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Competition - Romania

Supreme Court Overturns Competition Council Decision on Cement Cartel

Contributed by [Musat & Asociatii](#)

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A decision which imposed one of the highest fines ever issued by the Competition Council⁽¹⁾ has been quashed by the Supreme Court on the grounds of insufficient market evidence.

Facts

Following a long-term investigation which concluded that Carpatcement had been involved in a cement production cartel between 2000 and 2004, the council imposed a fine equal to 6% of the company's total turnover in 2004, a sum of over Lei313 billion (almost \$13 million). The other companies operating the cartel and penalized by the council were Lafarge Romcim SA, which was fined 6.5% of its turnover, and Holcim Romania SA, which was fined 5.5% of its turnover.

The *ex officio* investigation into the cement production market was launched after the council noted significant parallel price increases by the three cement producers between 2000 and 2004. The only competition faced by the producers in Romania was from imports, which represented only 2% of the market. The council found that the cartel's price fixing had caused serious detriment to customers in the relevant market, especially in light of the high costs charged by the producers and the lack of viable alternative sources of supply.

Although all three companies expressed their reservations about the evidence uncovered by the council during its investigation, only Carpatcement successfully challenged its fine in court.

Grounds for Annulment

Carpatcement appealed to the Supreme Court to overturn a Court of Appeals decision⁽²⁾ which had upheld the council's ruling against the alleged cartel members. Unlike the Court of Appeals, the Supreme Court ruled that a handwritten note from the general manager of Holcim, stating that "Lafarge Romania will reduce its discounts and must be followed with full attention", was insufficient to prove that the three companies had exchanged sensitive information in contravention of Article 5 of the Competition Law (21/1996), which implements Article 81 of the EU Treaty. The court found that the note revealed only certain assumptions about the unpredictable behaviour of Holcim's competitors and was intended to instruct the relevant Holcim employees to monitor Lafarge's price increases. Moreover, the much-disputed note was found not to demonstrate Carpatcement's involvement in the alleged cartel.

The court found that rather than lending such weight to an informal note, which did not bear a date that would have enabled the council to assess it in context, the council should have ascertained whether there was an economic rationale which dictated the disputed increases in prices, such as the inflation rate, rises in international cement prices⁽³⁾ and the seasonal nature of the cement industry which, in the court's opinion, leads to prices being reviewed by cement producers once every four months.

The council argued that its findings were supported by Carpatcement's recent acquisition of Tagrimpep Romcif SA Fieni. It claimed that the sole purpose of the acquisition was to force Tagrimpep Romcif to follow the price policy implemented by the alleged cartel members, thereby allowing them to control the entire Romanian market for cement production. The council maintained that this was the only possible explanation for Tagrimpep Romcif's sudden 30% increase in cement prices. Despite the council's allegations, the court construed the rapid increase in Tagrimpep Romcif's prices as being a natural consequence of a change in the shareholding structure of a recently acquired company, whereby the new shareholder seeks to implement its pricing policy. However, such an attempt on the part of a new shareholder will not be regarded as conclusively

disproving that a company intended to fix prices as part of a cartel unless other documents corroborate the new shareholder's legitimate intentions.

Comment

The council's ruling and the Court of Appeals decision were overruled by the Supreme Court primarily on the basis that the court had insufficient evidence to draw conclusive inferences about the existence of a long-term price-fixing cartel on the cement production market. The Supreme Court decision constitutes a valuable precedent for market players because it raises the standard of evidence which the council must meet when penalizing companies for anti-competitive conduct or agreements. The court has also acknowledged the seasonal nature of the cement industry, thereby allowing cement producers to review their prices periodically without running a significant risk that their conduct will be seen as collusive.

*For further information on this topic please contact [Anca Musat](#) at **Musat & Asociatii** by telephone (+40 21 202 5900) or by fax (+40 21 223 3957) or by email (ancam@musat.ro). The **Musat & Asociatii** website can be accessed at www.musat.ro.*

Endnotes

(1) Decision 94/2005.

(2) Decision 981/2006.

(3) In some countries, cement prices rose by up to 37% between 2002 and 2004 due to inflationary effects.

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