Chapter 15

Competition

1. General

Romanian Competition legislation was originally drafted in 1996, using corresponding EU legislation as its primary model. . Furthermore, in preparation for Romanian's accession to the European Union and as part of the process of legislative harmonization with the *acquis communautaire*, the competition regulations have been brought in line with the corresponding EU legislation. Romanian Competition Law, with a series of secondary legislation including regulations and guidelines, was once again amended as part of a process that started in 2010 and completed in December 2014. This was done in accordance with the latest European rules and standards. It is also noteworthy that the EU block exemption regulations and market definition regulations are applied *mutatis mutandis*.

Insofar as unfair competition is concerned, the applicable piece of legislation, first adopted in 1991, was subsequently amended in 2001, 2013 and 2014.

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, Law No. 255/2013 and Government Ordinance No. 12/2014 (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 companies (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 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;
- Commission notice on the definition of the relevant market for the purposes of Community competition law (the "**Notice on Relevant market**").

3. Competent authorities

The Competition Council, as an autonomous administrative authority in the competition field, is mainly responsible for the enforcement of Competition Law and secondary legislation. In a limited number of cases, sector regulators may have certain competition-related prerogatives.

4. Economic concentration

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

According to the provisions of Article 9 of Competition Law, an economic concentration occurs when:

(i) two or more companies, previously independent, merge;

(ii) one or more persons already controlling at least one company or more companies acquire direct or indirect control over the whole, or parts of, one or more companies, irrespective of the method used in taking such control. Furthermore, an economic concentration may be established by the creation of a joint venture, a legal entity constantly performing all the functions of an autonomous economic entity. The joint venture will do this without coordination of competitive behaviour of either its founder companies or between the joint venture and the founder companies.

All economic concentrations taking place in the territory of Romania as well as those taking place outside this territory but having effects on the Romanian market, are subject to the control and authorization of the Competition Council. This is provided they meet the turnover thresholds laid down in Competition Law. Consequently, international transactions (made without the involvement of Romanian entities) are also subject to the authorization of the Competition Council if the involved parties have 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 by determining 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, either together or separately, confer 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 entering into medium or long term supply contracts between suppliers and customers, combined with structural connections confer a major influence of the supplier or of the client over their partner.

It is considered sole control when the control is being exercised by a sole entity, or joint control when the control is exercised by two or more entities, such entities reach 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 a takeover, within the stipulations of Competition Law, represents an economic concentration the involved parties might be under obligation to notify the Competition Council of the particular transaction for authorization. This must be done provided their turnover for the year prior to the transaction taking place exceed the thresholds provided for in Competition Law, as follows:

(i) the parties' combined worldwide 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.

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 in accordance with the state budget, achieved by each party involved in the transaction and the group of companies it belongs to. This includes 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.

Finally, as a matter of principle parties to a notifiable economic concentration must refrain from implementing the respective economic concentration until the Competition Council has issued an authorization decision. In certain cases, the Competition Council may allow the perspective buyer to exercise some of its rights over the target before the authorization decision has been issued provided that a grounded request outlining the measures to be taken by the buyer before formal authorization is received and the urgent need regarding those measures being taken is filed.

4.4. Economic concentration compatibility test

The Competition Council will authorize economic concentrations which are deemed to be compatible with a normal competitive environment. In principle, economic concentrations that may lead to the restriction, elimination or distortion of competition of the entire Romanian market or a significant part of it, in particular through the creation or consolidation of a dominant position are not authorized by the Competition Council.

The effect of creating or enhancing a dominant position does no longer serve as the criterion for the assessment of the compatibility of an economic concentration with a normal competitive environment: are prohibited economic concentrations “which would raise significant impediments against effective competition”, in particular as a consequence of creating or strengthening a dominant position.

5. Anti-competitive practices

5.1. Preliminary remarks

The latest amendments to Competition Law expressly provide for the direct application by the Competition Council of Articles 101 and 102 TFEU, incorporating the corresponding provisions of Regulation No 1/2003 in domestic law. Consequently, each time it applies Articles 5 (1) and 6 of the Romanian Competition Law the Competition Council must also:

(i) assess the cases brought before it and determine which are capable of hindering trade between Member States in accordance with provisions of Articles 101 and 102 of the TFEU;

(ii) enforce said articles by applying certain measures as laid down in 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 Competition Law prohibits any explicit or tacit agreements between companies or associations of companies, any decisions by associations or any concerted practices between them, that have as either their object or effect:

(i) to fix, directly or indirectly, the selling and buying price, 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

(v) to put conditions on the conclusion of certain contracts to the partner's acceptation of clauses stipulating supplementary performances which do not have connections to the scope of such contracts.

Please note that the list above is not exhaustive, and other practices not expressly mentioned herein, such as bid rigging, may be assessed by the Competition Council as incompatible with rules on competition.

There is a possibility that agreements and decisions by associations or concerted practices initially seen as breaching the provisions of Article 5 (1) of the Competition Law to be legally exempted. This may happen if the following conditions, outlined in Article 5 (2) of the Competition Law, are cumulatively met:

(i) contribute to improving the production or distribution of goods or to promoting technical or economic progress, whilst allowing consumers a fair share of the resulting benefit;

(ii) do not impose on the companies concerned restrictions which are not indispensable to the attainment of these objectives;

(iii) do not afford such companies the possibility of eliminating competition for a substantial part of the products in question.

The categories of agreements benefiting from a block exemption and the conditions and criteria for qualification for this are those established by the Block Exemption Regulations issued by the European Council or the European Commission. Should a certain agreement not meet the conditions provided for in a block exemption the parties themselves will need to assess whether the conditions required for an individual exemption are met since the notification of the agreement to the Competition Council with a view to obtaining an individual exemption is no longer possible.

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" (in 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.

Further to the latest modifications, the Competition Law now contains a relative presumption of dominance in case a company holds a market share of 40% or above. While the presumption is rebuttable, the onus of proving that the market share exceeding 40% does not result in a dominant position is on the concerned company/companies.

The companies holding a dominant position in a particular market, due to their power to manifest independence from competitors, suppliers or clients, must refrain from certain behaviours considered abusive by Article 6 of Competition Law:

(i) imposing, directly or indirectly, 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 disadvantaging some in their competitive position;

Please note that the list above is not exhaustive and other types of practices, given their form, extent or nature may be assessed by the Competition Council under the rules applicable to identifying an abuse of dominance.

5.4. Sanctions

The anti-competitive practices entail administrative, criminal or civil liability. Breaches of the Competition Law and/or TFEU are sanctioned through Decisions issued by the Competition Council Plenum or, in certain cases, by a Commission (consisting of 3 members) to which the Plenum delegates this attribution. The offending companies may be fined up to 10% of their total turnover derived in the year previous to the sanction being issued. Fraudulent intention and in a determinant manner of a natural person in an anticompetitive agreement breaching the provisions of Art 5 of the Competition Law may be punished by jail from 6 months to 5 years or a fine and the prohibition of certain rights. Furthermore, any natural or legal persons which have suffered any losses attributable to an anticompetitive conduct have a right to action in court against the offending companies.

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

Finally, through recent reforms, the sphere for cases where a reduction of fines may be obtained when admitting infringement and access to files granted, has been considerably enlarged. Previously this reduction only applied to breaches of Article 5 and 6 of the Competition Law. Following the said reforms, mitigating circumstance applies also in cases of failure to notify an economic concentration before implementation, of implementing an economic concentration before a non-objection decision was issued or in breach of a prohibitive decision and in cases of non-compliance with an obligation, condition or measure imposed by decision under the Competition Law. Moreover, the maximum level of the reduction in case of

acknowledgement is 30% of the fine. Partial acknowledgements may be received by the Competition Council which has sole discretion in accepting them should it consider them incomplete.

6. Unfair competition

The acts of unfair competition, as well as penalties applicable to entities committing such acts are identified mainly in Articles 2 – 5 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) denigration of a competitor or of its products/services, by means of communication or distribution made by the corporate entity or its representative/employee of untrue information on the activity of a competitor or its products which may harm its interests;

(ii) diversion of a corporate entity's customers by a current or former employee/representative or any other person by using certain trade secrets. Provided the corporate entity has taken reasonable measures in order to ensure their protection and whose disclosure may harm the interests of the said corporate entity;

(iii) any other commercial practices which breach the principles of fair dealing and good faith, and either causes or may cause losses to any market participant.

Furthermore, 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) use of a business name, a logo or a package that may induce a confusion with those legitimately used by another corporation;

(ii) use of commercial purposes the results of experiments or other related confidential 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;

(iii) 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, provided this affects the commercial interests of a legal person;

(iv) disclosure 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, provided this affects the commercial interests of a legal person;

(v) the use, by one of the subjects identified in Art 175 (1) of the Criminal Code, of commercial secrets as a result of a person's office, provided this affects the commercial interests of a legal person

(vi) 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.

Following the 2011 amendments to the Competition Law, the Competition Council is vested with the right to enforce the provisions of the Unfair Competition Law and sanction any breaches of the said provisions with fines of up to 50.000 lei (approx. EUR 11,100) (in case of a legal person) or up to 10.000 lei (approx. EUR 2,200) (in case of a natural person). This is dependent on the infringement.

Following 2014 amendments, the Competition Council has a high degree of discretion when it comes to choosing unfair competition cases to pursue. They are entitled to reject a complaint outlining unfair competition practices if it finds that the effects of the conduct in question are minor. They take into account the gravity of the conduct, the circumstances in which it occurred and the importance of the affected economic sector to the national economy. Presumably, the Competition Council will be more open to cases in which the alleged unfair competition conduct falls within the two specific types of unfair competition conduct identified above.

Uniform application of all provisions governing direct and indirect unfair competition practices will be supervised by a newly established entity, the Inter-ministerial Council for Fighting Unfair Competition Practices. This body will include representatives of the Ministry of Finance, the National Audiovisual Council, the National Consumer Protection Authority, the State Office for Inventions and Trademarks and the Copyright Protection Regulatory Authority. Although not yet vested with an exhaustive set of prerogatives, this body will be tasked with applying public policy in fighting unfair competition and providing analytical support.

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 which came into force on 1 January 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 to the existing aid. Whereas the existing aid was not subject to any prior authorization by the Competition Council, the Competition Council had to be notified of any measure amounting to new aid and authorized by it 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 to reach the standards imposed by the European Commission , Law No. 143/1999 was amended in 2004, export aid and aid mitigating the charges or debts of a company towards the state budget (i.e. operational aid) were explicitly prohibited. Further to that amendment, the Competition Council was able to authorize financial support granted by the State or through State resources based only 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 constituted unlawful aid and could have been subject to a recovery order. This could result in 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, recovery orders were also issued with respect to state aid illegally or unlawfully granted.

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 1 January 2007 (the "GEO No. 117/2006"). The Law No. 137/2007, published in the Official Gazette No. 354/24.05.2007, amended the GEO No. 117/2006 and was, likewise, repealed by the Emergency Ordinance No. 77/2014, published in the Official Gazette No. 893/09.12.2014 and entering into force on 1 January 2015 (the "GEO No. 893/2014"). Such legislative framework was, in turn repealed via Government Ordinance No. 77/2014 on national proceedings in the field of State Aid, as amended and approved via Law No. 20/2015. Therefore, at present, national proceedings in the field of State Aid have been modernized in terms of the Competition Council's role as contact authority, but rest on the same principles that the European Commission is the sole approval authority on State Aid grants.

According to GEO No. 893/2014, starting 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.

Thus, the Competition Council acts as the national contact authority between the European Commission and Romanian authorities and public institutions, other aid providers and beneficiaries of aid involved in State aid procedures. The Competition Council also provides specialized assistance in the field of State aid to authorities, other providers and beneficiaries of aid, to ensure fulfillment of the obligations assumed by Romania in this field, as a member state of the European Union. Furthermore, the Competition Council may initiate, at the request of the supplier/initiator consultations with the European Commission and notification covering support measures projects able to constitute State aid.

Therefore, further to 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, 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 only being binding on 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 that the Act of the Accession of Romania and Bulgaria (the "Accession Act") 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 according to 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 fulfil 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. This 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 it only came into effect upon the date of accession.

When 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 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 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 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 a legal basis. The European Commission may investigate and eventually order the recovery of any aid granted by the State after the 1st of September 2004.