Competition

TUCA ZBARCEA
ASOCIAȚII

Attorneys at law

Competition
Guidebook

TUCA ZBÂRCEA
ASOCIAȚII

Attorneys at law

Published by Țuca Zbârcea & Asociații.

The information contained herein is valid as of September 2011.

Contents

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.). The firm's lawyers have achieved a considerable body of expertise in relation to investigations with the Romanian Competition Council and the EC and during down raids of the competition authorities. Furthermore, 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.

This guide is intended to help the market players assess the main 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 Union legislation in force and public sources available as of 1st of September 2011. Core legislation consists of (i) the Romanian Competition Law No. 21/1996[1] as republished ("Competition Law") and subsequent regulations and guidelines issued by the Competition Council and (ii) Articles 101, 102, 107 and 108 of the Treaty of the Functioning of the European Union ("TFEU", the "Treaty") and subsequent regulations and guidelines issued by the European Commission.

For details and clarifications on any of the topics dealt with in this guidebook please contact the following attorneys:

- *Raluca Vasilache, Partner raluca.vasilache@tuca.ro*

[1] As amended by the Emergency Ordinance No. 75/2010, published in the Official Gazette No. 459 of 6th of July 2010, which was subsequently amended and supplemented by Law No. 149/2011 published in the Official Gazette No. 490 of 11th of July 2011.

Introduction

Overview

In August 2010, July 2011, respectively, the Romanian Competition Law has been subject to a second substantial review in 15-year enforcement record following the law adoption in 1996. The main changes followed the general trends in antitrust field at European level, the Competition Council being provided with enforced rights of investigation. Highlights include (i) a rebuttable positive presumption of dominance set in the case of undertakings holding a share above 40% on the relevant market; (ii) Competition Council's sanctioning decision may only be suspended in court should the concerned undertaking pay a surety in accordance to the principles set under Fiscal Procedural Code in force; (iii) procedures related to enforcement of unlawful competition practices were transferred in the competence of the Competition Council.

Companies must now self assess entirely their market behaviour, since they cannot longer submit a clearance request to the authority asking for the prior approval of the practice by the Competition Council. During the investigation, undertakings may offer commitments that they will comply with a certain conduct as to end the alleged infringement and to avoid fines.

As the legal privilege has been expressly put in place, the communication between the lawyer and the client cannot be raised during a dawn raid or used as proof against the company, provided that they are made for the purposes of the exercise of the client's rights of defence and are

are related to the object of the investigation.

Cooperation with the authority is highly appreciated: companies blowing the whistle on hardcore cases, may enjoy not only immunity from fines but also full exoneration from the joint liability resulting from a potential damages action filed by the affected consumers or customers against the participants to the infringement.

In addition, a special mitigating circumstance in the form of cooperation with the authority during the administrative procedure applies in case the concerned undertaking recognises its breach of competition rules and, where applicable proposes remedies[2]. In such case, the amount of the fine is reduced by a percentage of 10 to 30% from the base level of the fine (inclusively, in cases where the fine is set to its minimum threshold).

Moreover, the Competition Council has substantially brought in line the national Merger Regulation and relevant guidelines with the rules applied by the Commission in dealing with merger cases.

[2] The undertaking may recognize the breach subsequent to receipt of the statement of objection and subsequently to the file access procedure up to the hearings date inclusively.

Compliance with Antitrust Rules

The market behaviour or strategies adopted by businesses may fall under the domestic and/ or EU competition rules to the extent it restricts competition on the market. In the area of cartels, vertical agreements and abuse of dominant position, Articles 101 and 102 TFEU directly apply when trade between Member States is affected by anticompetitive practices.

The public enforcement of TFEU antitrust rules is based on a system of parallel competencies: while the European Commission usually intervenes to investigate anticompetitive practices which justify a Community interest (i.e. the respective practice significantly affects the free circulation of goods in the internal market or the case has a novelty character at EU level) or affect more than three Member States, the Competition Council remains competent to examine practices affecting (mainly) the Romanian market.

Cartels

What is a cartel?
Agreements between competitors aimed at distorting market competition are top targets and severely sanctioned by the competition authorities, both at domestic and EU level. Both Article 5 (1) of the Competition Law and Article 101(1) of the TFEU 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.

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. The competition authorities also pay maximum attention 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. Where the exchanged information (i) concerns certain economic parameters based on which companies establish their behaviour on the market (e.g. information on prices, costs, sales, production, etc.); (ii) would have been treated, under normal competitive conditions, by the companies involved as confidential towards competitors; (iii) relates to individual data (i.e. it presents explicit data regarding the activity of a certain undertaking); (iv) relates to actual or future business strategies of the companies involved, there is a presumption that the exchange between competitors is prejudicial to effective competition, as it reduces market uncertainty and facilitates collusive behaviour.

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

2010 market allocation between the 14 administrators of mandatory private pensions funds (total fine of EUR 1,220,000): the alleged infringement related to the sharing among pension funds administrators, based on a 50-50% principle, of participants having subscribed for two different funds ("doubles") within the initial sales window. Although the agreement has dealt only a marginal part of consumers, i.e. the doubles, the Competition Council qualified this arrangement as a client sharing agreement between competitors, infringing both Article 5(1) letter c) of the Competition Law and Article 101(1) TFEU. The case is currently under review before the Romanian courts.

2010 minimum price fixing by the members of the Romanian Body of Expert and Authorised Accountants (RBEAA) (total fine of EUR 950,000): the sanction was applied for the price fixing practices which were undertook by the RBEAA members in accordance with the Internal Regulation on the criteria and procedures in setting the fees, consideration and compensation due to RBEAA members by their clients, and for continuing applying such practice subsequent to receiving indications from the authority that the price fixing behaviour is anticompetitive. This case sets a record for the Competition Council in terms of fine percentages (i.e. 9.2% of RBEAA's previous year's income).

2010 bid rigging cartel on the market of hydrotherapy treatment services in Băile Olăneşti (total fine of EUR 980,750): the members of the cartel set the level of tariffs and number of available places for treatment that each undertaking was bidding for. Moreover, they created a system whereby all offers submitted to the tender were monitored.

2008 market allocation on the insulin market case (total fine of EUR 22,600,000): 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. In court, some parties to the alleged infringement succeeded in reducing the fine initially uphold by the Competition Council.

2008 bid rigging between distributors on the dialysis market (total fine of EUR 1,600,000): three distributors participated in a bid rigging in the context of a national tender organized by the Ministry of Health in 2003.

2006 market sharing on the TV cable services market in Timişoara city (total fine of EUR 2,350,000): the case was overturned in court on procedural grounds, since the Competition Council's right to apply fines had been time bared.

2005 Wrigley-26 distributors' price fixing (total fine of EUR 5,480,000).

2005 price fixing on oral and personal care products (total fine of EUR 4,200,000): the Competition Council fined Colgate Palmolive and four of its distributors for indirectly fixing the minimum resale prices, both as vertical price fixing involving Colgate and as horizontal agreement between the distributors[3].

[3] Competition Council's Decision No. 124 of 11th of July 2005.

The decision has been overturned on procedural grounds by the High Court of Cassation and Justice[4], which found that the Competition Council`s right to review the case had been time bared.

2005 grey cement cartel (total fine of EUR 26,000,000): the highest fine concerned the three Romanian cement producers, Lafarge, Holcim and Carpatcement (part of the HeidelbergerCement group), which were found liable for a price fixing cartel. Carpatcement succeeded to win the appeal against the Council's decision before the Romanian High Court of Justice[5], which ordered the annulment of fines imposed to this company.

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

In some cases, the sanctions were significantly raised by the EC watchdog as a result of repeated anticompetitive behaviour of the defendants, as shown in the following recent examples:

Consumer Detergents: the Commission applied fines amounting to EUR 315,200,000 in a price fixing cartel case against household laundry powder detergents producers Procter & Gamble, Unilever and Henkel (the latter being granted immunity under leniency procedures). The cartel was implemented in eight EU countries.

LCD panels: the European Commission sanctioned six LCD panel producers (Samsung Electronics and LG Display of Korea and Taiwanese firms AU Optronics, Chimei InnoLux Corporation, Chunghwa Picture Tubes and HannStar Display Corporation), a total fine of EUR 648,925,000 being applied for operating a cartel which harmed European buyers of television sets, computers and other products that use the key Liquid Crystal Display component.

Airfreight: the Commission fined 11 air cargo carriers (for instance, Air Canada, Air France-KLM, British Airways, Cathay Pacific, Cargolux, Japan Airlines, LAN Chile, Martinair, SAS, Singapore Airlines and Qantas), the total fine amounting to EUR 799,445,000 for operating a worldwide cartel which affected cargo services within the EEA. The carriers coordinated their action on surcharges for fuel and security without discounts over a six year period.

[4] High Court of Cassation and Justice Decision No. 2720 of 25th of May 2007.
[5] High Court of Cassation and Justice Decision No. 1358 of 5th of March 2007.

Animal feed phosphates: the Commission imposed fines totaling EUR 175,647,000 on five companies for operating a cartel that lasted over three decades and covered a large part of EEA. All but one company settled the case with the Commission and therefore received a 10% reduction on each of their fines. This is the first settlement of a cartel case in a hybrid scenario, where both the settlement and ordinary procedures were followed.

Bathroom equipment cartel: the Commission fined 17 bathroom equipment manufacturers a total of EUR 622,250,783 for a price fixing cartel covering six EU countries. The EC's decision shows that between 1992 and 2004, 17 companies coordinated the sales price for bathroom fixtures and fittings in Germany, Austria, Italy, Belgium, France and The Netherlands. The coordination took place during meetings of 13 national trade associations in Germany (over 100), Austria (over 80), Italy (65), and also Belgium, France and The Netherlands, and in bilateral contacts. It consisted of fixing price increases, minimum prices, and rebates, and exchanging sensitive business information.

Car glass cartel: the Commission 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 on deliveries of car glass in the EEA in violation of TFEU. Between early 1998 and early 2003, these major players discussed target prices, market sharing and customer allocation in a series of meetings and other illicit contacts. The EC 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.

Wax producers cartel: the Commission imposed on the wax producers fines amounting to EUR 676,000,000 for price fixing and market sharing cartel. Between 1992-2005, 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. The investigation started with down raids prompted by Shell's application for immunity whereby it revealed the existence of the cartel to the Commission.

Lifts and escalators cartel: the European Commission applied a EUR 992,000,000 fine to Otis, KONE, Schindler and ThyssenKrupp groups for operating cartels for the installation and maintenance of lifts and escalators in Belgium, Germany, Luxembourg and the Netherlands, found to be in violation of Article 101 TFEU that outlaws restrictive business practices. 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. The Commission found 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 EC's leniency programme in respect of the cartels in Belgium and Luxembourg, as they first provided 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.

Year	Fines imposed by the European Commission (adjusted for Court judgements)*
2007	2,918,583,562.5
2008	2,268,948,900
2009	1,540,651,400
2010	2,868,676,432
2011	315,200,000
Total	**9,912,060,294.5**

* Statistics as dated 15th of July 2011

Ten highest cartel fines per case since 1969 (adjusted for Court judgements)*		
Year	Case name	Fine amounts
2008	Car glass	1,383,896,000
2009	Gas	1,106,000,000
2007	Elevators and escalators	832,422,250
2010	Airfreight	799,445,000
2001	Vitamins	790,515,000
2008	Candle waxes	676,011,400
2010	LCD	648,925,000
2010	Bathroom fittings	622,250,782
2007	Gas insulated switchgear	539,185,000
2007	Flat glass	486,900,000

* Statistics dated 15th of July 2011

Leniency programs available
Both national and European Union legal framework provide for different types of incentives for companies that voluntarily disclose the existence of a cartel and bring evidence to prove the infringement or cooperate during the procedure.

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 EC level being collected following a leniency application submitted by (at least) 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 Commission's leniency programme was also rewarded, as they were granted a reduction of their fines of 50%, 25% and 7% respectively. In addition to the leniency procedure, the European Commission has recently introduced a settlement procedure which allows the Commission to settle cartel cases through a simplified procedure.

Under this procedure, parties having seen the evidence in the Commission's file may choose to acknowledge their involvement in the cartel and their liability thereof. In return for this acknowledgement, the Commission can reduce the fine imposed on the parties by 10%. Such procedure aims to simplify the administrative proceedings and could reduce litigation before the European courts in cartel cases.

Both the leniency and settlement procedures prove their efficiency in latest cases before the European Commission. For instance, in a recent cartel case, namely the washing powder producers cartel, Henkel received full fine immunity, while other two companies (Procter & Gamble and Unilever) received fine reduction of 50% and 25% under the leniency program, as well as an additional 10% reduction under the settlement procedure for acknowledging the facts and enabling a swift conclusion of the investigation. At national level, although the leniency policy is available from 2004, no it did not yet lead to discovery and sanction of high profile major cartel cases had been discovered and sanctioned by the Competition Council following a leniency application.

Similarly to the leniency model applicable at EC level, the leniency guidelines previously in force, only applied to cartels, i.e. collusive behaviour between competitors targeting price fixing, market sharing, exports or imports restrictions. With the new guidelines adopted on the 7th of September 2009, the Competition Council broadens the leniency scope and opens up the possibility for distributors or suppliers to also report vertical anticompetitive agreements, such as price fixing, market allocation, imports or exports restrictions concluded with their downstream or upstream partners. Thus, from now on, the distributors or resellers may seek leniency by disclosing the anticompetitive provisions or practices agreed with or imposed upon by their suppliers.

To the same extent, the suppliers may be awarded full immunity from fines if they are first to provide insider information on anticompetitive practices agreed downstream and they have not initiated the infringement. This is a major development of the leniency policy in Romania, proving the Competition Council's full interest in vertical restraints and potentially putting the spotlight on the distribution/ reselling markets, if the distributors or producers will feel tempted to "break the ice" and disclose" whistle blow" on the anticompetitive practices they agreed upon with their clients or suppliers.

The first leniency case finalised before the Competition Council (2010) was a local cartel formed by the taxi drivers in Timis County. Since then, no other anticompetitive practices were identified and sanctioned further to leniency application. However, the President of the Competition Council declared on several occasions that the authority is assessing various disclosures under the leniency procedure.

In order to obtain total immunity under the leniency policy, a company which participated in a cartel or a vertical anticompetitive practice must be the first to inform the Competition Council of the undetected illegal activity by providing sufficient information to allow the authority to open an investigation and launch an inspection at the premises of the companies allegedly involved in the anticompetitive practice. If the Competition Council is already in possession of enough information to launch an investigation, or has already opened one, the company must provide evidence that enables the Competition Council to prove the infringement. In all cases, the company must also fully cooperate with the Competition Council throughout its procedure, provide it with all evidence in its possession and put an end to the infringement immediately.

Companies which do not qualify for total immunity may benefit from a reduction of fines if they provide evidence that represents "significant added value" to that already in the Competition Council's possession and if they have ceased involvement in the anticompetitive practice. Evidence is considered to be of a "significant added value" for the Competition Council when it reinforces its ability to prove the infringement. The first company to meet these conditions may receive 30% to 50% reduction, the second 20% to 30% and subsequent companies up to 20%.

Moreover, according to the Competition Law recently revised, companies may also benefit of 10% to 30% fine reduction if they choose to cooperate with the Competition Council and expressly recognize the infringement after the communication of the statement of objections or during the hearings before the Council's Plenum. Such form of cooperation is deemed as special mitigating circumstance which may even trigger a reduction of the fine below its minimum threshold set at 0.5% of the turnover obtained in the year preceding the sanctioning decision.

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.

Vertical Agreements. Cooperation Between Non-Competitors

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. Companies are provided with a set of rules based on which they should be able to self assess, before entering into cooperation agreements with other market players, whether such cooperation is legal. Some competition restraints, which relate to resale price fixing, market allocation and bid rigging, are per se prohibited, irrespective of the parties' market share. Resale price maintenance arrangements or absolute territory protection clauses, prohibiting passive sales to territories exclusively reserved to the supplier or allocated by the supplier to a distributor are some of the most frequent examples uphold by the Competition Council in practice. After Romania's accession to the EU, several investigations have been opened by the Competition Council based on the clauses in the distribution agreements which prohibited sales outside the country. Although none of such procedures have been yet finalised, they proved the national authority's focus in protecting the market integration objectives, in line with the EC's agenda. Under specified conditions and guidelines and below a market share threshold, some vertical agreements (e.g. exclusive or distribution, non-compete obligation, maximum resale prices or recommended resale prices) benefit of block exemption (are presumed legal). Should the vertical agreement not benefit block exemption (for instance, 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(2) of the Competition Law or Article 101(3) TFEU. The individual exemption requires a balance between the negative effects of the vertical agreements (e.g. rasing 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). Both on national and EU level, companies have to self assess the potential restrictive clauses in vertical agreements based on the guidelines issued by the EC, as the clearance procedure, aimed at obtaining a formal decision of the authority on the legality of the purported practice, is no longer available[6].

[6] At European Union level, the individual clearance procedure was repealed under Council Regulation (EC) No. 1/2003 of 16th of December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (currently Articles 101 and 102 TFEU). At national level, the individual clearance procedure has been repealed on the 5th of August 2010, when the Competition Law was significantly revised.

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 101 TFEU 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 EU level by adopting unilateral market strategies which could harm consumers and/ or competitors. Domination is defined as the ability of a company, to act, to a large extent independently from its competitors (actual and potential) and its clients in that particular market. The recently revised Competition Law provides for a relative presumption of dominance: firms which hold more than 40% of the relevant market in question and presumed to be dominant, should other factors not prove the contrary. Thus the presumption is rebuttable, for instance, based on the exact structure of the relevant market, position of the main competitors, entry barriers or specific advantages enjoyed by an undertaking.

Holding a dominant position is not prohibited, it is abuse which can be caught under the antitrust rules. The abusive behaviour may consist in: (i) exploitative practices, i.e. abusing market power in trading relationships with customers or suppliers (e.g. unfair purchase or selling prices, tying arrangements, price discrimination) and (ii) exclusionary practices, i.e. abusing market power with an aim to harm competitors (e.g. refusal to deal, predatory pricing etc).

Article 6 of the Competition Law provides only an exemplificative list of behaviours 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 dissimilar conditions for equivalent performances, causing to some of them a disadvantage in the competitive position;
- Conditioning of concluding certain contracts by the partner's acceptation 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.

According to the recently revised Competition Law, companies may now offer commitments during the investigation procedure that they will comply with a certain conduct as to end the alleged infringement.

The Competition Council has recently applied significant fines in two abuse cases, namely (i) one case against the national post-office operator for discriminatory prices applying a fine of approximately EUR 24,060,000 (ii) the other, against the two main telecom operators (i.e. Orange and Vodafone) applying fines of approximately EUR 34,800,000 and EUR 28,300,000, respectively for actions related to restriction of access to essential facilities. Such cases are currently on the top of the fine record applied by the authority in its practice.

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

Notification thresholds
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 and may trigger a notification obligation and applicable clearance requirement in the competent jurisdiction. In merger cases, a division of competence between the EC and the national authorities applies.

The Commission has exclusive power to examine concentrations with a Community dimension (the one stop shop principle) determined on the basis of certain conditions (mainly turnover thresholds provided under Council Regulation (EC) No. 139/2004 of 20th of January 2004 on the control of concentrations between undertakings - the EC Merger Regulation), while the Competition Council assess concentrations with national dimension.

Should the merger not fall in the jurisdiction of the European Commission, it would require clearance by the Competition Council if the following thresholds 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[7].

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. For justified cases, the buyer may also require for a derogation from the above rule. Within a 5-year statute of limitation period, the Competition Council can impose a fine of up to 10% of the Romanian turnover achieved by the buyer for completing a notified merger before clearance.

[7] The computation of the turnover from RON to Euro is performed by reference to the exchange rate communicated by the National Bank of Romania for the last business day of the year preceding the notified transaction.

Review periods
The Competition Council shall issue a decision to either authorize the merger, or open an in-depth investigation within 45 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 60-90 days, since the authority usually takes 15-25 days before it declares the submission complete and the statutory time starts to run. In certain cases, a simplified procedure is available. In such case, the parties submit the notification under a simplified form[8].

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 ranging from EUR 10,000 up to EUR 25,000 shall be paid.

[8] The general notification form is attached as Annex I to the Romanian Merger Regulation, while the simplified notification form is attached as Annex II to said Regulation.

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 authorities
The sanctions for violations of the Competition Law are serious and they may reach between 0.5% and 10% of the involved party's turnover on the year prior to the sanctioning decision.

Other sanctions include invalidity of contract terms, damages claims requested in court by the damaged competitors and other restrictions imposed by the Competition Council or the courts on the business activity. The Competition Law can also lead to criminal liability of those individuals responsible for the violation.

So far, the Competition Council has only once remitted the case to criminal prosecution.

Throughout more than 15-years, the Romanian Competition Council applied fines amounting in excess of EUR 150,000,000 for the infringements of domestic antitrust rules.

However, the largest part of this amount has been applied during the last few years, when the Competition Council accelerated the investigation process and also raised the fines level imposed on the players found "guilty" of anticompetitive practice.

Investigation tools

If the Competition Council has some information on anticompetitive behaviour (i.e. by its own sources or following a complaint submitted by a third party) it may open an investigation. The Competition Law recently revised provides that the opening order may only be contested at the end of the investigation procedure, together with the final decision. This is intended to put an end to the jurisprudence already formed, according to which, the Competition Council's order to open an investigation could have been annulled, in justified cases, and thus the whole investigation be ended by the court. The Competition Council may also decide to launch sector 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 market[9]. 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 60 days as from its submission in a comprehensive format. Where the Competition Council dismisses a complaint it must give the complainant the opportunity to make his views known before the competent commission.

Down raids

Dawn raids by the competition inspectors represent one of the investigation tools frequently used by the Competition Council for finding evidence on the infringement of the Competition Law. The inspectors, except for debutants, 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;

[9] At present, several market investigations are carried out by the Competition Council, e.g. on the energy and pharmaceutical markets.

- 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 between 0.1% and 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 raid[10]. Other fines imposed by the Competition Council were mainly determined by the undertakings providing for incomplete or misleading information in the course of investigation[11]. 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 thereof[12]. Comminatory penalties ("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.

As a novelty of national Competition Law, communications between a lawyer and client are protected by the legal privilege and cannot taken or be used as proof, provided that they are made for the purposes of the exercise of the client's rights of defence and are related to the object of the investigation. A special sealing procedure is provided in case the protected character of a communication is under discussion between the undertaking and the inspectors. The President of the Competition Council decides on the award of the legal privilege to the correspondence at stake and its decision is subject to appeal in court.

[10] 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.
[11] 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).
[12] 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.

How We Can Help

- Special lawyers teams permanently on-call to provide assistance at down 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 "surprise" 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 to legal actions 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 behaviour contrary to the competition rules), actions for nullity, etc.

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 the anticompetitive practice prohibited by the Competition Law.

The recently revised law provides that the status of limitation of the damages action is 2 years and starts to elapse from the date the Competition Council's decision remains definitive and irrevocable.

This provision may lead to the interpretation that the applicant may necessarily submit a complaint to the Competition Council and obtain an administrative decision on the infringement prior to seeking damages in court.

Although the burden of proof on the claimant is definitely more severe in the absence of the Competition Council's prior investigation of the case, we do not exclude however direct damages actions in court, as the national judges have extensive powers to directly apply both national and European Union antitrust rules.

Companies having blown the whistle in cartel cases or hardcore vertical agreements which benefit of leniency are also exonerated from the joint liability resulting from a damages action, which bears on all participants to the infringement.

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).

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 to 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 state aid is based on a system of ex ante authorization. Consequently, each Member State is required to inform the Commission, based on a notification procedure, 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" if it finds, after a preliminary examination, 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" if it finds, after a preliminary examination, that doubts are raised as to the compatibility of the notified measure with the common market.

Moreover, if 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. 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, 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 6th of August 2008 declaring certain categories of aid compatible with the common market in application of Articles 107 and 108 TFEU (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 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 complies 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 sectors[13];
- 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.

[13] 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; © 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.

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.

Victoriei Square
4–8 Nicolae Titulescu Ave.
America House, West Wing, 8th Floor
Sector 1, 011141, Bucharest
Ⓣ +40 (21) 204 88 90
Ⓕ +40 (21) 204 88 99
Ⓔ office@tuca.ro
Ⓦ www.tuca.ro