The European Antitrust Review 2015

Published by Global Competition Review
in association with

Popovici Nitu & Asociatii

GCR
GLOBAL COMPETITION REVIEW

www.globalcompetitionreview.com

Romania

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Recent developments of domestic competition rules

Amendments to the Competition Act No. 21/1996

In 2013, the Romanian competition legislation underwent very limited changes that were essentially meant at aligning the competition rules to the amendments brought, for example, to the Romanian criminal procedure laws. However, changes to the secondary legislation are expected in 2014 as the Romanian Competition Council (RCC) has already launched several public consultations in this respect.

The main changes brought to the Competition Act No. 21/1996 (the Competition Act) – which led to the Competition Act being republished,[1] a year later, for the second time since its entry into force in 1996 – concern the dawn raid procedure. These changes are the result of the enactment of the new Romanian Criminal Procedure Code, which expressly amends certain substantial conditions linked to the initiation and conduct of dawn raids by the RCC.

For a better understanding of the impact of these changes – not limited to the dawn raid procedure, but with a wider spectrum – an ante presentation of the main rules governing the dawn raids that were amended would be useful. Briefly, before these amendments, the RCC initiated the dawn raids in the locations indicated in article 36 of the Competition Act (ie, the premises, lands and means of transportation legally owned or used by the undertakings or the associations of undertakings) based on an order issued by the chairman of the RCC. This order was per se sufficient for the competition inspectors to proceed to the dawn raids.

In light of the above-mentioned changes, in addition to the order issued by the chairman of the RCC, a formal judicial decision approving the dawn raid issued by the president of the Bucharest Court of Appeal or by the delegated judge is necessary for carrying out dawn raids. Before initiating the dawn raid, the RCC must communicate to the undertaking concerned (in relation to which the dawn raid will be carried out) certified copies of the order of the issued by the chairman of the RCC approving the dawn raid and of the judicial decision approving the dawn raid.

Competition inspectors may then legally proceed to the dawn raid and inspect the locations indicated in article 36 of the Competition Act (ie, the premises, lands and means of transportation legally owned or used by the undertakings or the associations of undertakings) as well as any other premises, including the domicile, the lands or the means of transportation belonging to the administrators, directors, managers and to other employees of the undertaking or associations of undertakings that are subject to RCC's investigation only based on the order of the issued by the chairman of the RCC approving the dawn raid and on the judicial decision approving the dawn raid.

The Competition Act also regulates the legal procedure to be followed by the RCC to obtain the judicial decision approving the dawn raid. Thus, the RCC must file a dawn raid authorisation request to be assessed by the president of Bucharest Court of Appeal. This authorisation request must contain all information necessary to justify and support the envisaged dawn raid as the judge will need to assess if the authorisation request is indeed reasoned and only afterwards rule on such request. The request for dawn raid authorisation made by the RCC will be decided in the council room without the parties being summoned. The decision issued by Bucharest Court of Appeal may be challenged by either party (ie, the RCC and the undertaking subject to the dawn raid) within 48 hours after the judicial decision on the dawn raid has been communicated to the parties. The challenge of the judicial decision on the dawn raid does not suspend the enforcement and applicability thereof.

Considering that the dawn raid procedure is, in fact, the main tool used by the RCC for investigations, it is unlikely that the new procedure will lead to a decrease in the number of dawn raids. It may, however, moderate the rhythm of the dawn raids carried out by the RCC.

The new Criminal Code that entered into force on 1 February 2014 led to the amendment of the Competition Act provisions regarding the criminal liability of persons involved in anti-competitive practices.

Before the amendment, there was a general provision in the Competition Act saying that individuals that intentionally or substantially participate in the planning, organisation or implementation phases of a practice prohibited by article 5(1) of the Competition Act risk imprisonment from six months to three years, or a fine and a prohibition to exercise certain rights.

In light of amended rules, the category of individuals targeted by this provision is limited to the individuals acting as director or legal representative, or holding any other management position in a company that intentionally takes part in an anti-competitive practice. It must be noted, however, that these provisions do not apply in case the prohibited behaviour refers to a bid-rigging practice or agreement leading to the distortion of prices in a public bid. In such cases, the applicable sanction is imprisonment of from one to five years.

Romanian Competition Council's activity

On 14 March 2013, the Romanian Competition Council issued a set of best practices on the petitioning activity carried out jointly by competitors or associations of undertakings. As the individual and joint petitioning rights are expressly recognised in article 51 of the Constitution of Romania, the scope of these best practices is to raise awareness on the anti-competitive risks that may be raised by joint petitioning activities carried out by two or several competitors or by various associations of undertakings in the name of their members.

The best practices provide several criteria to be employed when assessing the potential anti-competitive risks of joint petitioning activity such as:

- the main purpose of the petitioning activity (ie, legitimate or not, justified or not or if it goes against general public interests);
- the amplitude of the petitioning (ie, the petitioning should not be disproportionate compared to the impact the decisions of the public authorities against which the petitioning is made might have on the market or upon the respective undertakings); and

- the working procedure between the parties involved in the joint petitioning and the consequences of the joint petitioning (ie, type of information exchanged during the preparatory phase leading to a potential coordinated behaviour on the market, the effects on other undertakings active on the market, etc).

Additionally, the best practices give some examples of potentially anti-competitive actions that will most likely amount to an infringement of the competition rules laid down in article 5(1) of the Competition Act and article 101 of the Treaty on the Functioning of the European Union, such as:
- any joint action of competitors that might lead to an increase of the costs of the undertakings active on the market or of their market power having as an effect price increases or negatively impacting the variety of goods available to the consumers;
- exchange of commercially sensitive information (ie, prices, production costs, business strategies, investment policies) between the undertakings involved in the petitioning activity;
- the joint petitioning activity that might lead to partial or total elimination of competition between the undertakings involved or negatively impacting other undertakings active on the same market or on neighbouring markets or the consumers; or
- any joint petitioning activities that will restrict competition or harm the consumers because they are disproportionate compared to the effects of the decisions of the public authorities against which the respective petitioning is made.

Based on the above, it is advisable for the undertakings involved in a petitioning activity before the initiation of any joint petitioning activity to conduct a thorough assessment of their intended joint actions in order to ensure compliance of their actions with the applicable competition rules. Running this internal compliance test is of utmost importance for the undertakings that consider initiating a joint petitioning activity because the RCC's past practice shows that joint court actions brought by several competitors against another competitors or opinions communicated to the RCC by various associations of undertakings either led in fact to new investigations being opened by the RCC or were used by as incriminating evidence in RCC's decisions.

On 11 October 2013, the RCC published on its official website a set of guidelines on the RCC's dealing with undertakings' requests for confidentiality as regards certain documents.

In addition to the general rules on the confidentiality of the information made available to or obtained by the RCC during investigations of anti-competitive practices and economic concentrations (laid down in the Competition Act and in the Guidelines on the access to the RCC's file in the cases regarding articles 5, 6 and 9 of the Competition Act, articles 101 and 102 of the Treaty on the Functioning of the European Union as well as in economic concentrations cases), the new guidelines provide some valuable insights on the RCC's views on the type of information that will most likely qualify to benefit from the confidentiality regime. The guidelines also bring some practical advice and clarifications as regards the methodology to be employed by the undertakings concerned when requesting confidentiality for certain data and information.

During an investigation, the undertakings subject to such investigation are requested to provide to the RCC various information and documents in connection with the purpose of the investigation. The RCC may also collect information and documents during the dawn raids carried out in these investigations. The main purpose of these guidelines is to provide the undertakings involved in an investigation with some practical detailed rules on how to request confidentiality of an information or document. The guidelines also present the RCC's views on the type of information that may represent 'trade secrets' or 'other confidential information' and provide examples of information that will not, in principle, be treated as confidential by the RCC.

When requesting the confidentiality of information contained in a document, the undertaking must provide a non-confidential version of these documents where the paragraphs containing information deemed 'confidential' are deleted. The rule is that an undertaking may not successfully invoke confidentiality for an entire document or entire sections of a document but only for specific information, and only if it describes the reasons for which such information should be granted the confidentiality privilege. It is expressly stated that blank pages will not be accepted by the RCC and that, when requesting confidentiality for certain figures (eg, market shares, value of sales), the undertaking cannot simply delete the data but must indicate a baseline for such data (eg, for a market share of 6.2 per cent, market share thresholds of between 5 and 10 per cent may be indicated).

It is necessary for the non-confidential version of a document to have the same format as the original (confidential) version thereof. In case confidentiality is requested for some parts of the document, the undertaking invoking confidentiality must provide an accessible non-confidential version of the entire document. For efficiency purposes, the guidelines grant the RCC the right to request that the undertakings first provide a draft of the non-confidential version of the documents in respect of which the confidentiality is requested. The draft must contain all information (confidential and non-confidential) while the confidential information will be only highlighted (ie, marked with the words 'confidential information') and not deleted. The final non-confidential version of the request for confidentiality will be provided to the RCC after the latter has provisionally accepted the draft request for confidentiality made by the undertaking concerned.

The confidentiality request must include a thorough presentation of the reasons supporting the request (ie, why such information is confidential and how the disclosure may cause serious damages to the business interests of the undertaking making the request or may have a significant negative impact upon a certain person or undertaking). A clear non-confidential description of the information that was highlighted or removed from the confidential version also needs to be included in the request for confidentiality. The guidelines go further to expressly stipulate that standard confidentiality warnings (eg, confidentiality in the header of documents issued by law firms, the 'confidential' stamp applied on documents provided to the RCC, per se confidentiality disclaimers contained in e-mail messages) will not be, de plano, deemed as meeting the requirements for benefiting from the confidentiality regime.

The non-confidential versions of the documents and the summaries of the deleted information must be drafted as to allow an undertaking that was granted access to the non-confidential versions to assess if the deleted information may be useful in its defence.

The guidelines also contain a non-exhaustive list of information that may qualify as 'trade secrets' and 'other confidential information' and clearly state that, irrespective of these lists, the decision to grant or not confidentiality to any information ultimately rests with the RCC.

Information considered confidential by the RCC includes:
- information that could qualify as 'trade secrets', such as: technical or financial information related to the know-how of an

undertaking, cost valuation methods, manufacturing processes and secrets, supply sources, quantity of goods manufactured and sold, market shares, lists of clients and distributors, marketing plans, prices and costs structure, sale strategy; or
- 'other confidential information' than trade secrets that will be, however, assessed on a case-by-case basis, such as: information related to the involved undertakings made available to the RCC by third parties provided such information could exert a substantial economic and commercial pressure on the competitors, the business partners, the clients or suppliers of the undertakings involved. Other types of information that may be included in this category include information allowing the undertakings concerned to identify the undertakings that made the complaint or other third parties, in case the latter have a reasoned option for keeping their anonymity and also provided that such option is motivated in writing.

Undertakings will not, in principle, benefit from confidentiality for the following:
- information contained in the oral statements given in the context of leniency proceedings (ie, information that supports the alleged breach). However, in case such information could negatively impact the applicability of the leniency proceedings by the RCC, such information will, most likely, benefit from confidentiality;
- information used by the RCC in order to prove an infringement of the competition rules and public information. Any information will be deemed as no longer confidential once such information is available to experts or may be deduced from public information;
- information known by third parties;
- information on undertakings' turnovers, sales, market shares and other similar information that are no longer important from a commercial perspective due to the passing of time. For carrying out such assessment, the specific features of the relevant market must be considered. Generally, any such information older than five years will not be treated as confidential. However, information older than five years may benefit from confidentiality in case, despite the passing of time, such information is essential for the respective undertaking's position on the market;
- potential circumstantial evidence considered, as a whole, indispensable for exercising the right of defence and all information the disclosure of which may not cause serious harm to the interests of an undertaking;
- generally, the names of the respective undertaking's employees;
- data from or about another undertaking, except for cases where such data would be made available based on an agreement concluded with the respective undertaking and such agreement has a confidentiality clause protecting these data from being disclosed. However, general references to a non-disclosure obligation are insufficient to justify the confidentiality of such data.

With regard to RCC's activity in the antitrust investigations area in the past year, the following should be noted:
- the main economic sectors scrutinised by the RCC in the investigations initiated in 2013 for alleged infringements of the competition rules are:
  - the road infrastructure sector;
  - the milk sector; and
  - the cinematographic sector;
- the practices under investigation and the relevant markets are:
  - an alleged cartel and anti-competitive actions of the public authorities on the road infrastructure local markets of several counties in Romania;
  - the alleged bid-rigging in the supply of dairy products through a national programme in one county from Romania;
  - an alleged cartel on the market for processing the and commercialisation of milk and dairy products; and
  - an alleged cartel regarding the distribution of films to cinemas and a potential vertical antitrust practice for price fixing on the market for distribution of films to the cinemas;
- the sectorial investigations opened by the RCC in 2013 focus on the following areas of activity:
  - liberal services (insolvency practitioners);
  - pharmaceutical sector;
  - communications;
  - wood sector;
  - medical assistance services; and
  - auto insurance.

Several sectorial inquiries were also finalised by the RCC on the market for distribution of films to cinemas, road and highway infrastructure services, the bank payments by card market and the beer market. Following these investigations, the RCC identified potential signs of infringements of the competition rules in six cases for which specific proceedings were initiated.

Monitoring economic sectors in view of identifying competition issues has always been a priority for the RCC. The 2013 Report on competition in key sectors issued by the RCC scrutinises several sectors: liberal economic professions, food retail, the auto-vehicles sector, and the banking and natural gas sectors. The novelty brought by this Report is the proposal made by the RCC consisting of a computation mechanism of an aggregated competitive pressure ratio (IAPC), the scope of which is to determine the potential competitiveness 'appetite' of some markets or industries from the national economy. The RCC presented the results of testing this ratio in 21 selected industries. Following such assessment, the RCC held that:
- the industries most predisposed towards free competition are the following: spare parts for automobiles; real estate brokerage services; food retail (supply); the wholesale distribution of automobiles; and the production of medicines; while
- the industries that are less predisposed towards free competition are: the distribution of LPG for cookers; the production and sale of natural gases; bank cards; public notary services; and the production and sale of cement.

The conclusions of the 2013 Report on competition in key sectors should be taken into consideration by undertakings that intend to implement transactions in the key sectors assessed in this Report. As for the food retail sector, the RCC holds that, although several economic concentrations between food retailers were implemented in the past two years, competition is still strong in this sector and the concentration level of the industry remains relatively low (ie, the top five retailers together hold a market share of approximately 30 per cent). It is also worth noting that in the context of assessments of economic concentrations carried out in the food retail sector, the RCC began to use certain economic analysis methods, such as ex ante (the gross upward pricing pressure index) and ex post (the 'Difference in Differences' method).

As regards the food sector, the RCC undertook, for the first time, a post-acquisition assessment of the market impact (ie, actual

impact) resulting from such acquisition. Specifically, this is the case of an economic concentration (cleared in 2010) whereby Lidl took over a network of stores (103 stores). In the assessment, the RCC looked at the market structure, market shares and the evolution thereof, as well as at parties' behaviour towards prices, the private labels category by reference to the general trend of the market.

Regarding the automotive industry, the RCC holds that, in fact, the market shares held by the main players were subject to significant fluctuations from one year to another, which leads to the conclusion that the market may be described as highly competitive, and therefore one may hold that an economic concentration on such market should not raise, prima facie, any anti-competitive concerns.

In 2013, during the assessment of economic concentrations and antitrust practices, the RCC also focused on issuing various opinions and standpoints on several draft enactments (eg, standpoint on the draft bill regarding public–private partnership; draft bill regarding the procedure for granting, amending and extending the validity and transferring the audio-visual licence and authorisation decision; the draft Emergency Ordinance amending and supplementing Emergency Ordinance No. 34/2006 on awarding public procurement agreements).

As to the RCC's activity in cases of economic concentrations, statistics show that during the past few years there was a downward trend. Thus in 2011 and 2012, the number of decisions issued by the RCC in merger control proceedings represented less than 50 per cent of the total number of decisions issued by the RCC, while before 2011 almost 80 per cent of the RCC's decisions concerned economic concentrations cases. These figures, which are based on the information available on the RCC's official website, show that the RCC mainly focused its activity on anti-competitive practices. The main reason behind this trend was the general financial crisis that started in 2008, the effects of which were visible in the mergers and acquisitions market as a lower number of transactions were completed. Consequently, fewer acquisitions meant a lower number of merger control cases for the RCC.

In numbers, the situation is the following: in 2011, the RCC issued 35 decisions in economic concentrations cases; in 2012 there were 42 such decisions issued by the RCC; and in 2013, according to the information made public by the RCC on its official website, there were only 32 merger control decisions. As a general remark, most of the RCC's decisions were issued during Phase I of the notification proceedings as the RCC rarely enters into Phase II (investigation) proceedings in case of economic concentrations.

The economic concentrations notified to the RCC during 2013 concerned undertakings active on a wide variety of relevant markets. However, there were a significant number of merger cases reviewed by the RCC in the financial sector (ie, eight economic concentrations in this sector, mainly in banking, life insurance and leasing services markets). Also, the RCC carried out assessments of mergers involving undertakings active in the energy and retail food market.

Notes

1 The Competition Act was republished in the Romanian Official Gazette Part I no 240 as of 3 April 2014 as per article 107(3) of Law No. 255/2013 on the applicability of Law 135/2010 on the Criminal Procedure Code and on the amendment and supplementation of the relevant legislation that contain criminal procedure provisions, published in the Romanian Official Gazette Part I no 515 as of 14 August 2013 as further amended and the provisions re-numbered.

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Popovici Niţu & Asociaţii is one of the first incorporated professional partnerships in Romania. It combines strong local resources with exceptional credentials, outstanding records and distinguished careers in law, business and academia. Experienced in most major legal fields, the firm's lawyers provide quality legal services combined with strong client relationships. It acts as outside counsel to a wide spectrum of legal entities, including key players in major industries, financial institutions, public authorities and investment funds.

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Silviu Stoica has been commended in *Chambers Europe* as 'very client-oriented' and 'focused on solutions'. He has advised a wide range of clients (including ArcelorMittal, Philip Morris, Cargill, Orange, Oresa Ventures and Innova Capital) on a whole array of competition matters and investment issues.

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 ISSN 1466-6065