The European Antitrust Review

2013

Published by Global Competition Review
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Romania

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Recent developments of domestic competition rules

Amendments to the Competition Law 21/1996

The continuous reform of the Competition Law and its secondary legislation can be seen in various material changes brought to the competition rules.

Since mid-July 2011, the main amendments of the national competition framework focused on:

- the legal regime applicable to the assessment of economic concentrations by introducing for the first time a 'national security' review of all proposed operations which involve, besides the Competition Council, the other two main public authorities, namely, the Supreme Council of National Defence and the Romanian government;
- the conduct of investigations by the Competition Council, reduction of the duration of the proceedings and role of the Competition Council;
- the individualisation and level of fines that may be imposed by the Competition Council in the case of breach of competition rules; and
- the organisational structure and functions of the Competition Council.

National security reviews

Aimed at bringing Romania into line with other countries that have introduced a national security screening procedure, such as the UK, Japan, Germany, Canada, the United States of America and most recently China, by far the most major change is the introduction of a special legal regime for operations consisting in the acquisition of control over undertakings or assets which might raise risks from a 'national security' standpoint.

Article 46(9) of the Competition Law articulates that a review is required when 'national security' is involved. The power to review and decide whether an operation raises 'national security' issues belongs to the Supreme Council of National Defence. Based on the proposal made by the Supreme Council of National Defence, the Romanian government may then issue decisions prohibiting concentrations which pose risks to the national security, with observance of the competence of the European Commission, if applicable. Also, the Competition Council will inform the Supreme Council of National Defence of economic concentrations notified to the Competition Council that are also susceptible to review from a national security perspective.

Following this amendment to the Competition Law that became effective mid-July 2011, it was widely expected that the newly introduced change would be accompanied by detailed guidelines on, for example:

- the conduct of proceedings and delineation of competences between the involved public authorities;
- the domains which justify a legitimate interest for the Supreme Council of National Defence and Romanian government to intervene;
- the limits of the powers of intervention of the Supreme Council of National Defence and of the Romanian government;
- the granting or not of discretionary powers to the Supreme Council of National Defence in order to assess national security risks, on a case by case basis;
- the mandatory or non-mandatory nature of the proposal made by the Supreme Council of National Defence to the Romanian government as regards the prohibition of an operation;
- the special time limits that must be observed by the Competition Council when notifying the Supreme Council of National Defence and the consequences of such notification in terms of competences, rights and obligations of the parties involved in the notified operation etc;
- the rules on the cooperation between the Competition Council, the Supreme Council of National Defence and the Romanian government and the working procedure applicable within the Supreme Council of National Defence, including fixed time periods for the Supreme Council of National Defence to issue its proposal and for the Romanian government to issue a decision, and especially the correlation of these special terms with the time limits provided by the Competition Law in case of economic concentrations; and
- the right of the interested parties to challenge in court the decision that prohibits a transaction due to national security risks.

At the beginning of 2012, the president of the Competition Council issued an order amending the Romanian Merger Regulation, which describes the procedure that must be followed in the case of operations that may raise risks from 'national security' perspective. As noted below, the procedure issued by the Competition Council lacks coherence and fails to cover all relevant material aspects for the conduct of national security reviews.

Under Romania's new national security review regime, the Supreme Council of National Defence may conduct a national security review of all proposed operations that would result in a change of control irrespective of whether such operations represent an economic concentration as defined by the Competition Law. The order provides for an extensive definition of 'operation consisting in the acquisition of control over undertakings or assets', namely the acquisition by a person of the possibility to exert a significant influence, based on rights, contracts or any other means, either separately or in association with other persons and considering also the de facto and de jure circumstances, over undertakings or assets of interest from national security standpoint and which may function and have stand-alone economic utility.

There are no further details on what 'national security' means and how is it to be applied. It seems that 'national security' has deliberately been left undefined in order to provide the involved authorities with significant political discretion and, implicitly, a wider scope to determine which operations to review from a national security perspective (and the grounds on which to approve, block or impose conditions on such operations).

Also, the general provisions of Law no. 51/1991 on the national security of Romania do not bring much clarity to what 'national security' may represent from a competition law perspective.

According to Law no. 51/1991, the national security of Romania shall be understood as a state of social, economic, and political legality, equilibrium and stability that is necessary to the existence and development of the Romanian national state – a sovereign, unitary, independent and indivisible state, to the maintenance of legal order as well as of the climate for the unhampered exercise of the fundamental rights, freedoms and duties of the citizens, in accordance with the democratic principles and rules provided by the Constitution. The Romanian National Security Strategy (posted on the official website of the Romanian Presidency) focuses on, among other things, energy and food security, transportation and infrastructure security, public health, sanitary, ecological and cultural security and also on financial, informatics and informational security.

Moreover, the relevant monetary threshold for commencing a national security review is also undefined. In this regard, the Supreme Council of National Defence may commence a national security review where the Supreme Council of National Defence or the Competition Council has reasonable grounds to believe that an operation could be injurious to national security.

The procedure on national security reviews as recently introduced in the Romanian Merger Regulation is on one hand contradictory and on another hand rather unclear and incomplete. The Competition Law stipulates that the Competition Council must inform the Supreme Council of National Defence only in the case of economic concentrations that are susceptible to undergoing national security reviews, meaning that the Competition Council should conduct a kind of preliminary assessment of the economic concentrations notified to it and decide which operations should be further reviewed from a 'national security' standpoint. The procedure expressly states that the Competition Council has the obligation to inform the Supreme Council of National Defence in respect of all notifications of economic concentrations registered with the Competition Council. Given the lack of any indicia on what 'national security' issues could be related to an economic concentration and considering also that the Competition Council has no prerogatives as regards 'national security', it seems to make more sense for the Competition Council to inform the Supreme Council of National Defence of all notifications registered by the competition authority.

The Supreme Council of National Defence must inform the Competition Council in respect of an economic concentration which is susceptible to a national security review within 30 days as of the date the Competition Council informs the Supreme Council of National Defence in respect of registered notifications of economic concentrations. Following such communication, the Competition Council must immediately inform the notifying parties that the transaction is also reviewed by the Supreme Council of National Defence.

Once the notifying parties become aware of the fact that the economic concentration is also assessed by the Supreme Council of National Defence, all information and documents which are necessary for conducting the review must be directly communicated to the Supreme Council of National Defence. The Supreme Council of National Defence must complete the review within 45 days as of receiving all necessary information and documents from the notifying parties. The result of the review carried out by the Supreme Council of National Defence is communicated to the parties within five days. The results are communicated to the Romanian government only if the Supreme Council of National Defence proposes the Romanian government to issue a decision prohibiting the said operation.

The Romanian Merger Regulation expressly states that the Competition Council carries out its own assessment from the Competition Law perspective in parallel with the national security review conducted by the Supreme Council of National Defence. Moreover, the Competition Council may issue a decision as regards the notified economic concentration even before the Supreme Council of National Defence completes its national security review of the same operation. It may be easily imagined that conflicts may appear in practice between a decision of the Competition Council authorising an economic concentration and a decision of the Romanian government prohibiting the same operation, although the same operation has been already approved by the competition authority and perhaps implemented by the parties. Lack of coordination between the results of the parallel proceedings carried by the Competition Council and the Supreme Council of National Defence may trigger negative effects of economic and financial nature, especially for the parties involved and should be remedied by future amendments of the competition rules.

EC merger control jurisdiction v 'national security'

The 'national security' issue should also be treated from the perspective of the EC merger control jurisdiction. The European Commission has exclusive jurisdiction over mergers with a Community dimension, namely those that meet its thresholds. Therefore, applying national competition law to a merger with a Community dimension infringes EU law.

Notwithstanding the exclusive jurisdiction of the European Commission over mergers that meet its thresholds, article 21(4) EC Merger Regulation does allow member states to take separate action to protect certain legitimate interests, namely public security, plurality of the media and prudential rules. Thus, any member state may seek permission from the European Commission to investigate the issues relating to national security, the prudential management of its national financial institutions or the plurality of its national media that are linked to a merger with an EU dimension.

Changes aimed at reducing the duration of proceedings carried out by the Competition Council

Individualisation of fines

The new amendments to the Guidelines on the individualisation of sanctions imposed by the Competition Council extend the scope of application of the recognition of the anti-competitive behaviour from breaches of articles 5 and 6 of the Competition Law and articles 101 and 102 of the TFEU, also to the following cases: failure to notify an economic concentration before implementing such operation, implementing an economic concentration declared incompatible with the competition environment and non-fulfilment of an obligation, condition or measure imposed by a decision issued by the Competition Council according to the Competition Law.

In all these cases, the undertaking may expressly recognise the anti-competitive behaviour and, if the case, propose remedies following the receipt of the investigation report and even during the hearings. Such initiative will be retained as a special mitigating circumstance and shall lead to the reduction of the fine by a percentage of between 10 per cent and 30 per cent of the base amount, including in those cases when the base amount is set at the minimum value of the fine provided by the competition rules.

Proof of the abuse of dominance

Another significant change is the amendment of the provisions of the Competition Law which regulate the abuse of dominance.

Prior to this amendment the Competition Law stipulated a negative relative presumption as regards the level of dominance by stating that one undertaking or several undertakings having a market share or cumulated market shares on the relevant market below 40 per cent were not considered dominant.

The amendment replaces the negative presumption by a positive relative presumption whereby an undertaking or several undertakings with a market share which exceeds 40 per cent are presumed as having a dominant position until the contrary is proved.

Based on these amendments, it appears that the level of market shares held by the undertakings, which in the past was deemed as representing a mere indicia as regards the existence of dominance, now becomes a key factor in determining the dominance.

Another significant effect of such amendment is the reversal of the burden of proof, as from now on the undertakings must prove that they do hold a dominant position on the relevant market. As regards the role of the Competition Council, the national competition authority now benefits from a significantly easier way to prove the abuse of dominant position.

Non-mandatory hearings before the Plenum

Following the new changes to the Competition Law and the secondary legislation, hearings before the Plenum are no longer mandatory.

Prior to these recent amendments, hearings before the Plenum of the Competition Council were mandatory in all investigation proceedings conducted by the Competition Council. Now, the undertakings that participated in an anticompetitive agreement, decision of an association of undertakings, concerted practice and abuse of dominance or economic concentration may submit written observations to the investigation report and, at the same time, request the Competition Council to hold hearings. Also, if the president of the Competition Council finds that hearings may be useful in an investigation file in order to establish the truth, the president of the Competition Council has the power to decide ex officio to hold such hearings irrespective of whether the undertaking concerned requested for hearings to take place.

The secondary legislation issued in respect of the hearings before the Plenum of the Competition Council was also amended to expressly state that, after receiving the investigation report, the president of the Competition Council decides if hearings are necessary in order to discuss the investigation report. If the president of the Competition Council decides not to hold hearings in a specific investigation file, upon sending the investigation report to the parties involved, the parties shall be also requested to inform the Competition Council within two weeks of receiving the investigation report if they wish for the investigation report to be discussed within a hearing. If the parties involved decide to have hearings, the president of the Competition Council shall set the date when the hearings will take place.

If an investigation initiated following a complaint does not reveal sufficient proof as regards the breach of the Competition Law or does not justify imposing of certain measures or sanctions by the Competition Council, the investigation is closed based on a decision issued by the Competition Council following hearings of the parties involved being expressly provided that such hearings will take place only if the complainant expressly requests so.

New rules on the individualisation of fines

At the end of 2011, the president of the Competition Council issued two orders which amend the guidelines on the individualisation of fines in case of contraventions provided by articles 50, 50[1] and 51 of the Competition Law.

The main novelty introduced by these amendments deals with the sanctions stipulated in article 51 of the Competition Law which refer, among others, to anticompetitive agreements and failure to notify an economic concentration and refers to the possibility of the Competition Council applying a fine which differs from the amount of the fine that should apply considering the gravity of the anticompetitive behaviour. In these cases, the Competition Council must indicate the grounds for such derogation.

Also, new mitigating circumstances are introduced namely: if the turnover achieved by the sanctioned undertaking on the market or markets on which the breach occurred does not exceed 20 per cent of the total turnover of the undertaking in breach, conditioned upon the possibility to certainly establish such turnover, the base amount of the fine may be diminished up to 25 per cent; and the undertaking proves the existence and effective implementation of a conformity programme with the competition rules.

The proceedings applicable if the undertaking recognises the anticompetitive behaviour were also amended as to provide the interested undertakings the right to request the Competition Council to have a meeting, before the hearings, to clarify the terms and conditions of the recognition.

If the Competition Council decides that the recognition must be accompanied by certain remedies of the undertakings, the competition authority will grant a period for the undertakings to propose such remedies.

As a general rule, in the case of recognition of the anticompetitive behaviour, the amount of the fine may be diminished by 10 per cent up to 30 per cent of the base amount. There are also particular cases where the maximum percentage of the reduction of the fine is below the general maximum percentage of 30 per cent, such as:

- in the case of an anticompetitive agreement or concerted practice in which the undertaking concerned could have applied for the 'leniency policy' but choose not to, the base amount of the fine in the case of recognition may be diminished by a maximum of 20 per cent;
- in the case of the undertaking benefitting from the leniency policy in the form of a reduction of the fine, the base amount in case of recognition may be diminished by a maximum of 10 per cent;
- if an undertaking involved requested and benefits from the leniency policy, another undertaking which recognises the anticompetitive behaviour may not benefit from a reduction of the base amount of the fine which exceeds 20 per cent.

It is also worth noting that the maximum and minimum levels of the fixed fines that may be applied by the Competition Council have been diminished. Therefore, the fines applicable to the central and local public authorities and institutions for providing inaccurate, incomplete or erroneous information to the Competition Council range between 1,000 and 20,000 lei (prior to this change, the minimum amount of the fine was 5,000 lei while the maximum amount of the fine was 40,000 lei). Also, the fines applicable to newly-created undertakings which have not achieved turnover in the year preceding the sanctioning are diminished as follows:

- in the case of the provision of inaccurate, incomplete or erroneous information following the request of the Competition Council or during inspections carried by the Competition Council or refusal to allow the Competition Council to carry out an inspection, the minimum fine amounts to 10,000 lei while the maximum

amount of the fine is 1 million lei (the minimum and maximum levels of the applicable fines prior to this amendment ranged between 20,000 and 2 million lei);
- in the case of anticompetitive practices consisting of the breach of articles 5 and 6 of the Competition Law and of articles 101 and 102 of the TFEU, or failure to notify an economic concentration prior to implementing the operation or implementation of an economic concentration before being declared compatible with the competitive environment or in breach of the derogation granted by the Competition Council or implementation of an economic concentration declared incompatible with the competitive environment or non-fulfillment of an obligation, condition or measure imposed by a decision issued by the Competition Council in accordance with the Competition Law, the minimum fine is 15,000 lei and the maximum amount of the sanction is 2.5 million lei (prior to this amendment, the amount of the fines ranged between 30,000 and 5 million lei).

Changes in the organisational structure of the Competition Council

At the beginning of May 2012, the Romanian government issued a decision for the approval of the Regulation on the organisation and function of the Advisory College. The Advisory College, which was introduced in mid-2011, is a technical non-permanent body in the structure of the Competition Council whose role is to issue non-binding opinions on the key aspects of the competition policy.

The Advisory College has from 11 to a maximum of 17 members, who are representatives of the academic environment (up to one third of the total number of members), representatives of the business environment (up to one third of the total number of members) and representatives of the consumer protection associations (up to one third of the total number of members) or other experts in the economic, legal or competition domains from other member states of the EU. The initial members of the Advisory College must be confirmed by the Plenum of the Competition Council and afterwards the decisions on the appointment of members or termination of their mandates shall be made by the Advisory College.

The members of the Advisory College shall not be remunerated by the Competition Council or by any other person for their activity as members of the Advisory College and the appointment of a person as member of the Advisory College shall be made only based on the written consent of the proposed person. The duration of the mandate of a member of the Advisory College is three years and may be renewed if the member consents to such renewal.

Each member of the Advisory College must immediately inform the Advisory College of the existence of any conflicts of interest. At the beginning of the mandate, each member of the Advisory College must submit to the Advisory College a list containing all economic entities, business and professional associations directly or indirectly controlled by the respective member or within which the member is part of the management team or has a collaboration or employment agreement. More details on the incompatibilities of the members of the Advisory College shall be provided in the Ethical Code of the Advisory College, which shall be prepared by the Advisory College and approved by the Plenum of the Competition Council.

There is also an express prohibition for the members of the Advisory College to request, receive or hold any confidential information, commercial, business or state secrets from the documents and files of the Competition Council. Breach of this obligation shall lead to automatic termination of the mandate of the member of the Advisory College.

The main attributions of the Advisory College are:
- preparation of non-binding recommendations and opinions on key aspects of the national competition policy, based on the request of the Plenum or of the president of the Competition Council;
- issuance of opinions on the reports of the Competition Council (annual activity report, report on competition), opinions regarding the strategy and annual action plan and with respect to the sector inquiries reports prepared by the Competition Council, based on the request of the Plenum or of the president of the Competition Council;

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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 eighteen major practice groups: banking & finance; capital markets; competition & antitrust; corporate & commercial; electronic communications, IT & media; employment & pensions; energy & natural resources; environmental law; healthcare & pharmaceuticals; insurance; intellectual property; litigation & arbitration; mergers & acquisitions/privatisation; project finance/PPP, concessions & infrastructure; public procurement; real estate; restructuring and insolvency and tax.

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.

- preparation of studies or issuing opinions on any other aspects, at its own initiative or based on the request of the Plenum or of the president of the Competition Council; and
- nomination of the persons proposed for being appointed as members of the Plenum of the Competition Council.

Upon incorporation, the Advisory College shall prepare and approve by the vote of the majority of its members the procedure for the selection of the candidates for the Plenum of the Competition Council, which shall become effective as of the date it is published on the official website of the Competition Council.

For the issuance of opinions, recommendations and studies the vote of the majority of the present members is necessary, while for validly deciding on the nomination of the persons for the Plenum of the Competition Council, the vote of two-thirds of the active members of the Advisory College is required.

The regulation also expressly states that the Advisory College shall meet on a quarterly basis and at any time deemed necessary, following the convening of the president of the Competition Council. The meeting shall take place at the headquarters of the Competition Council and the working sessions shall be recorded in minutes signed by all participants.

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 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 'very client-oriented' and 'focused on solutions'. Established clients of Silviu Stoica include 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 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.

Ramona Iancu
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Ramona Iancu is a senior associate within the competition practice group at Popovici Nitu & Asociatii. Her competition expertise covers in particular merger control proceedings and a wide range of antitrust matters, including structuring and implementation of compliance programmes and dawn raids procedures.

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