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Adapting to the EU Requirements: Recent Evolutions in Romanian Competition and State Aid Law

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Since 2007, Romania is, alongside Bulgaria, one of the newest members of the European Union. Consequently, the vast majority of its institutional and legislative developments in competition and State aid are connected to the adaptation of the law to EU requirements. Romanian competition law and policy has been replicating rules, definitions, and concepts established by EU legislation or through EU case law. One example concerns the notion of “undertaking,” broadly defined in the same lines as those developed by the EU Court of Justice.² Consequently, commitments from the Romanian Football Federation were approved with regards to retransmission rights for matches,³ and the National Association of Enforcers of Judicial Decisions was fined for discriminatory practices with regards to the entry in the profession, as well as for fixing excessive prices for their services.⁴ Furthermore, according to latest amendments, antitrust legislation applies also to local or central administrative authorities.⁵

In 1996, the Romanian Competition Law 21/1996 (“RCL”)⁶ was adopted, setting out the main antitrust rules in its Articles 5 (concerning cartels) and 6 (concerning abuse of a dominant position), two provisions directly inspired from (then) Articles 85 and 86 EEC (now 101 and 102 TFEU). The RCL was amended several times to ensure increasing convergence with EU rules, and a major reshuffling took place in 2010, when a Government ordinance⁷ was passed in order to align its provisions with EU’s modernization Regulation 1/2003.⁸ While the RCL has only been amended during the years, in 2006, Romania completely scraped out its former Law 143/1999 on public subsidies, replacing it with Government Ordinance 117/2006⁹ setting out the procedures that need to be followed at the national level in order to obtain approval of State aid schemes in accordance to EU legislation and policy.

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² Case C-41/90 Höfner and Elser v. Macrotron GmbH [1991] ECR I-1979, para. 21; Article 2(2) RCL.

³ Decision 44/2012 *available at*

http://www.consiliulconcurentei.ro/uploads/docs/items/id7753/decizie_nr_44din_10_08_2012_cu_anexa.pdf.

⁴ ECN Brief, October 2012, *available at* http://ec.europa.eu/competition/ecn/brief/04_2012/ro_executors.pdf.

⁵ Articles 2(1)(b) and 9 RCL.

⁶ *Available at* <http://www.consiliulconcurentei.ro/en/official-documents/competition/legislation/competition-law-21-1996.html>.

⁷ Government Ordinance 75/2010 approved by Law 149/2011.

⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

⁹ *Available at* http://www.stateaid.ro/documente/1%20-%20OUG%20117%20din%202006_326en.pdf.

From an *institutional* point of view, in April 1996 the RCL created the Romanian Competition Council (“CC”), an autonomous administrative body entrusted with the enforcement of competition rules. In the first semester of 2012, the Council has initiated 14 investigations and three sector inquiries, finalized 31 decisions, and dealt with 77 previously open investigations and ten sector inquiries.¹⁰

The CC is made up of seven members: a president, two vice-presidents, and four competition councilors, helped by competition inspectors. The members are appointed by the President of Romania, following Government approval and the interviewing of candidates by the relevant parliamentary commissions. The candidate list is suggested by the CC’s Consultative College, an informal body made up of academics and stakeholders representing businesses, consumers, and legal practitioners.

The CC works in commissions made up of two competition councilors and chaired by a vice president. Like the European Commission, the Council issues guidelines and notices further explaining legislation, dealing with the sanctions for competition law infringements, or analyzing complaints. At the regulatory level, the CC participates in public consultations initiated by the European Commission, such as the recent initiative in the field of damage actions for breach of the EC antitrust rules,¹¹ and it also formulates opinions on national legislation that may have an impact on competition.¹² The CC budget increased slightly during the years; for 2012, it benefited from EUR 10 million from the State budget, most of it used for staff expenses.¹³

The RCL amendments increased substantially the powers of the CC, endowing it with jurisdiction to also enforce Law 11/1999 on unfair competition, previously the realm of the Ministry of Finance, thus making an important step towards convergence of unfair competition rules and the antitrust regime.¹⁴ So far, the Council has imposed only a fine of less than EUR 1,000 in this area, out of 54 decisions issued.¹⁵ The RCC also integrated the Railway Supervision Council, the regulatory body for railway transport. The CC used to approve State aid until

¹⁰ Competition Council, Semestrial Buletin No 1 January – June 2012, *available at* http://www.consiliulconcurentei.ro/uploads/docs/items/id7760/buletin_semestrial_ian-iun_2012.pdf.

¹¹ Annual Report of the Romanian Competition Council, 2011, *available at* http://www.consiliulconcurentei.ro/uploads/docs/items/id7432/cc_raport_anual_2011_ro.pdf, 54.

¹² Article 26 (1) I RCL.

¹³ Annual Report of the Romanian Competition Council, 2011, *available at* http://www.consiliulconcurentei.ro/uploads/docs/items/id7432/cc_raport_anual_2011_ro.pdf, 99. According to the data publicly available on the website, the President of the CC has a salary of less than EUR 30,000 a year (http://www.consiliulconcurentei.ro/uploads/docs/items/id7493/chiritoiu_ct_bogdan_-_marius_da.pdf).

¹⁴ For a discussion at the EU level *see* THE ENFORCEMENT OF COMPETITION LAW IN EUROPE 659-664 (T. Mollers & A. Heinemann, eds., 2007).

¹⁵ Competition Council, Semestrial Bulletin No 1 January – June 2012, *available at* http://www.consiliulconcurentei.ro/uploads/docs/items/id7760/buletin_semestrial_ian-iun_2012.pdf.

Romania's accession to the EU in 2007;¹⁶ it still plays an important role in State aid policy, as will be seen below.

In the field of *antitrust*, following the decentralization of competition policy enforcement at the EU level, national competition authorities and national courts need to apply now Articles 101 and 102 TFEU. The RCL was altered in this respect, and it provides in its Article 3(2) a general competence to apply, at a national level, the antitrust provisions of the Treaty as well as Regulation 1/2003. The system of notifications of agreements envisaged by undertakings to the Romanian competition authority was abolished in August 2010, and since that date Romanian competition legislation makes reference to the EU block exemption regulations, applicable also to cases that have only a national dimension.¹⁷

Furthermore, the competition authority is enabled to conduct inspections requested by the European Commission and other EU Member States competition authorities on Romanian territory.¹⁸ Defense rights of undertakings were improved following amendment of the RCL, and undertakings can now formulate written comments to the report drawn by the CC following investigations, they can request a hearing to take place in their case,¹⁹ and the communication between undertakings and their lawyers is protected in order to avoid self-incrimination.²⁰

The CC can impose fines of up to 10 percent of the turnover on undertakings engaging in anticompetitive practices, as well as for obstructing and not cooperating in the investigations. Public authorities refusing to provide information requested by the CC can also be fined.²¹ Independently of the sanctions imposed, natural and legal persons have the right to claim reparation for damages produced as a result of competition infringements.²² In 2011 the CC imposed fines of EUR 300 million, doubling the figure of fines imposed since the beginning of its activity in 1997 up to 2010.²³ This was due mainly to a decision concerning a cartel on the fuel market and imposing the highest fine in the history of the CC (EUR 205 million).²⁴ Quite interestingly, the decision did not touch upon price-fixing (apparently under the investigation of

¹⁶ Preamble, Government Ordinance 117/2006.

¹⁷ Article 5(3) RCL.

¹⁸ Article 36(5) RCL.

¹⁹ Article 43 RCL.

²⁰ Article 36 (8) RCL.

²¹ Article 50¹ RCL.

²² Article 61 RCL.

²³ CC: 15 Years of Activity in Figures, *available at*

http://www.consiliulconcurrentei.ro/uploads/docs/items/id7434/15_ani_cc.pdf.

²⁴ Decision 97/27.12.2011, not yet published, summary available in the Annual Report of the Romanian Competition Council, 2011, *available at*

http://www.consiliulconcurrentei.ro/uploads/docs/items/id7432/cc_raport_anual_2011_ro.pdf, 21-23.

the Council as well),²⁵ but upon concerted practices developed in 2008 that limited the sale of a certain type of gas replacing lead-containing fuel.

With regards to *criminalization of cartels*, Romanian legislation follows a trend also noted in other EU Member States.²⁶ The fines for engaging in a cartel do not have a criminal character for the undertakings, and are administrative in nature. Nonetheless, persons willingly taking part in or facilitating a cartel can be criminally prosecuted and punished with prison terms from four months to three years or fines, as well as a ban on the exercise of a profession or on the conduct of economic activity similar to the one used for committing the offense. The CC has the competence to initiate criminal proceedings, and the court can order the publication of the final sentence in the media.²⁷

The 2010 amendments to the RCL introduced the possibility for the Council to accept commitments from the undertakings with regards to altering their uncompetitive behavior.²⁸ Attenuating circumstances were also introduced for the situation when undertakings admit expressly during proceedings that they engaged in anticompetitive practices. Such circumstances apply beyond the leniency policy, and can result in 10-25 percent fine reductions.²⁹ In 2011, for the first time, the CC reduced by 20 percent the fines imposed on two pharmaceutical companies engaged in export bans, following the activation of the settlement procedure.³⁰

Finally, the CC operates a leniency program and it also accepts summary applications.³¹ Undertakings are informed about the leniency policy through a special internet portal ran by the CC,³² and, according to the law, they can benefit from immunity or reduction of fines. No system of rewards for unveiling a cartel has yet been put in place in the Romanian legislation, unlike in other EU States such as the United Kingdom.³³ The first immunity from fines was granted for unveiling a price-fixing conspiracy among several taxi operators, a small cartel organized at the local level, which was punished with an overall fine of less than EUR 10,000.³⁴

²⁵ Business Cover, January 10th 2012, available at <http://www.businesscover.ro/10-01-2012-cartelul-petrolistilor-a-fost-amendat-de-consiliul-concurentei-cu-205-milioane-euro/>.

²⁶ See W. Wils, *Is Criminalization of EU Competition Law the Answer?*, 28(2) WORLD COMPETITION: LAW & ECON. REV. (June 2005).

²⁷ Article 60 RCL.

²⁸ Article 26(1)(c) RCL.

²⁹ Article 52(2) RCL.

³⁰ Decision 52/28.10.2011, available at

http://www.consiliulconcurentei.ro/uploads/docs/items/id7314/decizie_finala_52.pdf.

³¹ Competition Council, Order 300/2009 and Guidelines on Leniency Policy available at <http://www.consiliulconcurentei.ro/uploads/docs/items/id1040/ordin+instructiuni.pdf>.

³² <http://www.clementa.ro/ro/politica.html>.

³³ D. Sokol, *Detection and Compliance in Cartel Policy*, (2) CPI ANTITRUST CHRON. (2011).

³⁴ Decision 61/29.12.2010 available at

http://www.consiliulconcurentei.ro/uploads/docs/items/id7082/decizie_taxi_timis-publicare.pdf.

Companies that benefit from the leniency program are also exempted from liability *in solidum* for damages caused by the cartel to third parties.³⁵ In this connection, the CC is currently studying³⁶ the implications of the recent EUCJ judgment in *Pfleiderer* concerning access to information communicated in a leniency application to a national competition authority.³⁷

The decisions of the CC can be challenged before the Bucharest Court of Appeal and the High Court of Cassation and Justice.³⁸ According to the statistics for 2011, since 2009 there has been a steady increase in the number of judicial challenges, with the decisions of the CC having been generally maintained following court proceedings.³⁹ The amendments to the RCL introduced important incentives for accelerating court procedures. Thus, interim relief against decisions of the CC can be obtained only upon payment of a deposit representing up to 20 percent of the fine imposed; this was done in order to increase active involvement of the undertakings contesting decisions in the judicial proceedings.

The *abuse of dominance* is regulated by Article 6 of the Romanian Competition Law, which reproduces Article 102(1) TFEU.⁴⁰ If in the first years of activity the CC did not issue many decisions on abuse of dominance;⁴¹ its case law has evolved recently, while recognizing doctrines already established in EU law, such as essential facilities.⁴² The analysis of dominance done by the Romanian CC was evaluated as positive, although its practices need to be improved in several aspects, such as the clarification of the non-discrimination test, the analysis of the relevant market, and the calculation of market shares, especially by acknowledging the existence of local markets in certain cases. Given the specificities of the Romanian market, it was considered that the application of the rules regarding the abuse of a dominant position should be done while

³⁵ Article 61(5) RCL.

³⁶ Annual Report of the Romanian Competition Council, 2011, *available at* http://www.consiliulconcurentei.ro/uploads/docs/items/id7432/cc_raport_anual_2011_ro.pdf at 54.

³⁷ Case C-360/09 *Pfleiderer v. Bundeskartellamt* [2011] nyr (16 December 2010).

³⁸ Article 28(2) RCL.

³⁹ Annual Report of the Romanian Competition Council, 2011, *available at* http://www.consiliulconcurentei.ro/uploads/docs/items/id7432/cc_raport_anual_2011_ro.pdf at 93-95.

⁴⁰ See generally A. Chirita, *The German and Romanian Abuse of Market Dominance in the Light of Article 102 TFEU*, Baden-Baden, Nomos 2011.

⁴¹ R. Pittman, *Abuse-of-Dominance Provisions of Central and Eastern European Competition Laws: Have Fears of Over-Enforcement Been Borne Out?* US Dept. of Justice Economic Analysis Group Working Paper No. 04-1 (January 26, 2004). *Available at* SSRN: <http://ssrn.com/abstract=494862> or <http://dx.doi.org/10.2139/ssrn.494862> at 7.

⁴² Competition Council, Guidelines of March 4th, 2011 on the application of competition rules to access agreements in electronic telecommunications, Monitorul Oficial 197/22/03/2011; Decisions 1 and 2/14.02.2011, *available at* <http://www.consiliulconcurentei.ro/ro/docs/58/decizii-ds/page2.html>.

paying due regard to the needs of small firms, requiring a flexible interpretation of the law and freedom to foster innovation.⁴³

With regards to *economic concentrations*, the new rules provide for the possibility to notify the intention to takeover or merge, as opposed to previous procedures requiring notification only following conclusion of the operations. Following the 2010 amendments of the RCL, the procedures with regards to interim measures and commitments have been clarified; a simplified mode to calculate the notification tax was introduced.

When assessing the market effects of concentrations, the new rules provide for a new test to be applied by the authorities, which needs to determine whether the new merger would bring about a “significant impediment to effective competition” (the SIEC test).⁴⁴ This is in line with the EU Merger Regulation,⁴⁵ that introduced this test in EU law back in 2004, in striving to allow the authorities to prohibit also those mergers that do not create or strengthen a dominant position but may, in oligopolistic markets, have non-coordinated effects that restrict competition.⁴⁶ Moreover, regulatory action has been taken to enable the Romanian competition authority to benefit from the exchange of information within the European Competition Network, and to partake in the investigation of mergers notified in several jurisdictions.⁴⁷

The *State aid* legislation was reshuffled in 2006 in order to align national rules with the requirements imposed by Article 107 TFEU. In the application of these rules, the Europe 2020 objectives are taken into consideration by the authorities, including such objectives as enhancing research, development and innovation, improving the education system, and environmental protection.⁴⁸

Government Ordinance 117 requires subsidies to be granted to undertakings only following approval of the European Commission (Article 3). Regional aid maps are adopted by the Romanian Government and are notified for approval to the European Commission (Article 5). The CC is appointed as contact point in the relationship between the Commission and the

⁴³ A. Chirita, *The Abuse of Dominant Market Position under Romanian Antitrust Law in Light of European Antitrust Law*, EUR. COMPETITION L. REV. 162, 170 (2008).

⁴⁴ Article 10(3) RCL.

⁴⁵ Council Regulation (EC) 139/2004 on the control of concentrations between undertakings [2004] OJ L24/1.

⁴⁶ Recital 25 of the Preamble to EU Merger Regulation states: “The notion of ‘significant impediment to effective competition’ in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.”

⁴⁷ Amendment to the Merger Rules, CC, December 22nd 2011, available at http://www.consiliulconcurentei.ro/uploads/docs/items/id7319/ordin_nr941.pdf.

⁴⁸ Romanian Competition Council, Report concerning State Aid Granted in Romania between 2008 and 2012, available at http://www.renascce.eu/documente/RAPORT%20AJ%20STAT%202008%202010%20OFICIAL_718ro.pdf at 3.

Romanian Government, and it grants specialized assistance with regards to State aid to the authorities, stakeholders, and aid beneficiaries:

1. The CC analyzes the notifications and may suggest amendments before sending them to the European Commission.
2. According to Article 23 of the Ordinance, the Council ensures surveillance of financial relationships between public authorities and public companies, as well as the transparency of financial activities of companies endowed with special or exclusive rights or who are providing a service of general economic interest.
3. The CC represents Romania in the proceedings before the European Commission concerning State aid, and it monitors the aid schemes following their approval.

In the period 2008-2010, the European Commission authorized 18 state aid schemes, while 24 were exempted from notification, in accordance with the EU General Block Exemption Regulation.⁴⁹ The general level of aid decreased in Romania, in accordance to the requirements imposed by the EU State aid Action Plan,⁵⁰ from 0.20 percent of the GDP in 2007 to 0.17 percent in 2010, placing Romania on the 22nd place within the 27 Member States with regards to this form of involvement of the State in the economy.⁵¹ Interestingly, up to 2011 Romania did not take any aid measures for the financial sector.⁵²

With regards to the types of aid granted, recently Romania stood out together with Greece, Italy, and Slovakia in its efforts to direct aid towards horizontal objectives,⁵³ considered less harmful to the competition than the sectoral objectives.⁵⁴ This can be explained by the elimination, in 2010, of rescuing and restructuring programs.⁵⁵ Nonetheless, the level of sectoral aid remains quite high (28.85 percent of the subsidies granted).⁵⁶

In order to ensure consultation and exchange of information on State aid, in 2008 the National Network of State Aid (“ReNAS”) was created, an informal forum regrouping experts in

⁴⁹ Commission Regulation 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty [2008] OJ L214/3.

⁵⁰ European Commission, *State Aid Action Plan: Less and Better Targeted State Aid A Roadmap for State Aid Reform 2005-2009* COM (2005)107, < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0107:FIN:EN:PDF>>.

⁵¹ Commission Staff working document, *Facts and figures on state aid in the EU Member States* SEC(2011)1487, 01.12.2011, available at

http://ec.europa.eu/competition/state_aid/studies_reports/2011_autumn_working_paper_en.pdf, at 61.

⁵² *Id.*, at 32. 2012 figures not available.

⁵³ *Id.* at 14.

⁵⁴ *Id.* at 12.

⁵⁵ Romanian Competition Council, Report concerning State Aid Granted in Romania between 2008 and 2012, available at

http://www.renascce.eu/documente/RAPORT%20AJ%20STAT%202008%202010%20OFICIAL_718ro.pdf, at 34.

⁵⁶ *Id.*

this field from the CC and the public authorities. ReNAS has an internet portal facilitating its mission “to ensure smooth access to all relevant information in the State aid field.”⁵⁷

In *conclusion*, Romania has taken important steps recently to align its competition law to EU requirements. Enforcement of competition law is still at an early stage, with the first “big” cases (such as the oil cartel) decided only recently, and the leniency program only starting to show timid results. While under-resourced, the Romanian competition authority is adapting to the new ways of governance under EU Regulation 1/2003,⁵⁸ and has shown concern with regards to the uniform application of the law throughout Europe by participating in the European Competition Network, by being fairly transparent about its activities on its web page, and by informing the public through detailed guidance on the ways in which it intends to exert its powers. Albeit reflecting a general trend,⁵⁹ there is little comprehensive information on how Romanian courts apply competition law,⁶⁰ which is regrettable in the current context of decentralized competition law enforcement in Europe.

⁵⁷ <http://www.ajutordestat.ro/?pag=1&limba=en>.

⁵⁸ See, on the new ways of governance, I. Maher, *Competition Law Modernization: an Evolutionary Tale?*, THE EVOLUTION OF EU LAW (P. Craig & G. De Búrca eds., 2011).

⁵⁹ I. Maher & O. Stefan, *Competition Law in Europe: The Challenge of a Network Constitution*, THE REGULATORY STATE: CONSTITUTIONAL IMPLICATIONS 195-196 (D. Oliver, T. Prosser, & R. Rawlings eds., 2010).

⁶⁰ No judgments have been yet published on the site of the European Commission, following notification in accordance to Article 15(2) of Regulation 1/2003:

http://ec.europa.eu/competition/eojade/antitrust/nationalcourts/?ms_code=rom.