

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 2010 several new regulations and guidelines were issued by the Competition Council with a view to amend the already existing series of legal acts from 2004 in accordance with the latest European rules and standards.

2. Main regulations

- Competition Law no. 21/1996 as amended and republished (the “Competition Law”);
- Law no. 11/1991 on unfair competition, as amended and completed by Law no. 298/2001 (the “Unfair Competition Law”);
- Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (the “Block Exemption Regulation”);
- Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the “EC Merger Regulation”);
- Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, as amended to date (the “Regulation No 1/2003”);
- The Competition Council’s Regulation on the economic concentrations of 5 August 2010 (the “Economic Concentrations Regulation”);
- The Competition Council’s Regulation on the assessment and resolution of the complaints concerning the infringement of the provisions of articles 5, 6 and 9 of the Competition Law and of articles 101 and 102 of the Treaty on the Functioning of the European Union.

3. Competent authorities

- (i) The Competition Council, as an autonomous administrative authority in the competition field;
- (ii) 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 10 of the Competition Law, an economic concentration is achieved when:

- (i) two or more companies, previously independent, merge;
- (ii) 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, provided they meet the thresholds laid down in the Competition Law. 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 a certain 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 Economic Concentrations Regulation, “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 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 their 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 before the implementation of the concentration.

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 not authorized by the Competition Council.

5. Anti-competitive practices

5.1. Preliminary remarks

One of the changes of utmost relevance brought about by the 2010 amendments to the Competition Law consists in the powers given to the Competition Council, pursuant to Regulation 1/2003:

- (i) to assess the cases brought before it and which are capable of hindering trade between Member States in accordance with the provisions of Articles 101 and 102 of the TFEU;
- (ii) to enforce the said Articles by applying certain measures as laid down in the relevant laws, such as requiring that an infringement be brought to an end or ordering interim measures, or imposing fines.

5.2. 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 by associations or any concerted practices between them, pursuing among others:

- (i) to fix, directly or indirectly, the selling and buying prices, or any other trading conditions;
- (ii) to limit or control production, markets, technical development or investments;
- (iii) to share markets or supply sources;
- (iv) to apply, regarding the commercial partners, dissimilar conditions to equivalent performances, thereby causing to some of them a disadvantage in the competitive position;
- (v) to condition the conclusion of certain contracts to the partner's acceptance of clauses stipulating supplementary performances not having connection with the scope of such contracts;
- (vi) to participate, in a concerted manner, with collusive tendering to bids or other forms of tender participation;
- (vii) to eliminate competitors from the market; limit or obstruct the access to the market.

However, there exists a possibility for the agreements, decisions by associations or concerted practices to be legally exempted from the stipulation of art. 5(1) of the Competition Law, if the following conditions are cumulatively met:

- (i) contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit;
- (ii) do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

- (iii) do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The incidence of Article 5(1) of the Competition Law or of one of the above mentioned exemptions must be self assessed by the involved parties, based on the EU secondary legislation body.

5.3. Abuse of dominant position

The European Court of Justice (the “ECJ”), in one of the landmark cases in the area – C-27/76 United Brands, defines the concept of “dominant position” (on a particular relevant market) as the situation where a company is capable, due to the position of economic strength that it enjoys, to act, in a substantial degree, independently from its competitors (actual and potential) and its clients in that particular market. The Competition Law provides a relative presumption of absence of dominance, where an undertaking holds less than 40% market share on a relevant 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, as abusive:

- (i) imposing, directly or indirectly, of unfair selling and buying prices, price lists or other inequitable contractual clauses and the refusal to negotiate with certain suppliers or beneficiaries;
- (ii) limitation of production, markets, technical development in the disadvantage of the consumers;
- (iii) applying, regarding the commercial partners, of dissimilar conditions for equivalent performances, thereby causing to some of them a disadvantage in the competitive position;
- (iv) conditioning the conclusion of certain contracts to the partner’s acceptance of clauses stipulating supplementary performances which, neither by their nature nor according to commercial practices, have no connection with the scope of such contracts;
- (v) imposing excessive or predatory under-cost prices, to eliminate competitors, or exporting under production costs and covering the difference through higher domestic prices;
- (vi) exploitation of the economical dependence status of a client or supplier, as well as the termination of contractual relation based upon the refusal to comply with unjustified commercial conditions.

5.4. Sanctions

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

The sanctions for minor offences are applied by the Competition Council. The criminal action is initiated solely upon the complaint 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.

The Competition Council has also put in place instructions a leniency policy, applicable to undertakings willing to submit information on cartels. Based upon the fulfillment of certain conditions, the relevant undertakings may benefit from immunity or reduction of fines, depending on their conduct within the investigation and their role within the cartel.

6. 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, *inter alia*, are considered unfair competition and are sanctioned with fines:

- (i) offering by a corporate entity's exclusive employee of his/her services to a competitor of his/her employer or accepting such an offer;
- (ii) disclosing, acquiring or using a trade secret without the consent of its rightful owner and in a manner infringing fair commercial practices;
- (iii) 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 commercial activity of the rival company;
- (iv) 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 benefit for himself or for another person in the detriment of a competitor;
- (v) diversion of a corporate entity's customers by using the connections established with such customers while previously filling a position at that corporate entity;
- (vi) 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:

- (i) using of a 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;

- (ii) marketing counterfeited and/or pirated goods, to the detriment of the trademark owner and causing consumer confusion on the quality of the product / service;
- (iii) 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;
- (iv) 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;
- (v) 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;
- (vi) 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;
- (vii) 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 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.

7. State aid general framework

7.1. 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.

7.2. 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) is:

- (i) the TFEU Treaty, together with all the relevant 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 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 (currently Art. 108 TFEU), and thus not subject to authorization:

- (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 or which have diverted from the initial scheme shall be considered as new aid upon accession for the purpose of the application of Article 108(3) of the TFEU 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

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

determined in accordance with the Commission Regulation (EC) No 794/2004 of April 21, 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 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.