

# GLOBAL COMPETITION REVIEW

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**Romania**

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Tuca Zbârcea & Asociatii



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## Overview

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Economic aspects seem to play a more important role lately in the defence of the companies under investigation before the Competition Council. The authority's legal assessment on facts is often exposed to criticism before the relevant courts on the ground that it does not take into consideration the economic justifications of the facts presented by the defendants.

In cartel cases, in the absence of direct proofs and the application of leniency procedures so far, the council tends to rely on indirect or circumstantial evidence corroborating the existence of a cartel by way of deduction, common sense, economic analysis or logic operation. However, the use and evidential value of indirect proofs seem cautiously evaluated in court.

In a recent case, the High Court of Justice proved reluctant in accepting the Competition Council's evidentiary record, raising the standard of proof required to assess a cartel-type infringement. The competition authority has fined in 2005 three cement producers, namely Lafarge, Holcim and Carpatcement (part of the HeidelbergerCement group), which were found guilty of a price-fixing cartel (Competition Council decision number 94 of 26 May 2005). Following four years of investigation, the Competition Council established that during the period from 2000 to 2004, these three companies formed a cartel on the Romanian market of grey cement. The authority based its findings on a short note (identified under the inquiry as having been written by the country manager of Holcim) that sketched the prices evolution for Holcim and its two competitors. Although the parties argued that the increases anticipated by that note were only internal estimates and they had never actually been put in practice, the council connected such proof with other elements such as: the constant and symmetric market shares maintained by the three competitors during 2000 and 2004; a *de facto* price parallelism, which allegedly could not occur in the absence of sensitive price information among the three competitors; anti-competitive agreements between the groups involved in other jurisdictions (ie, Germany, EU – *Cembureau* case in 1990).

The High Court of Justice judged this case as

a typical price parallelism case and consequently applied the standard of proof set at EU level by *Ahlström Osakeyhtiö* and *CRAM* jurisprudence. Those judgments establish that where the competition authority's reasoning is based on the supposition that the facts established cannot be explained other than by concerted action between undertakings, it is sufficient for the applicants to prove circumstances which cast the facts established by the Commission in a different light and thus allow another explanation of the facts to be substituted for the one adopted by the Commission (*CRAM*, paragraph 16; *Ahlström Osakeyhtiö*, especially at paragraphs 70, 126 and 127). It annulled the decision of the Competition Council, ruling that the authority had not taken into consideration the economic justifications determining the price increases (inflation rate, international cement prices, the seasonal nature of the cement industry). The Competition Council should have proved the participation of the defendant in an express or tacit collusion, distinctively from the mere finding of price increases. In an oligopoly market, the players have the right to adapt themselves intelligently to the market conditions. It rests with the competition authority to substantiate, beyond any reasonable doubt, based on concluding and sufficient evidence, that concentration is the only plausible explanation for the price increases.

Similar cases are currently under review before the relevant courts. The Competition Council has recently fined some major players in the pharmaceutical industry, finding that a producer and three of its distributors have been involved in a hard core cartel, in pursuance of which they shared the producer's portfolio of insulin products at the national tender organised by the Ministry of Health on this market (the national tender counted for approximately 99 per cent of the national market for this product). Pursuant to a dawn raid at the producer's premises, the authority found in one computer some document headed "Overview" and detailing the producer's alternative scenarios for the national tender. The document amounted to a blueprint for the cartel, since it explicitly presented as best case scenario

from the producer's perspective the participation of the three distributors in the tender with non-overlapping categories of products. Although no direct proofs on the awareness, communication or acceptance of this scenario were found with the distributors, it seemed sufficient for the authority to presume the existence of collusion by the fact that the distributors had in fact no overlapping offers in the tender, ruling that in fact the preferred scenario was implemented and tacitly accepted by

them. No economic reasons justifying the parties' behaviour were upheld by the council.

It will be interesting to follow whether the high standard of proof with respect to the inference of collusion from the firms' behaviour shall also be shared by the judicature in this case and whether the economic grounds brought by the parties shall stand as to make questionable the Competition Council's deductions.

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Tuca Zbârcea & Asociații is one of the top three independent law firms in Romania. With over 75 lawyers in our Bucharest office, we offer full-range legal services in almost every area of practice, including competition, corporate/commercial, M&A, litigation and arbitration, real estate, banking and finance, capital markets, employment law, intellectual property, PPP/PFI and concessions, and environmental law.

Our lawyers in the competition department have over 10 years of extensive expertise on the Romanian legal services market and have assisted in relation to a broad range of legal issues, including competition compliance, merger and antitrust clearances, competition investigation, state aid, as well as in relation to the application of competition law in various domestic and cross-border transactions (mergers, acquisitions, joint ventures, etc).

As of 1 January 2008, our expertise in the competition area has been further strengthened with the promotion of Raluca Vasilache to partner in charge of competition matters and co-head of the firm's competition practice group. Raluca Vasilache is a competition partner with Tuca Zbârcea & Asociații. For over eight years, she has covered a wide array of legal issues in the field of competition law, as well as intellectual property.

Praised for her work on merger control, antitrust and state aid cases, she has undertaken numerous procedures reviewing mergers and acquisitions under competition law, acting for multinational clients from various sectors, such as telecommunications, consumer goods retail, oil, steel, pharmaceutical and electricity. She has also advised in relation to investigations with the Romanian Competition Council, dawn raids of the authority and state aid matters, as well as on litigation involving competition law issues.

Raluca Vasilache is also a regular lecturer at various local and international conferences on competition, state aid and intellectual property matters. She is also the local correspondent for *Global Competition Review* and has contributed numerous articles in leading local and international publications.

Anca Jurcovan is a senior associate with Tuca Zbârcea & Asociații. For the past five years, she has been a competition lawyer dealing mostly with competition matters for national and international transactions. Also, she has provided legal support in front of the Romanian Competition Council in relation to complex merger and antitrust clearances, investigations, dawn raids and state aid matters.

Other areas of expertise include intellectual property law, having advised on all aspects related to the registration, protection, licensing and transfer of patents, trademarks, copyrights, designs and software, as well as personal data protection, electronic commerce transactions, distance sales, advertising and unfair competition practices.



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She has also advised in relation to investigations with the Romanian Competition Council, relating to dawn raids of the authority and state aid matters, as well as on litigation involving competition law issues.

Furthermore, she has wide experience with privatisation and post-privatisation matters of major state-owned companies.

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