bpv GRIGORESCU ȘTEFĂNICĂ

Romania—Cartel between media service undertakings sanctioned by the Romanian Competition Council

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In December 2014, the Romanian Competition Council (RCC) issued a decision[1] sanctioning 11 undertakings[2] acting in the field of media services for concluding an anti-competitive horizontal agreement whose purpose was the exclusion from the media services market in Romania of the competing media agencies of the Group or affiliated with the latter (the Decision).

1. The facts

Between March 2012 and October 2012, 11 top media agencies active in Romania, holding together a quota of approximately 70 per cent of the media market, participated in several meetings and exchanged correspondence with the purpose of construing and implementing a strategy for excluding from the market their main competitor, the Group and its affiliates. The members of the cartel tried to justify their conduct by the alleged aggressive price strategy and advantageous business conditions practiced by the Group, strategies that consolidated its market position. The decision of the 11 competing undertakings to boycott the Group was enforced also by the participations gained by the said company in two other media agencies acting on the relevant market.

In order to implement their exclusion strategy, the 11 involved undertakings created the Romanian Media Club, an entity without legal personality under the auspices of the Union of the Advertising Agencies in Romania. RCC's investigation revealed that the main activities agreed and carried out by the sanctioned undertakings in view of implementing the exclusion strategy consisted of: the request of the list of participants to the pitches organised by the clients and the refusal to participate in case the Group had been invited; the creation of the Romanian Media Club and of a pitch guide that should have provided the obligation to reveal the list of agencies participating to pitches; the refusal to participate in public events in which the Group was supposed to participate; the withdrawal from the management bodies of the industry's organisations whose members also included employees of the Group. The involved undertakings have also discredited the Group by leading online researchers to negative articles about the Group and by justifying to the clients their refusal to participate in the pitches where the Group was invited by the unfair and opaque practices of the latter.

Furthermore, the evidence obtained during the RCC's investigation revealed that the involved undertakings were aware of the illicit nature of their conduct, as well as the risks implied by this conduct.

2. The relevant market

As regards the product market, the RCC identified two components of the advertising market in Romania from the advertising agencies perspective, namely the marketing communication services market (non-media market) and the media communication services trade (sale/acquisition) market (the media market). For the concerned case, the RCC deemed that the relevant product market is represented by the entire media communication services trade market, taking into account that there were no sufficient elements justifying the segmentation of the said market depending on the type of the client.

The relevant geographic market considered by RCC was of national dimension, namely the Romanian territory, in consideration of factors such as the language differences, various media conditions, price differences, necessity to adapt the communication to the targeted public in a certain country, different

[1] The full text of this Decision is available only in Romanian on the website of the Romanian Competition Council, http://www.consiliulconcurentei.ro/uploads/docs/items/id9971/decizie_media_varianta_pentru_publicare.pdf [Accessed April 8, 2015].
[2] Brand Programming Network SA, BV McCann-Erickson SRL, Groupm Media Operations SRL, Initiative Media SA, Mediacom Romania SRL, Mediaedgecia Romania SRL, Mindshare Media SRL, Opti Media SRL, Starcom Mediavest Group SRL, United Media Services SRL and Zenith Media Communications SRL.

consumption habits and media channels preferences, despite the fact that multinational clients might have chosen a global marketing strategy.

3. The law

Following its investigation, RCC concluded that the actions performed by the investigated undertakings represent a horizontal agreement in view of eliminating from the relevant market the competing media agencies of the Group or affiliated with the latter having as object and effect the restriction of competition on the relevant market. Such agreements are strictly forbidden according to both art.101 of the Treaty on the Functioning of the European Union (the Treaty) and art.5 of the Romanian Competition Law No.21/1996 (the Competition Law) and, therefore, the investigated undertakings are in breach of the aforementioned legal provisions.

4. The case assessment

The incidence of the above mentioned provisions of the Treaty and of the Competition Law in a particular case implies that the following conditions are cumulatively met:

(a) The existence of at least two undertakings or of an association of undertakings.
(b) The agreement between the undertakings, a decision of the association of undertakings or a concerted practice.
(c) The agreement, the decision of the association of undertakings or the concerted practices to have as object or effect the prevention, restriction or distortion of competition on the Romanian market or a part thereof or, in the case of art.101 of the Treaty, on the European Community market and in this latter case, also to significantly affect trade between the Member States.

RCC conducted an extensive assessment in order to determine if the aforementioned conditions were met in the case at hand. A series of arguments of the RCC in grounding the Decision summarised below are to be considered.

4.1. The concept of "undertaking"

In the case at hand, RCC concluded without any difficulties that the 11 media agencies were all undertakings falling under the provisions of the Treaty, since they were all joint-stock or limited liability companies carrying out an economic activity consisting in the supply of media services.

4.2. The agreement between undertakings

As a general rule, a competitive market is the only framework in which innovation of the undertakings and the protection of the consumers are adequately and efficiently performed. To such purpose, each undertaking has to design its business plan and carry out its activities independently, by intelligently adapting to the behaviour of its competitors on the market. Thus, the co-operation and co-ordination of the undertakings represents a form of conduct that breaches the aforementioned principle, the Court of Justice of the European Union (CJEU) stating that it is strictly forbidden for the undertakings to have any direct or indirect contact having as object or effect the influence of the conduct on the market of an actual or potential competitor or the disclosure to such a competitor of the course of conduct which they themselves have decided to adopt or contemplate adopting on the market"[3]. The decision of co-operation of the undertakings may materialise in an agreement or be carried out as a concerted practice.

As per the Decision, RCC reinforced that for an agreement to be qualified as a cartel, it is irrelevant whether the agreement was verbal or written, explicitly or tacitly entered into by the parties, being sufficient for the undertakings to express their common intent of behaving in a certain way on the market. Also, it is not specifically necessary for certain formalities to be observed or for the undertakings to convene beforehand on a mutual action plan. Nonetheless, the existence of such a plan may be qualified as evidence of a complex anti-competitive strategy showing an increased level of interest and intention in breaching the Competition Law.

The RCC deemed that the evidence revealed in the case at hand showed that the sanctioned

[3] *Coöperatieve Vereniging "Suiker Unie" UA v Commission of the European Communities* (40/73) [1975] E.C.R. 1663 at [174]

undertakings concluded an agreement providing in detail a certain conduct to be followed by all of them and all the actions in relation to which the said undertaking should have co-ordinated their conduct. By acting according to the said agreement, the undertakings waived their autonomous decisional process and co-operated to eliminate a competitor from the market. The RCC deemed that the actions of the involved undertakings are fulfilling all the criteria for being qualified as an agreement in the meaning of art.5 of the Competition Law and art.101 of the Treaty.

4.3. The prevention, restriction or distortion of competition

One of the most important elements of a free competitive environment is the risk the entities undertake when establishing their business strategy. The co-operation and co-ordination of the undertakings represent a form of conduct that is expected to distort such risk by diminishing it.

In accordance with the CJEU case law[4], the RCC emphasises in the Decision that, although the analysis of the anti-competitive behaviour of an undertaking focuses on the agreements that affect or that may potentially affect the competition by altering the prices, the production, the innovation, the variety and the quality of goods and services, however the competition regulations have the purpose not only to protect the interests of the competitors or of the consumers, but also the structure of the market and the competition itself.[4]

In the Decision, RCC decided that the agreement of such a group of competitors for eliminating a competitor from the market is a form of collective boycott that severely affects the structure of the market and which represents a restriction by object. In deciding as such, RCC stated that the declared purpose of the undertakings (i.e. the regulation of the market by implementing ethical and transparent principles) is only apparently legal and it is irrelevant in the case at hand. The true purpose, resulting from all the evidence gathered by RCC in the dawn raids, was in fact that of eliminating the main competitor from the market, a competitor whose low prices and high quality services were making it the main winner of the pitches organised by the clients.

The investigation of RCC revealed that, at the date of the Decision, the agreement had already produced some of its effects that were themselves reflected, for example, in the turnover of the sabotaged competitor and in the obstruction of the normal management of several tender procedure.

Even though the agreement was qualified by RCC as a restriction by object and therefore the assessment of its effects on the market was no longer necessary, the competition authority also emphasised in the Decision the potential future obvious effects of such agreement, envisaging the following alternative situations. First, RCC showed that if the agreement had attained its purpose and the Group had stopped being invited to pitches, the structure of the market would have been artificially modified by the elimination of an important actor of the market; the exclusion of the Group would negatively affect the media clients by allowing the undertakings to present increased prices in the pitches in order to increase their profit. Secondly, if the Group had been invited to pitches together with smaller companies than the 11 involved undertakings (which were major players on the market), the clients organising the pitches would have been deprived of the benefits of an intense competition. Thirdly, the pitches would have been annulled only if the Group and the 11 undertakings had been invited to participate, since the 11 undertakings would have declined the invitation and the sole participant would have been the Group, in which case competition would have been distorted.

Furthermore, the elimination of competition between the involved undertakings who colluded against a leading competitor and decided not to compete between themselves at the pitches the Group was invited to participate in is also to be considered.

Moreover, even if it is an atypical boycott because the actions of the involved undertakings are not exercised directly over the competitor (the Group), but only indirectly by the intermediary of the clients, the anti-competitive content of the deed remains intact.

As regards the arguments of the sanctioned undertakings that they were only reacting and defending themselves from the opaque and unfair practices of the Group, RCC deemed, in accordance with the CJEU case law, that

> "the fact that an undertaking that is adversely affected by an agreement whose object is the restriction

[4] *GlaxoSmithKline Services Unlimited v Commission of the European Communities* (C-501/06 P) [2009] E.C.R. I-9291 at [63]; *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* (C-8/08) [2009] E.C.R. I-4529 at [38].

> of competition was allegedly operating illegally on the relevant market at the time when the agreement was concluded is of no relevance to the question whether the agreement constitutes an infringement of that provision"[5].

RCC also concluded that the infringement does not qualify for individual exemption as the restrictions by object produce the highest prejudices as they benefit only the participants to the anti-competitive agreement and not the consumers.

Another sensitive issue analysed in the Decision is related to criteria to be met in order for an undertaking to be deemed to have delimited itself from the infringement. In this respect, it has been constantly[6] stated that, unless the undertaking has expressly and publicly delimited itself from the agreement, it is presumed that it infringed the competition provisions only by participating in the involved undertakings meetings, although it did not effectively implement any of the agreed measures. Furthermore, its passive participation in a meeting in which only one of the participants revealed its anti-competitive intentions is likely to be qualified as a breach of the provisions of the competition law[7]. In the Decision, RCC argued that the partial disapproval expressed by one of the involved undertakings only towards the other undertakings participating in the agreement and followed by its conduct in full accordance with the terms of the anti-competitive agreement cannot be qualified as public delimitation from the anti-competitive agreement. The fact that one of the undertakings did not effectively implement the agreement may represent at the most a mitigating circumstance, but it shall not exclude the liability for the anti-competitive conduct.

One of the elements invoked in their defence by the involved undertaking was the implementation of compliance programs. It is to be noted that RCC deemed that the effective implementation of a compliance program implies the training of the employees as regards the competition law in view of preventing its infringement, and therefore the involved undertakings cannot invoke that they were not aware of the competition law provisions when committing an infringement. Furthermore, in the case at hand, the evidence showed that the undertakings were aware of the competition risks implied by the agreement.

4.4. Considerations regarding the continuity of the infringement and the joint liability of the involved undertakings

The assembly of successive and various actions undertaken by the undertakings in view of achieving a sole purpose can be deemed as representing a sole and continuous breach and be qualified as a cartel, irrespective of the fact that one or more of those actions could represent by itself or themselves breaches of the competition law. It is irrelevant whether the agreement varies in time, if its mechanisms are adapted and consolidated or if one of its constituent mechanisms itself represents a breach of the provisions of the competition law[8]. RCC reiterated the aforementioned principle in the Decision and furthermore indicated that if the agreement refers to a sole and unique purpose it represents a cartel, irrespective of the occurrence of any derogation from the rules agreed upon or of any internal conflicts.

Based on the aforementioned assessment, RCC deemed that the agreement represented a sole and continuous infringement of the Competition Law and the Treaty.

As regards the level of responsibility of each undertaking participating to the agreement, the RCC referred to the case law which showed that the liability of an undertaking participating in an agreement for the infringement cannot be excluded only in the consideration of its specific contribution, but it includes the liability for the actions of the other participants as they acted in order to achieve a sole purpose. It is in the nature of this kind of co-operation for each participant to contribute distinctly to the agreement, depending on its market position, on the structure of the market and on whether the undertaking in question is an initiator of the agreement. Thus, an undertaking contributing to a cartel may be held liable for the actions performed by itself during the period for which it was party to the agreement, but also for the actions of the other participants as long as it acknowledged or could have acknowledged the illicit conduct and it was willing to take such a risk.

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[5] In *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.* (C-68/12) [2013] 4 C.M.L.R. 16.
[6] *Sarrio SA v Commission of the European Communities* (C-291/98 P) [2000] E.C.R. I-9991 at [118]; *Adriatica di Navigazione SpA v Commission of the European Communities* (T-61/99) [2003] E.C.R. II-5349 at [135]–[140].
[7] *Tate & Lyle v Commission of the European Communities* (T-202/98) [2001] E.C.R. II-2035 at [54]
[8] *Cimenteries CBR SA v Commission of the European Communities* (T-25/95) [2000] E.C.R. II-491 at [3699].

A recent development in the European and Romanian case law is represented by the sanctioning for the infringement of the involved undertakings which are not active on the relevant market, but participate individually and severally in the anti-competitive conduct. This was the case of one of the undertakings sanctioned by the Decision, incorporated as a special purpose vehicle for acquisition of media space for three other companies activating on the relevant market. The RCC deemed that even if this entity is not a competitor of the other involved undertakings, it was however a facilitator of the anti-competitive agreement considering that it acts on a related market and had an active role in establishing the directions for restricting competition on the relevant market.

4.5. Considerations regarding the effect on the trade between Member States

The interpretation that must be given to art.101 of the Treaty is that it applies only to the agreements that might significantly affect the trade between Member States, the agreement escaping the prohibition laid down in art.101 of the Treaty if its effect on intra-Community trade or on competition is not "appreciable" and it restricts competition or affects trade between Member States only insignificantly[9].

Moreover, as per the case law the trade between Member States may be affected if the relevant geographic market is national or regional considering that the application of the effect on trade between Member States is independent of the definition of the relevant markets. The effects an agreement has on the trade between Member States was analysed by the European Commission in the Guidelines on the effect on trade concept contained in arts 81 and 82 of the Treaty, stating among others that:

> "In the case of Article 81 of the Treaty (n.n. the current art. 101 of the Treaty), it is the agreement that must be capable of affecting trade between Member States. It is not required that each individual part of the agreement, including any restriction of competition which may flow from the agreement, is capable of doing so. If the agreement as a whole is capable of affecting trade between Member States, there is Community law jurisdiction in respect of the entire agreement, including any parts of the agreement that individually do not affect trade between Member States".

The assessment as to whether an agreement might impact competition refers to the mere possibility of such an agreement to trigger an amendment to the normal course of trade between the Member States. It is not absolutely necessary for the trade to be restricted or decreased, but may also imply an increase, even a significant one, in the volume of trade between Member States[10].

Furthermore, as per the Guidelines on the effect on trade concept contained in arts 81 and 82 of the Treaty

> "where an agreement by its very nature is capable of affecting trade between Member States […], there is a rebuttable positive presumption that such effects on trade are appreciable when the turnover of the parties in the products covered by the agreement […] exceeds 40 million euro. In the case of agreements that by their very nature are capable of affecting trade between Member States it can also often be presumed that such effects are appreciable when the market share of the parties exceeds the 5% threshold set out in the previous paragraph."

However, the aforementioned presumption is inapplicable in the case of agreements covering only part of a Member State; in such a case the significant effects have to be proven.

Another criteria worth taking into consideration is the market position of the involved undertakings—the better position they hold on the market, the higher the chances for the agreement to significantly influence the market.

RCC reminded that as per the CJEU case law the horizontal agreements affecting the entire national market are likely, by their nature, to affect the trade between Member States.

RCC concluded that there is a presumption that the effects on the trade between Member States are significant in the case at hand, taking into account the accumulated market share of around 70 per cent and a total accumulated turnover of around €223 million obtained by the involved undertakings in 2012, as well as the fact that the involved undertaking and the clients whose pitches have been affected by the anti-competitive infringement are multinational companies activating at national and international level.

[9] *Gosselin Group NV v European Commission* (T-208/08) [2011] E.C.R. II-3639 at [89]–[90].
[10] *Tréfileurope Sales SARL v Commission of the European Communities* (T-141/89) [1995] E.C.R. II-791.

5. The sanctions applied by RCC

The RCC concluded that the anti-competitive agreement was qualified as a horizontal restriction in form of a cartel covering the entire national territory of Romania and therefore as a hardcore restriction. Consequently all 11 involved undertakings were sanctioned by significant fines in total amount of around €3.2 million.

In individualising the sanctions, no aggravating circumstances were considered by the RCC, but a series of mitigating circumstances were accepted by the latter.

RCC considered as a mitigating circumstance the existence and implementation of a competition law compliance program by all the involved undertakings. Also, the novelty character of the infringement was considered as a mitigating circumstance, for it is the first case when the Competition Council sanctioned the breach of art.5 of the Competition Law by collective actions having the purpose of eliminating a competitor from the relevant market. RCC has also deemed that the guide elaborated by the Romanian Media Club was meant to create a transparent and efficient mechanism for the media market, an aspect that was considered by RCC as a mitigating circumstance. The co-operation of the investigated undertaking with the RCC was also deemed a mitigating circumstance. Also, the RCC qualified as mitigating circumstance the fact that one of the involved undertakings does not activate on the relevant market.

However, RCC did not accept a series of arguments invoked by the involved undertakings as mitigating circumstances, on one hand, due to the fact that such mitigating circumstances are not accepted in the case of cartels, such as: the undertakings stopped the infringement immediately, the lack of intention, and the absence of any economic advantages; and, on the other hand, due to the fact that such arguments were not sustained by the facts, as regards: the lack of the secret character of the anti-competitive deed, a reduced degree of implementation of the anti-competitive agreement, the economic crisis in a specific sector, reduced participation to the infringement, incapacity to pay the fine (as the latter is granted only in exceptional circumstances seriously grounded). Also, the RCC stated that the absence of a previous infringement of the competition law does not qualify as a mitigating circumstance just because the previous infringement of the competition law represents an aggravating circumstance.

As per the information available so far, 8 of the 11 sanctioned undertakings appealed the decision of RCC with the Bucharest Court of Appeal. None of the appeals was settled until the date, but the court has already rejected the request of four of the sanctioned undertakings for suspension of the Decision enforcement until settlement of the appeal.

6. Conclusions

In consideration of the RCC's thorough assessment of the infringement summarised above, the Decision brought an important contribution to the RCC's case law with respect to collective boycott agreements, as well as in the media sector. The guidelines provided by RCC in the Decision represent a step ahead in the restructuring process begun in 2013 in this sector by amendment of the Audiovisual Law for limiting the prerogatives of the media agencies.

Nevertheless, it is to be seen, following the settlement of the sanctioned undertakings' appeals, if the Romanian courts of law share the RCC's view in the Decision.

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