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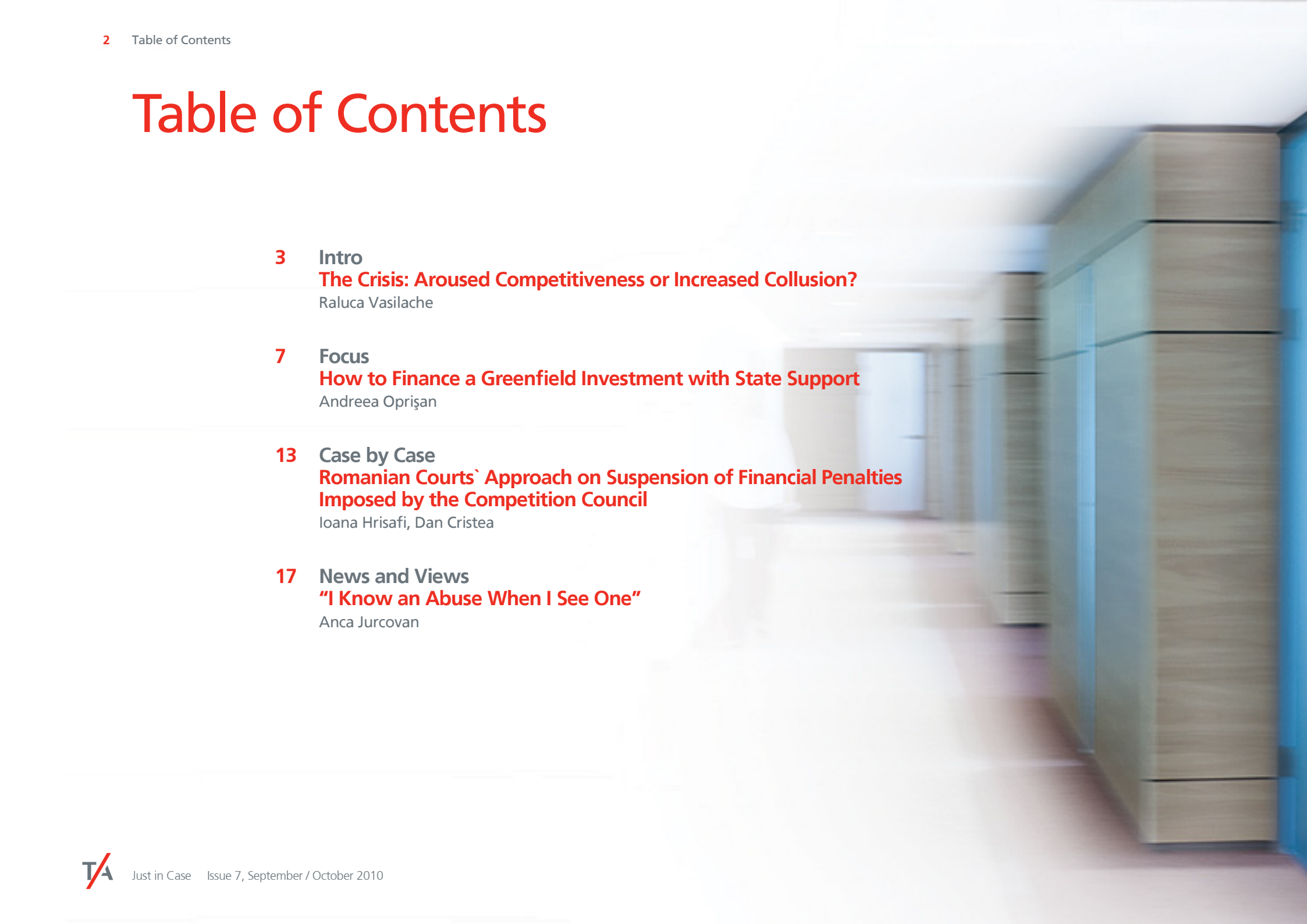

Intro

- The Crisis: Aroused Competitiveness or Increased Collusion?

The Crisis: Aroused Competitiveness or Increased Collusion?

Towards the end of 2008, signs that a major and imminent financial and economic crisis will shake the world became increasingly visible in Romania's economic environment.

It became clear that we were about to experience first hand what we only knew from books: exactly how an economic disaster affects the market economy as a whole and more particularly what its impact on the conduct of undertakings at various levels looks like.

If 2009 was a difficult year, 2010 proved things can get worse, especially for the corporate sector.

Anticipating certain tensions in the market, our law firm launched extensive trainings for clients, in an attempt to keep them out of the red flagged areas of anticompetitive conduct. We thought it only reasonable to assume that, with a decrease in consumption and a decline in prices, players in the market could become tempted to forget their "manners" and get involved in anticompetitive actions, such as some vertical or horizontal practices.

One then feels entitled to ask—What is the competition authority doing in such shaky times? Is it willing to apply a more lenient policy towards certain conducts that are pushing the legal boundaries (or even breach the law)? Or, on the contrary, is its monitoring of the players' actions in the market more relentless?

In May 2009, the Competition Council announced its new president, alongside several other new members in the Plenum (the supreme body of the authority).

The competition watchdog has been far more active ever since, and expressed more concern about legal norms and factual situations which involve competition issues than ever before.

Looking back, one could reasonably argue that the Competition authority`s activity has reached its peak level during these past 12 months. →

First Measure: Ensuring Stronger Public Transparency Through Permanent Communication

The new President of the Competition Council became a constant presence in the public eye, talking openly about the authority's immediate agenda and various hot issues being debated in several economic areas. Whenever a topic that risked involving anticompetitive behaviour came to its attention, the Council issued public warnings to the parties concerned, in order to reshape their actions.

Second Measure: Showing a Lot More Willingness to Discuss Matters Referring to Pending or Potential Cases

The Council's new management employed a straightforward manner in addressing issues under the authority's scrutiny. At the same time, the authority remained strict on sanctioning unlawful conducts and, steering away from raising suspicions that it might be granting favours to third parties, it kept an open door for dialogue with the players, allowing them to discuss and argue on public or confidential matters and, more, to express their views or qualifications on specific topics. Informal guidance was therefore provided when and where it was appropriate and it did not interfere with the authority's duties in identifying and sanctioning obvious anticompetitive practices.

Third Measure: Initiating Public Consultations on New Legislation so as to Improve the Efficiency and Transparency of the Regulatory Process

Starting August 2010, the Emergency Government Ordinance No. 75/2010 amending Competition Law No. 21/1996 entered into force. At the same time or, in some cases, shortly after, the Competition Council issued various guiding rules seeking to further strengthen the legal framework. Drafts of these enactments were published on the authority's website for public consultation even prior to being passed. Some of the amendments put forward by the business community were included in the final binding version.

To date, it is no overstatement to say that the legal framework on competition responds to a larger extent than before to the economic realities and to the EC competition regulations.

Fourth Measure: Assuming a Far More Direct Involvement in the Drafting (or Amending) of Legislation that is Susceptible to Give Rise to Anticompetitive Practices

From retail to the banking sector or private pension funds, ex officio or at the request of the parties concerned, the authority has publicly expressed its views on various laws and has put in the necessary effort to implement amendments that would create or enhance the competitive environment in the Romanian market. Although not easily accepted by the Romanian authorities enforcing such laws or by the companies subject to their provisions, the Competition Council was adamant in all confrontations.

> "While no major investigations have been opened in the last two years and only one has been finalized in 2010 so far, it is reasonable to say that the authority was more active than ever.

Fifth Measure: Speeding—up the Investigation Procedures

A significant number of investigations on potential anticompetitive practices are currently on the authority's radar screen. Internal team directives called upon firmer and shorter deadlines for the finalization of such inquiries than before. If previously there were investigations that lasted more than 4 or 5 years, the authority now aims at concluding new investigations within approximately 2 years from commencement.

While no major investigations have been opened in the last two years (except for an investigation on banking and inter—banking services and an investigation concerning the pharma distributors, both initiated in October 2008 at a time when the respective industries were confronted with major →

difficulties caused by the economic crisis), and only one has been finalized in 2010 so far, it is reasonable to say that the authority was more active than ever. Actively involved in understanding and correcting market tendencies where necessary, and also focused and reliable, the Romanian Competition Council seems to have a stronger commitment to becoming a point of reference and a real guidance for the players in the Romanian market and for the regulatory or supervisory authorities.

The modernization and emancipation of the national competition watchdog are hopeful signs that not only is the Romanian institutional system carrying on during the current economic downturn, but even more, that it is trying to ensure the right competitive environment to heal the wounds of the recession.

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Focus

- How to Finance a Greenfield Investment with State Support

How to Finance a Greenfield Investment with State Support

With the world economy showing signs of modest but constant recovery from the large—scale quake caused by the financial and economic crisis, companies shift from a wait—and—see attitude to making investment plans[1].

Once a specific sector has been chosen for investment, a potential investor will have to face a number of questions in articulating and developing the overall business plan on the prospected investments. This article deals with such questions and, most importantly, it provides answers that we hope you will find useful in your future investment plans.

Where Should the Investment be Placed?

As for the "where" question, emerging and transition economies appear to be a suitable target.

According to the UNCTAD, emerging and transition economies attracted half of the global foreign investment inflows and invested one quarter of the global foreign investment outflows in the first months of 2010.

Contrary to investments by way of acquiring a pre—existing company (for which the necessary funding is generally made available by the investor from its own funds and/or by bank financing[2]), investing in a greenfield project may draw State support benefits, as States are under a constant competition in offering incentives aimed at attracting such type of investments.

Notably, the support is not granted for the greenfield investment as a whole, but for certain components of the investment only, such as job creation, investments in tangible and/or intangible assets defined as eligible costs (e.g. employee—related costs for a certain period of time, or costs related to acquiring equipment, or the costs related to building a production unit).

> "This article deals with the questions that investors should raise when deciding upon an investment location and, most importantly, it provides answers that we hope such investors will find useful.

Until mid—2008, following the trends established before the crisis, Romania certainly qualified as a suitable investment location. The recent economic developments support this conclusion. According to the UNCTAD, Romania attracted 81 greenfield investments→

1. According to the United Nations Conference on Trade and Development ("UNCTAD") in its 2010 World Investment Report (Investing in a low—carbon economy), global foreign direct investment ("FDI") witnessed a modest, but uneven recovery in the first half of 2010. This sparks some cautious optimism for FDI prospects in the short run and for a full recovery further on. UNCTAD expects global inflows to reach more than USD 1.2 trillion in 2010, rise further to USD 1.3–1.5 trillion in 2011, and head towards USD 1.6–2 trillion in 2012. However, these FDI prospects are fraught with risks and uncertainties, including the fragility of the global economic recovery.

2. Further to the acquisition, undertakings may benefit from State support aimed at developing the project through State aid and European funding.

in the first four months of 2010, which makes 6% of the total greenfield investments made in Europe. Romania thus is ranking 1st in Central and Eastern Europe, and 6th in the European Union among the countries that attracted greenfield investments[3].

What Government/State Support Incentives for Greenfield Investments are Available in Romania?

Depending on the funding source, greenfield investments may benefit of:

- Support granted by the Romanian State from its resources based on a State aid scheme or an individual ad hoc aid (i.e. granted in the absence of a pre—existing State aid scheme). Such schemes are made available to private investors—large enterprises and small and medium size enterprises ("SMEs") usually in the form of non—refundable grants. Further incentives, such as the benefit of accelerated depreciation, local tax exemption, deduction of fees due by the employer to the State budget for its employees, may also be granted. Special advantages may be offered to industrial park investments made in sectors which benefit from a State aid scheme. All such measures qualify as State aid and are subject to the European regulations directly applicable in Romania and under the control of the European Commission;
- Support granted from European Funds (jointly with funds made available by the Romanian government) based on Sectoral Operational Programmes ("SOP") which are structured on social areas of interest (e.g. regional development, economic competitiveness, human resources, environment, transportation, rural development, support for the State administrative bodies). In contrast to State aid measures, the European Funds are not intended solely for private investors, but also for State administrative bodies or NGOs; however, as a matter of rule, State aid principles are also applicable to EU funding.

There are many State aid and European Support granted from European Funds (jointly with funds made available by the Romanian government) based on Sectoral Operational Programmes ("SOP") which are structured on social areas of interest (e.g. regional development, economic competitiveness, human resources, environment, transportation, rural development, support for the State administrative bodies). In contrast to State aid measures, the European Funds are not intended solely for private investors, but also for State administrative bodies or NGOs; however, as a matter of rule, State aid principles are also applicable to EU funding schemes in place in Romania, covering various sectors, as well as incentive benefits aimed at supporting new investments, creating jobs, regional development, environmental protection or employee training.

> "There are many State aid and European Support granted from European Funds in place in Romania covering different areas of activity and incentive benefits.

This is why, prior to the actual implementation of the greenfield project and before engaging into binding legal agreements and begin related payments, it is strongly recommended that the interested investor performs a thorough study of the opportunities for public funding that are available. In doing so, the interested investor should keep in mind, among others, that (i) not all investment costs are eligible for public funding; (ii) as a rule, public support→

3. Source Curierul National newspaper of 26th of July 2010 citing UNCTAD sources

depends on a pre—existing investment project which is not to be implemented until the State agrees to provide funding; (iii) there are certain restrictions or conditions governing investments in certain sectors (e.g. coal and steel, synthetic fibbers, agriculture) or depending on the legal status of the undertaking that makes the investment (e.g. large enterprise or small and medium size enterprises).

However, funding may only be provided for investments performed in Romania, or by Romanian undertakings, and only for a part of the investment up to an intensity threshold[4]. The remainder of the expenditure (amounts exceeding the intensity threshold and the non—eligible costs) is financed by the investor and/or the bank. Also as a rule, the funding should be provided upfront by the investor, and only subsequently covered by the State (from national and/or European funds up to a previously approved threshold).

As regards State aid schemes that currently apply to greenfield investments, initial investments (i.e. investments in tangible and intangible assets relating inter alia to setting up new establishments) exceeding certain value thresholds and creating a specific number of workplaces may benefit from State funding under Government Decision No. 1680/2008 implementing a State aid scheme aimed at supporting sustainable economic growth[5] and Government Decision No. 753/2008 implementing a State aid scheme on regional development by stimulating investments[6] up to a gross intensity of 50% for investments performed in Romania, except for investments made in Bucharest and Ilfov County, where the intensity threshold is at 40%. An absolute value threshold is also provided.

> “ Aid is granted further to an application submitted by an undertaking and based on an approval in principle issued by the relevant authority.

The industrial parks support scheme is designed for the undertakings making an initial investment in an industrial park. Under such scheme, the following fiscal incentives are made available to investors: building tax exemption, land tax exemption, exemption from the payment of taxes related to the modification of the legal category of use of the land belonging to the industrial park or related to withdrawing such land from agricultural use.

Aid is granted further to an application submitted by an undertaking and based on an approval in principle issued by the relevant authority and attesting that the project meets the applicable criteria for benefiting from an aid, subject to an in—depth assessment.

In case that, based on an ex ante analysis, the envisaged greenfield project appears not to qualify under the State aid schemes already in place, the investor may consider approaching the government for the purpose of obtaining public support (individual/ad—hoc aid) in connection to the project. However, such support would require clearance from the European Commission based on a notification submitted by the Romanian State, as grantor of the aid.

As regards the European Funds, as mentioned above, they are made available (as a rule, under the form of a grant) by reference to the sectors included in the SOP and further divided into sub—programmes and projects. The SOPs on the increase of economic competitiveness[7] and on the development→

4. As a rule, the intensity threshold is set to 50% for investments performed in Romania, except for investments performed in Bucharest and Ilfov County, in which case the intensity threshold is set at 40%; for SMEs, the threshold is increased by 10% to 20%
5. The scheme is open to (i) investments from EUR 10 to EUR 20 million and creating at least 100 workplaces, (ii) investments exceeding EUR 20 million and creating at least 200 workplaces, and (iii) investments over EUR 30 million and creating at least 300 workplaces
6. The scheme is open to large enterprises when the value of the investment is higher than EUR 100 million, the eligible costs exceed EUR 50 million and it creates at least 500 workplaces
7. The main objective of the programme consists in the increase of Romanian companies' productivity and market competitiveness. The main investments benefiting from funding under this programme are production capacity, (green) energy, R&D, IT and communications while tourism is also a focal point

of human resources[8] are of relevance for a greenfield investment.

Before initiating the investment project, EU Fund applicants should firstly identify a support measure suitable for their investment and establish whether such measure is available by reference to the legal status of the investor (i.e. large enterprise or SME) and the eligible expenditure of the investment covered under the programme. Secondly, they should identify the applicable period within which the project must be submitted to the relevant management authority and make sure funds are still available for the respective investment year. As a rule, projects may only be filed during periods established by the management authority. However, there are certain programmes for which investors may apply on an ongoing basis. As mentioned above, EU Funds must be considered in computing the maximum admissible level of State aid intensity, and must observe the cumulation rules. The verification is made on the basis of the programme documentation and particularly on the applicant's guidelines. Should the project meet the applicable criteria, a funding application is to be filed with the management authority [9].

Depending on the provisions of SOP and the applicant's guidelines, the application must be accompanied by a series of documents mainly relating to the project and the good standing of the investing company (e.g. financial and economic analysis of the project; risk assessment; feasibility study; documents attesting that co—financing of the project is available; accounting books; letter of good standing from a reputed bank; proof of absence of debts towards the Romanian State Budget and, where applicable, technical project, building permit; environmental authorization; ownership or concession deed). In some cases, the application may be submitted online.

The application is assessed by the competent administrative authorities. In case the project qualifies for funding, a financing agreement is signed and funding is made available according to the POS and the provisions of the agreement. The funds are generally released by the State after the investor has paid the eligible costs of the investment. In some cases, certain expenditures benefit from pre—financing.

We are currently at the middle of the time period for which EU funding is made available (i.e. 2007—2013). After a rather cautious start, the Romanian authorities in charge with applying the projects and the potential beneficiaries have by now gained plenty of experience in EU funding and are taking action in order to avoid the errors from past applications. In practice, the most common errors to be avoided in the applications for EU funding are the following:

- Errors related to the administrative preparation of the application file (e.g. failure to attach certain mandatory documents or to sign the application, failure to identify correctly the sector for which financing is requested, attaching expired authorizations and certificates to the application file);
- Miscalculation of the project objectives (e.g. the envisaged performances cannot be achieved in the proposed timeframe);
- Absence of a detailed analysis in the investment plan, in the application or in other relevant documents attached thereto;
- Incorrect structure of the project budget in connection to the eligible and non—eligible costs[10];
- Unrealistic financial estimates or project accomplishment timeframe estimate. →

8. The programme focuses on supporting the training of employees, thus increasing their competitiveness, reducing unemployment and leading to added value for the employer. It is also aimed at supporting the employment of a category of personnel facing difficulties in being employed (e.g. disabled workers, newly graduates)

9. The application letter is standard for each programme and sub—programme

10. Eligible costs may be different from a sub—programme to another and are listed in SOP and the applicant's guidelines

When an investor intends to implement a project which mainly envisages costs that are not eligible for European funds, or if the project cannot qualify for such funding based on the SOP and the applicant's guidelines, it may apply for funding under available State aid or vice versa.

Romania has public support measures in place (State aid and EU Funds) aimed at offering financing alternatives to greenfield investors, incentivizing undertakings interested to invest in such projects to actually implement the projects.

In this context, the investor should assess, prior to initiating the project, which are the public funding opportunities applicable to its type of project and file a funding application with the relevant authority. In this case, the description of the project and the business plan are key factors in the success of the public funding application.

Nevertheless, the investor should keep in mind that there are certain thresholds for EU Funds and State aid. These thresholds indicate the maximum level of financing that can be granted from such resources. Thus, the project will not be entirely financed with public support. The threshold is determined for the same eligible costs and takes into account all forms of public support (i.e. both State and EU funds).

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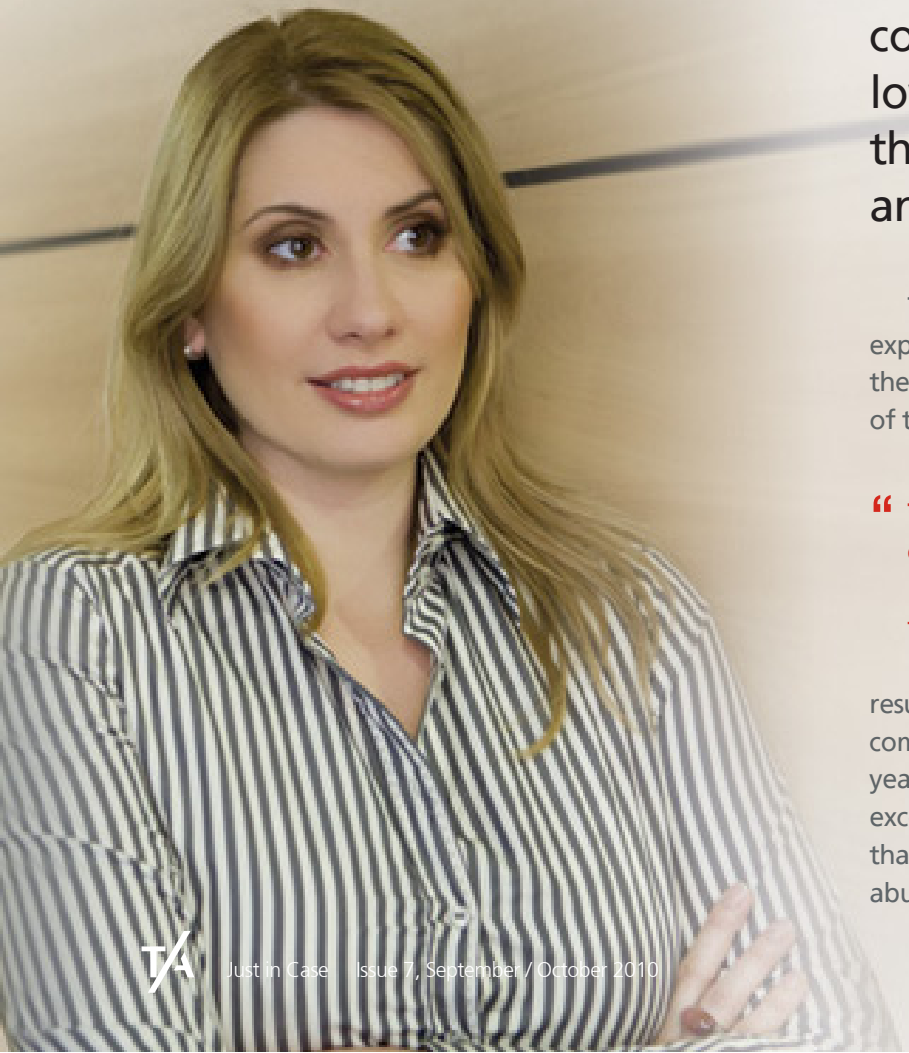
Case by Case

- Not So Fine with a Fine: Romanian Courts` Approach on Suspension of Financial Penalties Imposed by the Competition Council

Not So Fine with a Fine: Romanian Courts` Approach on Suspension of Financial Penalties Imposed by the Competition Council



Often times, fines are taken lightly by Romanian companies: misdemeanor fines are considered to be at the lowest level in Europe, labor fines cause barely a stir, but let the Competition Council show up for applying a penalty, and the entire management board will be on alert.

The situation described above has a simple explanation: Romanian competition law allows the Council to impose a penalty of even 10% of the company's last annual turnover as a result of uncovering a breach to applicable competition legislation. In real terms, past years have seen the Council ask penalties exceeding EUR 5 million in several instances that related to alleged cartel agreements or abuse of dominant position.

> "Top on the list of any advice—seeking company is the discovery of means to urgently restore the situation prior to the Competition Council`s investigation.

Top on the list of any advice—seeking (and, undoubtedly, worried) company is the discovery of the available means to urgently restore the situation existing before the Council's investigation, until an impartial court will have a say as to the legality of the penalty. In a litigation lawyer's own terms, an urgent objective is to obtain the suspension of the Council's decision until an irrevocable award is given upon the main claims of the company as to the unlawfulness of the Council's investigation.

How to do that?

First of all, the provisions of competition law show that any challenges (suspension requests included) have to be submitted to→

the Bucharest Court of Appeals, within a 30—day term from the moment the Council's decision was served to the contesting party.

Then, two substantial criteria have to be met in order for a court to be persuaded that suspension of the obligation to pay the fine is in order: (i) the existence of a well—justified case, and (ii) the existence of an imminent damage[1].

The latter criterion is often times undemanding: the sheer magnitude of the fine is self—explanatory of the damage it may cause to the company, should the investigation be unlawful. Companies regularly use accounting documents such as balance sheets, trial balances and profit/loss accounts in order to show the dramatic impact that such a fine would have on the debtor's current economic standing.

The former criteria, however, provides more legal hassle. The existence of a well—justified case criterion is met when, according to the law, "the presumption of legality of the administrative act is reasonably put to doubt by factual and legal circumstances"[2]. This, of course, presupposes that a main challenge against the act be filed prior or simultaneously to the submission of the suspension claim—the reasons put forward in such challenge, and referred to in the suspension claim should create a prima facie case for the unlawfulness of the Competition Council's decision.

Alongside the criteria of substance, the company seeking suspension of the Competition Council's fine will also have to fulfill a burdensome procedural prerequisite: pay a bail amounting to 30% of the penalty. This requirement, introduced through an August 2010 amendment to the competition law, poses serious problems as to the access to justice in cases of a significant fine. For instance, should the Council decide to impose a EUR 7 million penalty, as it has done in the past, the mere analysis of a suspension will see the applying company provide a bail of more than EUR 2 million. The above—stated line of argument can be used to show that such a legal provision breaches fundamental citizen rights of due process, and it is a safe bet that the Romanian Constitutional Court will hear a case on the constitutionality of this bail requirement in the following year.

> "Two substantial criteria have to be met in order for a court to be persuaded that suspension of the obligation to pay a fine is in order.

And now for the good news… Romanian courts have proven to be receptive towards companies that seek suspension of Competition Council`s decisions until court judgment on the merits of the penalty. This complies with a 1989 Recommendation made by the Council of Europe Committee of Ministers to all Member States, stating that "immediate execution in full of administrative acts which have been challenged or are about to be challenged may, in certain circumstances, prejudice the interests of persons irreparably in a way which, for the sake of fairness, should be avoided as far as possible. […] The aim behind provisional court protection is not to hinder the efficiency of public authorities' actions, but rather to preserve the fairness which should prevail in relations between individuals and the Administration"[3].

Such recommendation has been endorsed by the Romanian Supreme Court's jurisprudence, which asserts that "the proving of a well—justified case [as a prerequisite to the suspension of Competition Council's fines — ns.] does not require the presentation of clear evidence as to the unlawfulness of the Council's investigation, as such requirement would amount to prejudging the merits of the case". In the same case, the Supreme Court acknowledged that "the existence of an imminent damage caused by the immediate execution of the fine is satisfactorily shown→

1. Both criteria are provided by art. 14 para. (1) of Law No. 554/2004 regarding administrative disputes
2. The definition is stipulated by art. 2(1) t) of Law No. 554/2004 regarding administrative disputes
3. See Recommendation No. R (89) 8 of the Committee of Ministers to Member States on provisional court protection in administrative matters

not in consideration of the penalty amount in itself, although such amount is undeniably significant, but in view of the business specific, of the way the company has built up its assets and of the interests of the people the company represents, who would be directly affected by a scenario presupposing immediate enforcement of the fine, as such enforcement could trigger even the close—down of the company"[4].

In summary, procedures of suspension in competition litigation have enjoyed a positive feedback from Romanian courts, especially given the magnitude of the fines imposed by the Competition Council. However, this picture is about to become bleaker, due to the Romanian legislator's recent decision to introduce a 30% bail prerequisite for the filing of any suspension request. Companies which are confident in the fairness of their claims will have a tough time in finding means to advance 30% of a Council penalty at once—they might have a tougher time still if such penalty is enforced without opposition.

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4. See Romanian Supreme Court, Fiscal and Administrative Disputes Section, Decision No. 3015/ 23.11.2008

News and Views

- "I Know an Abuse When I See One"

"I Know an Abuse When I See One"

... seemed to be the stance taken by the Romanian Competition Council in 2006, when it found UPC liable of abusing its dominant position on the TV cable market by "imposing increased tariffs not justified by cost growth".

The competition authority argued that UPC had breached its contractual commitment with subscribers according to which tariffs were to be adjusted in line with cost increases. The authority investigated the monthly tariffs and costs registered by UPC during a 4—year period and characterized as "unfair" the price increases not accompanied by a simultaneous cost raise.

Since the proof of abuse did not relate to the level of prices but rather to a lack of synchronization between prices and costs increase, the Competition Council claimed that the case was not pursued on excessive tariff grounds but on unfair pricing imposed to subscribers, the latter being a distinct form of abuse of dominant position under article 6 of the Competition Law[1].

We now fast forward another three years and ... a trial later to see the Bucharest Court of Appeal overturn the Competition Council`s finding of dominant position abuse upholding that the market definition employed by the authority was too narrow and inconsistent with the previous case law[2].

The court went audaciously further and held that the Competition Council failed to provide evidence that prices were unfair by reference to the EC standards according to which unfair prices are either excessively high (excessive pricing) or too low (predatory pricing). UPC had neither achieved higher profits by reference to its main competitor RCS&RDS nor applied higher tariffs in the areas not overlapping with other competitors' networks. Moreover, the court held that→

1. Article 6 of the Competition Law No. 21/1996, letter a) prohibits unfair prices and commercial conditions while letter e) puts a ban on excessive or predatory prices
2. The TV cable market was defined at local level and each service provider was considered a monopolist in the city areas not overlapping with the other cable operators' networks; the court dismissed this narrow market definition inconsistent with its previous case law and held that UPC was not a dominant player since it only held less than 25% on the national market of TV cable services

the monthly analysis of costs was irrelevant, a cost analysis made on a sufficiently long term to catch the seasonal variations of service costs being more appropriate.

What`s Unfair Unless Excessive?

The court`s approach is reasoned from an economic perspective: unfair prices must relate to the level of prices as being excessively high as to exploit clientele or exclude competitors or irrationally low, below costs, predatory towards competitors. As far as exploitative prices are concerned what would be unfair unless excessive? The fact that a dominant company breaches the price adjustment mechanism agreed with its clients may trigger the contractual or consumer protection liability but cannot substantiate an abuse of dominant position if the increased prices are still at a competitive level.

What is the Competitive Level of Prices Dominant Companies Must Care For?

Quite often, identifying the competitive price benchmark against which the dominant firm's prices should be appraised proves difficult in practice. A first test would be to compare the price charged for a product and the cost for manufacturing such product. Under EC law, a price was considered to be excessive "because it has no reasonable relation to the economic value of the product supplied". "The excess could, inter alia be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin"[3].

In industries such as pharmaceutics and IT which involve heavy and risky investments in intellectual property rights, price may significantly exceed the unit cost of production given the need to recover upfront investments.

> "The European Commission has rarely intervened on pure excessive pricing grounds, i.e. resulting in the exploitation of customers.

While profits are then the reward of innovation, the difficulty lies in assessing what an appropriate reward by reference to the risk involved is. For this reason, under US Federal Law there is no excessive pricing offence, as the regulator chose a non—interventionist approach, believing that monopolist's profits shall spur innovation by competitors and attract new entry on the market and that, eventually, the problem will be solved by competition.

Moreover, in industries where demand is cyclical, prices may vary depending on the level of demand. Where demand is significantly above industry capacity, increased prices reflect normal competitive behavior and the fact that customers value more and are willing to pay more for the under—produced commodity. When difficulties related to the internal cost allocation arise, a comparison of prices can be made across various services offered by the dominant firm. Based on this test, the European Commission found Deutsche Post's prices for onward transmission of cross border mail as excessive by reference to the domestic tariffs. Other tests for excessive pricing may consist in comparisons across different firms in the industry (this test was applied by the Bucharest Court of Appeal in UPC`s case) or different geographical markets. Without having a universal application, all such tests need to be addressed with care, given the relevant differences among the terms compared and the specificities of each case. This explains why the European Commission has rarely intervened on pure excessive pricing grounds, i.e. resulting in the exploitation of customers. More often, the Commission focused on unfairly high prices applied by vertically integrated dominant companies, having exclusionary effects towards competitors (margin squeeze abuses).→

3. Decision of the Court of Justice in United Brands case 27/76 [1978]

The test is somehow more obvious in such cases: margin squeeze occurs where a dominant firm sells to competing downstream firms at a wholesale price that, given the prevailing retail prices, does not allow even an efficient downstream firm to cover its cost.

Under the Romanian competition law, given the distinction of unfair prices and excessive prices as two separate forms of abuse, perpetuated under the recent law revision in August 2010, a larger grey zone still floats on what is illegal or not. Failure to make a clear—cut distinction leaves room for the Romanian Competition Council`s "I know an abuse when I see it" approach, providing for little legal certainty on how dominant companies should price their products on the Romanian market.

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/ **The materials included herein are prepared for the general information of our clients and other interested persons. They are not and should not be regarded as legal advice.**

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