

COMPETITION ECONOMICS INSIGHTS

DOMINATING THE DOMINANT POSITION

THE 40% THRESHOLD: BETWEEN PRACTICAL UTILITY AND THE ILLUSION OF CERTAINTY

Romanian competition law presumes dominance at 40% market share. The threshold is clear, operational, and, in its own way, elegant. It is also, on its own, an incomplete answer to a question that is fundamentally economic. A firm with 45% of the relevant market may face vigorous competitive constraints that prevent it from behaving independently; another with 38% may enjoy structural advantages that amount to genuine market power.

This insight explores why dominance assessment cannot stop at market share, how the European Commission's multi-factor framework offers a more robust analytical model, and what role sector-specific indicators and behavioural evidence could play in bridging the gap between legal presumption and economic reality.

THE SEDUCTION OF THE THRESHOLD

There is something reassuring about a bright-line rule. Article 6 of the Romanian Competition Law establishes a relative presumption of dominance at 40% market share, and the appeal of such a rule is understandable: it gives firms a number to monitor, compliance officers a trigger to watch, and authorities an operational starting point. In a field as analytically demanding as competition economics, the temptation to treat a numerical threshold as a proxy for the full assessment is, if we are honest, entirely human.

But the threshold was never intended to be the assessment itself. It is, in the language of competition law, a *relative* presumption, one that shifts the burden of proof but does not, and cannot, answer the underlying economic question: does this firm possess the ability to behave to an appreciable extent independently of its competitors, customers, and ultimately consumers? That question, as the Court of Justice established in *United Brands* and refined in *Hoffmann-La Roche*, requires a combination of factors which, taken separately, may not be determinative.

Romanian decisional practice bears this out. There are cases where an undertaking held a share well above the threshold and yet the Competition Council concluded, after a thorough investigation, that dominance could

not be established. The share was important, the company's position was significant, but the totality of the evidence did not support a finding that the firm could act independently of competitive constraints. That outcome is not an anomaly; it is the system working as intended.

HOW THE EUROPEAN COMMISSION APPROACHES THE QUESTION

The Commission's framework for dominance assessment, refined over decades of case law and codified in its Guidance on enforcement priorities, rests on a structured analysis that moves well beyond market share. It is worth examining this framework not because Romanian law is bound by it, but because it represents the most developed articulation of how economics informs the dominance inquiry.

MARKET SHARE: THE STARTING POINT

The Commission treats market share as the first filter, not the last word. A share above 50% could give rise to a presumption of dominance (following *AKZO*), but even this is assessed in context. Three dimensions matter: the absolute level of the share, its stability over time (a firm whose share fluctuates significantly may face more competitive pressure than the headline number suggests), and the relative distance to

the next largest competitor (a firm with 45% and a nearest rival at 40% is in a very different position from one with 45% and a nearest rival at 12%).

BARRIERS TO ENTRY AND EXPANSION

This is where the analysis often becomes decisive. A high market share in a market with low barriers to entry may indicate little more than current competitive success, not durable market power. Barriers can be regulatory (licensing requirements, spectrum allocation), economic (scale economies, sunk costs, network effects), or strategic (brand loyalty, switching costs, control of essential inputs). The question is not whether barriers exist in the abstract, but whether they are sufficient to shield the incumbent from effective competitive entry within a reasonable timeframe.

There is a temptation, particularly in regulatory discourse, to conflate barriers to entry with competitive advantages. They are not the same thing. A cost advantage derived from superior efficiency is a competitive advantage; it becomes a barrier to entry only if it is *structural*, durable, and not replicable by an equally efficient entrant. The economic moat metaphor, popular in investment analysis, captures the intuition but risks overstating the case: not every moat is impregnable, and not every competitive advantage translates into the kind of market power that competition law is concerned with.

COUNTERVAILING BUYER POWER

The third pillar of the Commission's framework asks whether customers possess the ability to constrain the firm's behaviour, even in the absence of vigorous competition among suppliers. Buyer power can manifest through

concentration (a small number of large buyers), negotiating sophistication, credible switching threats, the ability to sponsor new entry, or vertical integration. Each of these reduces the extent to which a high market share translates into genuine independence from competitive constraints.

What matters is whether the buyer power is credible and effective across the market as a whole, not merely for a subset of sophisticated purchasers. A firm that can price-discriminate, exercising restraint vis-à-vis powerful buyers while exploiting captive segments, may still hold a dominant position.

BEYOND MARKET SHARE: SECTOR-SPECIFIC INDICATORS

If market share is an incomplete measure of market power, the natural question is: what else should we be looking at? The answer depends, more than is sometimes acknowledged, on the characteristics of the specific market under examination. A one-size-fits-all approach to dominance indicators is no more satisfactory than a one-size-fits-all threshold.

In energy markets, the residual supplier index (RSI) and pivotal supplier index (PSI) capture something market share alone cannot: whether the system depends on a particular supplier to meet demand at peak times. A firm with a moderate overall share could nonetheless be pivotal during periods of high demand, giving it transient but exploitable market power. In telecommunications, metrics like ARPU trends, churn rates, and network coverage ratios speak to the competitive dynamics in ways that aggregate share figures obscure. A dominant operator with declining ARPU and rising churn may be losing its grip; one with stable ARPU and near-zero churn may enjoy a position far stronger than its share implies.

Digital platforms present perhaps the most acute challenge to traditional market share analysis. Multi-homing rates, data control indices, and lock-in costs are all potentially more informative than volume or revenue shares, which can be misleading in multi-sided markets where the relevant competitive constraint may come from an adjacent market entirely. In pharmaceuticals, patent coverage ratios and time-to-generic entry may reveal more about market power than share of current sales. And in financial services, the Panzar-Rosse H-statistic, which measures the extent to which input price changes are reflected in revenues, offers a structural test of competitive conduct that bypasses market definition altogether.

LONG-RUN PROFIT PERSISTENCE

One cross-cutting indicator deserves particular attention: long-run profit persistence. The idea is conceptually straightforward. In a competitive market, supra-competitive profits attract entry and are eroded over time. If a firm's profits remain persistently above the competitive level, this could be evidence that competitive forces are not working effectively, which is, at bottom, what dominance means. The empirical approach involves testing whether a firm's profitability reverts to a competitive mean over time, or whether it exhibits the persistence pattern associated with durable market power.

Profit margin stability, assessed across different market conditions, offers a complementary lens. A firm whose margins remain stable regardless of input cost shocks, demand fluctuations, or competitive entry attempts may enjoy a degree of insulation from competitive pressure that warrants closer scrutiny. This is not a conclusive test, since stable margins can also reflect superior management or genuine

efficiency, but it is a data point that should inform the broader assessment.

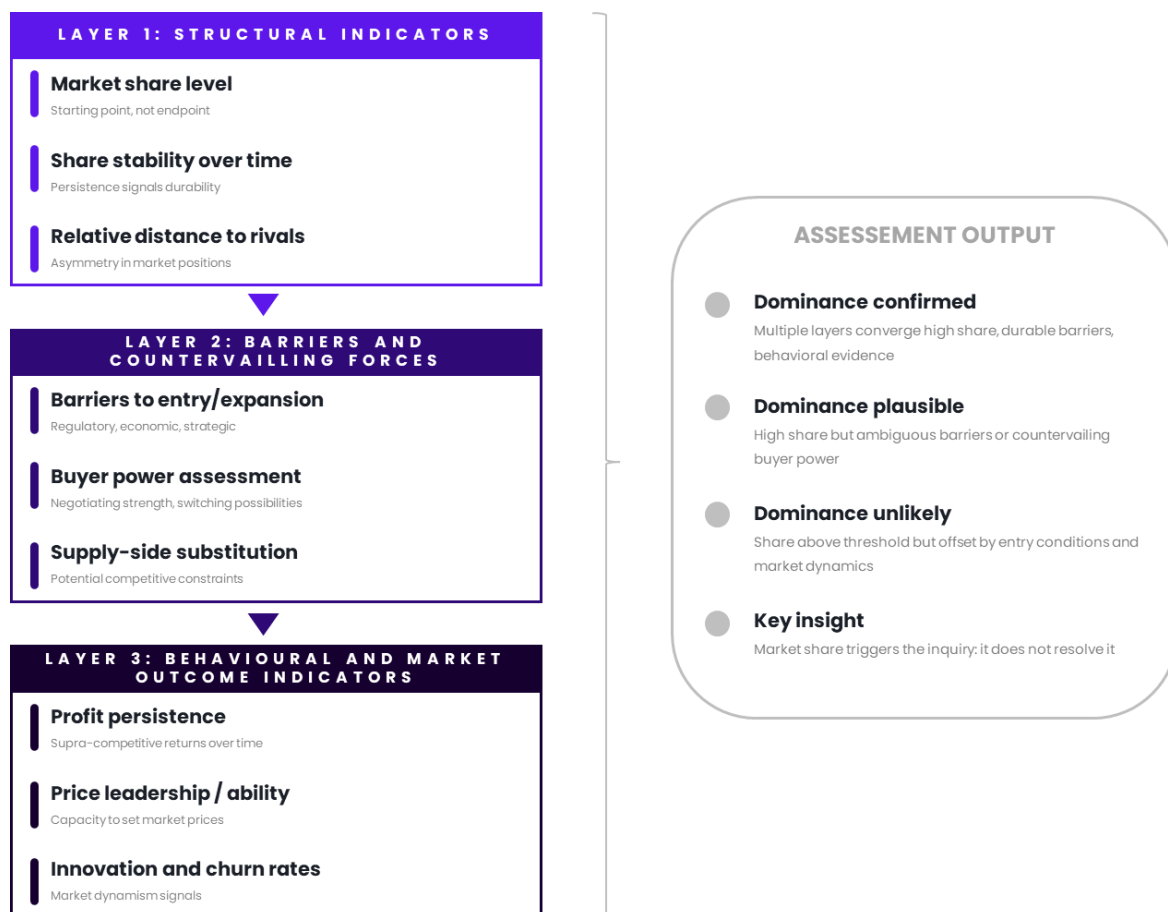
BEHAVIOURAL ASSESSMENT: WHEN STRUCTURE IS AMBIGUOUS

There are markets where conventional structural analysis, however carefully executed, produces ambiguous results. Media markets, where rapid convergence blurs traditional product boundaries, are a prominent example. Platform markets, where value creation depends on interactions between multiple user groups, are another. In these contexts, behavioural evidence could serve as a valuable complement to, and sometimes a substitute for, structural assessment.

Price leadership, the ability to raise prices and have competitors follow rather than undercut, is a classic behavioural indicator of market power. Tying and bundling ability, where a firm can condition access to a popular product on the purchase of a less popular one without losing customers, suggests a degree of commercial independence inconsistent with effective competitive constraints. Low customer churn, particularly when competitors offer objectively comparable alternatives, points to switching costs or inertia that could entrench a dominant position. And persistently low innovation rates in a market where the dominant firm faces no urgency to improve its offering may indicate that competitive pressure is insufficient.

None of these indicators is dispositive on its own. The strength of the behavioural approach lies in triangulation: when multiple behavioural signals point in the same direction as the structural evidence, the case for dominance becomes considerably more robust than any single indicator, including market share, could establish alone.

**Figure 1. Integrated Dominance assessment:
Beyond the Market Share Threshold**



TOWARD AN INTEGRATED ASSESSMENT

The most rigorous approach to dominance assessment, and the one most likely to withstand challenge before a court or appellate body, is one that integrates all three layers of analysis: structural indicators (beginning with, but not limited to, market share), barriers and countervailing forces, and behavioural or market outcome evidence.

This is, in effect, the approach the European Commission has been refining for decades. The Romanian Competition Council's framework, while anchored by the 40% statutory presumption, is not precluded from adopting a similarly layered analysis.

Indeed, its own decisional practice already reflects this: the cases in which dominance was not established despite high market shares were precisely those in which the authority looked beyond the share figure and found insufficient supporting evidence on barriers, buyer power, or competitive dynamics.

For firms and their advisors, the practical implication is clear. Compliance cannot be reduced to monitoring whether a market share figure crosses a threshold. It requires an ongoing assessment of the broader competitive landscape, including the durability of barriers, the evolution of buyer power, the trajectory of entry and expansion, and the behavioural signals that reveal whether the firm's market position translates into genuine

economic power. In our experience, the most effective compliance programmes are those that treat dominance assessment as a dynamic, multi-factor exercise, not a static reading of a single number.

The 40% threshold has genuine practical utility. It provides a focal point, a trigger for deeper analysis, and a basis for legal certainty that purely effects-based systems sometimes lack. But certainty that comes from simplification is, ultimately, the illusion the threshold's design wisely guards against through the word "relative." The presumption opens a door. The economic analysis determines what lies behind it.

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