign state in 1992.<sup>3</sup> The urgent government measures preceding the adoption of the first competition law have ordered state authorities not to permit the undertakings with dominant position: (1) to limit or to suspend production of goods including their withholding from the market in order to maintain the demand and provoke price increases; (2) to refuse the fulfilment of contracts for provision of works or services when such undertakings have real possibility to fulfil the contracts; (3) to impose unfavourable contract terms or other conditions that are prejudicial to the interests of the trading party and are not related to the object of the contract (obligations to transfer raw materials, goods, residential buildings, apartments, unmotivated requests to transfer financial means including foreign currency or transfer of labour force).<sup>4</sup>

The first Competition Act<sup>5</sup> adopted in 1992 prohibited the following actions of the dominant undertaking<sup>6</sup> that were capable of causing prejudice to the interests of other undertakings or consumers: (1) imposing unfavourable contract terms or other conditions that are prejudicial to the interests of the trading party and are not related to the object of the contract (transfer of financial means, including foreign currency, raw materials, products, apartments, labour force, etc.); (2) imposing discriminatory contract terms that place the trading party at a disadvantage in relation to other undertakings; (3) imposing contract terms in relation to the goods, in which trading party (consumer) is not interested; (4) creating entry barriers for other undertakings; (5) violation of the price regulations as established by law.<sup>7</sup>

The Government regulation implementing the provisions of the 1992 Competition Act has further specified the examples of the competition infringements: (1) removal of the goods from circulation in order to create or maintain market deficit or increase prices; (2) imposing unfavourable contract terms or other conditions that are prejudicial to the interests of the trading party and are not related to the object of the contract; (3) imposing discriminatory contract terms that place the trading party at a disadvantage in relation to other undertakings; (4) imposing the conclusion of the contract, in which trading party is not interested; (5) creating entry barriers for other undertakings; (6) market sharing; (7) exclusion from the market or preventing market entry for the undertakings acting as sellers or buyers of the goods; (8) limitation of the commercial activity of undertakings in

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<sup>1</sup> See Law No. 691 of 27 August 1991 concerning the Declaration of independence of the Republic of Moldova, published in the Official Gazette of the Parliament No. 11 of 27 August 1991.

<sup>2</sup> See UN General Assembly Resolution A/RES/46/223 of 2 March 1992, Admission of the Republic of Moldova to membership in the United Nations.

<sup>3</sup> See Government Decision No. 2 of 4 January 1991 concerning urgent measures for de-monopolization of the national economy of the Soviet Socialist Republic of Moldova, published in the Official Gazette of the Parliament No. 000 on 4 January 1991.

<sup>4</sup> Government Decision No. 2 of 4 January 1991, para 2(1). During the transition period before the adoption of the first Competition Act, undertakings with market share exceeding 70% have been viewed as dominant while market shares between 35% and 70% have been assessed on case-by-case basis.

<sup>5</sup> See Law No. 906 of 29 January 1992 concerning limitation of monopolistic activity and development of competition, published in the Official Gazette of the Parliament No. 2 of 1 March 1992.

<sup>6</sup> The law provided that an undertaking with a market share less than 35% could not be considered dominant. 1992 Competition Act, Article 3(2).

<sup>7</sup> 1992 Competition Act, Article 3(1).

certain sectors, unless authorized by law; (9) imposing restrictions on sale, purchase, exchange of goods; (10) requiring the undertakings to supply the goods to certain categories of buyers, unless authorized by law; (11) creating obstacles for establishment of new undertakings in certain sectors, unless authorized by law; (12) according favourable fiscal or other treatment to certain undertakings, which places them at a competitive advantage vis-à-vis the competitors; (13) increase, reduction or maintenance of prices or tariffs, unless authorized by law; (14) spreading false or denigrating information to the prejudice of the goods or reputation of another undertaking; (15) misleading the consumers; (16) misleading comparison of the goods for the advertising purposes; (17) unauthorized usage of the trademarks or other distinctive signs of another undertaking; (18) usage or disclosure of trade secrets without consent of the owner.<sup>8</sup> Since the above examples cover anti-competitive conduct of undertakings, acts of unfair competition and actions of state authorities, it is unclear which of the above refer to the unilateral anti-competitive conduct and whether the determination of dominance is required in order to establish such infringement.

The 1992 Competition Act was enforced by the Ministry of Economy,<sup>9</sup> which was authorized to issue prescriptions addressed to the undertakings found in violation of the specified competition rules.<sup>10</sup> In order to facilitate the monitoring of the activities of dominant undertakings, the Government ordered the Ministry of Economy to establish and maintain a Registry of dominant undertakings, whose market share exceeded 35%.<sup>11</sup> The undertakings were included in the Registry on the basis of the information supplied by the State Department for Statistics or upon the results of the investigation carried out by the Ministry of Economy. Once included in the Registry, the dominant undertakings become the subject of the mandatory merger control – any purchase of a shareholding in the competing undertaking by an undertaking with market share exceeding 35% as well as any purchase by any person of the shareholding in the dominant undertaking had to obtain an *ex ante* approval by the Ministry of Economy.<sup>12</sup>

The second Competition Act,<sup>13</sup> adopted in 2000, contained a broader and more detailed prohibition of anti-competitive unilateral conduct where the abuse of dominance was defined as actions “that lead or may lead to restriction of competition and/or prejudice the interests of other undertakings or individuals”.<sup>14</sup> The following actions were thereby prohibited: (1) imposing unfavourable contract terms or other conditions that are not related to the object of the contract (unmotivated obligations concerning transfer of financial means, goods or property rights); (2) conditioning the conclusion of the contract on purchase (sale) of certain other goods or obligation not to purchase certain goods from other undertakings or not to sell certain goods to other undertakings or consumers; (3) maintaining artificial shortage of goods on the market through deliberate reduction, limitation or interruption of production despite the existence of favourable conditions for production, as well as through removal of goods from circulation, accumulation of goods or through other means; (4) applying discriminatory conditions that place the trading party at a disadvantage in relation to other undertakings; (5) applying restrictions on resale price of the goods; (6) creating entry (or exit) barriers for other undertakings; (6) applying monopolistically low prices; (7) applying monopolistically high prices; (8) unjustified refusal to conclude a contract with certain purchasers when there is a possibility of production or supply of the respective goods.<sup>15</sup>

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<sup>8</sup> Government Decision No. 619 of 5 October 1993 concerning implementation of the Law concerning limitation of monopolistic activity and development of competition, published in Official Gazette of the Parliament No. 10 of 30 October 1993, Annex 3 Regulation concerning the procedure for examination of competition infringements, para 2.

<sup>9</sup> Ministerul Economiei, <http://www.mec.gov.md/>. Accessed 22 March 2015

<sup>10</sup> 1992 Competition Act, Article 13. See also Government Decision No. 619 of 5 October 1993, Annex 3.

<sup>11</sup> See Government Decision No. 619 of 5 October 1993, Annex 2 Regulation concerning the state registry of the dominant undertakings on the markets of the Republic of Moldova.

<sup>12</sup> 1992 Competition Act, Article 9. See also Government Decision No. 619 of 5 October 1993, Annex 1 Regulation concerning examination of the notifications for creation and transformation of undertakings, undertakings with considerable foreign investments, and purchase of shareholdings in accordance with applicable law.

<sup>13</sup> Law No. 1103 of 30 June 2000 concerning protection of competition, published in the Official Gazette of the Republic of Moldova No. 166-168 of 31 December 2000.

<sup>14</sup> 2000 Competition Act, Article 6.

<sup>15</sup> 2000 Competition Act, Article 6(a)-(i).

The 2000 Competition Act provided for the establishment of the independent national competition authority (NCA) – the National Agency for Protection of Competition (NAPC).<sup>16</sup> For various reasons the NAPC has been effectively created only in 2007, seven years after the adoption of the Competition Act, when the Parliament has appointed the President of the NAPC and ordered the Government to undertake practical measures for the establishment of the NAPC.<sup>17</sup> Once established, the NAPC has continued the practice of the Ministry of Economy in building the registry of the dominant undertakings<sup>18</sup> as the 2000 Competition Act has preserved the system of *ex ante* merger control over corporate acquisitions in or by the dominant undertakings.<sup>19</sup> The determination of dominant undertakings has been the subject of the first decisions issued by the newly established NAPC.<sup>20</sup> The NAPC has established dominant positions of the undertakings active in the markets for air transport,<sup>21</sup> telecommunications,<sup>22</sup> district heating,<sup>23</sup> potable water and canalisation, natural gas, etc.<sup>24</sup> In two cases the NAPC has established the existence of the collective dominance on the markets for wholesale distribution of cigarettes of medium price category (2 undertakings)<sup>25</sup> and civil liability insurance “green card” (4 undertakings).<sup>26</sup> The following chart (Chart 1) represents the NAPC’s caseload in relation to the determination of dominant companies during the period 2007-2011.<sup>27</sup>

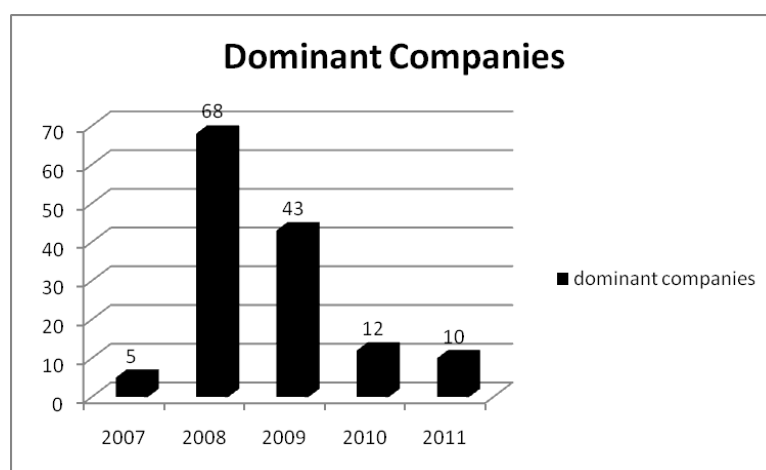


Chart 1

<sup>16</sup> Agenția Națională pentru Protecția Concurenței, <http://old.competition.md/>. Accessed 22 March 2015.

<sup>17</sup> Decision of the Parliament No 21 of 16 February 2007 concerning measures for the establishment of the National Agency for Protection of Competition, published in the Official Gazette of the Republic of Moldova No. 29 of 2 March 2007.

<sup>18</sup> 2000 Competition Act, Article 12(c).

<sup>19</sup> 2000 Competition Act, Article 18(1).

<sup>20</sup> For the review of the NAPC’s decisional practice during the first year of enforcement of the 2000 Competition Act, see A.Svetlicinii, “Enforcement of competition law in the Republic of Moldova: one year on” 29(9) ECLR 2008, pp. 532-539.

<sup>21</sup> In 2009 the NAPC has established dominant position of the three airlines (Air Moldova, Moldavian Airlines and Tandem Aero) on the regulated routes operated by these companies on the basis of the code share agreements with foreign air carriers. See A. Svetlicinii, (Case Comment) “Moldova: abuse of dominant position - air transport” 31(1) ECLR 2010, N3-4.

<sup>22</sup> See e.g. NAPC Decision No. 7 of 26 July 2007, published in the Official Gazette of the Republic of Moldova No. 112-116 on 3 August 2007; NAPC Decision No. 41 of 15 November 2007, published in the Official Gazette of the Republic of Moldova No. 188-191 on 7 December 2007; NAPC Decision No. 60 of 12 December 2007, published in the Official Gazette of the Republic of Moldova No. 14-15 on 22 January 2008.

<sup>23</sup> See A.Svetlicinii, (Case Comment) “Moldova: abuse of dominant position - heating services - dominance assessments”, 30(7) ECLR 2009, N105-106.

<sup>24</sup> See A. Svetlicinii, (Case Comment) “Moldova: abuse of dominant position - thermal energy - natural gas - public regulation - exclusive licences - ex ante determination of dominance”, 29(12) ECLR 2008, N195-196.

<sup>25</sup> NAPC Decision No. AA-16-10/21 of 17 March 2011.

<sup>26</sup> NAPC Decision No. DCC-49-09/79 of 24 March 2009.

<sup>27</sup> Source of the data: NAPC Activity Report for 2007-2011. <http://old.competition.md/reports/Raport2011.pdf>. Accessed 22 March 2015.

The coverage of the 2000 Competition Act in relation to anti-competitive unilateral conduct was quite extensive as it included general formulations such as “creating entry (or exit) barriers for other undertakings”.<sup>28</sup> The following example demonstrates the application of this broad category in the NAPC’s enforcement practice. Veritrans Plus, a private undertaking licensed to provide various laboratory and metrology services complained to the NCA that the National Institute for Standardization and Metrology (NISM)<sup>29</sup> has repeatedly refused to organise training and certification courses for certain metrology qualifications as requested by Veritrans Plus. As a result, Veritrans Plus was unable to provide the respective metrology services in the absence of certified metrology experts. The NISM was the sole state institution authorised to organise training and certification courses for the certified metrology experts. This monopolistic position allowed the NISM to leverage its market power on the related market of the metrology services, where it competed with private laboratories, which were required by law to employ metrology experts trained and certified by the NISM. The NCA concluded that by refusing to organise the requested training and certification courses as well as issuing two types of qualification certificates the NISM has raised market entry barriers for Veritrans Plus in relation to certain metrology services where the complainant lacked certified metrology specialists.<sup>30</sup> That finding was made on the basis of the above mentioned provision of the 2000 Competition Act containing the broad prohibition of creating entry barriers on the market.

The following case concerning “green card” insurance represents an instance where the NCA examined the abuse of dominance in form of making the conclusion of contracts subject to acceptance by the trading party of supplementary obligations which, by their nature or according to commercial practice, had no connection with the subject of such contracts. In Moldova the “green card” insurance scheme is administered by the National Bureau of Auto Insurers (NBAI). Only the members of the NBAI were certified to issue “green card” insurance policies in Moldova. When two insurance companies applied for the NBAI’s membership, the current NBAI members agreed to condition their acceptance by a substantial financial contribution to the NBAI’s assets. The NAPC established that such additional condition was not part of the formal criteria prescribed by law or the NBAI’s statute and concluded that current NBAI members abused their collective dominant position on the relevant market by effectively excluding new entrants.<sup>31</sup>

The above examples from the NAPC’s enforcement practice under the 2000 Competition Act demonstrate that broadly defined prohibition of anti-competitive unilateral conduct with non-exhaustive list of various forms of abusive behaviour allowed the NCA to intervene against various forms of unilateral conduct of dominant undertakings (both exclusionary and exploitative).

## 2. Definition of “abuse”

The current Competition Act,<sup>32</sup> which entered into force on 14 September 2012,<sup>33</sup> defines the dominant position on the market as “position of economic power which allows the undertaking to prevent effective competition on the relevant market, giving the possibility to behave independently, to a considerable extent, of its competitors, clients, and finally of its consumers.”<sup>34</sup> The above definition covers both single dominance and collective dominance, where the latter is defined in the law as a situation where “two or more undertakings may jointly hold a dominant position (collective dominant position) where, even in the absence of any structural or other link between them, these operate on a market whose structure is considered favourable for the production of coordinated effects”.<sup>35</sup> The 2012 Competition Act established a legal presumption of dominance in cases where

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<sup>28</sup> 2000 Competition Act, Article 6(f).

<sup>29</sup> Institutul Național de Standardizare, <http://www.standard.md/>. Accessed 22 March 2015.

<sup>30</sup> CC Decision No. ASR-10 of 3 April 2014. See A. Svetlicinii, (Case Comment) “Moldova: abuse of dominant position - standards setting” 35(10) ECLR 2014, N89-90.

<sup>31</sup> See A. Svetlicinii, “The Moldovan Competition Authority finds the existence of cartel on the market for international motor insurance (Green Card)”, 3 March 2009, e-Competitions Bulletin March 2009, Art. N° 25690.

<sup>32</sup> Law No. 183 of 11 July 2012 on competition, published in the Official Gazette of the Republic of Moldova No. 193-197 of 14 September 2012.

<sup>33</sup> See V. Mircea, “The Republic of Moldova adopts a new competition law: A step into the right direction”, 1 January 2013, e-Competitions Bulletin January 2013, Art. N° 51099.

<sup>34</sup> 2012 Competition Act, Article 4.

<sup>35</sup> 2012 Competition Act, Article 10(2). See also Regulation on establishing dominant position on the market and assessing the abuse of dominant position, approved by CC Decision No. 16 of 30 August 2013, published in the Official Gazette of the Republic of Moldova No. 206-211 of 20 September 2013, para 35.

market share of the undertaking(s) concerned exceeds 50% or the undertaking(s) concerned are vested with the exclusive rights.<sup>36</sup>

The reorganized competition authority – the Competition Council (CC)<sup>37</sup> has further elaborated on the determination of dominance in its Regulation on determination of dominance and assessment of abuse of dominant position. The Regulation establishes a rebuttable presumption of the absence of dominant position in cases where market share of the undertaking(s) concerned is below 40%.<sup>38</sup> In relation to the finding of collective dominance the Regulation provides the following criteria that have to be satisfied cumulatively: (1) there is no effective competition between undertakings concerned on the relevant market; (2) the undertakings concerned adopt uniform conduct and a common policy on the relevant market.<sup>39</sup> The Regulation also enumerates a number of factors that are taken into account when establishing collective dominance: market concentration, transparency, level of technology and innovation, stagnant or moderate growth of demand, low elasticity of demand, lack of customers' countervailing buying power, market maturity, product homogeneity, similarity of cost structures, similarity in market shares, high entry barriers, lack of excess capacities, lack of potential competitors, various types of informal links between the undertakings concerned, competitive pressure, lack of competition or reduced price competition, etc.<sup>40</sup>

The 2012 Competition Act contains the following provision prohibiting anti-competitive unilateral conduct:

“Any abusive use of the dominant position within the relevant market, to the extent it may affect competition or damage the collective interests of the final consumers on the relevant market, shall be prohibited. The abusive practices may consist in: (a) directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions; (b) limiting production, distribution or technical development to the prejudice of consumers; (c) applying, in the relationship with trading partners, dissimilar conditions to equivalent transactions, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the partners of supplementary obligations which, by their nature or according to commercial practice, have no connection with the subject of such contracts; (e) charging excessive or predatory prices, with the aim of driving competitors out; (f) the unjustified refuse to contract with certain providers and/or supply to certain beneficiaries; (g) the cessation of a commercial relationship established previously on the relevant market for the single reason that the partner refuses to obey to some groundless commercial conditions.”<sup>41</sup>

The specified provision of the 2012 Competition Act links the definition of an abuse of dominance to the effects of the actions of the dominant undertaking(s), which “may affect competition or damage the collective interests of the final consumers”.<sup>42</sup> The law provides a non-exhaustive list of practices that may constitute an abuse of dominance if they lead to such effects. The CC's Regulation on determination of dominance and assessment of abuse of dominant position follows the format of the law and discusses the CC's assessment of particular forms of abuse without providing any general definition of the “abuse of dominance” concept.

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<sup>36</sup> 2012 Competition Act, Articles 10(4), 10(5). See also Regulation, para 14.

<sup>37</sup> Consiliul Concurenței, <http://www.competition.md/>. Accessed 22 March 2015.

<sup>38</sup> Regulation, para 13.

<sup>39</sup> Regulation, para 36.

<sup>40</sup> These criteria are neither exhaustive nor cumulative. Regulation, paras 40-41.

<sup>41</sup> 2012 Competition Act, Article 11. The original text in Romanian language reads as follows: “Este interzisă folosirea unei poziții dominante pe piața relevantă în măsura în care aceasta poate afecta concurența sau leza interesele colective ale consumatorilor finali. Practicile abuzive pot consta în special în: a) impunerea, în mod direct sau indirect, a unor prețuri inechitabile de vânzare ori de cumpărare sau a altor condiții inechitabile de tranzacționare; b) limitarea producției, comercializării sau dezvoltării tehnologice în dezavantajul consumatorilor; c) aplicarea în raporturile cu partenerii comerciali a unor condiții inegale la prestații echivalente, creînd în acest fel unora din ei un dezavantaj concurențial; d) condiționarea încheierii contractelor de acceptare de către partenerii comerciali a unor prestații suplimentare care, prin natura lor sau conform uzanțelor comerciale, nu au legătură cu obiectul acestor contracte; e) practicarea unor prețuri excesive sau a unor prețuri de ruinare în scopul înlăturării concurenților; f) refuzul neîntemeiat de a contracta cu anumiți furnizori sau de a face livrări către anumiți beneficiari; g) ruperea unei relații contractuale stabilite anterior pe piața relevantă pentru singurul motiv că partenerul refuză să se supună unor condiții comerciale nejustificate.”

<sup>42</sup> 2012 Competition Act, Article 11(1).

The law also provides for an “efficiency defence” that can be invoked by the dominant undertaking with the aim to exempt its practices from the prohibition. In such case the dominant undertaking has to demonstrate that its practices are objectively necessary or produce significant efficiencies, which compensate any anti-competitive effects on consumers, under the condition that the practices at issue are indispensable and proportionate in relation to the alleged objective pursued by the dominant undertaking.<sup>43</sup> When claiming the increase in efficiency which is sufficient in order to guarantee there is no risk of causing a net prejudice to consumers, the dominant undertaking will have to prove with a high degree of probability and based on verifiable evidence, that the following cumulative conditions are fulfilled: (1) the efficiency increase was implemented, or it is likely to be implemented, as a result of the respective practices, such as technical improvement of goods’ quality or reducing the costs of production or distribution; (2) the respective practices are indispensable for that efficiency increase: there are no less anti-competitive alternatives for these practices; (3) the likely efficiency increase determined by the respective practices compensates any likely negative effects on competition and consumer welfare on the affected markets; (4) the respective practices do not eliminate effective competition by suppressing of the majority of all the existent sources of effective or potential competition.<sup>44</sup> The exclusionary practices which maintain, create or enhance a market position that approaches monopoly, may not be normally justified on the basis of the efficiency increase.<sup>45</sup> While the CC’s Regulation on determination of dominance and assessment of abuse of dominant position elaborates on the assessment of particular forms of abuse, it does not provide any additional guidance on the application of the “efficiency defence” in such cases.<sup>46</sup>

### 3. Exploitative and exclusionary abuses

The legal prohibition of the abuse of dominant position embedded in the 2012 Competition Act refers to the situation where the usage of the dominant position “may affect competition or damage the collective interests of the final consumers”.<sup>47</sup> Such definition covers impliedly both exploitative and exclusionary abuses since the two conditions are separated by the conjunction “or”, which indicates that the two conditions are alternatives. At the same time the Regulation on determination of dominance and assessment of abuse of dominant position adopted by the CC in 2013 provides that the CC shall enforce prohibition of unilateral anti-competitive conduct in cases where “on the basis of cogent and convincing evidence, if it is likely that the allegedly abusive conduct is likely to lead to anti-competitive foreclosure”.<sup>48</sup> The same Regulation defines anti-competitive foreclosure as “a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the anti-competitive conduct of the dominant undertaking”.<sup>49</sup> Since the purpose of the Regulation is to set the priorities that will guide the CC in enforcing prohibition of unilateral anti-competitive conduct,<sup>50</sup> it can be concluded that although the Competition Act does not exclude the exploitative abuses from the ambit of the prohibition, the CC will be less likely to intervene in cases of purely exploitative abuse without any exclusionary effect. Notably, the CC’s Regulation partially transposes the EU Commission Guidance on enforcement priorities in applying Article 102 TFEU.<sup>51</sup>

The CC’s enforcement practice supports the general understanding of the respective legal provision of the 2012 Competition Act distinguishing between exclusionary and exploitative abuses. For example, in relation to the substantive test for establishing abuse of dominant position in the form of applying predatory prices the CC noted that the objective of predation consists in elimination of competitors and increase in the market share of

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<sup>43</sup> 2012 Competition Act, Article 11(5).

<sup>44</sup> 2012 Competition Act, Article 11(7).

<sup>45</sup> 2012 Competition Act, Article 11(8).

<sup>46</sup> Regulation, paras 48-50.

<sup>47</sup> 2012 Competition Act, Article 11(1).

<sup>48</sup> Regulation, para 45.

<sup>49</sup> Regulation, para 4.

<sup>50</sup> Regulation, para 2. The preamble of the Regulation mentions that it partially transposes the Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20. While the EU document indicates that it contains “the enforcement priorities that will guide the Commission's action in applying Article 82 to exclusionary conduct by dominant undertakings,” the CC’s Regulation refers to the “priorities that will guide the Competition Council in applying the Article 11 of the Law No. 183 on competition.”

<sup>51</sup> Communication from the Commission 2009/C 45/02 Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C-45/7 of 24 February 2009.

the dominant undertaking.<sup>52</sup> Thus, in the absence of exclusionary effects (i.e. reduction of the competitors' customer base) the CC has rejected allegations of predation even without clearly determining the dominance of the undertaking concerned.<sup>53</sup>

The prosecution of exploitative abuses has been common in the early enforcement practice of the Moldovan NCA, which has adopted a strong consumer protection stance. One of the first reported findings of an abuse dates back to 2008 when the NACP has found that the supplier of natural gas Nord Gaz Sîngerei has abused its exclusive rights by requiring its customers to purchase meters of the consumption of natural gas produced by a certain company. Consumers who refused to purchase the "recommended" brand of meters had to bear all installation expenses otherwise covered by Nord Gaz Sîngerei. In that case the NACP found both exploitative (limiting the choice of the consumers and offering its services on unfavourable conditions) and exclusionary (limiting competition on the market for natural gas meters by preventing new entry on this market) elements of the established abuse.<sup>54</sup>

The exclusionary abuses have been also addressed in the NACP early enforcement practice. In 2008 the NACP found that Chişinău International Airport by an exclusive agreement for provision of taxi services, favoured a single provider, which was the single taxi operator allowed to use the parking facilities at the airport. The exclusive agreement resulted in a situation where competing taxi companies were artificially removed from the market and appeared at a competitive disadvantage, where they had to look for alternative ways to provide taxi services to arriving passengers. The NACP has characterized the actions of the airport as an abuse of dominance and ordered the latter to organize a public tender for the provision of taxi services, which would allow competition on the relevant market.<sup>55</sup>

#### 4. Price-based and non-price-based abuse

The current Competition Act contains the following price-related unilateral practices: (1) directly or indirectly imposing unfair purchase or selling prices; (2) charging excessive or predatory prices, with the aim of driving competitors out.<sup>56</sup> While the first example refers to the case of an exploitative abuse, the second example is an exclusionary abuse, which requires the showing of an anti-competitive objective. The CC has further elaborated on the issue of excessive pricing in its Regulation on determination of dominance and assessment of abuse of dominant position.<sup>57</sup> In order to establish the excessive pricing the CC shall "compare production or purchasing costs with the price alleged excessive and/or compare production or purchasing costs with the similar product(s) price on a comparable competitive market, including those in other countries".<sup>58</sup> The determination of the excessive pricing has to meet the following cumulative criteria: (1) the difference between *de facto* product costs incurred and *de facto* price charged shall not be excessive; and (2) if this difference is excessive, this price shall not be inequitable in itself or when compared to competing products.<sup>59</sup>

The assessment of the predatory pricing practices is also guided by the CC's Regulation on determination of dominance and assessment of abuse of dominant position.<sup>60</sup> It provides that the CC "shall intervene where the price-based exclusionary practices restricted or may restrict competition from competitors considered as efficient as the dominant undertaking, in some circumstances, from hypothetical competitors, as efficient as the dominant undertaking."<sup>61</sup> The CC should be expected to intervene in cases where dominant undertaking is deliberately incurring losses (sacrifice) with the aim to exclude or to be able to exclude one or more of its

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<sup>52</sup> CC Decision No. APD-21 of 5 December 2013.

<sup>53</sup> See A. Svetlicinii, "The Moldovan Competition Authority finds no dumping practices in the bundled packages on the telecommunications market (IM Sun Communications)", 5 December 2013, e-Competitions Bulletin December 2013, Art. N° 64855.

<sup>54</sup> See A. Svetlicinii, (Case Comment) "Moldova: abuse of dominant position - natural gas" 29(10) ECLR 2008, N161.

<sup>55</sup> See A. Svetlicinii, (Case Comment) "Moldova: abuse of dominant position - taxi services" 30(4) ECLR 2009, N51-52.

<sup>56</sup> 2012 Competition Act, Article 11(2).

<sup>57</sup> Regulation paras 51-55.

<sup>58</sup> Regulation, para 51.

<sup>59</sup> Regulation, para 52.

<sup>60</sup> Regulation, paras 83-97.

<sup>61</sup> Regulation, para 84.

current or potential competitors and thus to strengthen or maintain its market power.<sup>62</sup> The average variable cost is taken as the appropriate starting point for assessing whether the dominant undertaking incurred or is incurring avoidable losses. If a dominant undertaking charges a price below the average variable cost for all or part of its output, it is not recovering the variable costs: it is incurring a loss that could have been avoided. As a result, pricing below average variable cost will thus in most cases be viewed by the CC as a clear indication of sacrifice.<sup>63</sup>

In a recent case the CC has investigated an alleged predatory pricing on the part of the incumbent telecom operator Moldtelecom.<sup>64</sup> In that case the CC found that offering a 3G phone for the symbolic price of 1 MDL did not amount to predatory pricing as the cost of the phone was recovered by the company from the proceeds of the 24-month post-paid contract, which was a requisite condition for the specified promotion.<sup>65</sup> The recent enforcement practice indicates in cases of the alleged predatory pricing the CC is likely to focus on the economic feasibility of the predation strategy and the actual exclusionary effects (or absence thereof). In 2014 the CC investigated the complaint lodged by Moldtelecom against another mobile operator – Orange-Moldova. Moldtelecom argued that promotional campaign offering new prepaid customers a bonus of MDL 3,000, which could be used for calls, SMS and MMS within Orange-Moldova network amounted to predatory pricing and abuse of dominant position. Upon request of the CC, Orange-Moldova provided financial data demonstrating that due to the low costs of the services provided within own network, the promotional campaign allowed the company to realise certain profit margin. The CC also noted a continuous growth in the customer base of all mobile operators. In the absence of anti-competitive effects on the relevant market the CC concluded that Orange-Moldova was not abusing its dominant position.<sup>66</sup>

The CC has also examined the alleged predatory pricing in the context of bundled sales. In 2013 the competition authority investigated the marketing practices of the independent telecom provider Sun Communications that was offering to its customers bundled packages of IPTV, fixed telephony and Internet services. While IPTV service was also offered as an unbundled service, fixed telephony and internet access was provided by Sun Communications only in the bundled packages. The incumbent operator Moldtelecom argued before the CC that telecom services included in the bundled packages were offered below cost with the aim at recapturing customer base from the competitors. The NCA established that prices of bundled packages were always lower than the combination of the same services purchased by the consumers separately. The CC has also noted that Moldtelecom's customer base for IPTV and Internet services was constantly on the rise, while the Moldtelecom's falling share of fixed telephony market was a general industry trend where the incumbent still had more than 90% of the customer base. Thus, the absence of exclusionary effects prompted the CC to conclude that the bundled sales by Sun Communications did not constitute an abuse of dominant position.<sup>67</sup>

The CC may also prosecute predatory pricing applied by the dominant undertakings on secondary markets on which they are not yet dominant. In particular, the CC will be more likely to find such an abuse in sectors where activities are protected by a legal monopoly where the dominant might use the profits gained in the monopoly market to cross-subsidize its activities in another market and thereby threaten to eliminate effective competition in that other market.<sup>68</sup> The CC has followed this approach in a recent case involving the alleged predatory pricing on the mobile telecommunications market on the part of the incumbent telecom operator Moldtelecom.<sup>69</sup> In that case the CC has examined the alleged exclusionary effects on the mobile telecom market in the view of the monopolistic position of Moldtelecom on fixed telecommunications market and the possibility to cross-

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<sup>62</sup> Regulation, para 89.

<sup>63</sup> Regulation, para 91.

<sup>64</sup> See A. Svetlicinii, "The Moldovan Competition Authority investigates the pricing of post-paid mobile services by the incumbent operator (Moldtelecom)", 6 March 2014, e-Competitions Bulletin March 2014, Art. N° 68484.

<sup>65</sup> CC Decision No. APD-5 of 6 March 2014.

<sup>66</sup> See A. Svetlicinii, (Case Comment) "Moldova: abuse of dominant position – telecommunications" 35(6) ECLR 2014, N50-51.

<sup>67</sup> See A. Svetlicinii, (Case Comment) "Moldova: abuse of dominant position – telecommunications" 35(6) ECLR 2014, N47-48.

<sup>68</sup> Regulation, para 90.

<sup>69</sup> See A. Svetlicinii, "The Moldovan Competition Authority investigates the alleged predatory pricing of mobile telecommunications services by the incumbent operator (Moldtelecom)", 23 January 2014, e-Competitions Bulletin January 2014, Art. N° 68488.



subsidize its promotional campaigns for mobile services.<sup>70</sup> In another predatory pricing case telecom operator Moldcell argued that Moldtelecom has abused its dominant position by applying predatory prices to its mobile telecom services. During the winter holidays season of 2011 Moldtelecom launched a promotional campaign offering the following conditions to the new post-paid customers: (1) free calls within Moldtelecom's mobile network for the period of one year; (2) free calls to any Moldtelecom number (both fixed and mobile); (3) unlimited and free mobile Internet; (4) 3G-supporting mobile phone for the price of 1 MDL. Even though Moldtelecom was not dominant on the mobile telecom market,<sup>71</sup> the CC has assessed the possible anti-competitive effects stemming from the specified promotional campaign. Taking into account that Moldtelecom's rivals have been increasing their customer base at a faster pace than Moldtelecom, the NCA concluded that in the absence of exclusionary effects there was no abuse of dominance on the part of Moldtelecom.<sup>72</sup>

In cases of unfair pricing where the showing of exclusionary effect is not required the NCA's assessment is relatively simple, with the primary focus on the "unfairness" of the price in relation to the customers or consumers of the dominant undertaking. For example, in 2009 the NAPC found that imposition of 4% charge on the bus tickets sold on international routes by the bus terminal operator in the capital of Chişinău was unfair because all costs related to the ticketing of the passengers were already included in the 10% margin applied by the bus terminal to all kinds of tickets regardless of the final destination.<sup>73</sup> The unfair charges levied by the bus terminal operators reappeared in the focus of the NAPC's investigation in 2011. The NCA has qualified the following charges as unfair: (1) "advance sale fee" formulated as a lump sum or a percentage of the ticket's price (the NCA held that these fees were unfair because the bus terminal did not incur any additional costs by selling the tickets in advance as opposed to selling them on the day of the departure); (2) parking fee levied on all vehicles entering the territory of the bus terminal (the NCA held that these fees were unfair because the bus terminals were not licenced to supply parking services and there was no other possibility for the passengers arriving by taxis or private vehicles to deliver the luggage to the bus terminal); (3) "contract fees" charged by bus terminal operator for concluding new and extending the existing contracts with bus operators (the NCA held that these fees were unfair on the sole ground that bus terminal operators were dominant and specified fees increased the costs of bus operators and therefore created additional market barriers).<sup>74</sup>

The 2012 Competition Act prohibits the following non-price-based abuses, further elaborated in the CC's Regulation on determination of dominance and assessment of abuse of dominant position: (1) tying and bundling;<sup>75</sup> (2) refusal to supply;<sup>76</sup> (3) exclusive dealing.<sup>77</sup> The CC's Regulation distinguishes various forms of tying (technical and contractual) and bundling (pure and mixed). While tying in bundling are not viewed as competition infringements *per se*, they may be found in violation of the respective provision of the Competition Act when the following conditions are fulfilled cumulatively: (1) the undertaking is dominant on the tying market, though not necessarily dominant in the tied market. In bundling cases, the undertaking concerned should be dominant in one of the bundled markets. In case of tying in after-markets the undertaking concerned should be dominant in the tying market and/or the tied after-market; (2) the tying and tied products are distinct products;

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<sup>70</sup> In that case, the evolution of customer base demonstrated that Moldtelecom's rivals were much more successful in attracting new customers than the incumbent. As a result, the CC concluded that in the absence of the dominant position and/or anti-competitive effects there was no evidence of an infringement of competition rules. CC Decision No. APD-3 of 23 January 2014.

<sup>71</sup> Based on the annual turnover figures from the annual report published by the telecom regulator, the National Regulatory Agency for Electronic Communications and Information Technology (NRAECIT), in 2011 the market shares of the mobile telecom companies were as follows: Moldtelecom (3, 59%), Moldcell (25, 57%), Orange Moldova (70, 84%). Based on the number of customers the NRAECIT reported the following data for 2011: Moldtelecom (6, 07%), Moldcell (36, 61%), Orange Moldova (57, 32%).

<sup>72</sup> See A. Svetlicinii (Case Comment) "Moldova: abuse of dominant position – telecommunications" 35(10) ECLR 2014, N87-88.

<sup>73</sup> NAPC Decision No. 64 of 22 October 2009, published in the Official Gazette of the Republic of Moldova No. 163-164 of 13 November 2009.

<sup>74</sup> NAPC Decision No. APD-9-11/53 of 13 May 2011. See A. Svetlicinii, "The Moldovan Competition Authority finds excessive tariffs charged by the bus terminal operators for their ticketing services (Auto Terminals and Stations)", 13 May 2011, e-Competitions Bulletin May 2011, Art. N° 37383.

<sup>75</sup> 2012 Competition Act, Article 11(2)(d), Regulation, paras 56-68.

<sup>76</sup> Regulation, paras 69-82.

<sup>77</sup> Regulation, paras 98-115.

and (3) the tying practice is likely to lead to anti-competitive foreclosure.<sup>78</sup> The CC's intervention could be warranted in cases where the price of the products included in the bundle is below average variable cost because in such cases even an equally efficient competitor may be prevented from expanding or entering the relevant market.<sup>79</sup>

The abuse of refusal to supply cover a wide range of practices such as refusal to supply products to existing or new customers, refusal to license IP rights (under special circumstances such as when the license is needed to provide interface information), refusal to grant access to the essential facility or a network, etc.<sup>80</sup> The CC's Regulation on abuse of dominant position refers to situations where the dominant undertakings competes on the "downstream market" with the undertakings it refuses to supply. The term "downstream market" is used to refer to the market for which the refused input is needed in order to manufacture a product or provide a service.<sup>81</sup> The refusal to supply shall be deemed an infringement of competition rules if the following cumulative conditions are fulfilled: (1) the refusal concerns the product that is objectively necessary for the undertakings to be able to compete effectively on the downstream market (the product concerned is indispensable i.e. there are no current or potential substitutes); (2) the refusal is likely to lead to the elimination of effective competition on the downstream market; (3) the refusal is likely to lead to consumer harm.<sup>82</sup> The consumer harm may arise in situations where the foreclosed competitors are prevented from placing on the market innovative goods or services, where the competitors don't merely duplicate the goods or services already offered by the dominant company, but, intend to produce new or improved goods or services for which there is potential consumer demand or they are likely to contribute to technological development.<sup>83</sup>

The concept of "exclusive dealing", as a form of an abuse, refers to situations where an exclusive purchasing obligation requires a customer to purchase exclusively or to a large extent only from the dominant undertaking.<sup>84</sup> The CC shall intervene in situations where there are many customers and the exclusive purchasing obligations have the effect of preventing the entry or expansion of competitors.<sup>85</sup> The CC's Regulation addresses the practice of conditional rebates where they induce the customers of the dominant undertaking not to switch a portion of their demand to an alternative supplier.<sup>86</sup> When assessing the foreclosure effect of the conditional rebates the CC will estimate what price a competitor would have to offer in order to compensate the customer for the loss of the conditional rebate if the latter will switch part of its demand away from the dominant undertaking.<sup>87</sup>

## **5. Enforcement**

### **5.1. Decision-making practice**

The quantitative assessment of the NCA's decision-making practice can be helpful in understanding the enforcement tendencies and priorities in a particular jurisdiction. Prior to the analysis of the CC's enforcement record, several clarifications should be made. Neither 2000 Competition Act<sup>88</sup> nor 2012 Competition Act<sup>89</sup>

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<sup>78</sup> Regulation, para 61.

<sup>79</sup> Regulation, para 67.

<sup>80</sup> Regulation, para 70.

<sup>81</sup> Regulation, para 72.

<sup>82</sup> Regulation, para 75.

<sup>83</sup> Regulation, para 81.

<sup>84</sup> Regulation, para 101.

<sup>85</sup> Regulation, para 102.

<sup>86</sup> Regulation, para 108.

<sup>87</sup> Regulation, para 110.

<sup>88</sup> The 2000 Competition Act required the NAPC to publish in the Official Gazette of the Republic of Moldova only its annual reports and decisions of general public interest. As a result, the NAPC exercised an administrative discretion to decide which infringement decisions should be published. See 2000 Competition Act, Annex, paras 27-28.

<sup>89</sup> The 2012 Competition Act requires the CC to publish in the Official Gazette of the Republic of Moldova only its regulations, which is a type of secondary legislation of normative character. 2012 Competition Act, Article 45(6). The regulations concern the following: (a) organization and functioning of the CC; (b) organization, functioning and competences of the Council of Experts; (c) block exemption regulations for certain categories of agreements; (d) determination of dominant position and assessment of abuse of dominant position; (e) economic

required the NCA to publish the individual infringement decisions. As a result, the information about the enforcement activity of the NCA can be derived from the NCA's annual reports and press releases. At the time of writing of the present review the NCA has published its activity reports for the following periods: 2007, 2007-2008, 2009, 2007-2011 and 2012-2013.<sup>90</sup>

The following chart (Chart 2) represents the caseload of the NAPC in relation to the prohibition of the anti-competitive unilateral conduct under 2000 Competition Act.<sup>91</sup>

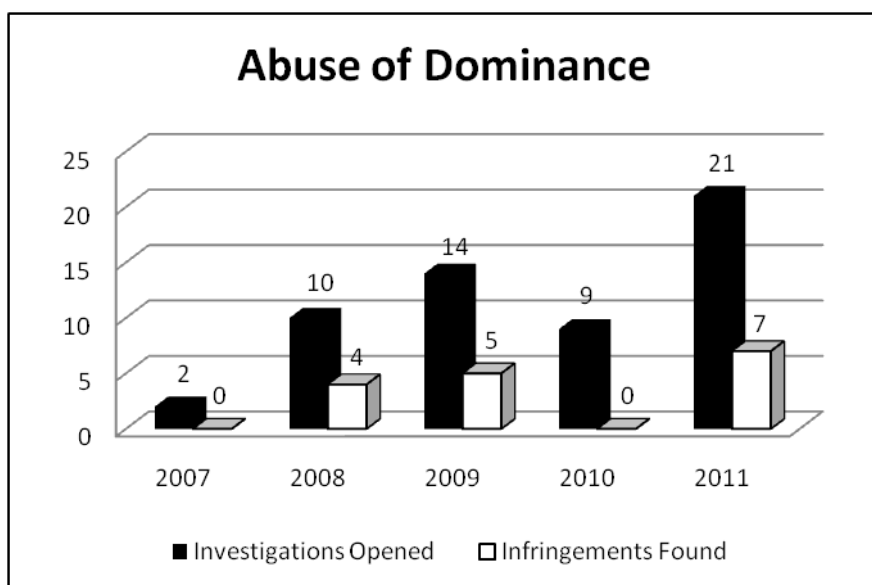


Chart 2

It is obvious that the number of investigations significantly exceeds the number of infringements found by the competition authority. This can be partly explained by the fact that 70% of the investigations were initiated upon individual complaints of the interested parties. Since the knowledge about competition law and the role of competition authority remained low, numerous ungrounded complaints (consumer- or competitor-driven) were lodged before the NAPC alleging the abuse of dominant position. Many of these cases were rejected due to the absence of the dominant position of the undertaking(s) concerned on the relevant market. It also demonstrates that the general public and business community often perceived the competition authority as a watchdog over monopolists and large companies without much regard to the scope of competition law and the functions of competition authority.

The following chart (Chart 3) demonstrates the ratio of the abuse of dominance cases in the overall caseload (excluding merger control and state aid) of the NAPC under the 2000 Competition Act.<sup>92</sup>

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concentrations; (f) commitments; (g) implementation of the state aid regime. 2012 Competition Act, Article 46(6).

<sup>90</sup> The annual reports of the NAPC and CC are available at <http://old.competition.md/reports/index.php> and <http://www.competition.md/publications/rapoarte-anuale.html>. Accessed 22 March 2015.

<sup>91</sup> Based on: NAPC, the Activity Report for 2007-2011. <http://old.competition.md/reports/Raport2011.pdf>. Accessed 22 March 2015.

<sup>92</sup> Based on: NAPC, the Activity Report for 2007-2011. <http://old.competition.md/reports/Raport2011.pdf>. Accessed 22 March 2015.

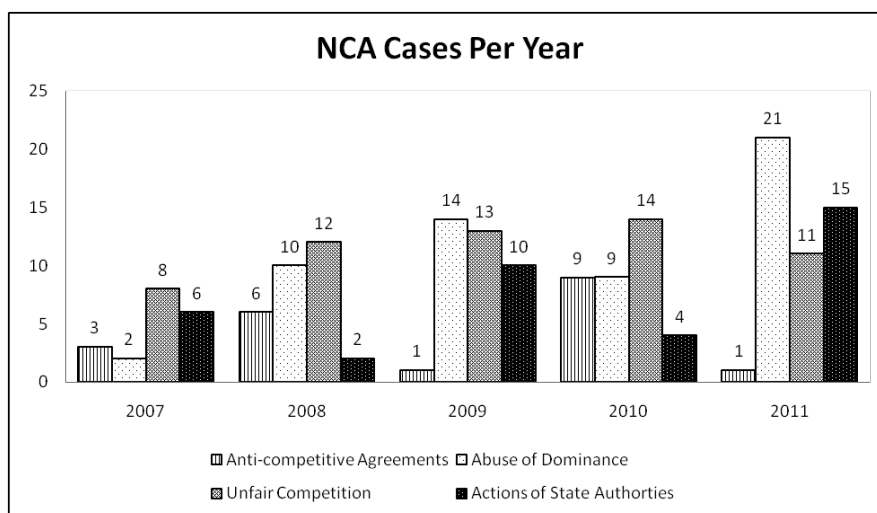


Chart 3

The above statistics for 2007-2011 indicates that the number of abuse of dominance cases per year is approximately equal to the number of cases concerning acts of unfair competition (approx. eleven cases per year). These two categories of cases (excluding merger control) share the first place in the workload of the NACP under the 2000 Competition Act. These numbers stand in stark contrast to the number of cases concerning anti-competitive agreements, which remained at average four cases per year during 2008-2011. The quantitative gap between the two types of antitrust infringements became only wider in 2012-2013 following the adoption of the 2012 Competition Act. According to the CC's data, it has started the year of 2012 with 2 investigations concerning anti-competitive agreements.<sup>93</sup> During 2012-2013 the CC has opened 6 new investigations in this field.<sup>94</sup> The CC's work in the field of unilateral anti-competitive conduct has been much more voluminous. The competition authority commenced the year of 2012 with 33 cases; it has opened 5 new cases during 2012-2013 and ended the year of 2013 with the 17 on-going investigations concerning potential abuse of dominant position.<sup>95</sup> While at the time of writing the CC's statistics for 2014 has not been yet released, it can be noted that in 2014 the CC has published 7 decisions concerning abuse of dominant position.<sup>96</sup> When it comes to the type of unilateral anti-competitive conduct targeted by the competition authority, it is problematic to provide a precise estimation of exclusionary and exploitative cases, especially since some cases include both elements. At the same time, certain economic sectors with little or no competition have seen NCA's interventions against exploitative practices. For example, a recent study of the NACP's interventions in the regulated sectors such as utilities and energy indicates that in the majority of cases the NCA has targeted exploitative abuses of dominant position.<sup>97</sup> The breakdown of the NCA's caseload throughout the years of its enforcement activity allows concluding that prosecution of the unilateral economic conduct has been a clear enforcement priority of the NCA from the early years of its existence and it continues to occupy a significant portion of its caseload under the 2012 Competition Act. It could be expected however, in the light of the improved cooperation between the CC and regulatory authorities and the CC's Guidelines on determination of dominance and assessment of the abuse of dominant position that the nature of the CC's interventions could shift from exploitative towards exclusionary unilateral practices.

## 5.2. Competent courts and authorities

<sup>93</sup> CC, the Activity Report for 2012-2013, p. 17.

[http://www.competition.md/uploads/rapoarte\\_anuale/Raportul-privind\\_activitatea\\_%20Consiliului-Concurentei\\_2012-2013.pdf](http://www.competition.md/uploads/rapoarte_anuale/Raportul-privind_activitatea_%20Consiliului-Concurentei_2012-2013.pdf). Accessed 22 March 2015.

<sup>94</sup> Activity Report for 2012-2013, p. 18.

<sup>95</sup> Activity Report for 2012-2013, p. 20.

<sup>96</sup> CC Decisions Nos. APD-1 of 10 January 2014, APD-3 of 23 January 2014, APD-5 of 6 March 2014, APD-6 of 11 March 2014, APD-33 of 25 September 2014, APD-41 of 13 November 2014, APD-42 of 13 November 2014. <http://competition.md/decizii/>. Accessed 22 March 2015.

<sup>97</sup> See A. Svetlicinii and M. Botta, "Enforcement of Competition Rules in Regulated Industries: Abuse of Dominance Practices in the New EU Member States, Candidate Countries and Potential Candidates" in J. Drexler and F. Di Porto (eds.) *Competition Law as Regulation* (Edward Elgar, forthcoming in 2015).

The court system of the Republic of Moldova consists of the courts of general jurisdiction (the Supreme Court of Justice (SCJ)<sup>98</sup>, the courts of appeal and the courts of first instance<sup>99</sup>) and specialized courts (economic court and military court).<sup>100</sup> Under 2000 Competition Act the courts have been actively involved in the antitrust enforcement due to the fact that the NAPC was not authorized to impose fines on undertakings found in violation of competition rules. The law authorized the NAPC to establish competition infringements and to issue prescriptions to the undertaking(s) concerned requiring the latter to modify their conduct and/or remedy anti-competitive effects of their prior conduct.<sup>101</sup> The NAPC's decisions could be challenged in court within six months from the date of adoption. The liability for the competition infringements was not regulated in the Competition Act and followed the general administrative procedure rules. Under those rules, an administrative authority (the NAPC) had to initiate an infringement procedure in court with request to impose financial penalties on undertaking(s) and individual(s) concerned. This legislative solution has increased the administrative burden of the newly established NCA and delayed the effective imposition of penalties on the offenders. Moreover, unlike the EU model of calculating the fine as a percentage of annual turnover, the administrative fines in Moldova are fixed, which determined a relatively low level of penalties for competition infringements.

The 2012 Competition Act has authorized the CC to impose fines calculated as a percentage of the annual turnover of the undertaking(s) concerned.<sup>102</sup> The new law has also introduced a leniency programme, which allows the CC to grant immunity or reduction of fines to the undertakings that have contributed to the investigation and the establishment of the infringement.<sup>103</sup> As a result, the courts are currently involved in the judicial review of the CC's infringement decisions and procedural acts (imposition of fines or periodic penalties, investigative actions, etc.) The rules on jurisdiction provide that the judicial review of the CC's decisions is exercised by the Chişinău Court of Appeals as a first instance court and by the SCJ (the Panel for civil, commercial and administrative cases) as a second and final instance court.<sup>104</sup> The 2012 Competition Act grants the above mentioned court the full judicial review powers in relation to the amount of fine imposed by CC: the courts can reduce the fine, increase it or annul the CC's decision.<sup>105</sup> The victims of the competition infringements can lodge a follow-on action for compensation of damages before the courts of general jurisdictions within one year from the date when the CC's infringement decision becomes final and irrevocable.<sup>106</sup>

Besides the CC and the courts entrusted with the judicial review of the CC's infringement decisions, the protection and development of market competition can be found among the responsibilities of various NRAs with monitoring and regulatory powers in the specific sectors of the national economy. For example, the Energy Act directs the government to "stimulate competition and limit monopolistic activity in the energy sector" through "creation of conditions for competition and liberalization of the energy markets".<sup>107</sup> Among the competences of the National Energy Regulatory Agency (NERA)<sup>108</sup> the law mentions promotion and protection of fair competition and efficiency of the energy markets.<sup>109</sup> The same objectives are proclaimed in the sector specific regulations enforced by the NERA concerning the market for petroleum products,<sup>110</sup> natural gas,<sup>111</sup> and

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<sup>98</sup> Curtea Supremă de Justiție, <http://despre.csj.md/>. Accessed 22 March 2015. See Law No. 789 of 26 March 1993 concerning the Supreme Court of Justice, published in the Official Gazette of the Republic of Moldova No. 15-17 on 22 January 2013.

<sup>99</sup> The interactive map of the courts of general jurisdictions is available at <http://courts.justice.md/>. Accessed 22 March 2015.

<sup>100</sup> Law No. 154 of 6 July 1995 concerning judicial organization, published in the Official Gazette of the Republic of Moldova No. 15-17 on 22 January 2013.

<sup>101</sup> 2000 Competition Act, Annex "Statute of the National Agency for Protection of Competition", Article 8.

<sup>102</sup> 2012 Competition Act, Articles 67-80.

<sup>103</sup> 2012 Competition Act, Articles 84-92.

<sup>104</sup> See Law No. 793 of 10 February 2000 concerning administrative procedure, published in the Official Gazette of the Republic of Moldova (special edition) of 3 October 2006, Articles 8-10.

<sup>105</sup> 2012 Competition Act, Article 78.

<sup>106</sup> 2012 Competition Act, Article 79.

<sup>107</sup> Law No. 1525 of 19 February 1998 on energy, published in the Official Gazette of the Republic of Moldova No. 50-51 of 4 June 1998, Articles 4(g) and 8(1)(a).

<sup>108</sup> Agenția Națională pentru Reglementare în Energetică, <http://www.anre.md/>. Accessed 22 March 2015.

<sup>109</sup> Law No. 1525 of 19 February 1998 on energy, Article 4 (2)(b).

<sup>110</sup> Law No. 461 of 30 July 2001 concerning the market for petroleum products, published in the Official Gazette of the Republic of Moldova No. 76 of 22 April 2003, Article 1(1).

electricity.<sup>112</sup> In the field of telecommunications where the National Regulatory Agency for Electronic Communications and Information Technology (NRAECIT)<sup>113</sup> acts as a NRA, the development of effective, fair and equitable competition are mentioned amongst the regulatory objectives.<sup>114</sup> THE NRAECIT is entrusted with the task to define the regulated markets with little or no competition, to determine the undertakings with the significant market power, to formulate specific regulatory obligations for the latter and to monitor their compliance. Even though the NRAs exercise their regulatory authority in relation to the dominant undertakings, the sector specific legislation takes an *ex ante* approach by prescribing specific conduct to the dominant undertakings instead of prosecuting them *ex post* for the abuse of dominant position, which is the competence of the CC. The following section discusses the approach followed by the competent courts and the interaction between the CC and the NRAs concerning anti-competitive unilateral conduct.

### 5.3. Approach followed by competent courts and authorities

The following case represents an instance where the NAPC's enforcement actions against abuses of dominant position appeared in a conflict with the sector specific regulation enforced by the NRA. In 2011 the NAPC established that RED Union Fenosa has abused its dominant position on the market for supply and distribution of electricity at regulated tariffs by including an automatic notice of disconnection in its monthly invoices sent to the consumers. The standard agreement for the supply of electricity to individual consumers provided for the supplier's right to disconnect the customers who failed to pay their monthly bills within 10 days from the payment date indicated on the invoice. The consumers were reminded about the supplier's right to disconnect the supply through a standard message inserted into their monthly electricity bills. The NERA in its consumer's guidelines required the electricity suppliers to include the following text on its monthly bills: "Attention! Notice on disconnection. We remind you that in case of non-payment of this bill until the due date indicated herein the consumption equipment will be disconnected from the electricity network without further notice". In compliance with the NERA's regulation RED Union Fenosa placed this message on all of its invoices sent to the customers without distinguishing between customers that paid their bills on time and those defaulting on their payments. The NAPC assessed this practice in light of the general requirement of the Civil Code, which in case of standard agreements requires the creditor to provide the debtor with the notice of default. The NAPC concluded that "automatic" notice on disconnection included in every electricity invoice did not fulfil the mandatory requirements of the Civil Code and represented an abuse of dominant position in the form of imposing unfavourable trading conditions.<sup>115</sup> In its decision the NAPC also urged the NERA to revise its regulations governing the supply and consumption of electricity and to oblige the electricity supplier to give express prior notices in cases of intended disconnection.

The NCA's interventions in the regulated markets based on the prohibition of the abuse of dominant position have been upheld by the judiciary. In a 2014 judgment the Supreme Court of Justice affirmed the judgment of the first instance court and upheld the infringement decision of the CC against the dominant electricity supplier Red Union Fenosa.<sup>116</sup> The CC has qualified as an abuse of dominance the actions of Red Union Fenosa where the latter has imposed on the customer an obligation to transfer the ownership over certain infrastructure to the electricity supplier as a condition for the connection to the electricity network. In an earlier case the SCJ has affirmed another intervention of the NCA against Red Union Fenosa based on the abuse of dominance prohibition.<sup>117</sup> In that case the NCA found that the dominant electricity supplier was "recommending" the consumers to install the electricity consumption meters with LCD screens, which effectively foreclosed the retailers of the mechanic electricity meters from the significant portion of the relevant market. The Court upheld

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<sup>111</sup> Law No. 123 of 23 December 2009 concerning natural gas, published in the Official Gazette of the Republic of Moldova No. 23-24 of 12 February 2010, Article 3(2)(c).

<sup>112</sup> Law No. 123 of 23 December 2009 concerning electricity, published in the Official Gazette of the Republic of Moldova No. 23-24 of 12 February 2010, Article 3(2)(c).

<sup>113</sup> Agenția Națională pentru Reglementare în Comunicații Electronice și Tehnologia Informației, <http://www.anrceti.md/>. Accessed 22 March 2015.

<sup>114</sup> Law No. 241 of 15 November 2007 on electronic communications, published in the Official Gazette of the Republic of Moldova No. 51-54 of 14 March 2008, Article 7(2)(c).

<sup>115</sup> NAPC Decision No. CNP-75/08/13 of 22 February 2011. See A. Svetlicinii, "The Moldovan Competition Authority finds an exploitative abuse of dominant position in the invoicing practices of an electricity distributor (RED Union Fenosa)", 22 February 2011, e-Competitions Bulletin February 2011, Art. N° 34942.

<sup>116</sup> SCJ, case 3ra-1056/14 of 29 October 2014 *Red Union Fenosa v Competition Council*.

<sup>117</sup> SCJ, case 3ra-748/13 of 29 May 2013 *Red Union Fenosa v Competition Council*. See also SCJ Case 3rh-7/14 of 15 January 2014 *Red Union Fenosa v Competition Council*.

the NCA's interpretation of the 2000 Competition Act, which prohibited a range of actions of the dominant undertaking that lead to limitation of competition and hamper the consumer interests. In that case, the energy NRA has submitted that sector specific regulation did not permit the electricity supplier to refuse installation of the metering equipment that satisfied technical standards so that Red Union Fenosa could not impose any particular type or brand of metering equipment on its consumers.

In another case the SCJ has upheld the CC's intervention in the market for potable water and canalization services where the NCA found that the dominant undertaking Apă-Canal Chişinău has abused its dominant position by requiring certain residential consumers to install the consumption metering equipment at their own cost.<sup>118</sup> The NCA held that this discriminatory treatment of certain consumers violated the utility company's obligation to install and maintain the metering equipment at its own cost. The SCJ aligned with the NCA and noted that the dominant position of Apă-Canal Chişinău provided for "special responsibility" of the dominant company in its relations with the consumers.

The 2012 Competition Act has regulated the relations between the CC and sector regulators in the following way. The NRAs are required to notify the CC of any possible competition infringements in the regulated markets and to submit the drafts of the sector regulations that may affect competition on the regulated markets to the CC for review and opinion.<sup>119</sup> Sector specific regulations provide for the possibility of the NRAs to consult the CC in cases where the former examine mandatory merger notifications in their respective fields<sup>120</sup> or determine the undertakings with significant market power.<sup>121</sup> In cases where the CC suspects competition infringements on the regulated market, it shall request the opinion of the respective sector regulator.<sup>122</sup> Generally, the legislator has divided the enforcement competences between the NCA and the NRAs in the following manner: the NRAs shall act *ex ante* in their respective sectors while the NCA shall act *ex post* in order to safeguard competition in all economic sectors.<sup>123</sup> In some sectors, such as telecommunications the cooperation between the CC and the NRA has been evolving successfully: the CC has been continuously consulting the NRAECIT in the line cases concerning alleged abuses of dominant position in the mobile telecommunications market.<sup>124</sup> In July 2014 the CC and the NRAECIT have formalized their relations by signing the inter-agency cooperation agreement.<sup>125</sup>

At the same time, as the preceding discussion demonstrates, the NCA's relations with the energy regulator have been far less "cooperative". The NCA on several occasions has intervened in the energy markets where it found that NERA's regulations have not prevented the dominant undertakings from engaging in exploitative practices in vis-à-vis their consumers and trading partners. In an earlier case concerning alleged price coordination among the petroleum products retailers the NAPC held that by receiving price data notified by the parties without assuring an effective price control, the NERA has contributed to the price coordination by facilitating the exchange of information among the undertakings concerned.<sup>126</sup> The role of NERA in facilitating the alleged price coordination has been examined on appeal of the NAPC decision before the courts where the NAPC's

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<sup>118</sup> SCJ, case 3ra-7/14 of 12 March 2014 *Apă-Canal Chişinău v Competition Council*. See also SCJ Case 3ra-1451/12 of 9 October 2013 *Apă-Canal Chişinău v Competition Council*.

<sup>119</sup> 2012 Competition Act, Articles 34(2), 34(4). See also Law No. 1525, Article 4<sup>1</sup>(5). The Law on energy requires the NERA to cooperate with the CC especially in relation to information exchange, which is necessary for the enforcement of competition rules.

<sup>120</sup> See e.g. Law No. 123 of 23 December 2009 concerning natural gas, Article 21; Law No. 124 of 23 December 2009 concerning electricity, Article 21; Law No. 92 of 29 May 2014 concerning thermal energy and development of cogeneration, published in the Official Gazette of the Republic of Moldova No. 178-184 of 11 July 2014, Article 32.

<sup>121</sup> See Law No. 241 of 15 November 2007 on electronic communications, Articles 51-57.

<sup>122</sup> 2012 Competition Act, Article 34(3).

<sup>123</sup> 2012 Competition Act, Article 34(5). See also A. Svetlicinii, "New Competition Law of the Republic of Moldova: Prospects and Concerns" 6 *Österreichische Zeitschrift für Kartellrecht* (2013), pp. 201-218.

<sup>124</sup> See Section 4 of the present report for the review of the CC's practice in the telecommunications sector.

<sup>125</sup> See press releases at <http://competition.md/news/a-fost-semnat-acordul-de-cooperare-bilaterala-intre-c-c-si-anrceti.html> and [http://www.anrceti.md/news18072014\\_2](http://www.anrceti.md/news18072014_2). Accessed 22 March 2015.

<sup>126</sup> See A. Svetlicinii, "The Moldovan Competition Authority finds concerted practices on the market for retail of oil derivatives (Petroleum companies)", 17 February 2011, e-Competitions Bulletin, Art. N° 36984.

decisions have been annulled for the lack of evidence concerning price coordination.<sup>127</sup> Needless to say, the NAPC's intervention and the resulting litigation have not contributed to the improvement of cooperation between the NCA and energy regulator.

## 6. Concluding remarks

As it was discussed earlier, the effective enforcement of the 2000 Competition Act by the NAPC has effectively commenced in 2007 when the leadership of the competition authority has been appointed by the Parliament and the Government has undertaken practical steps towards establishment of the competition authority. As a result, the current enforcement record of the NCA in the field of unilateral anti-competitive conduct has been accumulated during 2007-2012 under the broad prohibitions of various forms of abusive conduct embedded in the 2000 Competition Act. Although the early practice of the NAPC has attracted criticisms from the domestic business community and foreign investors, these were mainly directed towards the application of sanctions by the newly established competition authority.<sup>128</sup> The attitude of the general public or average consumers, often reflected in the media reporting on the work of the NAPC, was generally positive in relation to prosecution of abusive conduct of the dominant undertakings. The newly established NCA has received numerous complaints by consumers and competitors concerning the potential abuses of dominant position. The NAPC has managed to attract a substantial degree of public attention precisely by targeting dominant undertakings in socially sensitive sectors such as utilities, energy, transportation, etc. These interventions could be also seen as an "enforcement shortcut", which allowed the young NCA to build its enforcement record with limited human, financial and institutional resources and experience that were insufficient for organization of complex investigations or sophisticated economic assessments.

As a part of the 2008-2010 EU-funded project "Support for the Implementation of Agreements between the Republic of Moldova and the European Union"<sup>129</sup> the international experts have produced the review of the Moldovan competition legislation and enforcement mechanism for compliance with the EU standards. The authors have noted that 2000 Competition Act places undue emphasis on the abuse of dominant position: extensive list of possible abuses, determination of dominant position carried out by the NAPC in separation from the infringement proceedings, the declared purpose of the merger control being to prevent potential abuses of dominant position, etc.<sup>130</sup> During the course of its European integration, first as a participant of the EU's Eastern Partnership<sup>131</sup> initiative and currently as a signatory of the Association Agreement with the EU,<sup>132</sup> Moldova has substantially aligned its competition legislation with the EU standards, which has been reflected in the current 2012 Competition Act and secondary legislation such as CC's Regulation on determination of dominant position and assessment of abuse of dominant position, which partly transposed the EU Commission's Guidance on enforcement priorities in applying Article 102 TFEU.<sup>133</sup> In the light of this legislative reform of competition rules, enhancement of the investigative and sanctioning powers of the CC, improved cooperation

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<sup>127</sup> See A. Svetlicinii, "The Moldovan Supreme Court of Justices quashes two infringement decisions of the Competition Authority on concerted practices in the market for retail trade in oil derivatives for the lack of evidence (Petrom and Lukoil)", 7 December 2011, e-Competitions Bulletin December 2011, Art. N° 44496.

<sup>128</sup> See A.Svetlicinii, "Enforcement of competition law in the Republic of Moldova: one year on" 29(9) ECLR 2008, pp. 532-539.

<sup>129</sup> For general information about the EU-funded projects in Moldova see the official website of the State Chancellery, Department for Coordination of Policies, External Assistance and Public Administration Reform at <http://www.ncu.moldova.md/>. Accessed 22 March 2015.

<sup>130</sup> See Eugene Stuart and Abel Mateus, *Competition Law and Policy: Law Approximation to EU Standards in the Republic of Moldova* (IBF International Consulting, 2009), pp. 41, 97.

<sup>131</sup> The Eastern Partnership represents the Eastern dimension of the European Neighbourhood Policy. It is a joint policy initiative launched at the Prague Summit in May 2009, which aims to deepen and strengthen relations between the European Union and its six Eastern neighbours: Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. [http://eeas.europa.eu/eastern/index\\_en.htm](http://eeas.europa.eu/eastern/index_en.htm). Accessed 22 March 2015.

<sup>132</sup> The Moldova-EU Association Agreement was signed in Brussels on 27 June 2014, ratified by the Parliament of the Republic of Moldova on 2 July 2014 and by the European Parliament on 13 November 2014. See Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ 2014 L 260, p. 4.

<sup>133</sup> In its 2013 progress report for Moldova the EU Commission noted that "The Competition Council has made considerable progress in adopting the secondary legislation necessary to implement competition law and state aid law." Joint Staff Working Document Implementation of the European Neighbourhood Policy in the Republic of Moldova: Progress in 2013 and recommendations for action, 27 March 2014, SWD (2014) 93 final, p. 14.



between the NCA and the NRAs, growing experience of the CC in antitrust enforcement matters, it could be expected that in the future the CC will become more selective in its interventions against the unilateral anti-competitive conduct with the possible shift of the enforcement priority towards exclusionary abuses and high-impact cases.