

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2023 – Romania

Raluca Maxim (360Competition) · Wednesday, January 10th, 2024

This year marked a pivotal chapter in Romanian competition law. Over the past few years, the Romanian Competition Council (the ‘**RCC**’) has steadily emerged as a prominent player among the most active national competition authorities in the region. This ascent was solidified with new competencies and expanded responsibilities on unfair competition, foreign investment screening, investigation powers derived from the [P2B Regulation](#) or monitoring responsibilities under the [DMA](#). The latest milestone in this evolution is the adoption, by the Romanian Government, of an emergency ordinance which significantly enhances the RCC’s powers – not without controversy. These developments are summarized and briefly contextualized below.

Legislative developments

The Romanian Government recently adopted [Emergency Ordinance no. 108/2023](#) (‘**EGO 108**’), perhaps the most significant piece of legislation in recent years in Romanian competition law. Initially intended to transpose the [ECN+ Directive](#) into national law, EGO 108 surpassed this scope, sparking controversy and drawing criticism from legal professionals due to its far-reaching implications.

Enhanced powers

One of the most debated provisions of EGO 108 concerns the Romanian Government’s ability to instruct the RCC to carry out a ‘case analysis’ if it finds ‘elements which may distort the competition environment’ in relation to a particular market. While the RCC has been able to conduct sector inquiries for many years, it has done so at its own discretion, within the parameters of an investigation order issued by the Chairman of the RCC. EGO 108 adds several layers of uncontested arbitrariness: not only can an inherently political authority instruct an autonomous and independent enforcement authority, but the RCC can carry out such a ‘case analysis’ outside of an investigation. What’s more, the RCC can also carry out dawn-raids as part of the analysis – thankfully, a judicial authorization is still required in this latter case. Finally, there is no telling who, and on what basis, exactly determines the existence of the potentially distortive ‘elements’ triggering a case analysis.

The importance of substantial and procedural safeguards conferred by regular investigations is paramount in the protection of an undertaking's right to defence, which makes the implications of this new provision hard to digest by legal scholars and professionals alike.

Attorney-client privilege

Another disputed provision revolves around the attorney-client privilege, which is significantly weakened, particularly in the context of dawn raids, and contrary to the *Orde van Vlaamse Balies* ECJ preliminary ruling.

In brief, this provision states that the privilege can only cover communications concerning the exercise of the right of defence in the particular case investigated by the RCC, with the raided undertaking and its attorney having to prove the privileged character of each particular piece of communication. In this sense, during a dawn raid, the RCC inspectors will have the final say over whether a communication is privileged or not on the spot, *after* reading it. In the worst-case scenario, the RCC inspectors carrying out the dawn raid can outright reject the arguments concerning a particular piece of legal advice, deciding it is not covered by the privilege and seize it, as there is no judicial recourse to prevent them from doing so. If, however, the RCC inspectors and the attorneys of the raided undertaking are unable to reach a definitive conclusion as to the privileged character of communication, it is the RCC Chairman who will adjudicate the issue – admittedly, the decision of the RCC Chairman is subject to judicial review.

This provision goes head-to-head with the *Orde van Vlaamse Balies* ruling which expressly held that the privilege covers any type of legal advice in general. The direct implication of the ruling is that, once a communication is indicated as privileged, irrespective of whether it is related to the exercise of the right of defence in that particular case, inspectors should not be able to read it and, more importantly, they should not have the discretion to reject its privileged character on the spot and decide to seize it. Regrettably, this is precisely what EGO 108 allows them to do.

Finally, it is worth mentioning that the Dean of the Bucharest Bar has recently petitioned the People's Advocate (Office of the Ombudsman) to challenge these provisions before the Romanian Constitutional Court.

Foreign investment screening

EGO 108 also brings several amendments to the existing foreign investment screening regime dating back to April 2022. From a substantial standpoint, it is now crystal clear that both foreign and EU investments are subject to notification and standstill obligations to the extent they fall under the criteria: direct/greenfield investment, over 2 mil. EUR, carried out in a sensitive sector. At this point, this amendment appears to have the potential to be contrary to the *Xella* judgment, however, the authorities are set to issue secondary legislation which should bring clarity on this aspect.

Furthermore, the scope of notifiable direct investments was significantly enlarged, going well beyond the notion of acquisition of control as conceptualized in the *EUMR*. As a result, notifiable direct investments cover, but are not limited to, investments which allow 'an effective participation

in the *administration* or control of an undertaking'. This has far-reaching implications: any acquisitions of non-controlling shareholdings, irrespective of percentage, as well as other investments 'with the aim of establishing or maintaining durable and direct connections' between the foreign investor and an undertaking are now notifiable. Regrettably, the RCC has yet to issue much-needed guidance in this respect.

While there have been no prohibition decisions yet, investments, whether foreign or EU, can now be annulled to the extent they are found to affect the security or public order of Romania or are likely to impact projects or programs of EU interest.

From a procedural standpoint, EGO 108 introduces an 'examination fee' of EUR 10,000 payable upon submission and refunded in the event the notified investment does not meet the criteria for examination.

Finally, where the investment also constitutes an economic concentration within the meaning of EUMR and national law, the parties are now required to file two separate notifications, one for merger control clearance and one for foreign investment screening. From a timing perspective, EGO 108 expressly states that the economic concentration procedure will only be finalized following the resolution of the investment screening process. Essentially, from a parallel system, this has become a two-step authorization process. This is bound to impact timing for M&A or private equity deals, requiring careful synchronization in terms of early information-gathering, consideration of 'hell-or-high-water' clauses and many other aspects.

Capping the overall markup across the distribution chain

In what was seen as a populist move, the Romanian Government introduced an overall markup cap across the distribution chain to combat excessive price increases for agricultural and food products by way of [Emergency Government Ordinance no. 67/2023](#) further amended and extended by [Emergency Government Ordinance no. 89/2023](#) (collectively referred to as the 'EGOs').

The EGOs identified a number of food products in connection to which the producer margin could be up to 20% of the production cost; the cumulative distribution mark-up, regardless of the number of distributors across the chain, could be up to 5% of the acquisition cost plus operational expenses; and the retailer mark-up up to 20% of the acquisition price, plus direct and indirect expenses of the retailer.

This raised many competition concerns in particular regarding the distribution markup, since it involved a degree of transparency that could facilitate resale price maintenance practices or exchanges of sensitive information. Furthermore, such an initiative is highly problematic from a compliance perspective: if undertakings are encouraged to engage in systematic information sharing, albeit restricted to the maximum markup, is it then realistic to expect them to behave in compliance with competition rules?

Enforcement developments

Investigations

As mentioned at the beginning, the RCC has been increasingly more active, endeavouring to take on ‘giants’ or mirror enforcement actions carried out by the European Commission or other competition authorities.

The RCC has opened several high-profile investigations this year concerning an [alleged abuse of dominance by Sony Interactive Entertainment](#) and its subsidiaries over its distribution of video games compatible with PlayStation exclusively through its PlayStation Store platform, as well as a prohibition to sell activation codes for PlayStation compatible video games by competing distributors. The RCC is also probing [Apple over an alleged abuse of dominance](#) on the in-app advertising market by restricting access to user data and self-preferencing its own ad display services. Finally, the RCC has launched a second investigation in the banking sector concerning an [alleged agreement to limit consumers’ access to credit products and services](#) (the first one concerns an [alleged fixing of the ROBOR interest rate](#)).

Dawn raids

The RCC has fined [three undertakings part of the French group Lactalis](#) with close to EUR 3 million, for obstructing access to certain email accounts and communications during a dawn raid carried out as part of an investigation into alleged price-fixing arrangements on the production and marketing of butter market. Such fines are quite rare – indeed, the latest fine levied in a high-profile investigation dates back to 2008.

Unfair competition

Following the implementation of the [UTP Directive](#) in 2022, as well as of an amendment to the unfair competition legislation introducing the concept of ‘abuse of superior bargaining position’, companies braced for an enforcement crackdown and/or several complaints lodged.

However, as of yet, there is no enforcement, nor are there (made public) complaints – this might be partly owed to a lack of familiarity with the legislation. In turn, this raises questions as to the suitability of such instruments, since there does seem to be a preference to deal with such issues privately between companies, in civil court or otherwise.

Competition litigation

One of this year’s highlights in terms of litigation concerns the overturning of a RCC sanctioning decision in respect of Asigurarea Românească – Asirom Vienna Insurance Group SA one of the companies fined for an [alleged coordination between several insurance companies with the aim of increasing mandatory civil liability insurance tariffs](#). This development is highly important, since the success rate in court for the RCC has consistently been over 90% in the last decade.

Finally, the Bucharest Court of Appeal has granted a very rare [second referral for a preliminary ruling in a landmark case](#) concerning the functioning of European electricity markets and the legality of a special and exclusive right over the administration of these markets in a Member

State.

Conclusion

This past year has undeniably prompted a new narrative in Romanian competition law. However controversial, the enhanced powers of the RCC will alter the way investigations are conducted for the foreseeable future. In turn, companies are faced with overhauling their compliance programs to accommodate for new risks – far from being limited to competition rules, this will also have to include specific provisions for foreign investment screening.

All in all, the RCC's enforcement activity sends a strong message that the authority is no longer solely focused on traditional theories of harm but venturing towards the digital realm.

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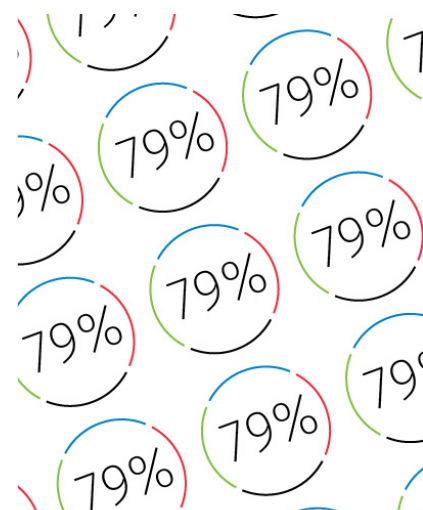
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