



Certain Substantive Divergence Between the Romanian and the Community Competition Legislation

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The competition file was at the core of the negotiations for the accession of Romania to the European Union. At that time, the European Commission's concern was not necessarily the harmonization of the Romanian competition rules with those of the European Union, as that was deemed to have been achieved in 2004, but whether the Romanian Competition Council had the institutional capacity to implement and enforce those rules.

The Competition Council thus had to prove within quite a short period of time that it is able to apply and enforce the competition legislation. While its decisions in a number of significant cases were not flawless, they were supported either by the courts or by the parties that refused to challenge those decisions.

With Romania's accession to the European Union, the undertakings would nevertheless need to face the differences between the domestic legislation and practice compared with the Community rules.

As provided for by Regulation 1/2003, the Member States can have a stricter legislation insofar as its application would not lead to results that are conflicting with the ones that would have been obtained through the application of Community provisions. Consequently, while having a different legislation is not in violation of the Community provisions *per se*, there are limits placed upon the degree of variation that may exist between the Romanian legislation and the Community legislation, and the interest of a Member State wishing to apply stricter legislation must be balanced against the need for legal certainty and predictability within the EU.

The scope of this article is not to provide a complete overview of the differences between the two legal regimes, but rather to briefly analyze the main and most important distinctions and their implications.

1. Substantive aspects regarding the abuse of dominant position

Article 6 of the Competition Law no. 21/1996 as amended (the "Competition Law") includes among others, in the list of conducts that constitute an abuse of the dominant position, the following distinct provisions:

- imposing, directly or indirectly, the sale or purchase prices, the tariffs or other inequitable contractual clauses, as well as refusing to deal with certain suppliers or customers;
- charging excessive prices or charging predatory prices, below costs, with the aim of driving competitors out of the market or of selling on the export below production costs, recovering differences by imposing increased prices to the domestic consumers.

These provisions seem to reflect to a certain extent the rule established by the article 82 of the Treaty establishing the European Communities (“Treaty”); however, they raise several issues:

(i) Excessive prices vs. fixation of prices

One issue is obviously the reason behind the existence of these provisions and why the Romanian Parliament felt the need to double, to a certain extent, the provision contained in the Treaty.

The charging of excessive prices, although certainly capable of constituting an abuse of a dominant position, can be difficult to identify as an abuse since there are no “correct” prices to start from and no generally agreed-upon commercial margin. The sanctioning of such a conduct should normally be made only in the most extreme circumstances, on a market that has strong barriers to entry, a super-dominant firm and little-to-none elasticity of demand. Consequently, the Commission sanctioned the charging of excessive prices in one instance alone, only to have its decision overturned by the ECJ in *United Brands*.

The Competition Council, on the other hand, found in its Decision 329/2004 regarding *Kronospan SA* that an abuse of a dominant position had occurred when a dominant entity had implemented price increases ranging from 18,85% to 50% for various products. While formally considering that *Kronospan’s* conduct amounted to an abusive “fixation of prices”, the Competition Council’s substantive reasoning was based on the absence of any increase in the company’s costs in the previous six months, thus arguing that the new prices were excessive. Such may lead us to the conclusion that the Competition Council unified the two provisions. Nevertheless, the Competition Council also argued that the increases of the prices were established within one week from the day when *Kronospan* obtained the dominant position on the Romanian market following the authorization of an economic concentration and such increases were “imposed” to the customers.

In conclusion, the potential impact of this provision cannot be underestimated. Companies from other Member States operating in Romania and enjoying a position of dominance on a particular market could be found to abuse their position by charging excessive prices far easier than they could in their home Member States. Furthermore, price increases by a dominant undertaking could be scrutinized from two perspectives in Romania, once as excessive prices, and secondly as dictated by the dominant undertaking (i.e., in the absence of discussions or negotiations with the customers or suppliers).

(ii) Export below costs and recoupment from the domestic market

Selling goods on foreign markets below production costs and recovering the difference by imposing increased prices on the domestic market can, in theory, constitute an abuse of a dominant position. The Competition Council used this argument as proof of the parties’ intention to collude, without applying a distinct sanction, in Decision 94/2005 regarding the *Cement*

Cartel. It disregarded the fact that a dominant entity on the domestic market may enjoy a weak position on the foreign markets and that its only chance of entering those markets may be to charge lower prices. There are no equivalent provisions applicable in either the EU or the majority of the other competition regimes and the strict enforcement of such a provision would result in the abandonment of foreign markets by companies enjoying a position of dominance on a Romanian market.

2. Implementation of Regulation 1/2003 and the individual exemption

The Competition Law and the secondary legislation in Romania still uses the institution of the individual exemption, whereby the Competition Council has to decide whether or not a clause that *prima facie* infringes the competition rules is saved by the application of Article 5(2), which mirrors the provisions of Article 81(3). The burden of proving that all the necessary conditions are met rests on the relevant economic entity. The difficulty arises from reconciling this with the provisions of Regulation 1/2003.

Following Romania's adhesion to the EU, Regulation 1/2003 becomes directly applicable. The Regulation 1/2003 expressly provides that the parties must make their own assessment regarding both the inclusion of the agreement under Articles 81(1) and 82 and the fulfillment of the conditions from Article 81(3). As a direct consequence, the Competition Council will have to directly apply Articles 81 and 82 of the EC Treaty and will not be able to use individual exemptions in relation to the cases that fall under them. Consequently, cases that have a Community dimension and the potential to affect trade between Member States will require the applicability of Regulation 1/2003 and allow the parties to make their self-assessment regarding the fulfillment of the Article 81(3) provisions, while wholly internal cases will still require notification to and individual exemption from the Competition Council.

The problem arises from the allocation of competence between the Commission and the Competition Council; specifically, whether or not a particular case has the potential to significantly influence trade between Member States. If it does, then Regulation 1/2003 applies and the parties do not need to notify any clauses that fall outside the provisions of the Competition Law and the secondary legislation, provided that, as a result of the self-assessment, they believe that the Article 81(3) conditions are met. If it does not, the parties have to apply to the Competition Council for an individual exemption. Whether or not an agreement may significantly affect trade between Member States is not a clear cut decision in most cases and this could lead to more uncertainty.

3. Joint venture and non-compete clauses, application of fines, leniency

Most of the secondary and tertiary legislation adopted by the Competition Council reflects to a certain extent the guidelines, instructions and notices of the Commission. A notable distinction is represented by the new Guidelines on the method of setting fines and the new Commission Notice on Immunity from fines and reduction of fines in cartel cases.

The implementation of the above-mentioned is not compulsory, as Member States retain full discretion as to their fining policy, even when they are applying Articles 81 and 82 of the EC Treaty. Considering however that many cartels commonly operate across the EU and in more than one Member State and that many infringements of competition have a Community dimension, thus leading to shared competence between more than one NCA, the need for common legislative provisions insofar as leniency and fines are concerned is obvious.

The differences between the pieces of secondary legislation (instructions, notices, guidelines) are too many to mention, but they may still have serious effects. For example, under the Romanian competition provisions, a non-compete clause between a full-functioning joint venture and the parent companies can only be justified for up to 5 years; anything past that must be notified for an individual exemption (see below), while under the Community legislation such a clause would be legal for the duration of the joint venture. The importance of such a clause in a joint venture agreement is significant, and the legality of the clause could depend on the competent authority, the Commission or the Competition Council.

Conclusion

While it is true that the Romanian competition legislation is, for the most part, harmonized with the Community legislation and that, pursuant to Regulation 1/2003, Member States can apply a more restrictive regime than the Community one, there are still significant differences between the two regimes. In order to ensure a consistent application of the rules and a climate of legal certainty favoring economic activity, nothing short of full harmonization will suffice.