

Chapter 15

Competition

1. General

With its accession to the European Union in early 2007, Romania achieved its major goal since 1990. The steps that were taken in this direction comprised, amongst other, the legislative harmonization with the *acquis communautaire*, a special attention being given to the competition regulations.

Accordingly, the legislation in the competition field was drafted in accordance with to the most modern European legal systems. Starting with 1996, the Competition Law and various subsequent regulations were passed inspired by the corresponding European legislation, and, in 2004, several new regulations and guidelines were issued by the Competition Council, to the same effect.

2. Main regulations

- Competition Law no. 21/1996 as republished (the “ Competition Law”);
- Law no. 11/1991 on unfair competition, as amended and completed by Law no. 298/2001 (the “Unfair Competition Law”);
- The Competition Council’s Regulation, enforcing the provisions of art. 5 and 6 of Competition Law no. 21/1996, regarding anti-competitive practices (the “Anti-Competitive Practices Regulation”);
- The Competition Council’s Regulation, enforcing the provisions of art. 5 of the Competition Law no. 21/1996 in cases of vertical agreements (the “Romanian Block Exemption Regulation”);
- The Competition Council’s Regulation, on the authorization of economic concentrations (the “Romanian Merger Regulation”);
- The Competition Council’s Guidelines enforcing art. 5 of Competition Law no. 21/1996 in case of horizontal cooperation agreements.

3. Competent Authorities

- a) The Competition Council, as an autonomous administrative authority in the competition field;
- b) The Government, which interferes in economic sectors or markets where competition is excluded or substantially restrained as an effect of a law or due to the existence of a monopoly. The Government intervenes, as a rule, with the prior consent of the Competition Council.

4. Economic concentration

4.1. Economic concentration definition. Transactions considered as economic concentrations. Territorial jurisdiction.

According to the provisions of Article 11 of the Competition Law, an economic concentration is achieved when:

- a) two or more companies, previously independent, merge;
- b) one or more persons already controlling at least one company, or one or more companies acquire, direct or indirect control of the whole or parts of one or more companies, irrespective of the method used in taking such control.

Moreover, an economic concentration may be established by the creation of a joint venture, which is a legal entity constantly performing all the functions of an autonomous economic entity, yet not achieving a coordination of the competitive behavior, either between its founder companies or between the joint venture and the founder companies.

All economic concentrations taking place on the territory of Romania are subject to the control and authorization of the Competition Council, as well as those taking place outside this territory, but having effects on the Romanian market. Consequently, the international transactions (made without the involvement of Romanian entities) are also subject to the authorization of the Competition Council, if the involved parties achieve turnover in Romania.

4.2. Definition of control

The key element in deciding if a transaction should be notified to the Competition Council is to determine if the purchaser will gain control of the target company or not. According to the provisions of the Regulation on the economic concentration, “control” is achieved when it derives from rights, contracts or other means that, either together or separately, conferring the purchaser the right and/or possibility to exercise, directly or indirectly, a material influence over the targeted company.

The most common forms to achieve control are: (i) acquisition of shares; (ii) acquisition of assets; (iii) developing commercial relations that may lead to a status of economic dependence, by concluding of medium or long term supply contracts between suppliers and customers, combined with structural connections conferring a major influence of the supplier or of the client over its partner.

It is considered sole control, when being exercised by a sole entity, or joint, when being exercised by two or more entities, such entities reaching an agreement in order to make important decisions.

Generally, sole control is exercised by holding the voting majority within the controlled company’s managing bodies or by holding a minority control position. Joint control is exercised based on a preliminary agreement, stated legally or de facto.

4.3. Turnover threshold

Should it be determined that a transaction involves the takeover, within the meaning of the Competition Law, thus representing an economic concentration, the obligation appears for the involved parts to notify that particular transaction for authorization to the Competition Council. However, the relevant legislation provides for a turnover threshold above which such operations must be notified. The notification should be filed with the Competition Council

within 30 days as of the date of signing the legal document whereby the take over was achieved.

Economic concentrations must be notified if the following conditions are met for the fiscal year prior to the transaction:

- (i) the parties' combined turnover exceeds €10,000,000; and
- (ii) at least two parties involved in the transaction have each achieved a Romanian turnover exceeding €4,000,000.

The €10,000,000 threshold is considered to be referring to the combined parties' worldwide turnover.

For the purpose of the threshold test, the turnover should be calculated by considering all sales in Romania (irrespective of the relevant product market on which the concentration will take place), after deducting exports value and excises due to the state budget, achieved by each party involved in the transaction and the group of companies it belongs to (i.e. its subsidiaries, its parent companies, the other subsidiaries of its parent companies, and any other entities jointly controlled by two or more of the companies belonging to the group).

4.4. Dominant position

In principle, economic concentrations which effect in the creation or consolidation of a dominant position, lead or could lead to restraining, eliminating or significantly distorting the competition on the entire Romanian market or on a part thereof, are forbidden.

However, the Competition Law provides in its Article 13, for certain criteria, according to which the compatibility of an economic concentration with a normal competitive environment is assessed:

- a) the necessity to maintain and develop the competition on the Romanian market;
- b) the market share of the involved companies, their economical and financial power;
- c) the alternatives available for suppliers and users, their access to supply markets and sources;
- d) the offer and demand trend on that particular market;
- e) the extent to which the interests of beneficiaries or consumers are affected;
- f) the contribution to the economic and technical progress.

5. Anti-competitive practices

5.1. Acts that may qualify as anti-competitive practices according to the Competition Law

Article 5(1) of the Competition Law prohibits any explicit or tacit agreements between companies or associations of companies, any decisions of association or any concerted practices between them, pursuing among others:

- a) establishing, in a concerted manner, the selling and buying prices, price lists, discounts, added values and any other inequitable commercial conditions;
- b) limitation or control of production, distribution, technological development or investments;

- c) sharing of retail markets or supply sources on the criterion of territory, of the amount of sales and acquisitions or any other criteria;
- d) application, regarding the commercial partners, of uneven conditions for equivalent performances, causing to some of them a disadvantage in the competitive position;
- e) conditioning of concluding certain contracts by the partner's acceptance of clauses stipulating supplementary performances not having connection with the object of such contracts;
- f) participate, in a concerted manner, with collusive tendering to bids or other forms of tender participation;
- g) eliminate competitors from the market; limit or obstruct the access to the market.

However, there exists a possibility for the agreements, decisions of association or concerted practices to be legally exempted from the stipulation of art. 5 (1) Law no. 21/1996, if the following conditions are cumulatively met:

- a) positive effects prevail over the negative ones or compensate the restraining of the competition;
- b) an advantage consistent with the one achieved by the parties of the agreement, decision of association or concerted practices, is ensured to beneficiaries and consumers;
- c) possible restrictions of competition are essential for obtaining the intended advantages, while no unfounded restrictions are imposed on the parties;
- d) the agreement, decision of association or concerted practice does not bestow the parties' possibility to eliminate competition from a substantial share of the targeted product or services market;
- e) the agreement, decision of association or concerted practice contributes significantly to:
 - (i) improvement of production;
 - (ii) encouragement of technical progress;
 - (iii) improvement of product quality;
 - (iv) durable practicing of substantially reduced prices for the consumers;
 - (v) increasing the competitive position of the small and medium-sized companies on the Romanian market.

Exceptions such as the ones listed above are granted by means of negative clearance granted by the Competition Council, for individual cases of agreements, decisions of associations or concerted practices or by block exemptions for the categories of agreements, decisions of associations or concerted practices, as stipulated by the regulations and subsequent guidelines issued by the Competition Council for the application of the Competition Law.

5.2. Abuse of dominant position

The provisions of the Regulation concerning anti-competitive practices define the concept of "dominant position" (on a particular relevant market) as the situation where a company is capable, in a substantial degree, to act independently from its competitors (actual and potential) and its clients in that particular market.

The companies holding a dominant position on a particular market, due to their power to manifest independence from the competitors, suppliers or clients, may be tempted to resort to certain behaviors, considered by Article 6 of the Competition Law no. 21/1996, as abusive:

- a) imposing, directly or indirectly, of selling and buying prices, price lists or other inequitable contractual clauses and the refuse to negotiate with certain suppliers or beneficiaries;
- b) limitation of production, distribution, technological development in the disadvantage of the consumers;
- c) application, regarding the commercial partners, of uneven conditions for equivalent performances, causing to some of them a disadvantage in the competitive position;
- d) conditioning of concluding certain contracts by the partner's acceptance of clauses stipulating supplementary performances which, neither by their nature nor according to commercial practices, have any connection with the object of such contracts;
- e) imposing excessive or ruinous under-cost prices, to eliminate competitors, or exporting under production costs and covering the difference through higher domestic prices;
- f) exploitation of the economical dependence status of a client or supplier.

6. Sanctions

The anti-competitive practices entail civil, administrative or criminal liabilities.

The contraventions are established by the control personnel of the Competition Council. The criminal action is initiated solely upon the notification of the Competition Council.

Based on the Competition Council's decision, supplementary profits or revenues achieved due to violation of the law will be confiscated and shed to the State budget.

7. Unfair competition

The acts of unfair competition, as well as penalties applicable to entities committing such acts are identified mainly in Article 4 of the Unfair Competition Law.

According to the above legal provisions, the following acts are considered unfair competition and are sanctioned with fines:

- a) a corporate entity's exclusive employee offering his/her services to a competitor of his/her employer or accepting such an offer;
- b) disclosing, acquiring or using a trade secret without the consent of its rightful owner and in a manner infringing fair commercial practices;
- c) communication, even confidential, or spreading, by another corporate entity, of false assertions over a competitor or over its goods/services, assertions that can, by their nature, harm the proper operation of the rival company;
- d) offering, promising or giving – directly or indirectly – gifts or other advantages to a corporate entity's employee or to its representatives, in order to learn, by disloyal behavior, its industrial procedures, to know or to use its customers or to obtain any other profits for himself or for another person in the detriment of a competitor;
- e) diversion of a corporate entity's customers by using the connections established with such customers while previously filling a position at that corporate entity;

- f) firing or attracting a corporate entity's employees in order to establish a rival company able to capture that corporate entity's clients, or hiring a corporate entity's employees in order to disorganize its activity.

Moreover, pursuant to the provisions of Article 5 therein, the following acts of unfair competition are violations of the law and are sanctioned with imprisonment or criminal fine:

- a) using business name, invention, trademark, geographical indication, of an industrial design or model, of topographies of an integrated circuit, of a logo or a package that may induce a confusion with those legitimately used by another corporation;
- b) marketing counterfeited and/or pirated goods, to the detriment of the trademark owner and causing consumer confusion on the quality of the product/service;
- c) using for commercial purposes the results of experiments which were obtained through a substantial effort, or other related secret information, sent to the competent authorities in order to obtain the trading authorizations for pharmaceutical products or chemical products for agriculture, containing new chemical compounds;
- d) disclosing information stipulated under letter c), except for the cases when such disclosure is necessary for public safety or when the necessary measures were taken in order to ensure the information protection against unfair use or trade, if such information originates from competent authorities;
- e) disclosing, acquiring or using a trade secret by third parties, without the consent of the rightful owner, as a result of an act of commercial or industrial espionage;
- f) disclosing or use of trade secrets by persons employed by the public authorities or by persons entitled by the rightful owners to represent their interests before the public authorities;
- g) any production, import, export, storing, marketing or sale of goods/services bearing false legends, or patents, trademarks, geographical indications, industrial designs or models, topographies of integrated circuits, other types of intellectual property such as the exterior appearance of a firm, the window dressing or the personnel clothing, advertisement methods and the like, the product's origin and characteristics, as well as the producer's or trader's name, for the purpose of misleading the other market competitors and beneficiaries.

8. State aid general framework

8.1. Pre-accession legal framework

Prior to the Accession Date, the Romanian law governing State aid measures was Law no. 143/1999 published in the Official Gazette no. 37/03.08.1999 and coming into force on January 1, 2000, as further amended and supplemented by various subsequent normative acts and republished in the Official Gazette no. 744/16.08.2005 (the "Law no. 143/1999").

According to Law no. 143/1999, any financial support granted by the state or through state resources constituted state aid and fell within its scope. The law distinguished between (i) existing aid, i.e. mainly the aid granted by the State prior to the 1st of January 2000 when Law no. 143/1999 came into force, and (ii) new aid, i.e. aid granted after the 1st of January 2000, as well as any alterations of the existing aid. Whereas the existing aid was not subject to any prior authorization of the Competition Council, any measure amounting to a new aid had to be notified to the Competition Council and authorized by the latter prior to the aid being actually granted or altered.

Law no. 143/1999, as it was initially drafted, did not exclude any form of State aid from the possibility of being authorized by the Competition Council. However, in the wake of the upcoming accession of Romania to the EU and for the purpose of reaching the standards imposed by the European Commission to that effect, by an amendment to Law no. 143/1999 from 2004, the export aid and the aid mitigating the charges or debts of an undertaking towards the state budget (i.e. operational aid) were explicitly prohibited. Further to that amendment, the Competition Council was competent to authorize financial support granted by the State or through State resources only based on certain Regulations (the so-called Block Exemption Regulations) and Guidelines issued by the Competition Council, each dealing with a specific form of state aid (e.g. state aid for R&D, state aid for employment, state aid for restructuring and rescuing firms in difficulty, etc).

It is noteworthy that prior to accession, the Competition Council was the only authority competent to assess State aid measures and declare them compatible with a normal competition environment. Pursuant to Law no. 143/1999, any aid granted prior to its authorization constituted illegal aid and could have been subject to a recovery order issued by the Competition Council.

Similarly, any aid granted by the State contrary to a decision of the Competition Council prohibiting the aid in question constituted unlawful aid and could have been subject to a recovery order asking for the reimbursement by its beneficiary of the total amount received together with the due interest.

Further to the Competition Council's duty to satisfy certain expectations of the European Commission, in 2005 and 2006, under the strict supervision of the European Commission, substantially more investigations were launched ex officio by the competition authority, as well as recovery orders were issued with respect to state aids illegally or unlawfully granted by the State.

8.2. Post-accession legal framework

In order to enable the European Commission to exercise pursuant to the EC Treaty exclusive jurisdiction over state aid measures adopted by the Romanian state, Law no. 143/1999 together with all the Block Exemption Regulations and Guidelines of the Competition Council were repealed by the Government Emergency Ordinance no. 117/2006, published in the Official Gazette no. 1042/28.12.2006 and coming into force on the 1st of January 2007 (the "GEO no. 117/2006").

According to GEO no. 117/2006, beginning with the Accession Date, the Competition Council has no longer the competence to review, authorize or prohibit, monitor, or order the recovery of any State aid previously or subsequently granted. Currently, the European Commission has exclusive jurisdiction to deal with State aid matters throughout the European Union.

Therefore, further to the accession, the only legislation applicable to State aid measures disposed by the Romanian state (through public or private bodies designated or established to that effect) are:

- (i) the EC Treaty, together with all the pertinent Regulations adopted by the European Council and/or the European Commission, and
- (ii) the Guidelines, Notices and Communications of the European Commission, the latter being binding only upon the European Commission to the extent that when assessing the compatibility of a State aid measure with the common market, it shall do so according to the relevant EC Regulations, Guidelines, Notices and, where applicable, Communications previously addressed to the Member States. Moreover,

the jurisprudence of the European Court of Justice (“ECJ”) shall always prevail over the Commission’s acts and decisions.

Within the above context, it should also be mentioned the Act of the Accession of Romania and Bulgaria (the “**Accession Act**”¹) which allows Romania certain derogations from the immediate applicability of certain provisions of the primary and secondary EC legislation (e.g. EC Regulations and/or EC Directives) and clarifies certain aspects with respect to specific subject matters, such as State aids and competition.

Hence, according to the Accession Act, the following aid schemes and individual aid (i.e. aid outside a scheme) put into effect in Romania before the Accession Date and still applicable after that date shall be regarded upon accession as existing aid within the meaning of Article 88(1) of the EC Treaty, and thus not subject to notification:

- (i) aid measures put into effect before 10 December 1994;
- (ii) aid measures which prior to the Accession Date were assessed by the Competition Council and found to be compatible with the *acquis communautaire*, and to which the European Commission did not raise an objection on the ground of serious doubts as to the compatibility of the measure with the common market, pursuant to a certain pre-accession procedure laid down by the Accession Act.

All State aid measures still applicable after the Accession Date which do not fulfill the conditions set out above shall be considered as new aid upon accession for the purpose of the application of Article 88(3) of the EC Treaty which provides for the obligation of the Member States to notify the European Commission about any plan to grant or alter aid and not to put their proposed measure into effect until the Commission’s final decision.

Furthermore, as previously mentioned, the European Commission may object, on grounds of serious doubts as to the compatibility with the common market, to any aid measure granted after 1 September 2004. Such a Commission decision to object to a measure shall be regarded as a decision to initiate a formal investigation procedure. If such a decision was taken before the Accession Date, the decision came into effect only upon the date of accession.

Where the European Commission adopts a negative decision following the initiation of a formal investigation procedure, the Commission shall decide that Romania shall take all necessary measures to effectively recover the aid from the beneficiary. The aid to be recovered shall include interest at an appropriate rate determined in accordance with Regulation (EC) No 794/2004, and payable from the same date.

It is noteworthy that the Accession Act sets out rules for the aid granted prior to the Accession Date whose applicability extends also after such date, but it does not, however, explain what happens with the illegal aid (i.e. the aid given without the Competition Council’s prior authorization) granted before the accession and not applicable after such date, given that under the Law no. 143/1999, the Competition Council had a 10-year statutory limitation for ordering the recovery of the illegal aid. Further to our informal discussions with the Competition Council, it appears that such State aids are the so-called “forgotten aids” and may not be subject to a recovery decision, given that the Competition Council does not have legal grounds for asking the reimbursement, and the European Commission does not have jurisdiction to decide retroactively on a measure that does not have any effect on the common market. Therefore, according to the Competition Council, the general rule is that the pre-accession state aid with no applicability post-accession is not subject to a notification

¹ L 157/268 EN Official Journal of the European Union 21.6.2005

obligation and at this moment neither the Competition Council, nor the Commission may order its recovery due to the lack of legal basis. Exceptionally, the European Commission may investigate and eventually order the recovery of any aid granted by the State after the 1st of September 2004.