Romania: The new Romanian order

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Catalin Grigorescu and Alina Melcescu of bpv Grigorescu discuss the changes in antitrust law since Romania joined the EU

As an effect of Romania's accession into the EU on January 1 2007, all EU rules and regulations in the area of antitrust law have become directly applicable in Romania. National antitrust rules shall apply exclusively where an agreement or practice does not have an effect on the trade between member states.

The Romanian competition legal framework is represented by Law no 21/1996 regarding competition (Competition Law). In addition to this general law, there are a number of regulations adopted by the Romanian Competition Council (RCC) establishing guidelines for the application of the Competition Law.

Anticompetitive agreements are primarily regulated under Romanian legislation by Article 5 of Competition Law. According to this legal provision, any explicit or tacit agreements between undertakings or associations of undertakings, any decisions by associations of undertakings and any concerted practices, which have as their object or effect the restriction, prevention or distortion of competition on the Romanian market or on a part of it, are prohibited.

Undertakings that do not comply with these provisions face a fine of up to 10% of their total turnover for the financial year previous to the sanction, according to Article 51(1, a) of Competition Law.

In addition to the provisions of the Competition Law, there are a number of regulations adopted by the RCC setting down guidelines for the application of Competition Law in what regards anticompetitive agreements.

The Romanian national antitrust law regime is largely harmonised with the European legislation in force prior to enactment of Council Regulation no 1/2003. As such, the Competition Law and the secondary legislation in Romania still use the system of the individual exemption, whereby the RCC has to decide whether or not a clause that prima facie infringes the competition rules (and does not fall under the scope of the block exemptions) is saved by the application of Article 5(2) of the Competition Law, which mirrors the provisions of Article 81(3) EC Treaty.

In an individual exemption procedure, the burden of proof that all necessary conditions under Article 5 (2) of Competition Law are met lies with the respective undertaking. In order to obtain an individual exemption, the applicant shall demonstrate before the RCC the fulfilment of the following main conditions:

- the positive effects prevail over the negative ones or are sufficient to offset the restriction of competition;
- customers are assured a benefit corresponding to that realised by the parties;
- it does not allow the parties to eliminate competition from a substantial part of the relevant market;
- the possible restrictions of competition are critical to obtain the expected advantages; and
- the arrangement between the parties contribute, or may contribute, to one of the following:
  - improving the production or distribution of goods;
  - promoting technical or economic progress and improving the quality of goods or services; and
  - charging consumers substantively lower prices in the long term.

As regards the consequences of the failure to apply for an individual exemption, in practice it is argued that a court has no legal grounds to ascertain the nullity of an agreement or practice for the sole reason of failure to apply for an individual exemption.

Recently, by its decision no 35/2009, the RCC imposed fines exceeding RON 1.5 million (approximately €360,000) on 32 driving schools that participated in a cartel in the market of car driving training services in Bucharest. Following an investigation, the RCC stated that an anti-competitive agreement was concluded between several driving schools in Bucharest in order to increase and fix the fees for car driving classes for the B category driving license to at least RON 800 starting February 1 2008. By this decision, the RCC also imposed an obligation on the driving schools to notify the RCC, for a period of two years, on any change in fees.

Additionally, in a case regarding the rights to broadcast football matches, on April 15 2009, the RCC opened ex officio two investigations on the following aspects:

- the possible infringement of the provisions of Article 5 (1) of Competition Law, the equivalent of the article 81 (1) of the Treaty establishing the European Community (the EC Treaty) by the Romanian Professional Football League and its members by the joint selling of football games commercial rights;
- the possible infringement of the provisions of the Article 5 (1) of Competition Law by the consortium between the
broadcasting company Antena 1 SA and the company RCS&RDS SA by the exercise of the television rights over the football games from the Romanian Championship – First league, as provided by the contract concluded between the Romanian Professional Football League and the aforementioned consortium.

By Order no 300 of August 21 2009, published in the Official Gazette of Romania, Part I, no 610 of September 7 2009, the RCC adopted new guidelines on the leniency policy and repealed the initial guidelines.

The most important provisions introduced by the new guidelines refer to the following aspects:

- The distinction between immunity type A (when an undertaking is the first to submit evidence that, in the RCC’s view, may enable it to open the investigation procedure or to effect unforeseen inspections) and immunity type B (ie when an undertaking is the first to submit evidence that, in the RCC’s view, may enable it to prove an infringement of Article 5 of the Competition Law or of Article 81 (1) of the Treaty establishing the European Community).
- The procedure of granting markers for the undertakings which decided to cooperate with the RCC, ensuring the priority regarding the order of registration for the immunity requests.
- The introduction of a new procedure regarding the simplified requests for the immunity type A (ie the undertaking which requested or intends to request immunity to the European Commission can also request immunity to the RCC by the procedure of the simplified requests when it considers that the Romanian authority could be better placed in accordance with the provisions of point 14 of the Commission Communication on the cooperation between the competition authorities.

According to Article 6 and Article 51 of Competition Law, the abusive use of a dominant position held by one or more undertakings on the Romanian market or on a substantial part of it, by anti-competitive behaviour, which affect or may affect the economical activity or prejudice the consumers, is sanctioned with a fine of up to 10% of the total turnover of the company realised during the financial year previous to the sanction.

Not many cases of abuse of dominant position have been investigated and found by the RCC. However, in May 2009, the RCC announced that it launched an investigation concerning a possible abuse of a dominant position of Lafarge Cement (Romania) SA on the market of cement type CEM I 52,5R in Romania. The RCC has already performed dawn raids at the headquarters of Lafarge, as well as at the undertaking's two business places. The RCC is currently analysing the case.

Also, following a third party complaint, the RCC opened an investigation on the market of therapeutic mineral water supply services in Baile Olănoşti for analysing a possible abuse of dominant position by Olănoşti Riviera SA, which refused granting access to the therapeutic mineral water resources in Baile Olănoşti.

Additionally, a recent development concerns the annulment by the Bucharest Court of Appeals, on May 5 2009, of the decision of the RCC in the case of abuse of dominant position against Kronospan Sepal SA on the market of simple wooden boards and melamine fireboards. The RCC has appealed the decision of the Bucharest Court of Appeals before the Supreme Court of Justice.

Articles 10-15 of Competition Law represent the legal framework for the control of economic concentrations. According to Article 12 of Competition Law, the economic concentrations having the effect of creating or consolidating a dominant position, which lead to or are likely to lead to a significant restriction, prevention or distortion of competition on the Romanian market or on a part thereof, are prohibited. According to Article 15 of Competition Law, concentrations that exceed certain thresholds (the cumulated turnover of all undertakings involved in the concentration exceeds €10 million or there are at least two undertakings involved in the concentration whose Romanian turnover exceeds €4 million) must be notified to the RCC.

An undertaking which does not observe the provision set out by Article 12 faces a fine of up to 10% of its total turnover in the financial year previous to the sanction. In addition, the failure to notify an economic concentration to the RCC in the cases where this notification is mandatory is sanctioned with a fine of up to 1% of its total turnover in the financial year previous to the sanction.

Several concentrations have been approved by the RCC in 2009. We note the RCC’s non-objection decision on March 2 2009 regarding the economic concentration resulting from the takeover of control by Raiffeisen Landesbank Oberösterreich, active in the banking sector, over Impuls Leasing International, Impuls-Leasing Romania IFN SA and Impuls-Leasing Services SRL.

By its decision no 24 of April 27 2009, the RCC approved the takeover by Unilever NV and Unilever South Central Europe SRL of the Romanian popular ice-cream brand production division Napoca, previously held by Napolact SA and Friesland Romania SA.

Also, by its non-objection decision no 42 of June 30 2009; the RCC approved the takeover by Pfeifer & Langen International BV of three sugar production factories in Romania.

In what concerns the sanctions applied in this area, by its decision no 18 of March 12 2009, the RCC imposed a fine in the amount of RON 163,486.98 (approximately €38,500) on AGIP Romania SRL for the failure to notify an economic concentration. AGIP Romania SRL is a member company of the ENI SpA Italia Petroleum Group, its main line of business in Romania consisting of retail trade of petroleum products (gasoline and diesel oil) by self-owned distribution stations. The economic concentration was the result of the takeover of 10 fuel distribution stations and of the related assets from MOL Romania Petroleum Products SRL by AGIP based on an agreement reached on December 19 2008.

Several sector investigations have been launched in 2009 by the RCC, aiming to identify the main concerns on competition of important markets of the Romanian economy.

The RCC finalised in July 2009 the investigation of the market of cereals used in the bakery industry. The investigation was started in September 2007, its purpose being to highlight the market organisation, functioning and the mechanisms of this area.
The investigation was focused upon the wheat market, which holds the most significant share of the analysed market and that the obtained results can be easily applied to other markets featuring this industry. The organization and the functioning of the wheat storage services market was also subject to this investigation, as this service is of an utmost importance to the functioning of the wheat market.

The main findings of this investigation include:

- A fractioned agricultural property, although recently a concentration of agricultural exploitations occurred;
- A significant black market, estimated to approximately 40%;
- Indirect interventions from the Romanian State, distorting the competition, as the Romanian State is delivering considerable wheat amounts from the state reserves to refresh supplies or to cover wheat shortages on the market during certain periods;
- The lack of wheat transactions on the commodity market represents a major problem;
- A discrepancy in negotiating power between individual producers, as suppliers, and the purchasers, exerting a considerable influence on the wheat prices;
- Significant entry barriers on the market of production and trading of wheat used in the bakery industry were not identified. Still, it can be stated that this market registers considerable scale economies and that undertakings that incorporate several related activities benefit from competitive advantages as a result of this diversification;
- The wheat storage services market is affected by entry barriers. Also, while a large numbers of undertakings operate on the wheat storage market, there are certain areas covered by a single undertaking; and
- The analysis reveals possible criteria regarding the definition of relevant markets in possible competition cases (retail trade market and wholesale trade market).

In May 2009, the RCC opened a sector inquiry destined for examining the mechanisms of the motor vehicle spare parts market.

This inquiry is intended to identify any possible distortions to competition in the market and also to assess if the motor vehicle spare parts market is competitive enough to transfer the competition benefits towards consumers.

According to the competition provisions, namely the Regulation of March 29 2004 regarding the application of article 5(2) of the Competition Law no 21/1996 to vertical agreements in the motor vehicles sector, the term motor vehicle spare parts stands for certain goods destined to be installed in or upon a motor vehicle so as to replace components of that vehicle, including goods such as lubricants which are necessary for the use of the motor vehicle, except for gasoline.

As part of its inquiry, the RCC intends to request information, documents and statements from the players on the relevant market (undertakings, producers, importers, distributors, professional associations or competent state bodies).

In April 2009, the RCC launched an inquiry into the milk processing market in order to examine the market structure and the relevant factors which influence the relationship between milk producers and processors of cow, sheep and goat milk.

The inquiry was the result of the RCC’s concerns deriving from certain hints indicating a tensioned relationship between cow milk producers and processors. Therefore it focuses on the first trading stages in order to identify and correct possible failures of competitive nature to the end of protecting the consumers’ interests.

During such inquiry, the RCC may request documents, information and statements from all involved agents such as undertakings, producers, importers, distributors, professional associations and competent authorities.

In March 2009, the RCC announced the launch of an investigation concerning the market of wholesale distribution of medical drugs, with the aim to acquire information in respect to the state of competition in this sector.

The RCC intends to conduct thorough research in this area, with the purpose to identify and remedy any possible competition malfunctions on the market. According to the RCC, the aim of this investigation does not consist of investigating and sanctioning specific companies, but of examining the market structure in this area, as a whole.

In the end of this report, we would like to mention the Decision no 1037 of July 9 2009 of the Romanian Constitutional Court, published in the Official Gazette of Romania, Part I, no 501 of July 21 2009, with important consequences on the competition law, by which the unconstitutionality exception regarding the provisions of Article 28 (2) of Competition Law was admitted. Article 28 (2) of Competition Law provides that "The regulations of the Competition Council can be appealed before the Bucharest Court of Appeal, in accordance with the procedure for administrative dispute resolution, within 30 days of the handing over or of the publication of the appealed act."

Law no 554/2004 regarding the administrative disputes (Law 554) provides that the individual administrative acts can be appealed at any time by an exception of illegality, while the normative administrative acts can also be appealed at anytime, but only by direct action.

The provisions of Competition Law stipulating a 30-day period for appealing by direct action both normative administrative acts and individual administrative acts issued by the RCC are derogatory from the general rule established by Law 554. Thus, the normative administrative acts would become intangible if they are not appealed by direct action within 30 days as of their publication.

In consideration of the above the Constitutional Court held that establishing a special period for appealing the normative administrative acts issued by the RCC comes into conflict with the provisions of Article 21 (1) of the Constitution which guarantees the free access to justice, as well as with the provisions of Article 126 (6) of the Constitution which guarantees the judicial control
over the administrative acts issued by public authorities. For these reasons, the Constitutional Court admitted the unconstitutionality exception. The decision of the Constitutional Court is final and generally binding.

**About the author**

Catalin Grigorescu is the managing partner and head of competition practice of bpv Grigorescu in Bucharest. He has more than 10 years of experience advising on a range of industries and competition issues, with focus on anticompetitive practices and merger control. His work includes advising and representing large and medium-sized companies on antitrust compliance and litigation matters under Romanian and EU law. He has assisted several clients in designing and implementing national or multi-jurisdictional compliance programmes. Further, he assists clients in national and multi-jurisdictional merger control filings. He holds a masters degree in European Competition Law from the University of Bremen and is a regular contributor on competition law to national and international legal publications. He is a member of the Bucharest Bar Association and of the International Bar Association.

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Alina Melcescu is a senior associate of bpv Grigorescu in Bucharest and a member of the firm’s competition practice group. Most recently she has been involved in carrying out an antitrust compliance audit for an international multinational client in relation to purported competition infringements and has advised on complex antitrust issues with a special view to abuse of dominance. Further, Melcescu’s experience includes drafting merger control notifications to the Romanian Competition Council and assisting clients in merger control proceedings. She is also a member of the firm’s corporate and M&A practice group and contributes actively to various task forces on competition, state-aid and single market access of several business organisations. She is a member of the Bucharest Bar Association.

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