Romania

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Regulatory framework

Romania's accession to the European Union as of 1 January 2007 has triggered the applicability of domestic as well as EU norms in the area of competition. The restrictive practices and merger control regimes are regulated at the national level by the same Law No. 21/1996 (the Law) and the secondary legislation in force before the EU accession.

Block exemption regulations are adopted in the following fields: technology transfer, insurance, consultation for passenger transportation tariffs for regular air services and allotment of slots in airports, research and development, sea transport, motor vehicles, specialisation, vertical and horizontal agreements.

Besides the Law, the regulatory framework in the merger control field is supplemented by the Merger Control Regulation and the Guidelines on relevant market definition with a view to determining the significant market share.

The Law has not suffered amendments since its restated version was republished in 2005. Although reflecting most of EU competition rules, the Law does not comprise the changes brought by the latest EU legislative modernisation. The competent authority in the field, the Competition Council (the Council), is currently revisiting the competition legal framework in view of fully aligning it to the EU standards. The Council has not yet decided on a prospective date for the modification of the Law.

The following sectors are specifically regulated:

- the energy sector is regulated by Romanian Energy Regulatory Authority;
- the gas sector is regulated by Romanian Gas Regulatory Authority; and
- the telecommunications sector is regulated by Romanian Telecommunications Regulatory Authority.

Restrictive practices

Generally, any of the following are prohibited that have, as their object or effect, the restriction, prevention or distortion of competition on the whole or part of the Romanian market:

- express or tacit collusive agreements between undertakings or associations of undertakings;
- decisions by associations of undertakings; and
- concerted practices.

The following agreements are excluded from the application of the Law:

- Agreements of minor importance. These are agreements between undertakings or groups of undertakings, the turnovers of which are below the thresholds set and revised periodically by the Council. The market share of each undertaking involved must not exceed, on the relevant markets:
  - 10 per cent (for non-competitors); or
  - 5 per cent (for competitors).
- Agreements that have as their object price-fixing, market sharing or false tenders are prohibited regardless of the market share held by the parties.
- Agreements between members of the same group of undertakings.
- Genuine agency agreements.

The exemption regime has not been amended, as the legal exemption regime provided by the Regulation 1/2003 is not being introduced to govern domestic cases. Exemptions may be granted for certain categories of agreements by falling within one of the various block exemption regulations or, in individual cases, by decision of the Council.

There is no obligation to notify the Council in order to obtain individual exemption. However, an investigation revealing practices falling under the scope of article 5 of the Law (corresponding to article 81 of the EC Treaty) and not exempted should trigger imposition of fines or other measures against breaching parties.

Despite the above, Council's recent practice shows that concerned undertakings are generally allowed to prove that their restrictive practice meets the legal conditions for exemption, as a defence tool within investigation proceedings.

Differently from merger cases, commitments undertaken by the parties are not regulated as reasons enabling the Council to close the investigation without reaching an infringement decision. However, such proposals could be considered by the Council when establishing the fines as mitigating circumstances.

Investigations

The Council has increased the scrutiny over various industries of general interest, in an attempt to find out whether they are subject to restrictive practices.

The investigated industries are the health sector (drugs market, the market for dialysis products and services), steel industry market, and the oil and oil derived products market.

The investigations are focused on the potential abuse of dominant position. The Council is particularly analysing how the private undertakings resulted from the divestiture process of former state owned companies (former monopolies) or from the gradual liberalisation of certain markets manage their dominant positions. The investigations also regard the participation of central and local public authorities in activities distorting, restricting or affecting the competition on the Romanian market (in particular the Ministry of Health and subordinated medical units and the National House of Health Insurance).

Council's findings of the investigated industries are awaited, as none of the opened investigations was closed yet.

Merger control

Besides the inherent changes triggered by Romania's accession to the EU (in terms of parallel competences and concentrations with Community dimension), merger control regime remained virtually the same.

A concentration exceeding the legal turnover thresholds must be notified to the Council within 30 days after the execution of the binding agreement giving rise to the concentration, regardless of when the parties intend to implement the concentration. Turnover thresholds remained the same: the concerned undertakings' worldwide aggregate turnover exceeds €10 million and there are at least two concerned undertakings that each have a turnover of greater than €4 million in Romania.

The notification itself is not available to the public and the Council must treat the information it contains as confidential business information.

Although it is not mandatory, a press release on the concentration can be issued (usually for matters of public interest). This comprises a general note that the concentration is being assessed by the Council. The clearance decision is published in the Official Gazette and on the Council's website (www.competition.ro). The parties can, however, ask that certain sensitive information be removed from a press release.

As regards the substantive test, the assessment of concentrations is made based on the dominance test criteria. The SIEC test has not been included in the domestic legal framework.

Economic concentrations are forbidden if they either:

- have the effect of creating or consolidating a dominant position; or
- lead (or are likely to lead) to a significant restriction, prevention or distortion of competition on the whole or part of the Romanian market.

To establish whether they are compatible with a normal competitive environment, concentrations are assessed according to the following criteria:

- the need to maintain and foster competition on the Romanian market, taking into account the structure of the markets concerned and existing or potential competition between the undertakings in Romania or abroad;
- the market share held by the undertakings concerned and their economic and financial power;
- the available alternatives for suppliers and customers and their access to markets and sources of supply; and
- the supply and demand trends for the relevant goods and services.

Procedure and timetable

The concentration must be notified within 30 days after conclusion of the agreement giving rise to the concentration. The Council then conducts a preliminary examination (phase I procedure). If additional information is not necessary, the notification becomes effective on its registration date with the Council. If the information is inaccurate or incomplete, the Council can request additional information within 20 days of notification, setting a maximum of 15 days to supply the information. The notification then becomes effective once the information is supplied.

The Council must do one of the following, within 30 days after the notification becomes effective:

- issue a non-intervention decision, if the Council considers that the concentration does not fall within the scope of the Law;
- issue a clearance decision, if the Council considers that, although the concentration falls within the scope of the Law, it does not raise serious doubts as to its compatibility with a normal competitive environment; or
- enter phase II procedure by deciding to open an investigation, if the Council considers that the concentration is likely to create or reinforce a dominant position which may affect competition. In that case, the Council must, within five months after the date the notification became effective, issue one of the following decisions:
  - a rejection decision;
  - a clearance decision; or
  - a conditional clearance decision, subject to the undertakings fulfilling certain remedies or conditions.

Ancillary restrictions

Where restrictive provisions are assessed and considered by the Council to be ancillary restrictions that are directly related and necessary for the implementation of the concentration, they are automatically cleared by the clearance decision.

If the provisions are not directly related and necessary, they are to be assessed under the general rules applicable to restrictive agreements or practices. Restrictive provisions in a concentration concerning which the Council issued a non-intervention decision are also subject to the same general regime on restrictive agreements or practices.

Commitments

The option for the parties to propose and accept commitments is regulated only in the field of merger control. During the first phase of the procedure the parties can propose commitments to the Council addressing competition concerns before or within a maximum of two weeks after the effective date of the notification.

If the parties submit remedy proposals within this time, the Council will issue a decision concerning the notified economic concentration within 30 days after the date when the notification became effective without opening an investigation.

The parties must:

- provide proposals sufficiently precise and detailed to allow a full and accurate assessment; and
- explain how the proposed commitments address and remedy the matters identified as being incompatible with a normal competitive environment.

Commitments can also be offered in the second phase of the procedure, within 30 days after the opening of the investigation by the Council. The term may be extended, for grounded reasons, with a maximum of 15 days. The commitments must allow the settlement of the incompatibility events contained in the objections communicated by the Council at the end of the first stage procedure. The parties must also indicate how this objective can be achieved.

The concrete measures to be adopted depend on the particular concentration and the factors that trigger incompatibility with a normal competitive environment, for example:

- the existence of exclusive agreements; or
- the mixing up of networks or patents.

Usually the remedies are structural, and concern the assignment of assets or shares. Assigned assets or shares must represent a viable activity which, if exploited by an appropriate buyer, would effectively and durably compete with the entity set up by the economic concentration.

Behavioural remedies are also commonly accepted.

In a recent merger control case in the bottled refined oil market, the acquisition by Bunge of certain assets and trademarks of Agricover (one of its main competitors) was cleared by the Council only after the parties submitted commitments during phase I of the procedure. The parties had to exclude certain trademarks from the acquisition and also had to reduce a non-compete obligation from five to three years.

The Council justified the commitments by the competition concerns raised by a transaction concluded between the first two largest competitors in a concentrated market. The Council issued the clearance without entering phase II investigation.

Leniency

Leniency can be obtained under the Guidelines on leniency published by the Council in May 2004, which provides the relevant conditions and criteria.

The leniency policy is aimed to encourage members of cartels to cease such practices and inform the Council about their existence and thus obtain immunity from fine or reduction of the fines, depending on their contribution and cooperation in revealing and sanctioning cartels.

Immunity may be granted only for the administrative fines provided by the Law. It is not possible to obtain immunity from criminal penalties.

The Council will grant immunity from fines on condition that the undertaking:

- is the first to provide evidence enabling the Council to open an investigation procedure, provided that when such evidence is communicated by the undertaking, the Council does not hold sufficient evidence in connection with the alleged cartel in order to open an investigation; or
- is the first to provide evidences enabling the Council to prove a violation of article 5 (1) of the Law (corresponding to article 81(1) of the Treaty), provided in addition that: when such evidence is communicated by the undertaking the Council does not hold sufficient evidence to establish the violation of article 5(1) of the Law; and no other undertaking had obtained the conditional immunity in accordance with the first bullet above; conditional immunity means the acknowledgment by the Council of an undertaking's eligibility for immunity, subject to the other conditions provided by the Guidelines;
- cooperates fully, continuously and in a timely manner with the Council throughout the procedure and provides all evidence it holds or may hold in connection with the alleged cartel;
- terminates its participation in the alleged illegal practice, at the latest when providing evidence;
- has not taken actions to coerce other undertakings participating in the alleged illegal practice.

Enforcement

In case of breach of competition rules, the Council can:

- order that the restrictive agreement stop;
- provide recommendations or impose interim measures or other conditions and obligations on the parties;
- apply fines;
- seize additional profits or revenues generated by the breach; and
- ask the court, where the public interest is involved, to take measures necessary to eliminate the dominant position on the market.

The Council cannot apply administrative fines to individuals (for example, directors or managers). The criminal liability of directors and managers that have a fraudulent and decisive involvement in the restrictive agreement or practice can be triggered by companies being punished by the Council on the basis that their directors or managers breached general fiduciary or management rules. If so, the Council (which cannot apply criminal penalties), will inform the relevant criminal prosecution bodies.

Guidelines regarding the solving by the Council of complaints concerning articles 5 and 6 of the Law (corresponding to articles 81 and 82 of the Treaty) set forth the goals of the Council, which should focus resources on cases:

- representing most severe violations of competition legislation; and
- when it needs to act in view of defining the competition policy or ensuring a coherent application of articles 5 and 6 of the Law.

The Council will make a careful analysis of the complaints submitted and will set out priorities in dealing with them, as well as in which cases to open an investigation. Class actions before the Council are also possible provided that the legal cause of action is satisfied.

The same Guidelines on complaints acknowledge the role of the courts in protecting individuals and legal persons' rights deriving from the provisions of articles 5 and 6 of the Law.

Although the Council is guided by the priority principle, the courts have the jurisdiction and the obligation to rule on all matters submitted to them. In particular, courts can rule on the validity or voidance of the agreements and have exclusive subject matter over the awarding of damages to individuals in cases of violations of articles 5 and 6 of the Law.

Court actions have the following advantages:

- courts can award damages for the losses caused by the breach of articles 5 and 6 of the Law, can order protective measures and award costs of litigation; and
- courts can also rule on matters concerning payments or execution of contractual obligations on the basis of an agreement reviewed under article 5 of the Law.

The concept of 'amicus curiae' is not regulated in domestic legislation. It is also not clear if courts can actually rule without Council's findings, further to investigation, of a prohibited agreement or practice, no such prerequisite being regulated or developed in practice.

It is therefore up to the courts (ex officio or upon parties' request) to ask for the Council's expert opinion in view of clarifying certain matters of the case. However, the opinion of the Council will not be binding on the court.

Council's recent practice

The majority of decisions issued by the Council were clearances of merger control cases and penalties applied for failure to notify concentrations and implementing concentrations before Council's clearance.

At the beginning of 2007, the Council closed a phase II investigation concerning the acetate products market, in connection with the acquisition by Celanese Corporation of Acetate's assets. After an in-depth analysis, the Council found that the market is in fact characterised by the absence of domestic manufacturers and of barriers to entry. The Council further concluded that the transaction raised no competition concerns and cleared it without commitments or other obligations being imposed on the parties.

As regards restrictive practices, in one case the Council retained the violation of the Law by partitioning the market of the services pertaining to the cable re-broadcasting of television channels (at a local level). In the same case, the Council also retained the abuse of a dominant position by imposing on consumers increased tariffs that were not justified by an increase of costs.

In another case of abuse of dominant position, the Council punished National Company of Railway Transport of Goods CFR Marfa SA on two accounts: refusal to deal with its beneficiaries, which are private railway transport operators, and imposing on private operators discriminatory conditions for equivalent services by way of differentiated tariffs.