

# Recent developments in antitrust field in Romania relevant for the international practitioner

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64

## General enforcement policy

Throughout its 10 year record, the Romanian Competition Council applied fines amounting in aggregate to €80 million for the infringements of the domestic antitrust rules. However, the largest part of this amount has been applied during the last few years. This is because, mainly starting 2004, the Competition Council accelerated its inquiries and the related decision-making process and also raised the fines level imposed on the players found 'guilty' of anticompetitive practices. The authority mainly focused on cartel participants in fast moving products industry, cement industry, telecom sector, but also on dominant players, such as former state monopolist railway freight carrier, TV cable operators, etc.

In addition, the Romanian courts are proving more efficient in censoring the Competition Council's assessments and recently overturned some important cases standing as 'big hits' in the enforcement practice of the Competition Council in 2005 and 2006. However, the national courts prove more 'audacious' in dismissing the Competition Council' arguments based on procedural grounds, and rather still reluctant in

going into complex analysis on the merits of an antitrust case.

## Cartels

Price fixing within fast moving consumer products distribution networks

In Colgate Palmolive Case<sup>1</sup>, the Competition Council applied fines of approximately €4.2 million against Colgate and four of its distributors under the charge of indirectly fixing the minimum resale prices in 1999, both as vertical price fixing involving Colgate and as horizontal agreement between the distributors.

The Competition Council's decision has been recently overturned on procedural grounds by the High Court of Cassation and Justice<sup>2</sup>. The Court held that the 6 month statute of limitation period provided by the framework legal enactment on administrative offences (Government Ordinance no. 2/2001) is applicable and denied application to the special limitation period provided in the Competition Law no. 21/1996 (i.e. five years). That is because, at the date when the infringement took place, the special limitation term had not been yet introduced in the Competition Law no. 21/1996. The High Court reached this conclusion, by giving effect to principle regulating the application in

time of the status of limitation laws: since the main cartel evidence, convention fixing the discounts dated back in 1999 while the special term of 5 years applicable for antitrust infringements was introduced later on in 2004 in the amended Romanian Competition Law no. 21/1006, the general term of 6 months (starting the termination of the anticompetitive practice) was found applicable.

## Grey cement cartel case

Carpatcement recently succeeded to win, before the Romanian High Court of Justice, the appeal against the Council's decision fining the three Romanian cement producers, Lafarge, Holcim and Carpatcement which were found guilty of a price fixing cartel<sup>3</sup>. The Supreme Court argumentation (yet to be published) will show whether the Competition Council's decision was overturned on procedural grounds or the evidence standard supported by the antitrust authority on the cartel activity was found unsatisfactory by the court.

## Abuse of dominant position

In the field of abuse of dominant position (i.e. article 6 of the Competition Law), the Competition Council took rather original approaches, by imposing rules even stricter than the

ones passed at EC level.

Indeed, article 6 of the Romanian competition law provides for a list of potential forms of abuse more detailed than the correspondent article 82 of EC Treaty. Exempli gratia, in addition to a case similarly regulated both by article 6 of the national law and by article 82 of EC Treaty (i.e. letter a) 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions'), letter e) of article 6 of the Romanian competition law provides, as a separate case, the excessive or predatory prices. The Competition Council gave a recent interpretation to this distinction, inferring that, 'unfair prices' is a stand-alone concept under the Romanian antitrust law, different from 'excessive prices or predatory prices' as traditionally perceived under EC practice. The Competition Council based on such distinction its ruling in a recent case involving the cable TV operators in Bucharest.

After almost 5 years of investigation, the Competition Council issued at the end of 2006 a decision concerning certain anticompetitive practices on the cable TV services market in Bucharest and Timisoara<sup>4</sup>. In Bucharest case, two of the four market players were found guilty of abuse of dominant position

<sup>1</sup> Competition Council's Decision no. 124 of 11 July 2005.

<sup>2</sup> High Court of Cassation and Justice, Decision no. 2720 of 25 May 2007.

<sup>3</sup> High Court of Cassation and Justice, Decision no.1358 of 5 March 2007.

<sup>4</sup> Competition Council's Decision no.237 of 12 December 2006.

<sup>5</sup> In total contradiction with its previous decisional practice, both in ex ante and ex post

assessments, where the relevant market of TV cable services was considered on national level, the Competition Council concluded that where a cable operator's network does not overlap with any other competitor networks, such operator is automatically found dominant. As such, even a small operator covering less than 4% of the aggregate number of subscribers in Bucharest was found dominant and fined.

by "imposing increased tariffs not justified by the costs growth".

Besides the fact that each operator acting on cable TV services market in Bucharest was considered as a dominant player, the specificity of this case lies in the odd way in which the 'unfair' pricing was assessed. The authority investigated the tariffs policy during a 4 year period and compared, on monthly basis, charged prices and the related costs. By extracting the months when the prices went up but the costs went down, the Council found such proof sufficient to

characterize as 'unfair' the prices charged by the operators as an abuse of dominant position. The parties argued that the Council's cost analysis conducted on monthly basis was irrelevant and that a simply lack of monthly synchronization between costs and prices increases could not define an abuse.

In fact, the Competition Council did not apply any of the criteria usually considered for determining excessive pricing, as explained by the authority in its guidelines applicable for electronic communications & telecom

sector (i.e. comparison with the competitors prices, with the usual industry profit margin etc), but innovated this peculiar criterion, i.e. comparison on monthly basis of prices vs. costs and attached it to the concept of unfair prices.

The case is currently under the review of the Bucharest Court of Appeal. In defending its ruling, the Romanian Competition Council seems to rely on the provisions of Council Regulation (EC) no. 1/2003 according to which a Member State could adopt and apply on its territory stricter national competition laws which

prohibit or impose sanctions on unilateral conduct engaged in by undertakings. Even if Regulation 1/2003 apparently leaves room for the domestic authorities to treat more strictly unilateral abusive behaviors, its scope of application is still arguable: whether it also encompass any form of abuse of dominant position or, in fact, Regulation 1/2003 only targets the different practices beyond the level of dominance fined in several jurisdiction (i.e. abuse of economic dependence in France or Germany). ■

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