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Judicial review of Competition Council's decisions – recent market developments

Enforcement of Competition Council's decisions, suspension of enforcements proceedings

The first part of the present article seeks to assess the degree of judicial scrutiny performed by Romanian courts when reviewing the Competition Council (Council) decisions, especially its sanctioning decisions.

Pursuant to Competition Act No. 21/1996, republished (Competition Act), the decisions issued by the Council may be challenged within 30 days as of their publishing or, as the case may be, as of their communication, by following the administrative disputes procedure, before the Bucharest Court of Appeal. The decision of the Court of Appeal may be further challenged in front of Romania's supreme court, that is, the High Court of Cassation and Justice.

In the meantime, if by its decisions the Council has established fines on the part of the undertakings, they are payable to the state budget within 30 days as of communication.

Failure to pay the said fines may give the Council cause to apply 'comminatory' fines (sort of delay penalties) of up to 5 per cent of the average daily turnover of the financial year preceding the sanctioning, for each day of delay. Moreover, in the event the Council imposes other measures besides delay fines, such measures must also be fulfilled by the undertaking within 45 days as of the notification of the decision adopted in this respect by the Council.

If the measures applied by the Council are still not fulfilled, the Council has the possibility to apply the maximum level of fines (depending on the nature of the infringement) of 1 per cent or 10 per cent of the total turnover generated during the year preceding the sanctioning or it may request the competent court to dispose one or more of the following:

- invalidation of certain agreements or contractual clauses facilitating the abusive exploitation of the dominant position;
- invalidation of the act or acts giving rise to an economic concentration creating a dominant position;
- limitation or prohibition of the market access;
- the sale of assets; or
- restructuring of the undertaking by spin-off.

Council's decisions are ex officio enforceable. This allows the Council, after expiry of payment date of the fine, to send the sanctioning decision directly to the tax authorities, with a view to begin enforcement proceedings.

As noted, the challenging of Council's decisions does not suspend de jure the enforcement of the measures ordered thereunder. In order to obtain the stay of Council's decisions, a special procedure regulated by the Romanian Administrative Disputes Act must be followed.

According to the relevant legal provisions and case law, the court may decide the stay of enforcement proceedings pending the court litigation in well-grounded cases that may raise doubts as to the legality of the challenged decision and in order to prevent an imminent harm. 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 June 1, 2006 and Decision 3963/2006).

This effect is triggered by the presumptions of legality, authenticity and truth that are central to an administrative act such as a decision of the Council. Therefore, in order to get a suspension, it is not sufficient only to prove the damages caused to those protected by the administrative disputes institution. The existence of any substantial grounds that would create a serious doubt as to the legality of the challenged administrative act must also be proven. It has been constantly affirmed that the high amount of the fine is not, in itself, a sufficient ground to admit the claim for stay of enforcement proceedings, particularly given that by definition the fine cannot pass over a maximum level provided by law (1 per cent or 10 per cent of the turnover).

As a result of this reasoning, in practice there are a limited number of cases where a suspension claim was admitted. The main reason for this is lack of evidence attesting the fulfilment of the aforementioned requirements.

Recovery options

This practice may create difficulties to those undertakings succeeding in their legal action against the sanctioning decision of the Council. Unlike the practice of other jurisdictions, where pending judicial review proceedings the fines are paid into a blocked account, here the fines are paid directly to the state budget related accounts, regardless of whether the decision of the Council was challenged or not.

If the decision of the Council is cancelled, there is no automatic effect to repay the undertaking. It will have to follow a distinct procedure, regulated by the Fiscal Procedural Code, in order to recover the amounts paid.

Pursuant to the Fiscal Procedure Code, in case the amount to be refunded or paid back is higher than the outstanding fiscal obligations of the undertaking, then offset proceedings will come into play, up to the level of the outstanding fiscal obligations, only the resulting difference being reimbursed to the undertaking. However if the amount to be paid back is lower than the outstanding fiscal obligations, the offset shall be performed up to the level of the amount to be paid back, so that no amount is to be reimbursed to the undertaking.

In practice, according to recent statements released by the Council's new chairman, approximately 90 per cent of the sanctioning decisions issued by the Council are challenged in court. Acknowledging the problems that such disputes overload may pose to the proper operation of the Council in accordance with its primary goals, by expanding the time and resources devoted to investigations, he inferred the possibility to implement a new practice. More specifically, the Council might grant various 'incentives' to the companies willing to pay the fines applied without going in court, such as the reduction of fines. In addition, legislative measures are also envisaged by the new chairman as regards the leniency regime applied to undertakings collaborating with the competition inspectors within investigations.

Limits of the judicial review. Recent developments of the courts' practice

National legislation provides for the exclusive subject matter jurisdiction of the Bucharest Court of Appeal over legal actions aimed at cancelling decisions of the Council, without containing other specific provisions.

Therefore, according to general rules, the Bucharest Court of Appeal is due to review the claims in terms of the existence of the right or the interest protected by law, by taking into account the legality of the challenged act. Its role is not different from that of community courts, the control occurring on several decision-making levels: review of jurisdiction, procedural correctness and the imperative nature of the measures, review of the factual circumstances and the limits of assessment by the administration, review of the form and substance requirements of Council's decisions.

In light of the above, although the reviewing limits are not actually legally set, in the court's practice certain delimitations between the jurisdiction of the competition authority and that of the court tend to be established. For instance, on the one hand the national practice reveals that, in case of technical assessments regarding complex economic circumstances, the national courts have given credit to Council' findings and interpretations. On the other, there is a practice to cancel decisions issued by the Council on procedural grounds, particularly as regards the statute of limitation. This is particularly possible given the absence from the Competition Act, until 2004, of references to applicable statute of limitation (which now in competition field is of five years).

Recently, however, the national practice seems to shift direction, as the High Court of Cassation and Justice also cancelled decisions based on issues on the merits of the case related even to the insufficiency or inconclusiveness of the evidence based on which the Council issued its sanctioning decision, or both.

It should be noted in this respect the High Court of Cassation and Justice judgment No. 1358 as of 5 March 2007 – Fiscal Administrative and Contentious Chamber, rendered with respect to the recourse filed by the undertakings sanctioned for a price-fixing cartel on the cement market. By this judgment, the High Court of Cassation and Justice tried to indirectly define a standard of evidence incumbent on the Council in order to find an infringement of the competition law provisions, establishing the following:

- the competition authority may decide the sanctioning only where it was proved without doubt that the respective price increase is due to the existence of a concerted practice, by a well-reasoned exclusion of the possible motivations of economic nature, the competition authority having to prove based on evidence and arguments why other explanations that may ground the price increase on the respective market are not plausible, so that it results without doubt that only the existence of certain concerted practices may be such a justification;
- the existence of a document is far from having proved 'without doubt' the participation to an express or tacit arrangement, as it is an undated, unsigned holograph document, comprising short notes in English about the price increases within the competing companies; and
- the other facts deemed in the judgment as base for certain presumptions – namely maintaining some constant market shares and the claimant's purchase of another company (ie, Tagrimpex) – may not be considered as elements of an anti-competition behaviour, in absence of documents atesting the company's participation to an express or tacit arrangement.

Although it benefits from full jurisdiction in respect of revising the amount of the fines applied by the Council (cancellation, resizing in the sense of its increase or reduction), the courts have acted only in the sense of limiting the fines applied to undertakings (the High Court of Cassation and Justice – Administrative Dispute Chamber, Judgment No. 4115 as of 10 December 2001 and Judgment No. 502/2006 File No. 2618/2005).

Open investigations and the Code of Best Practices

The Council continued its practice to open new investigations in fields with direct impact on the economy and the general level of prices. The most important investigations initiated by the Council refer to the banking segment, the market for trading food products especially within hypermarkets and supermarkets, drug distribution, the market for collecting, processing and trading recyclable industrial waste, the market for the services rendered by public accountants, certified accountants and the related companies in Romania, the real estate market and services related to real estate transactions, the Romanian market for non-food dyes and paints, the market for motor vehicles spare parts and the market for television rights of football matches.

The investigations have as subject matter either the potential infringement of article 5 paragraph (1) of the Competition Act and of article 81 paragraph (1) of the Treaty Establishing the European Community or sector inquiries (eg, analysis of the market for motor vehicles spare parts). The purpose of the sector inquiries is the analysis of the functioning means and mechanisms of the respective sector, as well as the identification of potential competition infringements.

Council's investigation on the banking and inter-banking service market has been launched in the fall of 2008, as a result of certain suspicions regarding the existence of a potential exchange of information, as well as certain trading behaviours, highlighted also by the mass-media, particularly on the inter-banking interests market.

Another market that has been subject to investigation since 2008 is the market for trading agricultural food products. This investigation is supposed to bring clarifications, among other things, to an allegation brought against hypermarkets by employers' associations in the food industry, regarding the existence of a dominant position of the hypermarkets and its abusive use by the latter.

The dispute between food suppliers and retailers (particularly hypermarkets and supermarkets) benefited from large mass media coverage. It was even brought to the attention of the Parliament, special hearing commissions being entrusted with clarification of the matter and making of recommendations. The Romanian government also got involved. It even adopted a memorandum containing various settlement recommendations, called suggestively 'Measures to solve the divergences between suppliers and large chains of stores'. In accordance with its recommendations, the concerned parties have tried to sign a Code of Best Practices in the field (the Code), containing sort of 'ethical' set of principles that the involved parties would agree to abide by in their business activity.

Even if the Code has not been signed yet or transposed into other official document, nor its legal nature, binding effects and remedy measures have been fully clarified, certain principles have ensued from it. Its ambitious intended goal is to ensure and guarantee the freedom of trade, as well as the protection of consumers' interests, both natural and legal persons.

Given the above, it is of interest to highlight the main principles laid down in the Code:

- the transparency of traders' general conditions within the relations with the suppliers. The traders have to make these terms

available to any supplier of the same classes of products, upon request;

- the deregistration conditions of supplier's products. Under the Code, deregistration may be performed only upon prior notice and within a reasonable period of time, so that in case of an economic dependence, to allow the supplier reconsider its trading strategy;
- the obligation of suppliers to contribute to trader's marketing costs. The trader should not be permitted to compel the supplier to contribute to its marketing costs. However, this should not prevent the supplier deeming that the marketing activities initiated by the trader are necessary in view of increasing sales volume, to participate to the costs related to these marketing activities;
- under the Code, the following restrictions cannot be imposed on the supplier: not to sell to other traders at a price lower than that used in relation to the concerned trader; and to contribute to the opening costs of new stores or to those related to the increase of the sale area, other refurbishments, renovations or changes of bar codes. In its turn, the supplier should not be allowed to impose on the trader certain shelf prices;
- payment terms. Such terms must be set at a reasonable level depending on the type of products and other sale particulars. The reasonable term recommended is of maximum 30 days for agricultural food products;
- the sale prices charged by the supplier are to be negotiated with each trader, taking account of both the incentives granted to the trader (discount, bonus) and the costs generated by the services rendered and invoiced by the trader; and
- compensations and indemnities. The trader should not be allowed to request the supplier compensations or other form of indemnities to cover trader's losses in the event the revenues resulted from the sale of supplier's products are lower than those projected (forecasted) by the trader, except when the supplier failed to observe the delivery terms or the quantities ordered and accepted, or both.

Given the nature and scope of the Code, it was submitted to the Council for review, which did not raise objections on the substance of the Code. Thus, the Council found that under the current market circumstances, the Code does not expressly contravene the competition laws; and due to its general wording, it does not comprise clauses likely to infringe the competition laws.

At the same time, the Council felt necessary to draw attention on the potential pitfalls of the Code. Thus, by applying the Code, it is essential not to create a platform for exchange of information practices facilitating the transfer of sensitive trading data at horizontal level, between suppliers or traders respectively, or at vertical level. Furthermore, the Council naturally has reserved the right to intervene in situations where the implementation of the Code would trigger concerted anticompetitive practices or arrangements between signatory undertakings.

The implementation of the Code is seeing new developments, as there are efforts now trying to pass the Code into law, thus ensuring to its provisions legally binding power. The government already adopted a draft law, submitted to Parliament approval, regulating the relationship between producers, distributors and traders in the field of agricultural food products, which takes over almost all important provisions of the Code. It is to be seen whether a law on this matter will actually be enacted and its exact content by reference to the current draft, as well as its potential impact in light of general principles laid down in the European Treaty.

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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 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 service in Romania since the beginning of the last century.

Popovici Nitu & Asociatii's team structure is divided into fifteen 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 dominant position.

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

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