

Unclassified

DAF/COMP/GF/WD(2016)58

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

09-Nov-2016

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE

## Global Forum on Competition

### INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

#### Contribution from Romania

-- Session III --

1-2 December 2016

*This contribution is submitted by Romania under Session III of the Global Forum on Competition to be held on 1-2 December 2016.*

Ms. Lynn Robertson, Global Relations Co-ordinator, OECD Competition Division  
Tel: +33 1 45 18 77, Email: [lynn.robertson@oecd.org](mailto:lynn.robertson@oecd.org).

**JT03405057**

Complete document available on OLIS in its original format

*This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*

DAF/COMP/GF/WD(2016)58  
Unclassified

English - Or. English

## INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

### -- Romania --

#### 1. Background

1. Since 1989 Romania fundamentally changed its economic system, from a centrally planned economy into a decentralized market economy. This process and the pace of reform has been different from other countries in the Central and East Europe as a result of previous history, political developments and other factors, mainly of an economic nature.

2. One common factor, however, in establishing a market economy, was the central role of competition law and policy in creating an economic environment where consumers' preferences and the efforts to compete with economic operators to satisfy those demands, led to economic efficiency and welfare.

3. Planned economies are generally characterized by a high level of economic concentration. Other typical features are state or other collective ownership, absence of an effective price mechanism, lack of administrative autonomy for economic entities, and insufficient framework setting up transparent and common rules. Competition authorities may have an important role to play in dealing with these specific problems.

4. Romania's status as candidate country for accession to the EU was certainly a factor that contributed positively to the creation and functioning of an efficient competition authority and the construction of a sound competition policy.

5. The 1993 Copenhagen European Council specified that candidate countries for EU accession must adjust their administrative structures, "so that European Community legislation transposed into national legislation is implemented effectively through appropriate administrative and judicial structures."

6. The Europe Agreement between Romania and the European Union, concluded in 1995, provided that Romania should apply the fundamental principles of EC competition and state aid law in so far as the trade between Romania and the European Community was concerned.

7. Hence accession to the EU depended on setting up the rules embodied in the *acquis communautaire* and on making them work.

#### 2. Start-up. Changes in institutional design and competition policy framework.

8. 1996 marked the creation of the Romanian Competition Council<sup>1</sup>, an independent administrative body in charge with the enforcement of competition and state aid policies in Romania. In addition, a Competition Office was created - a specialized institution within the Romanian Government, with 42 local inspectorates (one in each county and one in the municipality of Bucharest).

---

<sup>1</sup> For brevity purposes, the Romanian national competition authority will be referred to in this paper as RCC.

9. Romanian Competition Law no. 21/1996, designed with support from OECD, USA and EU was passed on 10 April 1996, and came into force on 1 February 1997. It prohibited anti-competitive practices, set rules for economic concentrations and provided for authorities to enforce the legal rules. Its provisions followed to a great extent the community competition provisions, since the EU model, apart from being already validated by practice, was also the natural solution in light of Romania's future EU accession. In its first years of existence, the competition authority adopted also a full set of secondary legislation, which subsequently was amended and completed during the process of harmonization with the *acquis communautaire*.

10. According to the OECD Country Survey in 1999, "the most unusual feature" of the Romanian Competition Act was its division of responsibility between the independent Competition Council and the Competition Office, a government specialized body.

11. The fact that there were two investigating authorities for anticompetitive practices ran the risk of double investigation and of different standards in each. That was why the law required that "the Competition Council and the Competition Office shall inform each other about the investigations they initiate" and stated that they may "cooperate in carrying out any investigation". While both the Council and the Office could carry out investigations and were responsible for enforcing decisions, the Council was clearly the only agency to take decisions based on investigations by either agency. If the two authorities disagreed, there was a simple hierarchy: "rules adopted by the Competition Council and its decisions are binding for the Competition Office". The independent Competition Council thus had more power than the government-dependent Competition Office. Nevertheless, the Competition Council, due to its much smaller staff had to rely on the Office to conduct the investigations it considered necessary and to control the enforcement of its decisions.

12. In the years to come, certain needs for improvement were identified, both as a result of internal assessments or exchanges of experience as well as triggered by EC recommendations in its Regular Reports on Romania's progress toward accession. Thus, both competition law and its enforcers underwent a series of reforms<sup>2</sup>.

13. The main changes brought by the 2003 legislative reform:

- **The elimination of the Competition Office and the devolution of all the competencies to enforce the competition rules to the Competition Council.** Thus, RCC became the only authority in Romania entrusted with the application of competition rules. The reform concentrated the enforcement of competition within a single authority independent from the Government.
- **New criteria for the appointment of the Board of RCC.**
- **The attribution to RCC of the power to give "binding" opinions on draft laws which may have an anticompetitive impact.** Under new article 27 (k) of the law, RCC acquired the competence to address binding advisory opinions ("aviz conform") on draft laws and governmental Ordinances that may have an anticompetitive impact and to propose amendments. This new provision strongly increased the profile of RCC in Romania before the Romanian legislative power.

---

<sup>2</sup> 2003 - GEO 121/2003 for the modification and the completion of Law 21/1996; 2004 - Law 184/2004 for the approval of GEO 121; 2005 - consolidated version of Law 21/1996.

- **The right of RCC to bring to Court other public administrative bodies, failing to comply to its decisions.**
- **A significant increase in sanctions.**
- **The introduction of a Statute of limitation for sanctions.** This provision filled a gap that existed under the previous legislation by introducing a Statute of limitation for competition infringements. It increased legal certainty for undertakings involved in competition infringements that came to an end, since they could no longer be fined if the Statute of limitation has expired.
- **Fines were to be set within the same decision declaring an infringement of the competition rules.** Under the previous version of the law, decisions issuing fines were separate from decisions declaring an infringement of the competition rules. In particular, decisions declaring an infringement of the competition rules were issued by the plenum of RCC. On the other hand, decisions setting fines were issued by a Sub-commission, appointed for this purpose by the President of RCC and composed of one Vice-president and two Counselors. This system presented two practical flaws. First, it increased the administrative burden of the Council by forcing it to issue separate fining decisions for each company concerned by the infringement decision (for instance, if the decision declaring an infringement of the competition rules concerned 50 companies, the Council was obliged to issue 50 separate fining decisions for each company concerned). Second, it created delays between the timing of the decision declaring an infringement and that of the decision issuing the fine. In particular, there have been instances where the decisions issuing fines were taken after the 30-day period established by the law to appeal a decision declaring an infringement. This created great uncertainty for companies concerned by infringement decisions, since, in these instances, they were forced to decide whether to appeal the infringement decision without knowing the level of fine established for their infringement.

14. Since the 2003 reform, RCC had to go across difficult tasks in a very short period of time. In 2004 it had to cope with the new competencies and tasks resulting from the new institutional framework. It had to deal with the difficult responsibility of developing a new, modern, flexible and efficient national system for competition promotion and protection and for state aid control. It had also to close the negotiation with EU on the competition and state aid chapter. Between the end of negotiations and Romania's date of accession, RCC had to fulfill a number of commitments in order to avoid the risk of activating the specific safeguard clause.

15. Once Romania joined the EU, the national antitrust authority entered into a new stage of development whereas national competition law and policy underwent a new reform in 2010.

16. Some of the 2010 amendments were directly related to the need to achieve greater convergence with EU competition law. For example, the notification system for restrictive agreements was abandoned and replaced by the EU's self-assessment model. The 2010 amendments also incorporated the EU's block exemptions into Romanian competition law. The possibility of settlements was introduced whereby defendants that accept the charges of the RCC can be granted substantial discounts in fines. The scope of criminal enforcement became better focused as well: criminal sanctions were limited to fraudulent restrictive agreements and no longer apply to abuse of dominance cases; procurement cartels were removed from the scope of the Competition Law's criminal enforcement provision and are subject to a special set of criminal sanctions in the Criminal Code applicable to procurement fraud. Thus, criminal sanctions under the Competition Law today are essentially limited to hard core cartels outside the procurement context.

17. In 2014-2015, RCC was engaged in a massive operation to review internal procedures and institutional arrangements. Much of this was triggered by the 2011 World Bank report that identified many areas where the RCC's internal procedures could be improved. Also, Romania underwent a Competition law and Policy Peer Review by the OECD. The recommendations of the two international bodies ranged from improvements in the governing legal framework to restructuring of the RCC and improvements of its internal capacities. The recommendations resulted in a strategic document that RCC uses as a guideline in its reform efforts.

18. Some reforms have already been implemented, like the creation of the Director General position, the Chief Economist Group, the Cartel and Procurement Directorates, and the Advocacy Unit. A new business and IT architecture of the organization was designed with the support of the World Bank team. Subsequently, RCC implemented a new IT integrated system; the system currently supports the automation of the mergers processes and lays the foundation for the automation of all the other business processes of the RCC in the near future. Other steps in the reform are ongoing, such as an improved prioritization and case management system, and initiatives to broaden training initiatives and to improve staff management.

19. Competition law was amended as well, with some of the most important changes presented below:

- A new concept of “competition whistleblower” was introduced
- Interviews have been made available to RCC as a new evidence gathering procedure
- The settlement procedure will only be available before the hearings. A minimum threshold of the fine is set by law when a reduction is attributed for the admission of guilt.
- the possibility for RCC to modify the merger control thresholds provided under the Competition Law by a decision of its Board, allowing for more flexibility in the future if the need to increase the threshold arises
- Matching wording of Articles 5 and 6 of the law with articles 101 and 102 TFEU
- Open access during dawn raids for RCC inspectors to internal documents drafted by companies under investigation. This includes documents prepared for the exclusive purpose of preparing their defense, including documents drafted by internal legal counsel. Attorney-client privilege continues to apply to documents prepared by external lawyers for the exclusive purpose of legal defense.
- Automatic qualification of RCC fining decisions or decisions setting taxes for authorization of mergers as enforceable/executory titles after 30 days from the date of communication, without any other formalities required for their enforceability

### **3. Judicial appeals**

20. According to the Competition Law, the decisions issued by RCC may be challenged at the Bucharest Court of Appeals, while the decisions of the Court of Appeals may be also challenged by appeal at the High Court of Cassation and Justice.

21. Programmes for interaction with the judiciary were a constant in RCC's advocacy strategy, within EU funded projects or using RCC's own resources. The activities included in such programmes were conferences, seminars, study visits etc. If in the early years the issues debated at these meetings were mostly related to the application of the national competition and state aid policy towards, in recent years the cooperation between the National Courts, ECJ and EC and the decentralized application of the antitrust legislation monopolized the topics of the meetings.

22. Apart from these more formalized approaches, the Legal department of the Romanian NCA initiated in recent years a series of more informal meetings with judges and magistrates from the national courts, in which community antitrust and state aid cases are also the topic of debate.

23. Statistics for the judicial review of the Council's antitrust cases show that overall the percentage of the Council's decisions upheld in the judicial review process ranges somewhere between 80-90%.

#### **4. Governance and decision-making**

24. RCC Board, or Plenum, consists of seven members, including the President, two Vice-Presidents, and four Competition Counsellors. The law provides for the independence of all Board members, stating that *"The members of the Plenum of RCC shall not represent the authority that appointed them and shall be independent in making the decisions. The members of the Plenum of RCC and the competition inspectors may not be part of political parties or other political formations."*

25. Also, "The capacity of acting as a member of RCC is incompatible to the exercise of any other professional or consultancy activity, to the participation, directly or through agents, in the management or administration of public or private entities or the holding of public positions or offices, except for the didactical positions and activities in the higher education, scientific research and literary and artistic creation. They may not be designated experts or arbitrators either by the parties or by the court or another institution".

26. The members of the Plenum are appointed by the Romanian President for a five-year period, at the proposal of the RCC Advisory Board, subject to the Government's endorsement and after hearing the candidates in the specialty commissions of the Parliament. Their mandate can only be renewed once. RCC Advisory Board is a consultative body consisting of former Competition Council Presidents, representatives of the academia, business community, consumer associations and of other experts in the field. In addition to the tasks of providing recommendations and opinions on main aspects of competition policy and activities of RCC, the Advisory Board is also responsible for proposing the names of candidates for RCC to the Government. Proposed candidates may be rejected only by a reasoned opinion.

27. The law provides for a series of qualifications for any appointment to RCC Board, and states that the members shall have real independence and should be nominated based on a high professional reputation and civic probity. In order to address conflict of interest issues, the 2015 amendment of the competition law introduced the obligation of the person that previously exerted a function within RCC to ask for the opinion of the institution on any new appointments that may generate conflicts of interest in the first three years following his/her leave. RCC's opinion will be communicated in 10 working days from receipt of notification. Otherwise, RCC may address the Court requiring that person to end its activities which are incompatible with the legitimate interest of the competition authority. Other corrective measures were also provided, such as penalties or obligation imposed to comply with the binding opinion of the competition authority.

28. The staff of the RCC is organized into Directorates that are headed by Directors. In order to alleviate the President of some of his day-to-day responsibilities in managing the authority and its staff, in 2015 RCC introduced the position of a Director General who would supervise the Directorates and report

to the President. This entails shifting the operational responsibilities previously shouldered by the President to the DG to ensure the separation of operational functions from decision making. Responsibilities of this function include the execution of RCC strategy established by the President and the Board. The DG directs, coordinates and manages the activity of the operative units and verifies the completeness of the acts, documents and proposals to be transmitted to the Board. This function reports to the President, but is accountable to the whole Board.

29. RCC adopts decisions either in the plenum or in a “Commission” that consists of a three-member panel led by a Vice-President. The investigation of cases rests largely with case teams in the Directorates, with certain decision making formal steps in the investigative process reserved for the Board. At the end of the process, the SO and proposed decision is presented by a rapporteur to the Board in a formal hearing where representatives of the defendants also participate and present their views. A formal, final decision will be adopted by the Board.

## 5. Enforcement

30. As shown above, in its 1996 form, Romanian Competition Law provided for the compulsory notification of all agreements, even those falling under a block exemption. One rationale for this double control of compulsory notification was “that the undertakings and the administrative institutions are not yet very familiar with the concepts of the market and free enterprise that are the main components of a so-called competition culture”<sup>3</sup> Taking into account that under the former centrally planned economy prices were set by the state, and agreements with suppliers rather than market demand used to determine the level of output, a general belief was that this system of double control will increase the awareness of businesses on competition provisions. Institutions would regularly be confronted with, and hence learn about, the relation between free competition and consumer welfare.

31. GEO 21/2003 provided for the elimination of mandatory notifications for agreements subject to a block exemption. The Ordinance also abolished the authorization tax for exemptions previously foreseen by Article 33 of the law and applied by RCC for reviewing notifications.

32. This change decreased the administrative burden of the RCC - so far overwhelmed with notifications of agreements having clear pro-competitive effects – and allowed it to focus its enforcement activities on serious infringements of the Romanian competition rules. Following this change, companies are free to self-assess whether their commercial agreements qualify for a block exemption since they are no longer under an obligation to defer this assessment to RCC.

33. In many reports regarding competition enforcement in Romania, the European Commission recommended “a more pro-active approach”, in particular by increasing the use of “own-initiative investigations” focused on major infringements of competition.<sup>4</sup> Later on, the World Bank had the same recommendation. Until 2004 the investigation activities of RCC were indeed conducted almost exclusively in reaction to complaints<sup>5</sup>. In 2007, complaints still represented the largest source of formally investigated cases; since 2008, their significance has constantly dropped.

---

<sup>3</sup> G. Oprescu: Modernisation of EC Competition Law: The Case of an Associated Country, 2000 EU Competition Workshop by the Robert Schumann Centre for Advanced Studies, Florence, p. 5.

<sup>4</sup> The Roadmaps for Bulgaria and Romania - 13 November 2002, recommends for antitrust enforcement in Romania “a more pro-active approach including own-initiative investigations” (pg. 30). The same wording is contained in the Regular Report for Romania of October 9, 2002.

<sup>5</sup> Note should be made that the Competition Council has a legal obligation to answer any complaint submitted to its attention within 30 days.

34. Today by far the most cases are initiated *ex officio* (57% in 2014, 77% in 2015). *Ex officio* investigations can be triggered by intelligence gathered from other enforcement cases or sector inquiries, information provided from other agencies with whom RCC has MoUs such as, for example, the Organized Crime Division of the Prosecutor's Office or the Anticorruption Directorate, tips received on the Competition Whistleblowers online platform that RCC created or publicly available information. Fewer cases are based on formal complaints.

35. When the RCC considers that a complaint is sufficiently complete, it has a 60-day period to reach a conclusion how to proceed. It is not under an obligation to formally investigate every complaint, but it must sufficiently analyze the factual and legal aspects of a complaint to make an informed decision whether to reject it or to follow up by a formal investigation. Decisions to dismiss a complaint can be challenged in court.

36. If the Board decides to open a formal investigation, parties are informed about the decision to go forward. Where applicable, complainants and leniency applicants will be also informed as well. A press release will also ensure that the public is informed, although notification and publication may be postponed where continued confidentiality of the investigation is warranted.

## **6. Accountability**

37. The annual report of activity is approved by the Board of RCC and it is published on the institutional website.

38. RCC has no general reporting obligations as provided for the competition law. Nevertheless, RCC communicates its point of view on any aspect in the competitive policy field at the request of:

- the Romanian presidency and Government;
- parliamentary commissions, senators and deputies;
- the authorities and institutions of the central and local public administration;
- the professional and employers' organizations to the extent that they have legal duties to regulate the fields they activate in;
- the organizations for consumers' protection;
- the courts and prosecuting offices.

39. Transparency has also been a permanent topic on the strategy agenda of the RCC. Part of the reason of creating an Advocacy and Communication Unit lied with the fact that communication is linked to accountability; effective advocacy depends on effective communication. This unit helps facilitate increased transparency and publicity of RCC activities with the goal of mainstreaming competition policy principles in public policy.

40. As indicated in the 2010 World Bank Functional Review, there were no results frameworks for competition enforcement. RCC should be able to monitor its performance and communicate its results to institutional stakeholders and market players to increase its accountability. The current action plan agreed to with the World Bank provides a good starting point. In particular, the RCC considers communicating performance targets in regularly published reports and on its webpage (especially after automating all existing business processes). This will involve devoting resources to strategic planning activities. Using

this information for competition enforcement, accountability of the RCC towards the public and government could be improved.

41. RCC makes a point of publishing all its enforcement decisions, its points of view regarding normative acts and other reports on competition matters on its website. Like all government entities, RCC is also held by law to publish all its legislative initiatives for public consultation prior to their approval. Recently RCC considered also the matter of drafting and publishing official standpoints of view and guidance letters, in order to increase its decisional transparency.

42. The various amendments of the Competition Law aimed both at correlating the local legislation with the EC regulations and also at readjusting the institution and its practice in order to increase the predictability of its decisions, initiative which was considered salutary by the private sector.

## **7. Resources**

43. Limited competition culture and economic development prevent many transition economies from allocating sufficient resources to competition law enforcement, in particular to competition authorities. RCC was also faced with this problem in the beginning, trying to enforce competition law and advocate for competition culture with minimal personnel and financial resources.

44. However, over time the necessity to allocate adequate financial resources, trained staff and proper endowment to the agency became obvious and steps were taken to address those issues.

45. The 2003 reform was a step in the right direction. As a result of the institutional merger, the staff of RCC increased considerably and also the staff salaries were raised at reasonable levels.

46. Furthermore, RCC acquired presence in 41 counties distributed around Romania. The existence of these territorial offices which are under the supervision of the Territorial Directorate is a somewhat unique feature in the organization of the RCC. In total, the territorial offices and the HQ-based Territorial Directorate represent more than 25 % of the RCC's total staff, making this unit the largest directorate. However, some of these employees needed specialized training and decisions needed to be taken on how to allocate the staff within the existing structure.

47. After accession, when most of RCC's state aid competences were now in the EC portfolio, debates regarding the efficient use of territorial inspectorates were reiterated, with some recognizing that the territorial offices can continue to be useful in order to gather local information and evidence; but others appeared to be more concerned whether maintaining staff in territorial offices is the best possible use of the RCC's resources.

48. However, when RCC acquired responsibilities in applying unfair competition law, allocating these cases to the territorial offices seemed like a sensible move since it involved using local resources with a deeper understanding of local/regional problems and economic issues in cases that largely have a local or regional scope. Moreover, to address relative disparities between central and local staff expertise, RCC has been moving some experienced staff from the headquarters to the territorial offices and has been focusing to that respective area a portion of its training programme.

49. Budget reforms during the economic crisis required salary cuts across the public administration, including the RCC. Special supplements assimilating salaries of competition inspectors to those of magistrates were eliminated. All salaries were further cut by 25 %. Although most of the cuts have been reversed, a certain cause for concern remains. A variety of factors had made the RCC in the past one of the most attractive employers in the public sector in Romania, and salary levels were a significant factor. This position is at risk, since employment in the private sector becomes relatively more attractive for the most

qualified and experienced staff members, and RCC has trouble attracting certain staff with specialized competences (such as IT experts).

50. Both the OECD and the World Bank have voiced concerns in the past that adequate financial resources will be required to maintain the RCC's human capital and prevent a brain drain. Clearly, financial and other measures focusing on maintaining and strengthening the RCC's human capital continue to be required in order to maintain the RCC's position as an attractive workplace.

51. Another feature of independence is that RCC draws up its own budget, which is provided for in a distinct chapter of the state budget. The returns from fees, taxes or fines or from other sanctions enforced by RCC were collected to the state budget. As of this year, RCC has obtained approval to retain mergers authorization fees in its budget and use it for staff training and performance bonuses. In this respect, RCC's efforts of improving its capacity to implement the relevant legislation gradually received corresponding support from Government, through the allocation of adequate financial means to achieve its objectives.

52. Use of resources though has a quantitative and qualitative aspect. Resource problems may flow not only from lack of endowment, staffing or budgetary restraints, but also from lack of prioritizing activities.

53. As shown above, certain legislative provisions, such as requirements to notify certain vertical agreements, lower thresholds for merger notification, and administrative requirements for the Council's decisions required in the past a substantial use of resources that sometimes impeded the authority's ability to focus on serious infringements of competition.

54. Considering the limited number of resources at its disposal, the authority was faced with the necessity to define a prioritization strategy for its ex-officio investigations and to optimize its legislative tools.

55. In the years following accession, the enforcement record of the Council showed the results of such a strategy, showing an increase in cases of serious infringements of competition law being prosecuted by RCC.