



The Liberal Professions and the Competitive Environment in Romania

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Similar to other countries, liberal professions have evolved in Romania into closed systems that preserved great privileges for its members; as such, modern attempts to increase competition in these sectors have faced serious resistance.¹

Recently, the restrictions in this area have been increasingly criticized for their anticompetitive effects and lack of legitimacy. The Romanian Competition Council (RCC) has acted consistently through both preventive and corrective measures in order to restore a normal competitive environment.

The main anticompetitive aspects concerning liberal professions in Romania were subject to repeated interventions and analyses by the RCC. We should enlist those concerning market access when talking about overregulation that is not motivated by the need to ensure high quality of services, especially the limitation of the number of professionals in the market (i.e. notaries, bailiffs) and those regarding the limitation of tariffs charged (notaries, bailiffs - by law; authorized accountants – by internal rule of profession) or restriction of advertising (in case of legal professions).

In addition to these, there are added exclusive rights granted to certain professions (activities assigned to notaries which could be performed by other legal professions, for example mandatory intervention of notaries in the real estate field) and other rules (those on business structure; for example, one can set up and operate a pharmacy only if one is a pharmacist).

The Competition law applies both to companies and natural persons engaged independently in an economic activity (self-employed) due to the fact that both are defined as undertakings and, implicitly, associations of undertakings. The representatives of liberal professions work mostly within individual or associated offices and are organized in professional associations or organizations.

It should be noted that almost all liberal professions ranging from lawyers, public notaries, architects, expert and licensed accountants, veterinaries, pharmacists, bailiffs, insolvency practitioners, financial auditors to evaluators, fiscal services mediators, and energy auditors are represented by a professional organization or association.

Most of these professions are regulated by the state and/or by professional organizations in virtue of their self-regulatory role assigned by the state.

¹ See *The Report 2009 on Common Market. National market. Competition policy in key sectors* elaborated by the Competition Council jointly with the Romanian Academic Society. The electronic version is available at www.consiliulconcurentei.ro

Similar to other countries, these associations should provide their members with training services, draft and application of professional ethical codes or best practices and in certain cases, and should represent and defend the interests of their members in the relationship with third parties. In this way, professional associations should play an important role in raising the efficiency of the field in which they operate.

The risk of competition restrictions is very likely when the professional associations are entitled by the state to issue rules limiting entry on the market and forbidding the pro-competitive conduct, but especially when the access to a market is conditional upon affiliation to the association.² This appears to be a feature specific to most of the liberal professions in Romania. Therefore, the affiliation to a professional association empowered to issue regulations is a mandatory prerequisite for a member to exercise the respective profession.

This may be explained to a certain extent by the fact that the professionals are required to continuously self-improve, to observe certain ethical rules or to face disciplinary measures in case they commit errors.

When an affiliation to a professional association gives rise to, for instance, concerted and coordinated conduct regarding tariffs, the beneficiary of the work lacks the advantages of free negotiation.

The main argument for maintaining such intervention in the market is based on the asymmetry of information³ which may be tackled by higher transparency, implying the supply of sufficient information which enables the beneficiary of the service to choose between different options and to understand its choice.

The transfer of certain regulatory powers to the professional associations should enable them to correct in an appropriate way the imperfections⁴ that are in general specific to the liberal professions, without reducing the economic welfare through the creation of certain competition distortions.

From the beginning, the RCC took an active stance in ensuring the compatibility of the normative acts provisions regarding the organization and regulation of these

² Potential pro-competitive and anti-competitive aspects of trade/business associations JT032544501, OECD , DAF/COMP (2007)45.

³ The consumer does not have the expertise necessary to evaluate the service offered by the members of these professions.

⁴ The so called market failures which might prevent the adequate match of the consumers needs (asymmetry of information, negative externalities, unsatisfactory provision of public goods/services).

professions with competition rules, within the limits of the attributions defined by law. Thus, the RCC implemented a series of procedures ranging from issuing recommendations aiming at amending or eliminating certain competition restrictions found in existing legislation to the attendance in different working groups, consultations, or issuing binding opinions on draft normative acts. In this way, it endeavored to ensure a broad dissemination of competition rules among public authorities as well as professional organizations involved in the regulatory process.

Over the years, following continuous advocacy activities, the RCC succeeded in eliminating or, at least, in replacing a major part of the competition restrictions with less harmful alternatives after deploying intense lobbying.

Thus, the mandatory minimum tariffs set up by the professional bodies by means of regulations on the organization and regulation of the professions were eventually abolished in regards to the expert and licensed accountants, lawyers, architects, geodesists, and veterinaries.

The quantitative restrictions limiting the number of pharmacists and dentists on the basis of certain geographic and demographic criteria were also abolished. In the case of the architects, the minimum tariffs were first replaced by reference tariffs and, most recently, by an information system regarding the costs for design.

However, it is important to mention that after eliminating these competition restrictions, the profession members, especially those of small size, continued to use the tariffs and fees stipulated in the lists already abolished as a benchmark in their own pricing policy. This explains why the negative effects continued to occur in the market even after the official abolition of those anticompetitive restrictions.

There are still professions featuring a high level of regulation. We refer here mainly to the legal professions, for instance the public notaries where all forms of competition restrictions featuring the so-called system of Latin notaries are still in place.⁵

⁵ System in force in countries such as France, Germany, Spain, Italy, Belgium etc and characterized by: the mandatory intervention in the field of real estate transactions; numerus clausus (limitation of the number of notaries); qualitative entry restrictions (a minimum period of legal studies, a minimum period of professional experience); mandatory minimum and/or maximum tariffs; other market conduct regulations (structure of the business, inter-professional cooperation, advertising restrictions).

Apart from the legal arguments pleaded to sustain the necessity of eliminating external constraints, the RCC has lately resorted to economic analysis tools to have a clear image of the effects of these restrictions in the market.

In 2009, taking as a starting point the study conducted in 21 Member States on services connected to real estate (commissioned and published by the European Commission⁶) and making use of economic methods and models of analyses, a similar study was initiated in Romania to survey the market of liberal professions from real estate services, services rendered by evaluators or by specialists in cadaster to legal services. From the comparative assessment of regulation indices, one of the highest degrees resulted in the case of public notary profession. The level determined was set over the European average of countries with similar organization, specific to this profession. Another aspect of assessment that was pointed out regarded the costs inferred from a real estate transaction, adjusted based on the country net average income and on the buying power, which was up to four times higher than the European average.

Thus, the assessment revealed an obvious positive correlation between the increased level of these costs with the high degree of regulation, at least in regard to legal services.

Following the RCC recommendations on the basis of this study and the European Court of Justice's judgments in competition cases which provide for the nationality criterion for notaries⁷ and the character of the economic activities performed⁸ by notaries, the representatives of the branch and the Minister of Justice showed relative openness in finding solutions to remove part of the current restrictions.

In this context, the law regarding public notary profession has been recently changed to introduce the possibility of liberalizing the market through flexible tariffs for certain acts and notarial procedures. In this regard, it was jointly agreed upon to implement a pilot program for a fixed period of time. At the end of this period, the effects will be quantified to determine whether the liberalization will continue or not, as well as to determine which regulation should be reintroduced.

⁶ Study of the European Law and Policies – ZERP (Bremen), International School of Real Estate (Regensburg), Viena University and Institute for Advances Studies (Viena)

⁷ C 47/08 EC versus Belgium Kingdom, C 50/08, EC versus Franch Republic, C 51/08 EC versus Marelui Louxemburg, C 53/08 EC versus Republic of Austria, C 54/08 EC versus Germany, Cauza C 61/08 EC versus Greece.

⁸ Character which results from the performance of this activity in competition conditions, conferring them the character of undertakings.

When restrictions of competition are not generated from a regulatory act adopted by the state but derive from decisions made within a professional organization, in the absence of a legal provision, the professional organization is subject to alleged infringement of competition law.

A similar situation was encountered in the case of dental technicians sanctioned in 2008.⁹ Furthermore, one year later, within management forums constituted through a large representation at the country level, the chartered accountants set jointly the bounding tariffs to be applied by each member of the organization. In case of chartered accountants, the sanction was imposed with a fine very close to the maximum legal threshold,¹⁰ after the permissive government regulation had been repealed and after repetitive notifications had been made with regard to the incidence of competition legislation in this particular field.

In 2012, another professional association, this time the bailiffs' association, was sanctioned¹¹ by the RCC for tariff-setting and for limiting the access on the market through imposition of excessive discriminatory rules applied.. In Romania, bailiffs represent a professional category with a particular statute, characterized by their assignment to perform acts under the legal control of the competent courts, having a regime of liberal profession. Although their nomination is approved by the Minister of Justice, they do not act as public servants. There are activities performed by bailiffs for which the decisions made in relation to the parties are not in the competence of the bailiffs, but of the court.

This profession is one of those featuring in practice a double anticompetitive regulation. Firstly, there is in force a regulation issued by the state, through the Ministry of Justice who, after consulting the association, settles the minimum and maximum tariffs for the services carried out by notaries, which implies the restriction of competition by price. Secondly, there is an additional restriction performed by the professional association consisting of the setting of certain expense levels as long as these expenses are also collected by the members of the association from their clients.

As regards to the access to market, the number of professionals is limited by geographic and demographic criteria. Additionally, their competence has a territorial limit. The access to the profession and by this, to the market, depends on their membership to the respective organization, the only one in Romania for this

⁹ A fine of about 5,000 euros.

¹⁰ A fine of 1,000,000 euros.

¹¹ A fine of 150,000 euros

professional category. Moreover, the professional organization introduced an excessive entry tax, 15 times higher than the average income, but for which the first-degree relatives and affinity of those already in the profession and organization were exempted from payment.

The professional organization waived the latter practice shortly after the RCC opened the investigation. As concerns the tariffs, the RCC decision ascertained the infringement, established the penalties and eliminated any form of intervention by the association.

However, those restrictions provided by normative acts are still under close supervision of the RCC. Their removal requires a long-term and assiduous process of competition advocacy amongst the regulatory bodies of this profession.

Most recently, the Romanian Competition Council opened a new sector inquiry targeting the market of services supplied by the insolvency practitioners, a professional category relatively new in Romania but one that has very quickly evolved over the last several years. In this case, there are signals regarding the existence of certain distortions generated on the one hand, by the regulation manner and on the other hand, by its implementation.

As everywhere in Europe, a total deregulation of liberal professions has no purpose in itself. The RCC has in view an economic analysis approach when assessing the reasons based on which these legal provisions have been set up in this area, because each restriction could generate both positive and negative effects on social welfare. Research undertaken at the European Commission's request, revealed that in countries with less regulation, markets are not functioning worse than in those with excessive regulation. On the contrary, in the first case, markets appeared to be more developed, a fact that led to a win-win situation for both consumers and professionals.

The practice so far has shown that gradual elimination of competitive restrictions from these markets has, over time, generated lower prices, diversified services, and developed the profession without decreasing the quality of services provided to consumers.

There are situations where regulation is necessary to guaranty the quality of services offered by members of this profession. Therefore, conditions such as completing a certain level of education are necessary to practice, going through several stages of professional training, mandating professional liability, and

elaborating and observing codes of professional conduct are accepted and even encouraged by the RCC.

As a follow-up, the RCC will continue to focus on:

- The elimination of tariff regulation and advertising restrictions, which are considered disproportionate to the aim pursued, respectively to guaranty quality service and protection of consumers, and especially when these measures are linked to other restrictions such as *numerus clausus*;
- The elimination of territorial limitation of competences, where there are no grounds for this limitation.
- Waiving exclusive rights and granting permission to those who are not notaries, to provide less complex services in this area, and
- Granting permission to those who are not lawyers, to own or manage law firms.