

COMPETITION ECONOMICS INSIGHTS

ECONOMICS IN COMPETITION COMPLIANCE

MARKET DEFINITION, DOMINANCE THRESHOLDS,
AND THE AS-EFFICIENT COMPETITOR TEST



Competition compliance is too often treated as a purely legal exercise. For firms operating anywhere near the dominance threshold, this approach could leave significant blind spots. Under Romanian competition law, dominance is presumed at 40% market share, a threshold notably lower than in most European jurisdictions. This creates an environment where the difference between robust compliance and material regulatory exposure may hinge on the precision of economic analysis: how the relevant market is defined, how shares are calculated, and how pricing practices are tested against the standards a competition authority would actually apply.

This insight explores how economics can serve as the missing dimension of compliance, from market definition simulations through to the implementation of the as-efficient competitor test.

RELEVANT MARKET DEFINITION: THE FOUNDATION OF ANY COMPLIANCE EFFORT

The relevant market, in both its product and geographic dimensions, is the stage on which every dominance assessment unfolds. It determines who the competitors are, what the total market looks like, and what share the firm holds. Yet market definition is far from mechanical. It requires a structured application of economic principles, most notably the hypothetical monopolist test (SSNIP), supplemented by evidence on demand and supply substitution, price correlations, and trade flow analysis.

For compliance purposes, the real value of conducting market definition simulations lies in anticipating how a competition authority would delineate the market. The methodology ought to replicate, as closely as possible, the analytical steps that the Romanian Competition Council or the European Commission would follow in a formal investigation. This is not about predicting a specific outcome with certainty, since market definition inherently involves judgment, but about identifying the range of plausible definitions and, for each, computing the resulting market share.

Practice suggests that the difference between a 35% share and a 45% share often hinges on whether one additional product category or geographic area falls within the relevant market. In Romania, this difference could be the line between a firm that operates with full commercial freedom and one that bears the *special responsibility* of a dominant undertaking.

THE 40% THRESHOLD: A ROMANIAN SPECIFICITY WORTH UNDERSTANDING

Article 6 of the Romanian Competition Law establishes a relative presumption of dominance at 40% market share, a threshold notably lower than the levels commonly considered in EU practice, where the Commission's guidance suggests that dominance is unlikely below 40% but is typically established above 50%. The practical consequence is that Romanian firms face an asymmetric compliance landscape: the zone of uncertainty where dominance could be found begins earlier and covers a broader range of market positions than in most other jurisdictions.

This lower threshold transforms market definition from an academic exercise into an operational necessity. A firm that estimates its

share at 38% under its own commercial segmentation could discover, once the market is defined according to competition authority methodology, that its share sits comfortably above 40%. The presumption, though rebuttable, shifts the burden: the firm would then need to demonstrate that, despite its share, it lacks the ability to act independently of competitors, customers, and consumers. In practice, rebutting this presumption calls for precisely the kind of economic evidence, on barriers to entry, buyer power, capacity constraints, and competitive dynamics, that should ideally have been assembled proactively as part of the compliance programme.

It is worth noting that other jurisdictions with lower thresholds, such as Germany (which also applies a 40% presumption under §18 GWB), tend to have more developed compliance cultures around dominance screening. In France, where no fixed threshold applies and the analysis is purely effects-based, firms face a different kind of uncertainty. The Romanian framework sits somewhere in between: a clear numerical trigger, but one that demands economic sophistication to interpret correctly.

THE SELF-ASSESSMENT TRAP: BUSINESS LOGIC IS NOT AUTHORITY LOGIC

One of the most consequential errors in competition compliance, and one that is remarkably persistent, is the assumption that a firm's internal understanding of its competitive position is an adequate proxy for the assessment a competition authority would conduct. This assumption is almost always incomplete, and in predictable ways.

Commercial teams naturally define markets based on competitive strategy: who they compete against for customer budgets, which products they track, what geographies their sales teams cover. This "business logic" is invaluable for strategy, but it systematically diverges from the competition authority's analytical framework. Authorities define markets based on substitutability, specifically whether, in response to a small but significant price increase, enough customers would switch to alternative products or suppliers to make the increase unprofitable. This hypothetical monopolist logic often produces market definitions that are either narrower (when a product range spans multiple relevant markets) or broader (when supply-side substitution brings in competitors that the firm does not routinely monitor) than the commercial view.

Relevant Market Definition: From Simulation to Compliance



The divergence has tangible consequences. A telecommunications operator that views itself as competing in the broad "connectivity" market could find that the authority defines separate relevant markets for fixed broadband, mobile telephony, and business data services, each with a significantly different competitive structure and market share. Conversely, a manufacturer that segments its products by quality tier could find that the authority treats all tiers as part of a single relevant market, producing a higher aggregate share. Neither outcome is necessarily more *correct* in absolute terms; the point is that the two frameworks ask fundamentally different questions.

Effective compliance requires bridging this gap. The economic analysis should replicate, to the extent possible, the methodology the Romanian Competition Council would apply, drawing on its decisional practice, the European Commission's Market Definition Notice, and established quantitative techniques. And this is not a one-off exercise. Markets evolve, and what constituted a plausible market definition two years ago may no longer hold. Periodic simulation updates, tied to material changes in market conditions, are arguably an essential component of any robust compliance programme.

IMPLEMENTING THE AEC TEST: PRICING COMPLIANCE WITH ECONOMIC RIGOUR

Once a firm identifies itself as potentially dominant, or, more prudently, as operating in the zone where dominance is plausible, the question shifts from "are we dominant?" to "are our pricing practices defensible?" The as-efficient competitor (AEC) test provides what is arguably the most robust economic framework for answering this question.

The test asks whether a competitor that is as efficient as the dominant firm, one that mirrors its cost structure, could profitably match its pricing. If the answer is no, the pricing could exclude equally efficient rivals and may constitute an abuse of dominance.

The elegance of the test lies in its objectivity: it relies on the dominant firm's own costs, not on those of any actual competitor, thereby avoiding the perverse outcome of protecting less efficient rivals at the expense of consumer welfare.

COST BENCHMARKING: SELECTING THE RIGHT STANDARD

The first phase requires identifying the appropriate cost standard. For predatory pricing analysis, the framework refined through the AKZO and Post Danmark case law distinguishes between average avoidable cost (AAC) and average total cost (ATC), with long-run average incremental cost (LRAIC) increasingly employed by both the Commission and national authorities. The choice of cost standard is not merely technical; it determines the boundary between presumptively lawful pricing, pricing in a grey zone requiring further analysis, and pricing that could carry a presumption of abuse.

CONTESTABLE SHARE AND SUCTION EFFECTS

The third phase translates the analysis into operational guidance. Pricing below AAC would typically carry a strong presumption of predation; pricing between AAC and ATC would require additional evidence of exclusionary intent or strategy; pricing above ATC is generally presumed lawful, though it could still be problematic in the context of a margin squeeze or bundled rebate scheme where the

relevant analysis applies to the incremental price of the tied product.

For a compliance programme, the value lies in translating these thresholds into concrete, actionable outputs: specific price floors tied to cost benchmarks, safe-harbour zones above which pricing is presumptively defensible, and monitoring triggers that flag when pricing approaches the zone of risk. The objective is not to eliminate all commercial flexibility, but to ensure that pricing decisions are taken with full awareness of their regulatory implications.

ECONOMICS AND LAW: COMPLEMENTARITY, NOT SUBSTITUTION

The relationship between legal and economic analysis in competition compliance is one of complementarity, not substitution, and it is worth being explicit about why. Legal analysis identifies the relevant prohibition, establishes the typology of the abuse, and defines the evidentiary standard. Economic analysis provides the quantitative toolkit to test whether conduct meets that standard. Neither is sufficient on its own, and attempts to do one without the other tend to produce results that are either imprecise or disconnected from institutional reality.

Consider the practical difference. A legal assessment that a pricing practice “*might*” constitute predatory pricing is of limited operational value to a commercial director who needs to set prices for the next quarter. The economic analysis transforms this legal uncertainty into actionable guidance: specific price floors, safe-harbour thresholds, and monitoring triggers. Conversely, an economic analysis demonstrating below-cost pricing is of limited use without the legal framework that determines whether an objective justification or efficiency defence is available, and what evidence would be required to sustain it.

In our experience working with undertakings in markets where dominance is plausible, the most effective compliance programmes tend to be those that embed economic analysis into the compliance architecture from the outset, not as an *ad hoc* response to an investigation, but as a standing capability. Regular market definition simulations, updated cost benchmarking, and continuous AEC monitoring create an infrastructure that is both proactive and resilient. When an investigation does materialise, the firm is not scrambling to reconstruct its market position from fragmentary records; it has a documented, methodologically sound analysis that speaks the language competition authorities understand.

The integration of economic analysis into competition compliance is not a luxury.

For any firm operating near the dominance threshold, and particularly in Romania, where that threshold is set at 40%, it could well be a necessity. The margin for error is slim, and the cost of relying on commercial intuition rather than structured economic assessment may only become apparent when it is too late to course-correct. The analytical tools exist, and they are well understood. What they require is the institutional commitment to deploy them with the same rigour and regularity that firms already bring to financial reporting or regulatory compliance in other domains.

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