

Competition & Antitrust - Romania

Considering legal certainty in competition cases

Contributed by **Musat & Asociatii**

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Introduction

Legal certainty – the requirement that the law allow those subject to it to regulate their conduct *ex ante* – is regarded in both common law and civil law systems as a central requirement of the rule of law. In order to be obeyed, the law must be known and understood; in order to be understood properly, it must be both precise in its content and requirements and predictable in its application, so as to provide legal certainty to its adherents. Consequently, the courts must apply the law in a predictable manner.

This principle applies in Romania, at least in theory. According to Article 126 of the Constitution, the High Court of Cassation and Justice must ensure the unitary interpretation and application of the law by the other courts. In practice, however, the reality is different, with the high court being one of the worst offenders.

This update examines a case concerning an antitrust agreement in the privately administrated compulsory pensions market. In 2010 the Competition Council penalised 14 companies active on this market for breaching Article 5(1) of the Competition Law and Article 101 of the Treaty on the Functioning of the European Union by entering into a customer allocation agreement. Nine of the 14 penalised companies challenged the Competition Council decision before the Bucharest Court of Appeals.

Appeal court decision

The decisions of the appeal court covered the entire range of possible outcomes. Of the nine actions filed:

- three were admitted and resulted in annulment of the Competition Council decision in relation to those particular companies (ie, positive judgments);
- four were rejected and the infringement finding and fines for the respective companies were upheld (ie, negative judgments); and
- two were partially admitted, resulting in the upholding of the infringement finding, but a reduction in fines for the respective companies (ie, reduction judgments).

The appeal court decisions were all based on the substantive merits of the case and none was justified on procedural grounds – nine judges of the same court, faced with a similar set of facts and presumably presented with relatively similar sets of arguments, simply reached different decisions.

High court decision

Somewhat remarkably, all nine judgments of the appeal court were appealed to the high court – which is also responsible for ensuring the unitary interpretation and application of the law.

The first judgment concerned an appeal of one of the negative judgments. The high court found in favour of the appellant and annulled the Competition Council decision in relation to that particular company.

The second judgment concerned an appeal of another negative judgment and resulted in a partial admission and reduction of the fine imposed on the respective company. Notably, the high court rejected the Competition Council's request for a preliminary ruling from the European Court of Justice (ECJ) in this regard as unfounded.

The third judgment concerned an appeal of another negative judgment and also resulted in a partial

admission and reduction of the fine imposed on the respective company. The high court also rejected a request by the Competition Council for a preliminary ruling from the ECJ – as well as a request for the European Commission to act as *amicus curiae* – as unfounded.

The fourth judgment concerned an appeal of a positive judgment. The high court found in favour of the appellant, quashing the appeal court judgment and sending the file back to the appeal court, where it was suspended.

In the fifth case, which concerned an appeal of a negative judgment, the high court:

- admitted the Competition Council's request for a preliminary ruling from the ECJ;
- rejected a request for the European Commission to act as *amicus curiae*; and
- suspended the file until the ECJ has answered the request for a preliminary ruling.

All of the other cases were also suspended pending the ECJ's answer to the request for a preliminary ruling, three of which were pending before the high court while one was pending before the appeal court.

Comment

Several conclusions may be drawn from the above:

- The appeal court judgments covered the entire range of possible outcomes, showing that the judges were not necessarily influenced by the judgments of other appeal court judges in similar cases concerning court actions against the same Competition Council decision.
- Even though the prior case law of the high court should be persuasive – if not binding – the high court judges gave little importance to judgments rendered by their colleagues in similar cases concerning court actions against the same Competition Council decision. For example, the high court:
 - admitted appeals filed by both the companies and the Competition Council, but quashed appeal court judgments both upholding and annulling the Competition Council decision; and
 - rejected the request for a preliminary ruling on two separate occasions, but allowed it in the third case, even though the requests were very similar, as they had all been submitted by the Competition Council.
- The outcome of the pending cases depends to a large extent on the ECJ's response to the request for a preliminary ruling.
- It is still unclear whether the final decision in the first three cases outlined above could be influenced by the ECJ's response to the request for a preliminary ruling. In fact, the Constitutional Court previously held that a domestic court judgment's non-compliance with EU law, as expressed through an ECJ response to a request for a preliminary ruling, constitutes adequate grounds to request revision of the judgment in question.

Finally, the lack of unitary practice among the Romanian courts insofar as competition matters are concerned may result in a strange situation, whereby the Competition Council could impose penalties for an anti-competitive agreement between two parties, both parties could challenge the decision but only one might manage to have it annulled, leaving the other as the sole party to an anti-competitive agreement. Hopefully, it will not come to this and Romanian judges will begin to pay closer attention to the judgments issued by their colleagues.

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