



Competition

TUCA ZBARCEA
ASOCIATII

Attorneys at law



Competition Guidebook

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Țuca Zbârcea & Asociații offers legal advice on the application of competition (antitrust) law in various domestic and cross-border transactions (mergers, acquisitions, joint ventures etc.). Our lawyers have advocated for clients' rights before the national competition authorities as well as in litigation before the judicial courts in a variety of disputes.

The competition practice group with Țuca Zbârcea & Asociații received the Competition Award for the overall performance in 2007 and firm's impressive client portfolio in this area (FinMedia, 2008 Top Lawyers of Romania Gala).

This guide is intended to help the market players identify and assess the main areas in their business strategies and decisions which may be exposed to antitrust rules and trigger application of public (i.e. administrative fines, nullity of anticompetitive agreements, or even criminal liability) and private sanctions (i.e. damages award to the affected customers or competitors). Moreover, it provides for an overview on the main tools available under the competition law to protect the businesses from the aggressive market behavior of suppliers, competitors or clients as well as to react against illegal public support of the competitors' trade.

This booklet is drafted based on the Romanian and European Community legislation in force and public sources available as of November 2008. Core legislation consists of (i) the Romanian Competition Law No. 21/1996 as republished ("Competition Law") and subsequent regulations and guidelines issued by the Competition Council and (ii) Articles 81, 82, 87 and 88 of the Treaty establishing the European Community ("EC Treaty") and subsequent Community regulations and guidelines.

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Compliance with Antitrust Rules

Overview

The market behavior or strategies adopted by your business may fall under the domestic and/or European Community competition rules to the extent it restricts competition on the market.

In the area of cartels, vertical agreements and abuse of dominant position, the EC Treaty provisions directly apply when trade between Member States is affected by an anticompetitive practice. A system of parallel competencies of the European Commission and of the national competition authorities is instituted at Community level.

While the European Commission usually intervenes to investigate anticompetitive practices affecting more than three Member States or justifying a Community interest (i.e. the respective practice affects the internal markets' freedoms or the case has a novelty character at Community level), the Competition Council remains competent to examine practices affecting (mainly) the Romanian market.

This section deals with the antitrust practices to be rigorously self assessed by the market players before entering into agreements with their competitors (Cartels), clients or suppliers (Vertical Agreements) or before implementing unilateral market behaviors excluding competitors or exploiting clients, which are prohibited for dominant players (Abuse of Dominant Position).

Cartels

What is a cartel?

The agreements between competitors aimed at distorting market competition are top targets and severely sanctioned by the competition authorities, both at domestic and Community level.

Both article 5 (1) of the Competition Law and article 81(1) of the EC Treaty prohibit any explicit or tacit agreements between undertakings or associations of undertakings, any decisions of association or any concerted practices between them, pursuing among others price fixing; customers or markets allocation or bid rigging.

The cartels are illegal secret agreements concluded between competitors as to fix prices, restrict supply and/or divide up markets. The agreements may take a wide variety of forms but often relate to sale prices or increases in such prices, restrictions on sales or production capacities, sharing out of product or geographic markets or customers and collusion on the other commercial conditions for the sale of products or services.

Such hardcore restrictions aimed at eliminating competition between the players on the market are prohibited per se, irrespective of the market share of the companies involved.

Maximum attention should also be paid to the exchange of sensitive information with competitors, may such exchange be occasioned by the formal contacts between the members of a professional association or informally between the managers or employees of competing companies.

According to the case law developed in this field, there is an assumption that the exchange of commercially sensitive information between competitors is prejudicial to effective competition as it reduces market uncertainty and facilitates collusion behavior, where the exchanged information:

- concerns certain economic parameters based on which companies establish their behavior on the market (e.g. information on prices, costs, sales, production, etc.);
- would have been treated, under normal competitive conditions, by the companies involved as confidential towards competitors;

- is individual (i.e. it presents explicit data regarding the activity of a certain undertaking);
- relates to actual or future elements of the activity of the companies involved.

The Competition Council has recently addressed this issue within the context of the analysis of the code of good practices in the trade of food products. Hence, the Competition Council mentioned that the impact of a possible exchange of information on the competitive environment should be analyzed based on three elements:

- the structure of the relevant market;
- the nature of the information exchanged;
- the value of the information for consumers.

Cartel cases in Romania

The enforcement record of the Competition Council on cartel cases covers various industries such as pharmaceutical distribution, cable TV services, fast moving consumers goods, grey cement etc.

As shown below, some of the cartel cases built by the Competition Council were overturned in court.

2008 market allocation on the insulin market case: Eli Lilly (producer) and three distributors were sanctioned for an alleged allocation of the portfolio of diabetes products produced by Eli Lilly in the context of the national tenders organized for the centralized acquisition by the Ministry of Public Health of such products (Competition Council's Decision No. 15 of 12 March 2008).

2008 bid rigging between distributors on the dialysis market: three distributors participated in a bid rig in the context of the national tender organised by the Ministry of Health in 2003 (Competition Council's Decision No. 12 of 3 March 2008).

2005 price fixing on the oral and personal care products: the Council charged Colgate Palmolive and four of its distributors and imposed aggregate fines of EUR 4,200,000 for indirectly fixing the minimum resale prices, both as vertical price fixing involving Colgate Palmolive and as an horizontal agreement between the distributors (Competition Council's Decision No. 124 of 11 July 2005). The Competition Council's decision has been overturned on procedural grounds (status of limitation) by the High Court of Cassation and Justice (High Court of Cassation and Justice, Decision No. 2720 of 25 May 2007).

2005 grey cement cartel: the highest fine (amounting in aggregate to EUR 26,000,000) concerned the three Romanian cement producers, Lafarge, Holcim and Carpatcement (part of the HeidelbergerCement group), which were found liable for a price fixing cartel (Competition Council' Decision No. 94 of 26 May 2005). Carpatcement succeeded to win the appeal against the Council's decision before the Romanian High Court of Justice, which ordered the annulment of fines imposed to this company (High Court of Cassation and Justice, Decision No. 1358 of 5 March 2007).

Fines imposed by the Competition Council in cartel cases			
Year	Undertaking	Amount in EUR*	Comments
2008	Eli Lilly Export	1,040,000	Case of market sharing for diabetes products. The total amount of the fines around EUR 22,600,000.
	A&A Medical	1,180,000	
	Relad Pharma	7,200,000	
	Mediplus Exim	13,500,000	
2008	Alsifcom Intermed	58,000	Case of bid rigging. The total amount of the fines around EUR 1,600,000.
	Fresenius Medical Care Romania	1,500,000	
	Opremi Medfarm	80,000	
2006	UPC Romania	2,100,000	Case of market sharing. The total amount of the fines around EUR 2,350,000.
	RCS	235,000	
2005	Colgate Palmolive	3,000,000	Case of price fixing (i.e. Colgate and distributors fixing the resale price). The total amount of the fines around EUR 4,200,000.
	La-Ro Impex	530,000	
	Pronto Universal	300,000	
2005	Lafarge Romcim	10,424,955	Case of price fixing (i.e. fixing the cement price on the market). The total amount of the fines around EUR 26,000,000.
	Holcim Romania	8,015,385	
	Carpatcement Holding	8,655,787	
2005	Wrigley Romania	2,240,000	Case of price fixing (i.e. Wrigley and 26 distributors fixing the resale price). The total amount of the fines around EUR 5,480,000.

2005	Branches of the National Union of Real Estate Agencies		Case of price fixing (i.e. the minimum fee to be applied by all agencies). The total amount of the fines around EUR 2,100.
2005	Association of Romanian Fluvial Port Operators (Harbour services)		Case of price fixing. The total amount of the fines around EUR 3,000,000.
*The EURO equivalents are approximated.			

Cartel cases at Community level

The European Court of Justice has held that “in order to come within the prohibition imposed by Article 81 of EC Treaty, the agreement must affect trade between Member States and free play of competition to an appreciable extent”¹. According to this criterion, the cartels having a minimum level of cross-border effects shall be dealt with by the competition authorities under Community law (Article 81 of the EC Treaty).

While an agreement between parties located in different Member States is most likely to affect trade between Member States, national cartels, especially those dominating the whole or a large part of a market could also be prohibited under Article 81 of the EC Treaty, for instance if they make more difficult for undertakings from other Member States to penetrate the market. This would be the case for instance if the cartel members provide for protective and defensive measures to be taken against foreign undertakings. Moreover where the relevant product or service affected by the cartel is easily transmissible across borders it is likely that an effect on trade will be found and Article 81 shall come into play.

At EC level, the European Commission's recent enforcement record is notable by the level of fines imposed to the cartel members.

In some cases, the sanctions were significantly raised as a result of repeated anticompetitive behavior of the defendants. By way of example, the following recent cases may be mentioned:

¹ Case 22/71, *Beguelin Import Company v. GL Import Export SA* [1971] ECR 949, [1972] CMLR 81. The text of Article 81(1) does not require that the effect on competition or trade should be appreciable.

Car glass cartel: on 12 November 2008, the European Commission has imposed fines totaling EUR 1,383,896,000 on Asahi, Pilkington, Saint-Gobain and Soliver for illegal market sharing, and exchange of commercially sensitive information regarding deliveries of car glass in the EEA, in violation of the EC Treaty's and the EEA Agreement's ban on cartels and restrictive business practices (Article 81 of the EC Treaty and Article 53 of the EEA Agreement). These are the highest cartel fines the Commission has ever imposed, both for an individual company (EUR 896,000,000 on Saint-Gobain) and for a cartel as a whole.

Asahi, Pilkington and Saint-Gobain are the three major players in Europe. Between early 1998 and early 2003 these companies discussed target prices, market sharing and customer allocation in a series of meetings and other illicit contacts. The Belgian company Soliver also took part in some of these discussions. These four companies controlled about 90% of the glass used in the EEA in new cars and for original branded replacement glass for cars at that time, a market worth about EUR 2,000,000,000 in the last full year of the infringement.

The European Commission started the cartel investigation on its own initiative following a tip-off from an anonymous source. The EC increased the fines on Saint-Gobain by 60% because it was a repeat offender. Asahi provided additional information to help expose the infringement and its fine was reduced by 50% under the leniency procedure.

Banana suppliers cartel: in October 2008, the European Commission found that banana importers Chiquita, Dole and Weichert participated in a cartel between 2000 and 2002 by coordinating the setting of their quotation prices for bananas in eight EU Member States and, thus imposed a total of EUR 60,300,000 in fines on Dole and Weichert, while Chiquita benefited from 100% fine reduction under the leniency procedure since it provided information that enabled the opening of investigation. The fines on Dole and Weichert were reduced by 60% in view of the particular circumstances of the case, including the specific regulatory regime for the banana market that was in place at the time. An additional reduction of 10% was accorded to Weichert as it did not participate in a part of the cartel. Del Monte is held jointly and severally liable for the payment of the fine imposed on Weichert as it controlled Weichert at the time of the infringement.

Wax producers cartel: the European Commission imposed on the wax producers fines amounting to EUR 676,000,000 on several wax producers for price fixing and market sharing cartel. From 1992 to 2005, the producers of paraffin waxes and slack wax operated a cartel in which they fixed prices for paraffin waxes. ExxonMobil, MOL, Repsol, Sasol, Shell and Total also engaged in market allocation for this product and ExxonMobil, Sasol, Shell RWE and Total also fixed prices for slack wax sold to end-consumers on the German market. The companies held regular meetings to discuss prices, allocate markets and/or customers and to exchange sensitive commercial information. Mention should be made that the European Commission's investigation started with dawn raids prompted by Shell's application for immunity whereby it revealed the existence of the cartel to the European Commission.

Lifts and escalators cartel: the European Commission applied a EUR 992,000,000 fine to Otis, KONE, Schindler and ThyssenKrupp groups for having operated cartels for the installation and maintenance of lifts and escalators in Belgium, Germany, Luxembourg and the Netherlands, in clear violation of the EC Treaty rules that outlaw restrictive business practices (Article 81). The decision names 17 subsidiaries of the above groups, together with Mitsubishi Elevator Europe B.V. which participated in the Dutch cartel. Lifts and escalators play a major role in modern urban life; Otis alone estimates that the equivalent of the entire world's population travel on their lifts, escalators and moving walkways every 9 days.

Between at least 1995 and 2004, these companies rigged bids for procurement contracts, fixed prices and allocated projects to each other, shared markets and exchanged commercially important and confidential information.

It was considered by the European Commission that the effects of this cartel may continue for twenty to fifty years as maintenance is often done by the companies that installed the equipment in the first place; by cartelising the installation, the companies distorted the markets for years to come.

KONE subsidiaries received full immunity from fines under the European Commission's leniency programme in respect of the cartels in Belgium and Luxembourg, as they were first to provide information about these cartels. Similarly, Otis received full immunity

in respect of the Netherlands cartel. The fines imposed on the ThyssenKrupp companies were increased by 50%, as it was a repeat offender.

Ten highest cartel fines per undertaking			
Year	Name of the undertaking	Name of the cartel	Amount in EUR*
2008	Saint-Gobain	Car glass	896,000,000
2007	ThyssenKrupp	Elevators and escalators	479,669,850
2001	Hoffman La-Roche AG	Vitamins	462,000,000
2007	Siemens AG	Gas insulated switchgear	396,562,500
2008	Pilkington	Car glass	370,000,000
2008	Sasol Ltd.	Candle wax	318,200,000
2006	Eni SpA	Synthetic rubber	272,250,000
2002	Lafarge SA	Plasterboard	249,600,000
2001	BASF AG	Vitamins	236,845,000
2007	Otis	Elevators and escalators	224,932,950

* Amounts corrected for changes following judgments of the Court of First Instance and European Court of Justice.

Leniency procedure

Both national and EC competition framework provide for an “incentive”, consisting in fines immunity or reduction, on the companies that voluntarily disclose to the competition authority the existence of a cartel and bring evidence to prove the infringement.

The leniency procedures are tools that aim at easier cartels discovering and collecting evidence for the competition agencies, while awarding the “traitor” for its support burden of proof. The immunity or reduction of the fine varies widely depending on the timing and significant added value of the information and evidence provided by the cartel members.

The enforcement record of the European Commission proves that the leniency procedure is an effective incentive for the companies to disclose the cartel activity, evidence on the most recent cases at the EC level being collected following a leniency application submitted by one of the cartel members. For instance, in the wax producers` cartel, Shell was the first company to come forward with information about the cartel under the leniency procedure and therefore received full immunity from fines. The cooperation with the investigation

of Sasol, Repsol and ExxonMobil under the European Commission's leniency programme was also rewarded, as they were granted a reduction of their fines of 50%, 25% and 7% respectively.

The European Commission has recently introduced a settlement procedure which allows the authority to settle cartel cases through a simplified procedure. Under this procedure, parties having seen the evidence in the Commission file may choose to acknowledge their involvement in the cartel and their liability thereof.

In return for this acknowledgment, the Commission can reduce the fine imposed on the parties by 10%. Such procedure aims to simplifying the administrative proceedings and could reduce litigation before the European courts in cartel cases. This cooperation is different from the voluntary disclosure of evidence to trigger or advance the Commission's investigation which is already covered by the leniency procedure.

No procedure of this kind currently exists in the Romanian competition framework.

At national level, although the leniency policy is available from 2004, the undertakings active on the Romanian market have not rushed to blow the whistle on cartel cases for the purpose of enjoying immunity. Broadly inspired by the European Commission's Notice on immunity from fines, the domestic guidelines provide for a similar scope of application of such policy. Thus, domestic immunity would be available to the most serious agreements or practices restricting competition, such as cartels relating to price-fixing, fixing the level of production, sales quotas, market or client sharing, bid-rigging, import-export restrictions.

The Romanian Competition Council may grant immunity from fines if an undertaking is the first to submit evidence that in the Competition Council's view enables it to open an investigation or to prove the infringement of Article 5 (1) of the Competition Law.

An undertaking may benefit of immunity (no fine) if cumulatively complies with the following conditions:

- it cooperates fully, continuously and expeditiously with the Competition Council;
- it ends its involvement in the alleged illegal activity the latest on the date it submits evidence;

- it did not take any steps to force other undertakings to engage in the illegal alleged activity (it was not the cartel initiator)

Undertakings that are not eligible for immunity can benefit from a reduction in the fine. To qualify, the applicant:

- must provide evidence of a substantial added value to that which the Competition Council already holds. Whether evidence is of a substantial added value depends on the extent to which it strengthens, by its nature and level of detail, the Competition Council's ability to prove the facts in question;
- must end its involvement in the cartel, by the time it submits the evidence.

The potential level of leniency granted depends on the timing of the application:

- the first applicant to meet the conditions receives a reduction of 30% to 50%;
- the second applicant receives a reduction of 20% to 30%;
- subsequent applicants receive a reduction of up to 20%.

To determine the level of reduction within these percentage bands, the Competition Council takes into account the (i) time at which the evidence that meets the conditions was submitted; (ii) extent to which the evidence represents added value. It may also take into account the extent of any co-operation provided (and whether it was provided continuously) after the application was made.

How We Can Help

- Competition audits, interviews with the managers and personnel in order to detect potential participation to cartel activities.
- Assistance for leniency applications to the Romanian Competition Council and/or the European Commission.
- Assistance for submitting complaints against your competitors suspected of cartel implication.

Cooperation Between Non-Competitors. Vertical Agreements.

The agreements with non-competitors may they be customers or suppliers (e.g. distribution agreements, supply agreements, outsourcing or specialization agreements) also require particular awareness. Potential hardcore restrictions on price fixing, clients or market allocation, prohibited irrespective of the parties` market strength, as well as other non-hardcore competition restrictions (e.g. exclusivities, non-compete clause, recommendation of prices, etc) could fall under the domestic and/or EC antitrust rules, thus exposing the business of the parties involved to severe sanctions.

Hardcore restrictions

Several types of agreements are being deemed as representing per se an infringement of competition rules and principles, thus not being allowed irrespective of the circumstances under the competition regulations.

Such agreements mainly consist in price fixing, market allocation and bid rigging, as shown below:

- *resale price maintenance*, the restriction of the buyer's ability to determine its sale price;
- *passive sales ban in an exclusive distribution network* limiting the distributor to respond to unsolicited orders coming from customers located in territories exclusively reserved by the supplier or allocated to another distributor;
- *active and passive sales ban to territories which are not exclusively reserved by the supplier or allocated to another distributor*, in a non-exclusive or mixed distribution network;
- *restriction of sales to end users in a selective distribution* by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorized place of establishment;
- *restriction of cross-supplies between distributors within a selective distribution system* operating at different levels of trade;
- *spare parts restrictions* consisting in the restriction agreed between a supplier of components and a buyer incorporating those components, which limits the supplier to selling the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

However, while the national Competition Law is concerned with fostering competition, the EC legislation has a double agenda. It also has an imperative policy of seeing end-users and resellers being able to source products anywhere in the European Union single market. Some of the highest fines were imposed on companies seeking to frustrate this aim, even if their actions had little effect on competition. As such, agreements that prevent single market integration are considered serious violations by the European Commission.

Permitted practices

It can be presumed that, where the share of the relevant market accounted for by the supplier does not exceed 30%, vertical agreements which do not contain hardcore restrictions generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits². Hence, such agreements are deemed as allowed and are considered to be block exempted. The parties claiming the benefit of block exemption must prove the fulfilment of the exemption conditions.

Provided that the 30% threshold is observed³, certain clauses included in vertical agreements benefit from block exemption, such as:

- exclusive distribution – the supplier sells its products to a sole distributor that benefits from the right to exclusively resell the suppliers' products into a specific territory. The distributor is also banned from actively reselling the supplier's products into other exclusive territories reserved by the supplier or allocated by the latter to other distributors of its network;
- non-compete obligation - any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market,

2 In the case of vertical agreements containing exclusive supply obligations, it is the market share of the buyer which is relevant in determining the overall effects of such agreements.

3 In case the 30% market share threshold is exceeded, a vertical agreement would still benefit from block exemption for 2 consecutive years following the year the threshold is exceeded, provided that the market share does not exceed 35%. In case the threshold is exceeded by more than 5%, the vertical agreement would still benefit from block exemption for 1 year following the year the threshold is exceeded. In any case, the extension of the block exemption benefit may not exceed, in total, 2 years.

calculated on the basis of the value of its purchases in the preceding calendar year. A non-compete obligation may benefit from block exemption provided that it does not exceed a 5 years duration (respectively 1 year after the termination of the agreement);

- exclusive supply obligation - any direct or indirect obligation causing the supplier to sell the goods or services specified in the agreement only to one buyer for the purposes of a specific use or for resale;
- maximum resale prices or recommended resale prices - the supplier may impose a maximum sale price or recommend a sale price, provided that it does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- active sales ban - the restriction of a distributor to actively approach individual customers inside another distributor's exclusively allocated territory or exclusively allocated customer group by direct mail, visits, advertisement in media or other promotions specifically targeted at that customer group or targeted at customers in that territory or by establishing a warehouse or distribution outlet in another distributor's exclusive territory;
- other restrictions: (i) the restriction of sales to end users by a buyer operating at the wholesale level of trade; or (ii) the restriction of sales to unauthorized distributors by the members of a selective distribution system; or (iii) the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier.

Self-assessment vs. individual clearance procedure

Should the vertical agreement not benefit block exemption (i.e. in case of companies whose market shares exceed the 30% threshold), the parties must assess the clauses potentially affecting the competition on the market from the perspective of the individual exemption provided by article 5(3) of the Competition Law or article 81(3) of the EC Treaty.

The individual exemption implies a balance between the negative effects of the vertical agreements (e.g. raising the artificial market entry barriers, restriction on inter-brand and intra-brand competition etc.) and the expected positive effects (e.g. products quality improvement, investments for entering new markets, better distribution services etc.). While at EC level the companies have to self assess the potential restrictive clauses in vertical agreements based on the guidelines

issued by the European Commission⁴, under the Romanian legal framework, the domestic players still have available a procedure of individual clearance with the Competition Council, aimed at obtaining a formal decision of the authority to exempt the restrictive agreement from the legal prohibition provided by Article 5(1) of the Competition Law. Mention should be made however that this procedure leads to the automatic opening of an investigation by the Competition Council, having as object the notified agreement(s). The individual clearance decision is usually granted for a limited duration and may be renewed upon request of the interested parties or, to the contrary, withdrawn, subject to the maintenance of the market or parties related circumstances. Moreover, the individual clearance decision is deemed null and void in case it is granted based on inaccurate or misleading information submitted by the parties.

Should the parties seek confirmation that their agreement is legal and does not fall under Article 5(1) of the Competition Law, they can also apply for a less burdensome procedure, by requesting a non-intervention decision (negative clearance) from the Competition Council.

Within such procedure, which does not automatically (but could) involve investigation, the parties shall present to the Competition Council their own interpretation of the legal provisions and facts and the authority shall assess whether there is scope for application of the prohibition in Article 5(1) of the Competition Law.

For instance, in case one supplier builds its territorial distribution network on agency agreements in order to have the control on the final prices (clause which would normally infringe Article 5(1) should the members of the network act as distributors, and not as pure agents, bearing the commercial and financial risks related to the business promoted) it could look for a confirmation from the Competition Council on the nature of its agents network by applying the non-intervention procedure⁵. Mention should be made that the Competition Council may directly apply Article 81 of the EC Treaty in Romania when it considers that the intra-community trade is affected by an unlawful practice.

⁴ At EC level, the individual clearance procedure was repealed under 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.

⁵ This was the case for instance of the national fixed telephony operator, Romtelecom (Competition Council's Decision No. 16 of 17 March 2008 certifying the non-intervention of the Competition Council based on Article 5 (1) of Competition Law on the template agency

How We Can Help

- Tailored competition audits aimed at identifying the potential competition issues raised by the agreement concluded with customers or suppliers.
- Assistance in respect to vertical agreements self-assessment under Article 81 of the EC Treaty or Article 5 of the Competition Law.
- Application for individual clearance procedure before the Romanian Competition Council in case of non block exempted agreements.
- Application for non-intervention certificate (negative clearance) on certain vertical agreements.
- Application for guidance letters to be issued by the Competition Council in cases where new and unresolved antitrust issues occur and require general interpretation by the authority.
- Assistance for submitting complaints against illegal agreements between third parties acting on the market.

Abuse of Dominant Position

Dominant players on the market could also infringe the antitrust rules, both at national and Community level by adopting unilateral market strategies which could harm consumers and/or competitors.

The prohibition of market power abuse is set out in Article 6 of the Competition Law and in Article 82 of the EC Treaty. The mere fact that an undertaking holds a dominant position does not by itself trigger an infringement of the competition rules. For the purpose of assessing whether an undertaking abuses its dominant position, two criteria are to be considered: (i) if the undertaking is dominant and (ii) if it abuses its dominant position.

Assessment of dominance

The competition regulations define the dominant position (on a particular relevant market) as the situation where a company is able, to a large extent, to act independently from its competitors (actual and potential) and its clients in that particular market.

The structure of the relevant market and the market share held by the undertaking concern play a significant role in substantiating dominance. According to the decisional practice of the Competition Council, the dominance may be presumed in the absence of contrary evidence if an undertaking has a market share persistently above 40% to 50%.

The structure and characteristics of the undertaking itself may give its ability to prevent effective competition due to its internal strength. Relevant factors are the undertaking's technological resources, production capacity, access to raw materials, financial strength and other commercial advantages over its rivals.

The conduct of the undertaking on the market, such as overpricing or predatory acts against competitors, may indicate that the undertaking is behaving in a manner largely unconstrained by competition and therefore holds a dominant position. However, caution must be exercised in drawing conclusions based on market conduct, as most types of behavior can be practiced both by dominant and non-dominant undertakings.

Practices which may substantiate an abuse of dominant position

Given that no legal definition was offered for the abuse of dominant position is currently available, it was the courts role to interpret such concept.

Thus, the European Court of Justice defined the abuse as “an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.” (Case 85/76 Hoffman-La Roche)

The abusive behavior may consist in:

- exploitative practices by exploiting the market power in trading relationships with customers or suppliers by such practices as unfair purchase or selling prices, tying arrangements, price discrimination, etc.
- and
- exclusionary practices by abusing market power to harm a competitor by anticompetitive means such as refusal to deal, predatory pricing, or other predatory actions.

Article 6 of the Competition Law provides only for an exemplificative list of behaviors that are deemed as abuse of the dominant position:

- imposing, directly or indirectly, of selling and buying prices, price lists or other inequitable contractual clauses and the refuse to negotiate with certain suppliers or beneficiaries;
- limitation of production, distribution, technological development in the disadvantage of the consumers;
- application, regarding the commercial partners, of uneven conditions for equivalent performances, causing to some of them a disadvantage in the competitive position;
- conditioning of concluding certain contracts by the partner's acceptance of clauses stipulating supplementary performances which, neither by their nature nor according to commercial practices, have any connection with the object of such contracts;

- imposing excessive or ruinous under-cost prices, to eliminate competitors, or exporting under production costs and covering the difference through higher domestic prices;
- exploitation of the economical dependence status of a client or supplier.

One recent case on abusive practice found by the Competition Council dealt with the TV cable services market. 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 which were found guilty of abuse of dominant position by "imposing increased tariffs not justified by the costs growth".

How We Can Help

- Tailored competition audits aimed at identifying the potential competition issues raised by unilateral practices of dominant players on the market.
- Application for non-intervention certification by the Competition Council on the unilateral market strategies of companies with high market shares.
- Application for guidance letters to be issued by the Competition Council in cases where new and unresolved antitrust issues occur and require general interpretation by the authority.
- Assistance for submitting complaints against the exploitative or exclusionary practices of dominant suppliers or competitors on the market.

Economic Concentrations

In merger cases, a division of competence between the European Commission and the national authorities applies. The Commission has exclusive power to examine concentrations with a Community dimension determined on the basis of certain turnover thresholds, while the Competition Council assess concentrations with national dimension.

The merger of two or more previously independent parties, or the direct or indirect control brought about by share capital/ assets acquisition, by contract or by other means qualifies as an economic concentration falling under the provisions of EC relevant legislation and the Romanian Competition Law.

Community notification thresholds

Two alternative sets of thresholds must be taken into account in order to determine if a concentration between undertakings has a Community dimension and thus must be notified to the Commission.

First set of thresholds

- the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5,000 million; and
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250,000,000;
- unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State;
- the worldwide turnover threshold is intended to measure the overall dimension of the undertakings concerned; the Community turnover threshold seek to determine whether the concentration involves a minimum level of activities in the Community; and the two-thirds rule aims to exclude purely domestic transactions from Community jurisdiction.

Second set of thresholds

- the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2,500 million;
- in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100,000,000;

- in each of at least three Member States included for the purpose of the point above, the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25,000,000;
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100,000,000;
- unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

A concentration that does not meet the first set of thresholds, but meets the ones mentioned above has a Community dimension and thus must be notified to the Commission.

National notification threshold

Should the merger not fall in the jurisdiction of the European Commission, it would require clearance by the Romanian Competition Council if the thresholds provided by the domestic regulations are cumulatively met in the fiscal year preceding the transaction:

- the parties' combined worldwide turnover exceeds EUR 10,000,000 and
- at least two of the parties involved in the transaction have a turnover in Romania exceeding EUR 4,000,000.

For the case of banking and other financial institutions, the annual turnover is replaced by 10% of the annual balance sheet value. Also, for insurance companies, the turnover criteria is replaced by the value of the gross premiums issued, which shall include all amounts received or to be received according to the insurance contracts concluded by them or on their behalf, including outgoing reinsurance premiums after deducting taxes and fees identified by the Competition Council through the guidelines.

For the purpose of the threshold test, the group that each involved party belongs to shall also be taken into consideration.

Implementation prior to clearance

Romania is considered to be a "suspensive jurisdiction", i.e. a transaction may not be implemented prior to clearance issued by the Competition Council. However, the buyer may close the transaction pending clearance provided that it does not take any measures deemed as irreversible with regard to the target's operations.

Similar to EC rules, when the transaction involves acquisition of control through a public bid, the transaction could take place prior to clearance provided that the acquiring parties do not determine, directly or indirectly, the target's behavior on the market (e.g. by exercising the voting rights attached to the shares, especially nominating the board members and executive management).

Within a 5 year statute of limitation period, the Competition Council can impose a fine of up to 10% of the buyer's Romanian turnover for completing a notified merger before clearance.

Review periods

The Competition Council shall issue a decision to either authorize the merger, or open an in-depth investigation within 30 days after the submission is effective (upon registration at the Competition Council or, upon submission of additional required information).

In practice, the review period (phase I) is likely to take up to 45-60 days, since the authority usually takes between 15-30 days before it declares the submission complete and the statutory time starts to run.

If an investigation is opened (phase II), the Competition Council shall issue a decision of refusal/ authorization/ conditional authorization within a 5-month term after the notification is effective.

Authorization fee

If the authorization of the economic concentration is granted, an authorization fee of 0.1% of the aggregate annual turnover on the relevant markets affected by the transaction shall be paid to the State budget.

According to the Competition Council's current practice, the affected markets shall comprise all relevant markets in which the target is present (thus including markets that do not overlap the acquirer's market).

How We Can Help

- Merger filings to the Competition Council or to the European Commission, coordination of multi-jurisdictional filings.
- Assistance during the first phase merger clearance or in-depth merger investigations conducted by the competition authorities.
- Negotiation of acceptable remedies - conditional clearance arrangements - with competition authorities where this is necessary to ensure that the transaction is cleared.
- Submission of comments to the Competition Council or the European Commission, on behalf of the interested parties related to the mergers and acquisitions of other players on the market which may affect their business.

Enforcement of Antitrust Rules

Public Enforcement

Setting of fines by the Competition Council

The sanctions for violations of the Competition Law and/or Community antitrust rules may reach 10% of the involved party's turnover on the year prior to the sanctioning decision.

The Competition Law can also lead to criminal sanctions on those individuals responsible for the violation. In the most serious cases, imprisonment is possible⁶. Throughout over 10-year record, the Romanian Competition Council has applied fines amounting in aggregate to approximately EUR 80,000,000 for the infringements of domestic antitrust rules.

However, the largest part of this amount has been applied during the last few years. This is due to the fact that, mainly starting 2004, the Competition Council has accelerated its inquiries and the related decision-making process and also raised the fines level imposed on the players found culpable 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.

⁶ According to Article 60 of the Competition Law, the fraudulent participation of individuals to the initiation, organisation or implementation of the anticompetitive practices prohibited under Article 5 or Article 6 of the Competition Law constitute criminal offence and is punished with prison between 6 months to 4 years or fines. The criminal action shall be initiated on the request of the Competition Council.

Investigation tools

If the Competition Council has indications of an anticompetitive practice (i.e. by its own sources or following a complaint submitted by a third party) it may open an investigation. Investigations are time consuming, expensive and tie up management resources, even if the company is ultimately found not to have violated the law. This is why we stress that compliance and avoiding even the suspicion of non-compliance is important.

The Competition Council may also decide to launch inquiries in order to gain useful information on a respective market. Although such initiative does not entail a remedy decision thereon, it is nevertheless useful to understand, for example, the way of functioning of a less competitive market⁷. The next step that the Competition Council may take is to resort to the competition proceedings i.e. open an investigation on a specific anticompetitive practice.

Dealing with complaints

Should a complaint do not show sufficient grounds in order to justify the opening of an investigation, the Competition Council dismisses thereof. The grounded decision thereon is to be communicated to the author of the complaint within 30 days as from its registration. Where the Competition Council dismisses a complaint it must give the complainant the opportunity to make his views known. Moreover, complainants and third parties showing a sufficient interest have the right to be heard in writing and may also be given the opportunity to develop their views at the oral hearing.

Down raids

Dawn raids to the companies' premises represent one of the investigation tools frequently used by the Competition Council for finding evidence on the infringement of the Competition Law.

In 2007, the Competition Council performed 42 dawn raids and in 2008, the overall dawn raid number is expected to be significantly higher.

⁷ At present, several market investigations are carried out by the Competition Council e.g. on the real estate and ancillary services market, on the trade of food products market.

The inspectors, except for debutantes, have the following powers:

- to enter any premises, land and means of transport of the undertakings and association of undertakings;
- to examine any documents, books and other records related to the business, irrespective of the location they are stored in;
- to take statements of the representatives and the employees of the undertaking or of the association of undertakings on the facts and documents deemed as relevant;
- to take or obtain in any form copies of or extracts from any documents, books or records;
- to seal any business premises and documents, books or records for the period and to the extent necessary for the dawn raid.

The inspectors may also enter any other spaces, including domiciles, lands or means of transport of managers, directors and other employees of the undertakings under investigation. The court authorization is however required.

Should the company provide incomplete or misleading information or does not provide the requested information documents and records in the course of the dawn raid or the investigation or refuses the inspection, fines up to 1% of an undertaking's total turnover in the preceding year may be imposed. In 2008, the Competition Council has imposed for the first time a fine on an undertaking for refusing to submit to a dawn raid⁸.

Other fines imposed by the Competition Council were mainly determined by the undertakings providing for incomplete or misleading information in the course of investigation⁹. Furthermore, at Community level, the Commission imposed for the first time a fine for breach of seals used in order to prevent the possibility of evidence being lost during an inspection, thus undermining the effectiveness thereof¹⁰.

8 The Competition Council imposed an approximate EUR 400,000 fine on TCE 3 BRAZI SRL in the course of an investigation on the bread market and the related markets.

9 For example, a fine of RON 374,698 was imposed on Fildas Trading SRL (in September 2006), a fine of RON 55,000 was imposed on Eli Lilly Romania SRL (in May 2006).

10 The Commission's seals are made of plastic film. If they are removed, they do not tear, but show irreversible VOID signs on their surface. The Commission imposed a fine of EUR 38,000,000 on E.ON Energie AG for breaching a seal affixed to secure documents collected in the course of a dawn raid in May 2006.

Comminatory penalties (in Romanian “amenzi cominatorii”) amounting up to 5% of the average daily turnover in the preceding financial year may be imposed on undertakings in order to determine them to provide in a complete and correct way the information and documents they were requested or to submit to an inspection.

The companies may try to protect during a dawn raid the correspondence and documents exchanged between with the external lawyers for the purpose of seeking or giving advice about the practices or arrangements under investigation or preparing the companies' defense to a possible or actual investigation.

As per the EC case law, communications between a lawyer and client are covered by the legal privilege provided that they are made for the purposes of the exercise of the client's rights of defense and they emanate from independent lawyers”.

Similar inspections powers are held by the inspectors of the European Commission.

¹¹ Decision of the Court of First Instance in Akzo Nobel Chemicals Ltd. and Akcros Chemicals Limited v. Commission of the European Communities (Cases T-125/03 and T-253/03) and AM&S Europe Ltd. v. European Commission Case 155/79.

How We Can Help

- Special lawyers teams permanently on-call to provide assistance at dawn raids.
- Post raid risk assessment and legal defense.
- Training and preparing the company's personnel and managers for the unexpected investigative actions of the competition authorities, organization of the company's internal files, do's and don't-s during the unexpected visits of the competition inspectors, the rights and responsibilities of the inspected company.
- Organization of mock dawn raids at clients premises.

Private Enforcement

Private enforcement relates legal action that can be brought before a national court by one private party against an undertaking that infringed the competition regulations. Private enforcement of competition rules can take different forms, including actions for damages, actions for injunctive relief (to stop the behavior contrary to the competition rules), actions for nullity, etc.

Private enforcement at EC level

One significant development clearing the way for implementation of a system of private enforcement has been the enactment of Regulation No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

This Regulation decentralized the application of Community competition laws, enhanced the power of the competition authorities of Member States, and enhanced the power of national courts to adjudicate competition matters thus facilitating the ability of private parties to enforce the competition laws through litigation in national courts. The Regulation authorizes national courts to apply Articles 81 and 82, and Article 3 of the Regulation, in particular, provides that national courts shall apply Community competition law to anticompetitive conduct that affects trade between Member States.

Recital 7 of the Regulation also explicitly acknowledges the importance of a private right of action: "National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of national courts here complements that of the competition authorities of the member states. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full".

In 2001 and 2006, the European Court of Justice recalled that, as a matter of Community law, the possibility of claiming compensation must be open to any individual who suffers harm as a result of an infringement of Community antitrust rules (Case C-453/99, *Courage and Crehan*, and Joined Cases C-295/04 to C-298/04, *Manfredi*). The Court of Justice emphasized the complementary function of private enforcement of directly applicable EC Treaty rights as early as 1963 (Case 26/62, *van Gend en Loos*) and, in later years, made it clear that without a working

mechanism for victims to obtain redress, the effectiveness of Articles 81 and 82 of the EC Treaty is put at risk.

The White Paper on Damages Actions¹² sum up the following principles:

Indirect purchasers: the principle according to which any individual who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts should also apply to indirect purchasers i.e. who had no direct relation with the infringer, but who nonetheless may have suffered considerable harm because an illegal overcharge was passed on to them along the distribution chain.

Collective redress: a combination of two complementary mechanisms of collective redress: (i) representative actions which are brought by qualified entities, e.g. consumer associations, state bodies or trade associations on behalf of the victims and (ii) opt-in collective actions in which victims expressly decide to combine their individual claims for harm they suffered through one single action.

Access to evidence: national courts should, under specific conditions, have the power to order parties to proceedings or third parties to disclose precise categories of relevant evidence. The conditions for a disclosure order should include inter alia that the plaintiff has presented all the acts and means of evidence that are reasonably available to him, provided that these show plausible grounds to suspect that he suffered harm as a result of an infringement of competition rules by the defendant, and that he has satisfied the court that the envisaged disclosure measures is both relevant to the case and necessary and proportionate. In order to prevent destruction of relevant evidence or refusal to comply with a disclosure order, courts should have the power to impose sufficiently deterrent sanctions, including the option to draw adverse inferences in the civil proceedings for damages.

Binding effect of the decisions issued by the national competition authorities: national courts that have to rule in actions for damages on practices under Article 81 or 82 on which a national competition authority in the European Competition Network has already given a final decision

¹² White Paper on Damages Actions for Breach of the EC antitrust rules COM (2008) 165, 2 April 2008.

whereby it has upheld an infringement thereof, or on which a court has given a final judgment upholding the decision of the national competition authority or finding itself an infringement, can not take decisions running counter to any such decision or ruling.

Fault requirement: for those Member States where it is required to prove the fault, it is suggested that once the victim has shown a breach of Article 81 or 82, the infringer should be liable for damages caused unless he demonstrates that the infringement was a result of a genuinely excusable error¹³.

Calculation of damages: the victim must receive full compensation for the loss suffered e.g. compensation not only for the actual loss due to an anticompetitive price increase, but also for the loss of profit as a result of any reduction in sales. In order to facilitate the calculation of damages, the Commission intends to draw up a framework with pragmatic, non-binding guidance for quantification of damages in antitrust cases e.g. by means of approximate methods of calculation or simplified rules on estimating loss.

Passing-on overcharges: defendants should be entitled to invoke the passing-on defense against a claim for compensation of the overcharge, otherwise the denial thereof could result in unjust enrichment of purchasers who passed on the overcharge and in undue multiple compensation for the illegal overcharge by the defendant. The standard of proof for this defense should be not lower than the standard imposed on the plaintiff to prove the damage. Indirect purchasers should be able to rely on the refutable presumption that the illegal overcharge was passed on to them in its entirety.

Limitation periods: the limitation period should not start (i) before the day on which the infringement ceases in case of a continuous or repeated infringement, (ii) before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm caused. A new limitation period of 2 years should start once the infringement decision on which a follow-on plaintiff relies has become final. However, for the time being, no specific Community rules (other than those derived from the principles of effectiveness and equivalence) exist regarding claims for competition damages before civil courts, so the national rules on civil liability and civil procedure apply.

¹³ Should a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition, the error would be excusable.

Private enforcement in Romania

With regard to special provisions on private enforcement under the Romanian competition legislation, the Competition Law expressly provides that independently from the sanctions applied under the Competition Law, the natural and legal persons are reserved the right to claim for the recovery in full of the damages resulting from an anticompetitive practice prohibited by the Competition Law.

By the same token, the guidelines issued by the Competition Council stipulate that any individual can claim in court damages for the loss caused to him by an agreement or conduct susceptible of limitation or distortion of the competition. The guidelines also provide that only the judicial courts can grant damages to natural persons in case of infringement of the Competition Law.

The advantages of a claim in court listed under the guidelines reside in the fact that the court can award damages for the loss incurred, can decide securing measures (in Romanian “masuri asiguratorii”) and can grant judicial expenses and also it can decide on the payments and obligations performed based on an agreement that falls under the provisions of Article 5 of the Competition Law¹⁴.

No other specific provisions on antitrust damages actions currently exist in the Romanian legislation. Therefore, the general legal provisions on liability are applicable. According to the Romanian Civil Code, any deed of a person that caused damages to another person requires the person by whose fault the damage was caused to repair such damage. Consequently, the author of a deed that results in damages, including a breach of competition rules that caused damages, has the obligation, upon the victim's request, to repair the damage incurred provided that the victim proves the fulfillment of the conditions of tort liability, namely: (i) the existence of an illicit deed; (ii) the fault; (iii) the damage suffered by the plaintiff; (iv) the casual link between the illicit deed and the damage suffered by the plaintiff.

14 For example, in the context of a distribution agreement, damages may become an issue when the distributor is of the opinion that the supplier has abused its dominant position by asking excessive prices and the distributor therefore wants to file a claim for the recovery of the excessive prices paid and for the loss caused to its business or when a distributor may want to claim damages for the absolute territorial restrictions imposed by its supplier.

Being administrative acts, the decisions issued by the Competition Council enjoy the presumption of legality and solidity as regards the existence of the deed, the identity of the author of the illicit deed and the author's fault¹⁵.

The limitation period for filing claims for damages commences to run, as a rule, from the moment the deed is committed or from the moment the victim had knowledge or could have had knowledge, in a reasonable way, of the author of the deed and of the damage suffered. In case of continuous or repeated infringements, the limitation period starts running the day the breach ceases i.e. the day the deed is consumed. The cases that interrupt the limitation period are explicitly and restrictively provided by the Romanian law and the public enforcement of competition rules is not one of such cases. Thus, the initiation of an investigation procedure does not have the effect of interrupting the limitation period for damages claims due to infringement of competition rules.

As regards the quantum of the damages, the Romanian law system acknowledges the full compensation principle in case of tort liability.

Thus, the author of the anticompetitive practice could be compelled to reimburse both the actual prejudice (*damnum emergens*) and the loss of benefit (*lucrum cessans*).

¹⁵ In the event that such decisions would be challenged before a court and they are maintained in its judgment, no other judgment can be delivered by a court on these three elements, due to the fact that *res judicata* is applicable.

How We Can Help

- Assistance and representation related to the damages actions before the Romanian courts based on antitrust infringements of competitors, customers or suppliers.
- Legal defense against damages actions brought in court against the client, based on an alleged breach of Competition Law.

Public Incentives

State Aid

Considering that state aid may distort or threaten to distort competition by favoring certain undertakings to the detriment of others, the European Union rules provide for a strict control of state aid measures granted by the Member States.

Measures qualifying as state aid

Measures granted by the Member States should qualify as state aid in case the following criteria are met:

- transfer of state resources – granted by central or local authorities, public banks, foundations or private or public intermediate bodies appointed by the State;
- economic advantage – which would not be obtained in the ordinary course of business;
- selectivity – only selected undertakings have access to the measure; measures applying without distinction to all undertakings in all economic sectors in a Member State (e.g. a nation-wide fiscal measure) are not selective and therefore should not fall under the state aid principles;
- effect on competition and trade – the undertaking benefitting from the measure must be engaged in economic activities.

Subject to the criteria described above, measures qualifying as state aid may take various forms, such as grants, capital injections, debt write-off, exemptions, reductions or deferrals of fees and/or tax payments, accelerated depreciation allowances, preferential interest rate loans, interest rate rebates, loan guarantees, price reductions in connection with goods supplied and services provided by public, central and local authorities or other bodies managing central or local

state resources, including sale or rent of land owned by public central or local authorities or other bodies managing central or local state resources below market price. State aid measures may be granted under a specific state aid scheme made available to a larger number of undertakings or in the form of individual aid. Individual aid may take the following two forms: (i) ad hoc aid and (ii) individual awards of aid on the basis of an aid scheme (the individual award requiring the performance of a notification procedure under state aid rules).

State aid control by the European Commission

The Commission is competent to keep under constant review all systems of aid existing in the Member States. The supervision of the Commission in connection with the state aid is based on a system of ex ante authorization. Consequently, each Member State is required to inform, based on a notification procedure, the Commission of any plan to grant or modify any previously authorized state aid measure.

Member States are not allowed to put such aid into effect before it has been authorized by the Commission (i.e. the “Standstill-principle”). Aid granted in absence of authorization by the Commission, is automatically deemed as “unlawful aid” and is subject to recovery.

Based on its examination of the notified aid, the Commission may (i) issue a decision attesting that “the notified measure does not constitute aid”; (ii) issue a “decision not to raise objections” in case, after a preliminary examination, it finds that there no doubts are raised as to the compatibility with the common market of a notified measure; (iii) issue a “decision to initiate a formal investigation procedure” in case, after a preliminary examination, it finds that doubts are raised as to the compatibility of the notified measure with the common market¹⁶.

Moreover, in case the Commission finds that aid granted by a Member State or through that Member State's resources is not compatible with the common market, or such aid is being misused, the Commission is competent to decide that the Member State concerned must abolish or alter such aid within a period determined by the Commission.

¹⁶ All Commission decisions in state aid matters are subject to review by the European Court of Justice.

If the State concerned does not comply with such decision within the prescribed time, the Commission or any other interested Member State may refer the matter directly to the European Court of Justice.

State aid which is not subject to prior notification procedure

As an exception from the notification rule, certain state aid measures do not fall under the notification requirement.

Such measures are either falling under the (i) de minimis aid rules or (ii) are block exempted under a specific Commission regulation.

Transparent incentives not exceeding the minimum threshold (EUR 200,000 over any period of three fiscal years) are deemed to be authorized and are not subject to notification requirement.

The European Commission has issued a General Block Exemption Regulation (EC) No. 800 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the EC Treaty ("GBER") codifying previous block exemption regulations and regarding:

- regional aid;
- small and medium sized enterprises investment and employment aid;
- aid for creation of enterprises by female entrepreneurs;
- aid for environmental protection;
- aid for consultancy in favor of small and medium sized enterprises and small and medium sized enterprises participation in fairs;
- aid in the form of risk capital, aid for research, development and innovation;
- training aid; and
- aid for disadvantaged or disabled workers.

In order to benefit from the notification exemption, a state aid measure must observe, inter alia, the following criteria:

- the aid measure is transparent - aid in respect of which it is possible to calculate precisely the gross grant equivalent ex ante without the need to undertake a risk assessment;
- the aid measure does not exceed the aid intensity thresholds provided in the GBER (i.e. the gross aid amount expressed as a percentage of the eligible costs);
- the aid measure does not exceed the individual notification thresholds provided in the GBER;

- the aid measure is targeted at activities or investments that prove an “incentive effect” - under the European Union principles on “less and better targeted aid” any state aid measure must be targeted to an activity or investment that would have not been performed in the absence of aid;
- the aid measure comply with the specific requirements under the GBER for each category of aid contemplated above;
- the measure must not be targeted at: (i) aid to export-related activities, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current costs linked to the export activity; or (ii) aid contingent upon the use of domestic over imported goods;
- the measure must not be targeted to certain sectors¹⁷;
- the measure is not targeted at (i) aid schemes which do not explicitly exclude the payment of individual aid in favor of an undertaking which is subject to an outstanding recovery order following a previous Commission decision declaring an aid illegal and incompatible with the common market; (ii) ad hoc aid in favor of an undertaking which is subject to an outstanding recovery order following a previous Commission decision declaring an aid illegal and incompatible with the common market; (iii) aid to undertakings in difficulty.

State aid schemes available in Romania

The State aid schemes currently available in Romania are mainly targeted at regional aid for new investments projects.

Aid for industrial parks: the aid scheme relates to tax deduction in connection with land and building taxes, as well as taxes for changes of land destination and for removal of land from the agricultural circuit (if applicable), for buildings and lands located in an industrial

17 Such sectors are the following: (a) aid favoring activities in the fishery and aquaculture sectors, except for training aid, aid in the form of risk capital, aid for research and development and innovation and aid for disadvantaged and disabled workers; (b) aid favoring activities in the primary production of agricultural products, except for training aid, aid in the form of risk capital, aid for research and development, environmental aid, and aid for disadvantaged and disabled workers to the extent that these categories of aid are not covered by Commission Regulation (EC) No 1857/2006; (c) aid favoring activities in the processing and marketing of agricultural products when the amount of the aid is fixed on the basis of the price or quantity of such products purchased from primary producers or put on the market by the undertakings concerned or when the aid is conditional on being partly or entirely passed on to primary producers; (d) aid favoring activities in the coal sector with the exception of training aid, research and development and innovation aid and environmental aid; (e) regional aid favoring activities in the steel sector; (f) regional aid favoring activities in the shipbuilding sector; (g) regional aid favoring activities in the synthetic fibers sector.

park certified by the relevant state authority (Order No. 296/2007 issued by the Ministry of Internal Affairs and Administrative Reform approving the regional state aid scheme for industrial parks investments).

Regional State aid scheme for new investment: direct grants are available for new investments exceeding EUR 30,000,000 and generating at least 300 new jobs under the regional state aid scheme recently adopted by the Romanian Government (Government Decision No. 1165/ 26.09.2007).

Regional aid for large investment: the aim of the scheme is promoting regional development in Romania. The conditions for receiving aid under this scheme are (i) to perform an initial investment totaling the RON equivalent of EUR 100,000,000, whereas the value of the eligible costs must exceed the RON equivalent of EUR 50,000,000; and (ii) to create at least 500 new employment positions as a result of the initial investment performed in Romania (Government Resolution No. 753/2008 implementing a regional state aid scheme for investments).

Structural Funds

Romania's accession to the EU has opened financing opportunities for private and public investments from Community sources. Structural funds are funds allocated by the European Union for support for the poorer regions of Europe and support for integrating European infrastructure especially in the transport sector. Eight financial instruments, Operational Programmes have been adopted by national authorities in negotiation with EU relevant representatives, with the purpose to apply and strengthen the correct and appropriate linkages of national policies to the EU Economic and Social Cohesion policies and the Lisbon Strategy for growth and job creation.

Operational programmes

Sectoral operational programme

The Operational Programmes are financed in a large proportion from EU funds (European Regional Development Fund¹⁸, European Social Fund¹⁹), the remaining amount being covered from national resources.

¹⁸ Through the European Regional Development Fund it is granted financial support for the creation of infrastructures, employment investments, local development projects and assistance for small enterprises.

¹⁹ The European Social Funds provide support mainly for the reintegration of unemployed and disadvantaged persons on the employment market.

Each of the seven programmes aims at sustaining the development of specific national sectors or regional areas that are confronted with a lack of economic growth and consequently with a low living level of the population. The Operational Programmes currently in force will apply between 2007 and 2013. Within this period, private or public investors fulfilling certain conditions may obtain co-financing of their projects from public resources.

Regional operational programme (ROP)

The objective pursued under ROP is to obtain a long-term equilibrated economic and social development of Romanian territory, as delimited in 8 Development Regions.

In order to achieve such objective, the projects financed through ROP will focus on the following action areas: (i) the support to sustainable development of urban growth poles, (ii) the improvement of regional and local transport infrastructure, (iii) the improvement of social infrastructure, (iv) the strengthening of the regional and local business environment and (v) the sustainable development and promotion of tourism.

Sectoral operational programme increase of economic competitiveness (SOP IEC)

The general objective of SOP IEC is the increase of Romanian companies' productivity, in compliance with the principle of sustainable development, by reducing the disparities compared to the average productivity of the EU. The target is an average annual growth of GDP per employed person by about 5.5%. This will allow Romania to reach approx. 55% of the EU average productivity by 2015.

This main objective will be attained through financial support for investments allowing to obtain the (i) consolidation and environment-friendly development of the Romanian productive sector, (ii) the establishment of a favorable environment for sustainable enterprises' development, (iii) increase of the Research and Development capacity, stimulation of the cooperation between Research Development and Innovation („RDI”) institutions and enterprises, and increase of enterprises' access to RDI, (iv) the valorization of the information and communication technology potential and its application in the public (administration) and private sector (enterprises, citizens) and (v) the increase of energy efficiency and the sustainable development of the energy sector.

Sectoral operational programme development of human resources (SOP DHR)

The general objective of SOP DHR is the development of human capital and the increase of competitiveness on the labour market, by linking education and lifelong learning with the labour market.

This main goal must be achieved by supporting actions for (i) the promotion of initial and continuous education and training, including higher education and research, (ii) the promotion of entrepreneurial culture and improving quality and productivity at work, (iii) supporting entry or reentry into the labour market of young people and the long term unemployed; (iv) the development of modern, flexible and inclusive labour market; (v) the promotion of reentry into the labour market of inactive people, including those in rural areas; (vi) the improvement of public employment services; and (vii) the facilitation of access to education and the labour market of disadvantaged and vulnerable groups.

Sectoral operational programme environment (SOP Environment)

This Programme is created to address the challenges related to the protection and improvement of the environment and the living standards in Romania, focusing in particular on meeting the acquis communautaire in this sector.

The aim is to reduce the environment infrastructure gap that exists between the other EU Member States and Romania by (i) improving the quality and access to water and wastewater infrastructure, (ii) developing sustainable waste management systems, (iii) reducing the negative environmental impact and mitigation of climate change, (iv) protecting and improving biodiversity and natural heritage by supporting the protected areas management, including NATURA 2000 implementation and (v) reducing the incidence of natural disasters affecting the population.

Sectoral operational programme transport (SOP Transport)

SOP Transport must cooperate on the promotion of a long-lasting, rapid and safe transport system in Romania, both for persons and freight, in order to achieve a level of services attaining the European standards.

Sectoral operational programme development of administrative capacity (SOP Development of Administrative Capacity)

SOP Development of Administrative Capacity addresses horizontal management problems at all public administration levels, both central and local, with a focus on key attributes that strengthen the reliability of the administration, in particular decision making, better regulation, accountability and organizational effectiveness, and specifically target improvements to the decentralization of service delivery in certain prioritized sectors (Health, Education, Social Assistance).

Sectoral operational programme technical assistance (SOP Technical Assistance)

SOP Technical Assistance aims at ensuring that the implementation of the above listed financial instruments in Romania meets the principles and rules on partnership, programming, evaluation, communication, management, including financial management, monitoring and control on the basis of responsibilities shared between the Member States and the Commission, in compliance with the EU relevant provisions.

Mention should be made however that SOP Technical Assistance, SOP Development of Administrative Capacity, SOP Transport and SOP Environment offer financial support to specific public beneficiaries, mainly administrative bodies that are responsible for the administration of protected areas, administration of public networks or provisions of public services.

Private investors interested to invest in Greenfield projects in these areas will not be able to access the financial support granted through one of the four specific Operational Programmes mentioned above, but will have to analyze the possibility to benefit from public funding from the remaining programmes²⁰.

²⁰ Mention should also be made that two specific programmes have been adopted for the development of rural area and cross-border, trans-national and interregional development: the National Programme for Rural Development and the Territorial Cooperation Programme. They are not qualified as Operational Programmes but they offer financial support for projects implemented in these sectors.

How We Can Help

- Assistance on identifying the public incentives available in Romania, for greenfield, as well as other investments projects, negotiations with the Romanian authorities aimed at attracting state aid incentives for the client`s investments project.
- Advice on state aid rules compliance, advising on the application of the private investor principle, as well as advice during the monitoring stage of authorized state aid.
- Assistance during the state aid notification and clearance procedure with the European Commission.
- Submission of complaints on the illegal public support granted by the Romanian State to the client`s competitors.



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