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Romania: Antitrust Compliance in the Public Procurement Field

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Free competition in public procurement

The legal framework applicable to public procurement has undergone an intense process to ensure compliance with the *acquis communautaire*, by complying with the stages described in the reform strategy of the public procurement system.

In line with the above, the most recent changes in this field mainly were reorganisations at the level of the central and local institutional framework, changes regarding the award of agreements, selection criteria for bids and assessment methods, and improvements in the competitive character and transparency of the procedure for awarding public procurement agreements.

The content of some fundamental principles, namely transparency in decision-making and free competition, have been given in detail in order to ensure the enforcement of the new regulations.

Conformity with the free competition principle is mainly achieved by ensuring free access to award procedures for public procurement agreements, and determining impartially the selection and award criteria for the public procurement agreement.

The role of the Competition Council in the public procurement field

The Competition Council is not a regulatory authority for the public procurement field, but it may intervene in its capacity as administrator of the Competition Law whenever there are doubts regarding failures to observe the principle of free competition within public procurement procedures.

The intervention of the Competition Council may be ex officio or upon notification by or complaint of a natural or legal person who wishes to ensure the protection and stimulation of competition, a normal competitive environment and promotion of consumers' interest on the public procurement market.

Among the specific duties of the Competition Council in this field are:

- a counselling role, through the issuance of opinions, recommendations and approvals to be issued in compliance with the provisions of the Competition Law;
- monitoring the enforcement of legal provisions and enactments that come under the regulatory scope of the Competition Law;
- notifies the government of the interference cases of the local and public administrative bodies in the enforcement of this law;
- issues its assent for enactment drafts that may have an anti-competitive impact and proposes the amendment of those enactments having such an effect; and
- issues recommendations for the government and local administrative bodies for the implementation of actions facilitating the development of the market and competition.

Among its duties for ensuring a normal competitive framework in the public procurement field, the Competition Council intervenes actively, and has initiated a series of investigations.

Most of these investigations focus on how public authorities have affected the competitive environment by the manner in which

they conduct the public procurement procedures for the award of public procurement agreements.

Some of the investigations have been completed by the Competition Council between 2007 and 2008, through either sanctioning decisions or closing orders accompanied by the issuance of recommendations by the Competition Council for public authorities.

The decisions issued by the Competition Council based on the investigations have noted on one hand the breach of the provisions of the Competition Law by public authorities acting as contracting authorities and on the other, the participation of undertakings in a concerted manner, with rigged bids in tenders or in any other kind of bid contests, a deed that is forbidden by article 5, paragraph 1, of the Competition Law (restrictive practices), an article that corresponds to article 81 of the EC Treaty.

Following the breach of the provisions of Competition Law, the Competition Council punished the undertakings with fines calculated by reference to the turnover achieved prior to the year when the deed was committed.

Besides the fine, the Competition Council did not enforce any other sanctions (eg, seizure) or a corrective action in view of restoring normal competition on the market.

In cases of failure of public authorities to comply with the provisions of the Competition Law, the Competition Council issued several recommendations that aimed to unblock the market, so that the access of the existing or potential undertakings to the market is allowed.

However, the regulations in force do not provide specific actions for the enforceability of recommendations made to the public authorities breaching the Competition Law. The instruments used by the Competition Council to monitor the compliance and enforceability of the recommendations by the public authorities are yet to be clarified.

Recent developments in Competition Council practice

In recent years, the Competition Council has directed its interest mainly towards the review of the public procurement market, including the medical services and drugs field, mainly on the national procurement conducted for several health programmes.

During the investigations conducted in these markets, the Competition Council focused mainly on reviewing the possible breach of the:

- provisions of article 9 of the Competition Law, which prohibits any actions of the local or central public administrative bodies that have as their object or may have as their effect the restriction, prevention or distortion of competition;
- provisions of article 5 of the Competition Law (the equivalent of article 81 of the EC Treaty), which prohibits any express or tacit agreements between undertakings or associations of undertakings, any decisions issued by associations of undertakings and any other concerted practices that have as their object or may have as their effect the restriction, prevention or distortion of competition on the Romanian market mainly by participating with rigged bids in tenders or in any other bid contests; and

- provisions of article 6 of the Competition Law (the equivalent of article 82 of the EC Treaty), which interdicts the abuse of a dominant position.

During most of the triggered investigations, the Competition Council ascertained the following:

- the blocking of the market caused by the failure of the Ministry of Health to conduct other national tenders from 2003 up to the present time, and by the renewal of the drugs supply agreements concluded after the national tender conducted in 2003;
- the Ministry of Health and the National Health Insurance House¹ have distorted competition by breaching the objectivity obligation towards all the market operators, thus breaching the provisions of the Competition Law; and
- division of markets or supply sources based on territorial, sale and purchase volume criteria and any other criteria (the form of the vertical agreement concluded between the producer and bidding undertakings) or participation in a concerted manner with rigged bids in tenders or any other forms of tenders.

Paraclinical medical investigation services market

By Order No. 158/2005, the Competition Council initiated ex officio an investigation into a potential breach of article 9 of the Competition Law (which prohibits any actions of the local or central public administrative bodies that have as their object or may have as their effect the restriction, prevention or distortion of competition) by the Ministry of Health and the National Health Insurance House.

Based on the investigation, the Competition Council issued Decision No. 57/2007 by means of which it noted that the Ministry of Health and the National Health Insurance House breached the provisions of the Competition Law. Basically, the Competition Council noted that the Ministry of Health and the National Health Insurance House, which by their interferences created a competitive advantage for the Euromedic Romania SRL imaging reference centre, thus disadvantaging the other paraclinical medical investigation centres operating on the paraclinical medical investigation services market.

The violation committed by the Ministry of Health and the National Health Insurance House consisted of granting Euromedic an advantageous position as opposed to the other undertakings by means of a discriminatory regulatory framework and by undertaking some specific obligations towards Euromedic, based on documents concluded by Euromedic as follows:

- promoting and recommending the medical services provided by Euromedic so that Euromedic received a substantial amount of work, the only limitation being the technical capacity of the equipment;
- granting medical or non-medical support;
- paying for the medical services provided in compliance with the agreements concluded for five years; and
- maintaining the exclusivity of Euromedic for the supply of imaging diagnosis services within the Fundeni Clinical Institute.

Thus, the Competition Council noted the breach of the transparency, equal treatment of all bidders and the principle of free competition. The Competition Council expressly requested the Ministry of Health and the National Health Insurance House to take actions for the removal of the undertaken obligations that granted a competitive advantage to Euromedic.

The breach of article 9 of the Competition Law by the Ministry of Health and by the National Health Insurance House consisting of the failure to conduct the national tenders and the renewal of

the drugs supply agreements concluded in 2003. According to the Competition Council, the failure of the Ministry of Health to conduct tenders between 2003 and 2006 lead to a market pegging, thus hindering not only the access of undertakings to the market, but also the launching of new products on the market. As opposed to other decisions by which the Competition Council issued several recommendations to public authorities guilty of breaching the Competition Law, in this case the Competition Council did not issue any recommendation.

The Romanian insulin market

By Order No. 157/2005, the Competition Council initiated an ex officio investigation into the Romanian insulin market.

The legal framework regulating the insulin market and its enforcement methods were reviewed during this investigation.

The Competition Council focused on the manner in which the national tender was conducted in 2003 for the human insulin necessary for the implementation of the National Diabetes Programme, as well as the electronic tenders conducted by hospitals for the procurement of insulin outside the national diabetes programme.

Based on the investigation performed, the Competition Council issued decision No. 15/2008, which mentioned that the Competition Council has noted that Eli Lilly Export SA and A&A Medica SRL, Relad Pharma and Mediplus Exim (the authorised distributors of Eli Lilly Export SA) concluded an anti-competitive agreement having as its object the market partition.

According to the conclusions of the Competition Council, the agreement comprised the division of the diabetes product portfolio of Eli Lilly.

Eli Lilly Export SA products were offered by means of three distributors authorised by Eli Lilly Export SA (A&A, Relad and Mediplus) for different products, so that the distributors did not compete each other within the tender.

The Competition Council considered that for each product there was a single bidder and authorised distributor, which made the Assessment Commission proceed with the completion of the tender by sole source negotiation.

As evidence, the Competition Council mainly invoked a document issued by Eli Lilly Export SA and obtained during the sudden inspection conducted by the Competition Council at the headquarters of Eli Lilly Romania, which comprised the overview of the status of the insulin market prior to the national tender conducted in 2003; a presentation of the terms and conditions of the National Diabetes Programme; alternative scenarios regarding the manner in which Eli Lilly would participate in the national tender conducted in 2003; and the recommendation of Eli Lilly in this respect.

In defence, the involved undertakings invoked the following: the document presented by the Competition Council as evidence of the agreement (the Overview) represents an internal document drafted by an employee of the Romanian representative office of Eli Lilly, which could not have determined the behaviour of the parent company on the market, the decision to participate with a single product was an unilateral decision and not the result of an anti-competitive agreement, and the participation with a single product was due to the lack of technical capacity and logistics necessary for the distribution of the product quantities required by the tender documentation.

The Competition Council did not take into consideration the defences invoked by the involved parties showing that, in fact, the distributors legally and contractually supported the decision of Eli Lilly to authorise the distributors.

The aggregated fine imposed on the involved undertakings amounted to approximately €22 million. Upon the determination of the fine, the Competition Council noted that the infringement was serious, interdicted by its object regardless of its effect on the market, which lasted for two years (from 2003 until 2005).

The Competition Council did not take any other corrective actions for the involved undertakings in addition to the fine.

The oncology products market

By the order of the president of the Competition Council No. 219/09.09.2005, an investigation was initiated into the Romanian oncology products market to review of a potential breach of the Competition Law by the public authorities with duties in the health field.

Based on this investigation, although it did not note the breach of the provisions of the Competition Law by the Ministry of Health, the Competition Council issued some recommendations in order to restore the competitive environment.

The Competition Council recommended the Ministry of Health enforce the removal of the B3 form from the standard documentation for the drafting and presentation of bids within the public procurement for the national health programmes in order to allow the occurrence of real competition between distributors within tenders. The purpose of this action was to remove any arbitrary intervention of the producers.

The B3 form actually represents a document issued by the producer and attesting the authorisation of the distributor in view of the delivery of products. According to the Competition Council, this form may have represented an instrument at hand for the producer, which could choose to authorise only certain distributors by discriminating against others, a situation that would remove the competition among distributors.

The Competition Council recommended the amendment of chapter III Sole Source Negotiation Procedure of the Regulations on public procurement conducted in the sanitary field in view of redefining the sole source. According to the recommendation of the Competition Council, the sole source should refer only to the situation in which not only there is a sole producer, but also a single distributor of a certain drug on the Romanian market.

The final recommendation was that there be an annual conduct of tenders for the prevention and control programme of oncology pathology with a view to opening the market not only for the existing producers and distributors, but also for those that have entered the market recently.

Revision of the decisions issued by the Competition Council

According to the Competition Law, the decisions issued by the Competition Council may be challenged at the Bucharest Court of Appeals, while the decisions of the Court of Appeals may be also challenged by appeal at the High Court of Cassation and Justice.

In line with the above cases, the undertakings sanctioned by the Competition Council for anti-competitive deeds filed complaints against the decisions issued by the Competition Council. The main accounts of those complaints examined the annulment of the decision, the undertakings invoking either the inexistence of the anti-competitive deed or the lowering of the fine enforced by the Competition Council.

Given that the decisions of the Competition Council are *ex officio* enforceable, the punished undertakings petitioned for the suspension of the enforcement of the decision of the Competition Council until the settlement of the main action on the merits of the case (drafted based on the provisions of Administrative Law No. 544/2004).

However, in order to obtain the suspension of the Competition Council's decision, the undertakings must prove before the Bucharest Court of Appeals that the cases are well grounded and the necessity to prevent an imminent damage.

The common practice of the Court of Appeals and of the High Court of Cassation and Justice is to reject the suspension claims related to the Competition Council's decisions in the cases where the undertakings do not fulfil the above requirements.

In some specific cases and in compliance with the Recommendation No. R(89)8 dated 13 September 1989 of the Committee of Ministers of the European Council issued for the member states on the legal revision of the administrative deeds, the Court of Appeals accepted the suspension of the enforcement of the decisions issued by

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Popovici Nitu & Asociatii is one of the first incorporated professional partnerships in Romania. The firm brings together strong local resources, with exceptional credentials, outstanding records and distinguished careers in law, business and academia. Experienced in most major legal fields, the firm provides quality legal services combined with a sincere relationship with its clients.

The firm acts as outside counsel to a wide spectrum of legal entities, including key players in major industries, financial institutions, public authorities and investment funds.

The firm has linked its name with the creation of the essential Romanian market economy institutions after 1990, including the property funds, the stock exchanges, numerous regulatory agencies and judicial bodies. For decades, significant investment and acquisitions projects on the local market have been carried out with the legal assistance of Popovici Nitu & Asociatii. The Popovici name has been associated with legal service in Romania since the beginning of the last century.

The Popovici Nitu & Asociatii team structure is divided into twelve major Practice Groups, including subdivisions: corporate/commercial (including employment and competition sub-groups); mergers and acquisitions/privatisation; power, energy and natural resources; real estate, projects/PPP; banking, finance and capital markets; telecommunications and IT; insurance; intellectual property and copyright; regulatory, litigation and arbitration.

Popovici Nitu & Asociatii has a strong competition counselling and litigation practice in all aspects of antitrust, unfair competition and trade regulations law, including legal assistance and representation before the Competition Council during investigations, guidance during mergers and acquisitions authorisation (merger control) and counselling in relation to exclusive distribution or purchase schemes.

the Competition Council (eg *Relad Pharma v Competition Council*, *C&D Impex Trading SRL v Competition Council*).

Damages claims

According to the Guidelines on settlement by the Competition Council of complaints regarding the provisions of article 5 (restrictive practices) and article 6 (abuse of dominant position) of the Competition Law No. 21/1996, courts may decide on the validity or nullity of the agreements concluded and only such courts can grant damages to natural persons if article 5 (restrictive practices) and 6 (abuse of dominant position) of the Competition Law are breached.

It appears that legal persons are not allowed to file such claims, this being an issue that does not comply with the community provisions and practice. Although we do not rule out extensive enforcement in practice, the positions adopted by the courts towards the claims filed by legal persons in view of recovering the losses caused by breaching the Competition Law are to be clarified.

Even so, legal persons can use other legal means. In the absence of a specific provision, the general rules of contract and tort liability may be applied.

Finally, it should be noted that, up to now, there has been no such individual or collective claim.

Notes

- 1 An autonomous institution, with a legal capacity, whose main business scope is to ensure the unitary and coordinated operation of Romanian health and social services.

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Silviu Stoica advised both Romanian and foreign companies in expanding their operations in Romania, including legal advice on corporate vehicles and corporate governance. He deals with a broad range of competition matters, including merger control, antitrust and trading policies, while his practice includes also corporate commercial advice.

Silviu Stoica was admitted to the Bucharest Bar and Romanian Bar Association. He holds a degree in Law from the University of Bucharest. He attended the US Legal Methods – Introduction to US Law course at the Institute for US Law in Washington, DC and the International Development Law Organization’s Development Lawyers Course (DLC-20E), in Rome. ■