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Silviu Stoica and Mihaela Ion
Popovici Nitu & Asociatii

Romanian competition law and case law – recent developments and trends

New leniency guidelines

In an attempt to boost the efficiency and attractiveness of the leniency programme, in respect of which undertakings have so far been reluctant to apply, the Competition Council initiated a reformation programme materialised by the entry into force, in September 2009, of a new set of guidelines regarding the conditions and criteria for the application of a leniency policy (Leniency Guidelines).

The main novelty brought by the Leniency Guidelines is the extension of its scope of applicability. There is a new definition of cartels that may qualify for leniency, which includes not only horizontal agreements and concerted practices between competitors, but also vertical agreements and concerted practices between undertakings concerning conditions of purchase, sale or resale restricting the freedom of the buyer to determine the selling price, the territory or customers, giving absolute territorial protection.

The reward for denouncing such cartels is purely personal. An application for leniency filed jointly by more undertakings will not be considered an application for the purposes of the Leniency Guidelines. Also, given the system of parallel powers between the European Commission and national competition authorities, an application for leniency submitted to an authority is not considered an application for leniency before any other authority. By way of example, this would mean that if the Romanian territory was affected by the anti-competitive practice, and the Romanian competition authority could be considered well placed to act against that violation, the concerned undertaking may request leniency from the Council.

In order to implement the designed leniency programme, as of the end of 2009 the Council has set up a 'Leniency Module', which aims to ensure the connection between the competition authority and the undertakings applying for leniency.

Changes to the Regulation on Council's organisation, functioning and procedures

These changes have been brought as of April 2010 (Council Regulation).

The changes envisaged mainly organisational issues of the Council, as well as the correlation with the state aid provisions.

Most importantly, the Council Regulation provides for the establishment of a new department – the Auctions and Petitions Department and the Council, which became necessary given the high number of investigations launched by the Council and complaints regarding alleged anti-competitive conducts committed in the context of public procurements and auctions.

Also, in the context of setting up the new Auctions and Petitions Office and the increased attention that it intends to allocate to the public procurement sector, the Council has concluded co-operation agreements with authorities having attributions in this area (eg, National Regulatory and Monitoring Authority for Public Procurements, National Complaints Settlement Council), in order to prevent and discourage the anti-competitive practices in the public procurement sector.

Legal provisions regarding the abuse of bargaining power

At the end of 2009 the market for food trading faced substantial changes triggered by the dispute on the retail market between food producers, suppliers and retailers, embodied in the adoption of Law 321/2009 regarding the trading of food products (Law 321/2009).

The declared purpose of Law 321/2009 is to set up a legal protection tool against anti-competitive agreements on the market for food trading. The law seems, however, more far-reaching than this, putting forward a series of prohibitions aimed at limiting or eliminating the abuse of bargaining power of the retailers that are active on this market.

Methods provided by the law to achieve this goal consist primarily of expressly regulating the following requirements and prohibitions:

- the parties cannot mutually commit, directly or indirectly, to buy or sell products or services from or to a third party;
- retailers are prohibited from requesting and receiving from suppliers payments for services not directly related to sales operations and not included in the cost of purchase or payment for services related to the retailers' distribution network expansion or fitting plan, or related to sales operations and retailers' business promotion events;
- retailers are prohibited from selling products at prices equal to or lower than the acquisition costs; and
- retailers are prohibited from requesting that suppliers do not sell, to other retailers, the same products at a price equal to or less than the acquisition cost of those products.

Interestingly enough, violation of the above requirements can trigger penalties under the Law 321/2009 only to the extent that the competition law is not applicable. It remains to be seen how the authorities would be able to enforce this law in practice, so as to avoid parallelism with the competition law.

Important changes to the Competition Law 21/1996

On 6 July 2010 important changes to the competition law were published in the Official Gazette (by way of government emergency ordinance) and are due to enter into force on 5 August 2010.

The amendments incorporate elements taken from the Community competition law and European Commission codes of good practice, but also from the practice of the European courts, with the declared aim to coordinate better domestic legislation with articles 101 and 102 of TFEU and Regulation No. 1/2003.

Among the main changes, the new legal framework has removed the individual exemption regime and, in terms of exemption regulations, has decided to refer directly to relevant EU regulations, as other member states also did (eg, Germany and Spain).

The articles dealing with anti-competitive agreements and abuse of a dominant position (articles 5 and 6) have been also aligned for the most part to articles 101 and 102 of TFEU.

The new legislation also introduces important changes related

to (i) the compatibility test of a merger control with a normal competitive environment, switching from the 'dominance test' to the SIEC test, (ii) the possibility to apply sanctions to central and local authorities that do not provide requested information and documents, or that provide them incorrectly or incompletely (given that until now the Council was allowed to fine only undertakings), and (iii) the reduction of fines with a 10 to 25 per cent rate of the basic level for undertakings admitting an anti-competitive act – this reduction not being applicable as a result of the leniency policy, but as a mitigating circumstance.

Another important novelty is the provision that a decision of the Council may be suspended by the Court of Appeals only upon payment of 30 per cent of the value of the fine as collateral. Also, because lately the undertakings introduced separate annulment actions against investigation orders, the new legislation is trying to end this practice by including an express provision under which such orders may be appealed only together with the final decision of the Council further to the investigation.

The new changes also include provisions regarding sanctions that can be applied to individuals. Thus, individuals participating with fraudulent intent and a determining role in the organisation of a cartel may be sanctioned with imprisonment of between six months and four years, a fine or prohibition from holding a position, exercising a profession or carrying out an activity similar to that which was used in the infringement.

Also, in line with the Community rules, the new regime expressly recognises the right to action for full compensation for damages caused as a result of a prohibited anti-competitive practice. Claims may be brought within two years from the date when the decision of the Council that triggered the action remains final and irrevocable.

Other changes refer to, inter alia:

- the Council attributions as a national competition authority in the application of articles 101 and 102 of TFEU;
- the right of the Council to accept commitments with respect to open investigations;
- the regulation of a rebutting legal presumption, according to which a market share below 40 per cent does not indicate a dominant position;
- the setting-out of penalties for newly established companies that did not record any turnover in the prior year;
- the express recognition of the legal professional privilege in respect of the correspondence between external counsels and the undertaking subject to the dawn raid;
- the notification requirements of economic concentrations, which are now to be notified prior to implementation and not necessarily within a specified term post-signing of the binding agreement;
- establishment of a clearance fee in merger control cases at 0.04 per cent of the total turnover achieved by the concerned undertakings in Romania, capped at €100,000;
- the introduction of the possibility for the competition authority to deliver to the courts its views on a case; and
- the introduction of the obligation for national courts to notify the European Commission through the Council about the rulings regarding violations of TFEU (article 101 or 102).

Recent developments in the Council and courts' practice

The Council's activity has increased lately, especially in the antitrust division. In this segment, the Council has directed its attention to sector inquires with respect to key areas of Romania's economy and also decided to pursue investigations into various fields as a result of complaints.

More than half of all open investigations concern the analysis of potential violations of national and Community competition provisions, especially with regard to the breach of article 5 of the Competition law and article 101 TFEU.

Compared to previous years, in its investigations the Council now examines how trade between member states is or is not affected by anti-competitive practices examined in the investigations.

Markets on which the Council focuses in the investigation envisage different sectors of activity, ranging from independent professions to weapon auctions, optics equipment and prepaid mobile products. Some examples in this respect include:

- the Romanian market for CEM I 52.5R cement;
- standard internal postal services on advertising and internal postal services supplied to enterprises (including intermediary undertakings);
- car repair and maintenance services;
- the trading of football television rights;
- the supply of therapeutic mineral water;
- harbour operation services involving solid bulk merchandise;
- wholesale drug distribution;
- drug production;
- the distribution of D&P perfume products; and
- the distribution of IT products.

In addition to the above, the Council has conducted analyses of the existing market structure, existing market players and general competition problems which the Council may face in the sectors considered relevant for the Romanian economy (eg, energy, banking, insurance, steel, construction, communications and information technology, engineering, tourism, pharmaceuticals, postal services, media and real estate).

Since this may represent a trigger for further investigations in the key sectors mentioned above, it is worth noting the main issues identified by the Council in these sectors.

Relevant competition issues in the oil and gas sector

- Market-like behaviour: as the fuel distribution market is concentrated, with only seven companies that have gas stations (Petrom, Rompetrol, Shell, Lukoil, Agip, MOL, OMV), the Council deemed it necessary to monitor the prices charged by oil companies to gas stations in Romania, because they can be formed as a result of anti-competitive agreements.
- Dominance issues that can occur as a result of mergers among oil companies: when this market power leads to a dominant position which may result in restriction, prevention or distortion of competition, authorising the proposed merger may be prohibited.
- Tie-in sales: when filling stations are run by independent companies, oil companies may be motivated to bind the fuel supply to the supply of other products or services.

Relevant competition issues in the media sector

- The allocation and distribution of radio frequencies that would normally be made on objective transparent, non-discriminatory and proportionate basis, serving to objectives of general interest; restrictions serving the general interest should be objective and proportionate, targeted towards fulfilling that general interest.

- Exclusivity: the suppliers of TV programmes (eg, sports leagues) and major film distributors may conclude exclusive agreements with broadcasters, preventing other suppliers from accessing their programmes, and ultimately discouraging market entry from pay-TV broadcasters and other digital broadcasters.
- Public procurement: auctions to award broadcasting licences should be based on fair and non-discriminatory criteria.
- Dominance issues: concentration in the radio/television broadcasting sector should be carefully overseen to prevent a dominant market position as new technologies enter the market.

Competition issues regarding the retail food market

- The bargaining power in the retailer-producer relationship.
- The product pricing and discounts policy.
- Potential agreements between large retailers and manufacturers having anti-competitive effects.

The Council made the following recommendations to undertakings, namely:

- to consider whether to eliminate taxes (fees) which cannot be directly and immediately connected to the retailer's performance, such as fees covering the costs for retail network expansion/modernisation or charges to cover in one way or another the risk of not selling the products;
- to eliminate the most favoured customer clause from retailers' and suppliers' trade relations, given the existence of shelf fees; and
- the responsibility of shelf space allocation to remain a duty of the retailers.

Competition issues in the pharmaceutical sector

- Cartels.
- Parallel trade.
- Dominance issues that can occur as a result of mergers between pharmaceutical companies.

The average fines imposed by the Council to undertakings having engaged in anti-competitive practices was up to 4 per cent of the aggregate turnover for the year preceding the sanctioning.

Although so far there has been no instance of leniency, in June 2010 the Council decided to offer a substantial fine discount to an undertaking which admitted its involvement in committing anti-competitive practices recorded and sanctioned by the Council.[1]

In 2009, there were about 92 cases regarding mergers and antitrust before the Bucharest Court of Appeal and High Court of Cassation and Justice, and 19 regarding state aid.

In most cases, fine suspension decisions were rejected by the Bucharest Court of Appeal on the grounds that claimants failed to prove the two conditions imposed by the administrative litigation law, ie, the well-grounded cases that may raise doubts as to the legality of the challenged decision, and/or the need to prevent an imminent harm.[2]

In other cases, given the court's full jurisdiction of revising the fines imposed by the Council, the amount of fines applied by the Council was reduced.

In addition, in an attempt to make use of European Court of Human Rights decisions and the recent decisions of the European Court of Justice, the illegality exception of article 36, article 37 and article 38 of the Competition Law, regarding inspection powers granted to competition inspectors through an order of the Council, was raised before the Constitutional Court.

It was alleged that these provisions are contrary to the Romanian Constitution, article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and also contrary to the practices of the European Court of Human Rights and the Court of Justice concerning the domicile inviolability. The reasoning was that, although initially the concept of 'home' was narrowly viewed by the Strasbourg Court, later on, in the 2002 case *Société Colas Est and others v France*, the Court extended the notion of 'home' to the undertaking's professional premises. Headed in the same direction is the Court of Justice, which, in the 2002 case *European Commission v Roquette Frères*, reached the same conclusion.

It was argued that the challenged provisions are unconstitutional because they establish the opportunity to inspect premises owned by undertakings without a judicial warrant and without warranties to ensure the domicile inviolability and abuse prevention from the inspection bodies.

In its ruling, the Constitutional Court, through Decision no. 6 dated 12 January 2010, rejected the claim, for the following main reasons:

- Regarding the provisions of article 27(1) – (3) of the Constitution, the inviolability of domicile, the Court held that, where industrial or commercial premises are not also places of residence, the premises inviolability is not subject to the same rules as the space where person's private life unfolds and that the authorities can therefore exercise control over the professional activities that take place in these premises. As ruled in a previous case, the Court retained that the activities overseen by the Labour Inspection are not private but actually public, obviously aiming at the protection of general interest. The Court retained that the solution and decision considered remain valid in this case.
- Regarding the provisions of article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Court retained that they were not applicable in this case, as they refer to the private and family life. The challenged legal provisions regulate the inspection activities of the Council – the national competition authority – that aim to protect a general interest and that cover matters regarding the public, not the private, aspects of the undertaking activity. It is true that in the decision dated 16 April 2002, case *Société Colas Est and others v France*, the European Court of Human Rights ruled that the rights guaranteed by article 8 of the Convention 'can be interpreted' as including, for an undertaking, the right of claiming respect regarding its headquarters, agencies or professional premises, but this interpretation is possible only 'in certain circumstances', to be determined on a case-by-case basis, taking into account the exclusive competence of the specialised agents to assess the number, duration and extent of inspection operations.
- As regards the other assertions that dawn raids conducted by the Council should be compared to the notion of 'search' used in the Criminal Procedure Code and, therefore, should be ordered by a judge, the Court found that they cannot be accepted. Thus, the provisions of article 27(3) of the Constitution, under which the searches are ordered by a judge and are performed based on the conditions and forms stipulated by law, refer to the institution regulated by article 100 of the Code of Criminal Procedure, and cannot be assimilated with the Council inspection, under the Competition Law.

Notes

1 Decision issued based on the investigation triggered by the Competition Council on the market of car repairing and servicing services provided within the city of Slobozia and the neighbouring areas.

2 This interpretation has been upheld by the recent case law of the High Court of Cassation and Justice – Tax and Administrative Disputes Chamber (Decision No. 2052 as of 1 June 2006 and Decision No. 3963/2006).

Popovici Nitu & Asociatii

239 Calea Dorobanti, 6th Floor
Bucharest, 1st District
010567 Romania
Tel: +40 21 317 79 19
Fax: +40 21 317 85 00

Silviu Stoica
silviu.stoica@pnpartners.ro

Mihaela Ion
mihaela.ion@pnpartners.ro

www.pnpartners.ro

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 property funds, 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 services in Romania since the beginning of the last century.

Popovici Nitu & Asociatii's team structure is divided into 15 major practice groups: administrative and public law, public procurement and regulatory; banking, finance and capital markets; competition and antitrust; corporate and commercial; employment and pensions; energy and natural resources; environmental law; insurance; intellectual property; litigation and arbitration; M&A and privatisation; project finance and PPP, concessions and infrastructure; real estate; tax; and telecommunications, IT and media.

Popovici Nitu & Asociatii has a strong competition practice in all aspects of competition, antitrust, unfair competition and state aid. The firm provides a full range of legal services, including assistance and representation in relation to antitrust litigation, investigations and inquiries, guidance during merger control proceedings and counselling in respect of restrictive agreements and abuses of a dominant position.

Silviu Stoica

Popovici Nitu & Asociatii

Silviu Stoica is a partner at Popovici Nitu & Asociatii 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 industries inquiries, abuses of dominant position and antitrust disputes. Silviu Stoica also advises clients on restrictive agreements and works closely with in-house corporate counsels in sensitive internal compliance reviews.

Silviu Stoica has been commended in *Chambers Europe* for impressing clients 'with his deep knowledge of the Romanian business environment'. Established clients of Silviu Stoica include Philip Morris, Cargill, ArcelorMittal and Oresa Ventures, relating to 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 head of the practice group. Silviu Stoica holds a degree in law from the University of Bucharest Faculty of Law, and is a member of the Bucharest Bar Association. He attended 'US Legal Methods – Introduction to US Law' at the Institute for US Law in Washington, DC, and the International Development Law Organization's Development Lawyers' Course (DLC-20E) in Rome.

Mihaela Ion

Popovici Nitu & Asociatii

Mihaela Ion is a senior associate within the competition practice group at Popovici Nitu & Asociatii. She joined the firm in 2006 and became senior associate in 2009. Her area of expertise covers, in particular, antitrust litigation, unfair trade practices, consumer law, merger control proceedings and state aid. She also assists clients in structuring and implementing compliance programmes, providing regular training as external legal counsel on all relevant aspects of competition law.

Mihaela Ion holds a degree in law and is a member of the Romanian Bar Association.


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