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Romania: Overview

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Recent developments of domestic competition rules

Amendments to the Competition Act No. 21/1996

In 2014, the main legislation in Romanian competition underwent only limited changes that were essentially meant at aligning the competition rules to the amendments, for example, to the Romanian criminal procedure laws. However, changes to the secondary legislation are expected in 2015 as in 2014 the Romanian Competition Council (RCC) launched several public consultations in this respect.

Main framework

The main changes brought to the Competition Act No. 21/1996 (the Competition Act) – which led to the Competition Act being republished in 2014, for the second time since its entry into force in 1996 – concern: the dawn raid procedure, access to the confidential information included in the investigation file and the prioritisation principle.

After the entry into force of the New Criminal Procedure Code in February, 2014, the RCC cannot initiate any more dawn raids without: the RCC President's order and a formal judicial decision approving the dawn raid issued by the president of the Bucharest Court of Appeal or by the delegated judge. In practice, there have already been cases of dawn raids based on the new procedure, and even though it should imply another form of control from the court, this turns out to be just a pure formality, given the fact that the judges have so far approved all dawn raids orders without putting into question the premises of the action or the order's investigation limits. However, we do consider it necessary for the court to actually set a clearer object of investigation to avoid extending the investigation to 'similar' situations, as mentioned in the RCC's order.

As to the access to the confidential information included in the investigation file, in light of the new amendments brought by the Government Ordinance No. 12/2014, the order of the President of the Council, refusing access of the interested undertakings to such confidential data may now be appealed only in conjunction with the final decision. In the light of previous rules, the documents, data and information from the investigation files that were classified as confidential could not be accessed unless there was an order of the President of the Council. Such order was subject to a separate appeal made within 15 days of its communication. Moreover, the appeal suspended the proceedings before the Council until a definitive settlement of the case was delivered by the Bucharest Court of Appeal. Owing to this suspension, several Council investigations were prolonged by approximately one year, which also negatively impacted some undertakings involved in the investigations (mainly those for which the turnover increased during the past year). To overcome this issue, the order of the President of the Council, refusing the interested parties access to the confidential data included in the investigation file, may now be appealed only in conjunction with the final decision, thus reducing the investigation time.

As mentioned above, another important change of the Competition Act refers to the prioritisation principle. Therefore, the

recent amendments allow the Council to prioritise cases based on the potential impact on effective competition, the general interest of consumers, or the strategic importance of the economic sector concerned. However, there are no clear criteria to be applied by the RCC in prioritising cases.

The unfair competition legislation has also changed in the past year and the main law was republished. Compared with the previous version of Law No. 11/1991 regarding the unfair competition, which provided an extensive list of unfair competitive practices, the amended regulation defines only two distinct situations: disparagement of a competitor or its products or services through different methods, and undermining an undertaking's client base by a former or current employee or representative or by any other individual or legal entity through use of trade secrets. However, the new regulation also leaves the door open to any other kind of unfair practice, stating that 'any other commercial practices contrary to the principles of fair dealing and good faith, which cause or have the potential to cause damage to any market participant, constitute unfair competition', thus expanding the definition of unfair practice.

The new regulation sets up specific detailed provisions on the RCC's procedure for applying sanctions for unfair competitive practices. For example, it specifies the time limits for solving complaints about unfair competitive practices, for communicating the decisions to interested parties, the enforceability of decisions issued by the RCC and the possibility for competition inspectors to conduct dawn raids related to solving unfair competition complaints. Therefore, at the end of December, the RCC set up by regulation a procedure for resolving complaints of unfair competition practices. In this respect, according to the principle of transparency, in October the RCC launched a public debate regarding this regulation.

Secondary legislation

In the merger sector, the RCC's Regulation on economic concentrations (Merger Regulation) has faced some important changes: increasing the importance of prior contacts between the competition authority and undertakings intending to submit notifications in simplified form, the openness and transparency of the competition authority by publishing information on all merger notifications and by expanding the scope of the simplified procedure for merger analysis considered unlikely to affect the competitive environment.

According to the new amendments, to qualify for the simplified procedure form, market shares were decreased as follows: market share below 20 per cent on the same product market and the same geographical market (horizontal relationships) and market shares smaller than 30 per cent for vertical relationships. Prior to these changes, the market shares were 15 per cent for horizontal relationships and 25 per cent in the case of vertical ones. In the simplified procedures, the thresholds for horizontal and vertical relationships apply to market shares at local and national level as well as to any plausible alternative product market definition that could be considered in a given case. Market definitions set out in the notification

form must be precise enough to justify the assessment that these thresholds are not met and that all alternative market definitions are mentioned (including geographic markets which are narrower than national). In cases where market definition is a key element of the assessment, the parties shall transmit to the Competition Council information on the transaction as well as all possible definitions of the relevant markets at least five days prior to consultation.

In addition, with respect to commitments, to assist the parties and to reduce the time spent on drafting the trustee agreement, the Competition Council made a draft of this agreement available for interested parties. This form of trustee agreement is only guidance from the RCC, the parties having the possibility to include, depending on the particular case, other provisions necessary to ensure compliance of the monitoring activity. The final form of the trustee agreement will be subject to approval by the Council.

Romanian Competition Council's activity

Whistle-blowers platform

The 'Instruments for detecting cartels – The whistle-blowers platform' project aimed at creating a communication platform with the persons that wish to offer the RCC information regarding anti-competitive practices.

This initiative materialised by implementing an electronic communication platform, accessible through the RCC's webpage, guaranteeing the anonymity of the users. Through this platform, the competition authority receives information offered voluntarily by individuals with knowledge of cartel-type anti-competitive agreements. These may include employees or former employees of the undertakings involved, or employees of the undertakings located in a different market to the one in which the anti-competitive agreement took place, such as the upstream or downstream market. Moreover, any person who comes into possession of this kind of information may transmit it to the RCC without needing to be implicated in the aforementioned activities. In March 2015, the RCC's President stated that the competition authority received more than 50 referrals within two months of the launch of the platform.

Inquiries

In 2014, the RCC finalised the inquiry began in 2013 regarding life insurance market. One of the conclusions of the sector inquiry conducted by the Competition Council on the life insurance market is that this sector in Romania has a low level of development, the penetration degree is far behind that of other European countries or of the countries in the region. Also, the competition authority recommends an online price comparator in the life insurance sector where insurance products are, to some extent, standardised, as such a tool could help consumers in the selection process. At the same time, the financial education of Romanian clients in these complex insurance products could alleviate the information imbalance among customers on one hand and between insurers and insurance intermediaries on the other hand.

The Monitor of consumer goods prices

Also in the past year, the RCC, in collaboration with the Romanian Association for Consumer Protection (APC) and with support of the government through the National Authority for Consumer Protection, launched 'The Monitor of consumer goods prices'. This project has as its objectives, on the one hand, to help consumers compare prices and find stores where they can buy basic foodstuffs at the lowest prices and, on the other hand, to inform them of price reductions owing to increased

competition between stores. The pilot project is being implemented between 1 March 2015 and 31 December 2015 with the financial support of the state budget and after that period with the financial support of European funds.

Finalised investigations

With regard to RCC's activity in the antitrust investigations area in the past year, the following cases should be noted:

Food retail

As an introductory note, in 2014 the RCC focused on the retail food market. Therefore, the RCC has sanctioned 25 companies on the retail food market (four retailers and 21 suppliers) with fines totalling approximately €35 million). The sanctions were applied during an investigation on an agreement to fix prices between four retailers and their suppliers during 2005–2009. Further to the investigation, the companies were sanctioned both for fixing the reselling prices (at shelf) and for their behaviour during the promotions.

The Competition Council found that the sales prices on the shelves were not set according to the market rules of supply and demand, but the supplier and retailers were setting a fixed or a minimum price. This kind of practice leads to higher prices for the end-consumer, the retailer cannot reduce the price set together with the supplier.

As to the behaviour of companies during the promotions, the contracts or contractual documents between some retailers and suppliers contained a clause providing that the suppliers could not make simultaneous promotions in other retail chains and it could only alternate (promo clause). In this way, the end-consumers could not have access to promotions at the same time and implicitly at the lowest price in competing stores.

After the sanctions were announced in 2014, more companies publicly declared that they would appeal the RCC's decisions in court, especially regarding the promo clause and the interpretation given by the RCC in its respect.

Moreover, the food retail market will also be subject to further investigation in 2015, as the RCC announced that it has opened a new investigation on retail food market concerning some retailers and their distributors. To date, the competition authority has not made any further comments regarding this investigation.

Leniency procedure (Romgaz)

The year 2014 was a pioneer year for the RCC. For the first time, it has sanctioned four companies for rigging actions in the oil and gas drilling works in Romania following an investigation which has opened as a result of a leniency application. The companies have agreed to share the drilling work for which the auction was organised, establishing the winners of auctions in advance and the way they had to act. One of the companies involved in the agreement provided the RCC with evidence of the infringement and therefore it was exempted from paying the fine.

Even though the leniency procedure is not new in competition legislation, up to now no other company has resorted to it, the procedure of recognition as a mitigating circumstance being preferred instead. However, after this case, it is expected that more companies will resort to the leniency procedure in the future.

Failure to comply with commitments – Professional Football League (LPF)

For the first time the RCC also applied sanctions for failure to comply with commitments. Therefore, the RCC sanctioned three

companies (including the Professional Football League) via fines totalling approximately €156,340 during the investigation for failure to comply with the commitments that had been assumed by the companies concerned.

In 2012, the RCC completed two investigations on possible anti-competitive agreements between the mobile operators Orange, Vodafone and Cosmote and all their distributors of mobile phone prepay products (approximately €150) after the companies involved assumed commitments to conclude contracts that included provisions to stimulate competition. However, two of the distributors did not change their contracts with their sub-distributors within the deadline and therefore they were sanctioned with fines amounting to 298,905 lei, or 220,510 lei respectively.

With regard to LPF, it was sanctioned with fines of 185,664 lei for failing to comply with the commitments it had assumed to broadcast rights of football matches in the 2011–2012, 2012–2013 and 2013–2014 competitive seasons. Moreover, the RCC is currently conducting a new investigation on how LPF sold broadcasting rights to League I matches. This investigation was initiated following a complaint.

New investigations

In addition to the finalised cases mentioned above, the RCC also focused in 2014 on the antitrust area by starting new investigations in the following main sectors: the media, the food retail and the energy sector.

These new investigations mainly relate to:

- a possible cartel in the market of selling broadcasting rights for football matches during League 1 matches, an investigation that was initiated following a complaint;
- a possible abuse of dominant position on the rebroadcasting of audiovisual TV and radio programmes market;
- a merger implementation prior to its notification to the RCC and obtaining a clearance decision on the trade media communication services market;
- a possible anti-competitive vertical agreement on the food retail market;
- possible anti-competitive actions from the public administration on the market of producing and trade of electricity;
- a possible cartel on the market of the award of contracts for natural gas connections and upgrading and maintenance works of related facilities contracted through public actions;
- a possible cartel on the market of financial audit; and
- two cases regarding possible anti-competitive vertical agreements on the production, distribution and marketing of batteries and accumulators.

As can be seen, the RCC does not focus on one particular set of practices; it covers both horizontal and vertical agreements as well as anti-competitive deeds which concern public authorities, thus disclosing a very complex activity.

Sectorial inquiries and reports

In 2014, two sectorial investigations were finalised and refer to: the electricity market and the market for local transport of persons (public transport services through scheduled/regular trips in counties from the south-eastern Romanian area).

In the electrical energy report issued by the RCC, the authority recommends the introduction of financial instruments specific to these markets (ie, agreements for difference, option agreements) that will help operators to manage financial risks arising from

any inaccuracies that may occur at some point between supply and demand.

As to the transport of electrical energy (including distribution), the RCC considers that the current pricing mechanism, divided into geographical areas, affects competition without benefiting consumers, nor it is justified by the safety of the National Power System. After the report was put out to public debate, several companies expressed their intention to make observations in this respect. However, up to this moment, no other information about the status of this report has been published.

Moreover, in the second half of 2014, the RCC issued two reports, namely, a report regarding the evolution of competition in key sectors and a report on the beer market.

In the 2014 report on competition in key sectors, the RCC analysed, inter alia, the aggregate index of competitive pressure (AICP) for certain markets or industries in the national economy. Following analysis on AICP, the RCC held that the industries that are the most predisposed towards free competition are the following: architectural services, disposal services, food retail (supply), wholesale distribution of automobiles, production of drugs; while the industries that are the most predisposed towards anti-competitive behaviours include distribution of LPG for cookers, retail fuel distribution, mobile services, life assurance, notary services, production and sale of cement.

Also within the above-mentioned report, the RCC makes several conclusions that should be taken into consideration by the companies that intend to implement transactions in the key sectors analysed in this report.

Regarding the mobile industry, the RCC holds that the AIPC in fact registered the most significant increase out of the industries analysed, having risen by three percentage points from the previous year. The aspects considered to have supplemented the pro-competition pressure in this sector are the intensification of marketing actions and communication among participants in the market, an increase in the position of the rebel competitor and a greater tendency towards innovation.

The following are the main findings of the above-mentioned reports which might have an impact on the contingent transactions on such markets:

- the life assurance market was deemed to be fairly rigid and even showing a decline, with few new players entering the market because of tougher entry barriers; the market concentration has a tendency for growth, with the first five players maintaining a high market share, while the first 10 players control almost the entire market, with a concentration ratio of 95 per cent;
- the market for mobile communication in Romania is a market with a high degree of concentration (the Herfindahl-Hirschman Index (HHI) equals 3,818). However, as mentioned above, the commitments submitted in 2011 by the telecom operators are meant to ensure pro-competitive pressure in the market. The collaboration between the RCC and the National Authority for Management and Regulation in Communications in Romania constitutes a model of interaction with positive effects on competition, in general, and consumers, in particular;
- the banking sector:
 - during 2010–2014, the number of credit institutions active on the market remained relatively constant, at the end of the first half of 2014 40 credit institutions were active, of which nine were subsidiaries of foreign banks. In comparison, in 2010 there were 42 credit institutions active on the same market;

- the main factors that determine the dynamic of competitors in this sector are a relatively high barrier for entry or exit and the macroeconomic environment, in particular, the uncertainties surrounding the main indicators and public policy affecting the business environment;
- even though the number of existing financial institutions is stable, as mentioned above, the degree of concentration on this market has decreased over the past few years, from an HHI of 1046 in 2007 to an HHI of 806 in July 2014;
- the beer market:
 - is characterised by significant entry barriers owing to the high value of the initial investment in production, high marketing and publicity costs necessary to set up and promote the brand and create a distribution network with national coverage;
 - there are four big producers, representing international groups, two large local producers with developed high-capacity production units, and four independent producers. The market share of the first four international producers is approximately 85–90 per cent;
 - the RCC issued a list of recommendations including, for example, a limit of five years for lending clauses on some goods or a limit of five years on contracts that refer to placing draught beer equipment with the possibility of renegotiating them and the possibility to unilaterally terminate the agreement on behalf of restaurants, hotels and coffee shops.

The RCC also issued in 2015 a preliminary report on access services to the electronic communication infrastructure in Bucharest, which is the result of a sector investigation opened in 2013. Therefore, the competition authority recommends supplementing the legislation on the communication infrastructure by issuing a set of technical rules within the main law (Law No. 154/2012).

Besides the areas mentioned above, in 2014 the RCC opened another investigation focusing on the energy and agricultural irrigation sector.

Merger control

With respect to the RCC's practice regarding economic concentrations, statistics show that during the past few years there was a downward trend, followed by an increase in the past two years. Thus in 2011 and 2012, the number of decisions issued by the RCC on merger control represented less than 50 per cent of the total number of its decisions, while within the years prior to this period almost 80 per cent of the RCC's decisions concerned economic concentrations. However, in 2013, the number of decisions issued by the RCC represented almost 80 per cent of the total number of decisions, while in 2014 the number of decisions issued by the RCC on merger control and published on the website amounted to 70 per cent. These statistics show that the RCC's activity has mainly focused on anti-competitive practices.

The main reason behind this trend has been the general economic crisis which determined a lower number of transactions and, as a consequence, a lower number of notifications to the RCC regarding economic concentrations. Where, in 2012, the RCC issued 42 decisions with respect to economic concentrations, in 2013 there were 47 such decisions issued by the RCC and, in 2014, there were only 42.

On a general note, most of the RCC's decisions were issued during Phase I of the notification proceedings, as the RCC rarely enters into Phase II (investigation) proceedings in economic concentrations. Moreover, half of the decisions issued in economic concentration cases were analysed via the simplified procedure.

The economic concentrations notified to the RCC during 2014 concerned undertakings active in a wide variety of relevant markets. However, there was a significant number of merger cases reviewed by the RCC in the areas of retail food, banking, energy and leasing markets. The RCC also carried out assessments of mergers involving undertakings active in the insurance and IT market.

Commitments

With regard to commitments, in 2014, the RCC accepted both structural and behavioural commitments in only two cases concerning economic concentrations notified with the RCC, in February 2014 and July 2014 respectively.

The commitments accepted by the RCC related to the merger control clearances obtained by Agrana Zucker GmbH for the acquisitions of assets of SC Zaharul Liesti SA and SC Lemarco Cristal SRL; and by Mega Image SRL for acquiring control over some assets of Angst Retail SRL.

The first above-mentioned transaction received clearance from the RCC through Decision No. 33/2014, while the decision on the latter has not yet been published. Both clearances took place without initiating a Phase II procedure.

As detailed in Decision No. 33/2014, the parties presented a complex set of commitments consisting of behavioural remedies with respect to the production market for consumer goods, primarily sugar, over the whole of Romanian territory including: the obligation to transfer CLX import licences to other sugar producers situated in Romania, without imposing discriminatory conditions; and the obligation, after achieving the clearance, for a period of five years expiring at the end of 2019, not to purchase any other factory for refining raw sugar. With respect to the economic concentration on the commitments submitted by Mega Image, the parties undertook structural remedies, assuming the obligation to divest several activities (the activity related to or in the geographic area of the shop located in the Academiei area and the activity related to or in the geographic area of the shop located in the Amzei area, owned at present by Angst Retail SRL). In addition, Mega Image undertook the obligation to maintain adequate administration of the assets concerned, not to buy back any significant influence over the assets within 10 years of the RCC's clearance decision and to submit for the prior approval of the RCC the sale purchase agreement for the divested assets.



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Silviu Stoica is a partner at Popovici Nițu & Asociații and head of the competition practice group. His practice focuses on a broad range of contentious and non-contentious competition matters, with an emphasis on cartel investigations and industry inquiries, abuses of dominant position and antitrust disputes. Silviu Stoica also advises clients on restrictive agreements and works closely with in-house corporate counsel in sensitive internal compliance reviews.

Silviu Stoica has been commended in *Chambers Europe* as 'strategic and realistic' and 'business-friendly and very easy to communicate with'. He has advised a wide range of clients (including ArcelorMittal, Philip Morris, Cargill, Orange, Oresa Ventures and Innova Capital) on a whole array of competition matters and investment issues.

Silviu Stoica has been with the firm since its inception, pursuing all carrier stages from associate to senior associate to practice head. Silviu Stoica holds a degree in law from the University of Bucharest – Faculty of Law and is member of the Bucharest Bar Association. He took a course on US legal methods (introduction to US law) at the Institute for US Law in Washington, DC, as well as a development course (DLC-20E) at the International Development Law Organization in Rome.



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Mihaela Ion holds a degree from Lucian Blaga University of Sibiu and is a member of the Romanian Bar Association. She also holds a master's degree in European and International Business, Competition and Regulatory Law from Freie Universität Berlin, a master's degree in competition from the Bucharest Academy for Economic Studies and a master's degree in international relations and European integration from the Romanian Diplomatic Institute. She is PhD candidate in international trade law at Bucharest Academy for Economic Studies' Institute for Doctoral Studies.

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