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Romania: The amendment of the first commitments on anticompetitive practices accepted by the Romanian Competition Council under assessment

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The opportunity to submit proposals for commitments in order to alleviate the concerns regarding infringement of the antitrust rules was effectively granted to undertakings in Romania only in 2011, following the substantial amendment of the Competition Law in 2010 in view of approximation with the European legislation and the publication of the relevant Romanian Competition Council's Guidelines on the conditions, terms and procedure for accepting and assessing commitments related to anticompetitive practices in 2011. Many of the undertakings under investigation took account of the aforementioned opportunity and offered commitments for remedying the competition concerns, hoping to avoid the potential risk of incurring a fine of up to 10% of their previous year turnover.

On the 19th of April 2011, commitments were accepted by the Romanian Competition Council (the "RCC") for the first time by its decision on the investigation open against the Romanian Football Federation and its members, as well as against the Football Professional League and its members regarding the potential breach of the Romanian and European antitrust rules by joint commercialisation of the commercial rights on football competitions, investigation which was closed by the same decision. But recently the investigation has been open again by RCC following request of the Romanian Football Federation with respect to the amendment of the commitments undertaken in 2011 grounded on the "conditions offered by the current market and the current marketing conditions".

The amendments of the commitments proposed by the Romanian Football Federation have been subject to a preliminary assessment of the RCC and submitted to public consultation. Also, the RCC stated that a market study will be performed in order to support its decision on the amendments of the commitments.

The initial investigation performed by the RCC revealed that the members of the Romanian Football Federation, which were also members of the Football Professional League, transferred their commercial rights regarding advertising, publicity, television and/or radio broadcasting in relation to the competitions attended by them to the Football Professional League in view of their joint commercialisation, as per the

explicit provisions of the By Laws of the Football Professional League and of the related organizational and disciplinary regulations. Moreover, the members of the Romanian Football Federation of League I level decided in the By Laws of Football Professional League to jointly commercialise the rights of direct broadcasting, registration and retransmission by radio-television or by other audio-visual means of the football events organised by the Football Professional League, while the advertising and publicity rights within the playgrounds and the locations regarding the professional sport competition should have been exercised individually by each member.

The RCC concluded that the joint commercialisation could lead to market foreclosure for the suppliers of audio-visual media active in the television programs field, the suppliers of radio programs rebroadcasting services, the suppliers of mobile communications networks, mobile services providers and the web hosting providers interested in sport events broadcasting and consequently the joint commercialisation can lead to the limitation of the area covered by the broadcasting of the football matches prejudicing the consumers. Furthermore, the RCC deemed that the competition between the football clubs was prevented by the joint commercialisation of the aforementioned commercial rights.

In view of its assessment, the RCC defined the relevant market as the Romanian market of commercialisation of the commercial rights -- including rights of broadcasting by any means and any advertising and publicity rights -- with respect to the football matches related to the competitions taking place regularly each year. Although it did not express a conclusive opinion on this matter, the RCC mentioned that the investigated joint selling could affect also the EU Member States. For this purpose, the RCC argued that the entire territory of Romania was affected and the latter represent a substantial part of the common market. Also, the assessed relevant markets of the product are *per se* markets which are likely to affect the trade between the EU Member States, as per the European case law (e.g. COMP/C-2/38.173 - FA Premier League; COMP/C-2/37.214 - Bundesliga Fussbalverband e.V), the football clubs involved in the practice have a strong position on the markets they are active on being able to influence the EU market and many of the media companies interested in purchasing the commercial rights are active also at European level. Furthermore, RCC stated that the joint selling of any of the said commercial rights to a single undertaking or consortium represents a limitation of commercialisation to active undertakings at EU level and, taking into account that the joint selling concerns the entire territory of Romania, it could lead to market allocation and create barriers to entry the affected markets.

As remedy to the above mentioned concerns of the RCC, the Romanian Football Federation and the Football Professional League proposed individual commitments, which were assessed jointly by the RCC considering the close "corporate" connection between such entities, although the commitments of the two entities were not identical.

One of the commitments deemed the most efficient by the RCC concerned the obligation of the involved undertakings to sell the commercial rights by open, transparent and non-discriminatory tender procedure, which would allow to all the

media suppliers interested in sports to compete for the commercial rights. Also, the RCC considered that the competition will be increased as result of grouping the rights per categories (e.g. radio, Internet, mobile services, external media rights, TV) in view of selling them, as all the rights will be available on the market contributing to the development and satisfaction of the consumers' requests.

Furthermore, the involved parties committed to conclude contracts for the sale of the commercial rights with a duration of maximum three years, so that the interested undertakings to be able to compete on a regular basis and frequently for the acquisition of such rights. The RCC expressed its opinion that the awarding of the commercialisation rights for a longer duration would have allowed to the purchaser to acquire a dominated position on the downstream market, which could be used in order to limit the competition during the subsequent tender procedures and could restrict competition by creating barriers to entry the market due to the fact that a new undertaking willing to enter the market could be prevented from acquiring commercial rights necessary for creating a product to be addressed to the consumers.

Another important commitment considered by the RCC concerned the fact that the contract concluded based on the tender procedure for the commercialisation the commercial rights will not include a clause regarding the automatic extension or renewal of the contract at the expiry of the period it was concluded for. The exclusion of such clause prevented the elimination of competition by such a contractual provision and the market foreclosure which could have occurred as result of the increase of the market position of the undertaking benefiting from such rights for a longer period.

Moreover, the involved undertakings committed that the contracts concluded based on the tender procedure for the commercialisation of the respective commercial rights will not include a clause granting the acquirer of the commercial rights a right of first refusal with respect to the commercial rights as regards the next awarding, which, in the RCC's opinion, could have led to the consolidation of the market position of the acquirer benefiting from such right of first refusal and therefore distort competition.

The RCC deemed also that the competition on the market where the commercial rights are exercised will be effective as result of the involved undertakings' commitments that the rights for the matches related to the national football championship League I and to the Cup of Romania will not be acquired by the same buyer as per the principle of *no single buyer*. To this end, the Romanian Football Federation committed that the television and radio rights for direct broadcasting of the Cup of Romania matches (starting with matches of 1/16) cannot be acquired by a single undertaking, except for the sole situation when there is/were just one or two offers for each group of commercial rights, in which case all the radio and television groups of rights can be acquired by a sole undertaking. Similarly, the Football Professional League committed that one bidder will not acquire, hold or exploit more than six of the seven groups of rights for the matches related to the national football championship League I offered for sale in relation to which no special conditions related to the area of cover and the "free-to-air" criterion were established.

The amendments of the commitments addressed by the Romanian Football Federation

to the RCC concerned especially the restructuring of the groups of commercial rights regarding television direct broadcasting depending on the type and/or the number of matches and were intended also to loosen the principle of *no single buyer*. Thus, the Romanian Football Federation claimed to be granted the possibility to sell three of the proposed five groups of rights regarding television direct broadcasting related to the Cup of Romania (starting with matches of 1/16) and to the SuperCup to a single undertaking.

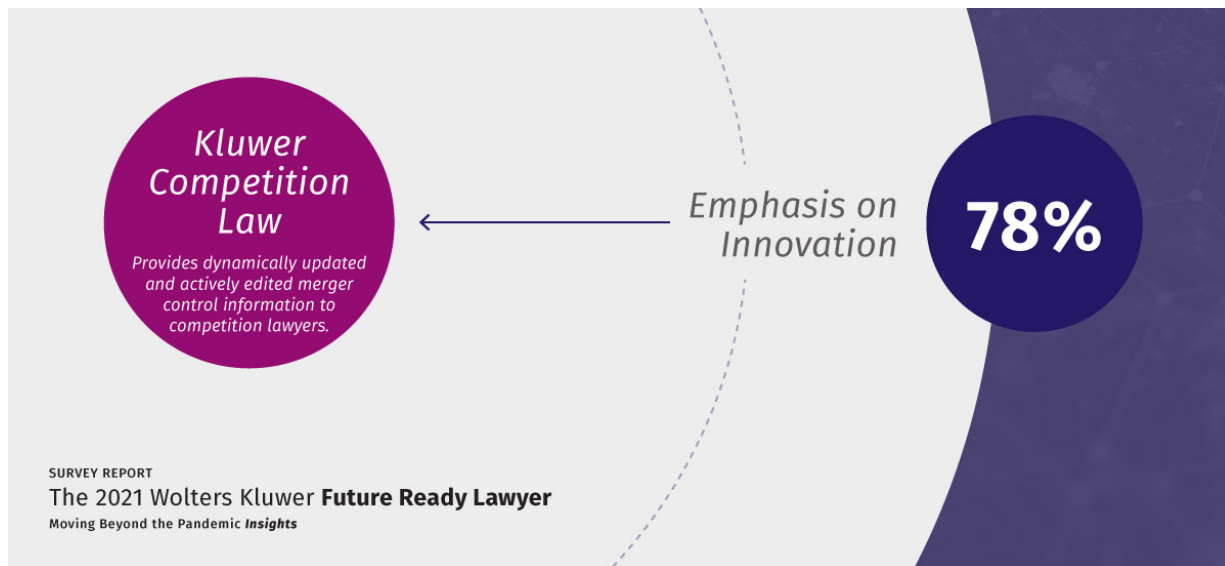
Since the assessment of the RCC with respect to the groups of commercial rights to be offered for sale and with respect to the form of implementation of the principle of *no single buyer* proposed by the Romanian Football Federation was not extensively developed in its decision of 19th of April 2011 and the “weight” of these individual commitments in the RCC’s decision for acceptance of the commitments is not very obvious, it is expected for the RCC’s resolution on the amendments to the commitments requested recently by the Romanian Football Federation also to bring to further light the RCC’s reasoning in its initial decision regarding the acceptance of the commitments. As first decision of the RCC on amendment of accepted commitments related to anticompetitive practices, it shall represent a step forward in the development of the competition law proceedings in Romania contributing to the guidance of the undertakings and their consultants.

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