

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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relation to Evidence Gathering - Contribution from Moldova****- Session IV -****30 November 2018**

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More documentation related to this discussion can be found at: oe.cd/invpw.

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Investigative Powers in Practice

Breakout session 3 - Due Process in relation to Evidence Gathering

- Contribution from Moldova –

1. The evidence collected and presented in the case file has an important role in the conduct of competitive procedures during the investigation.
2. Obtained information, as evidence, may be accumulated at different procedural levels of the investigation. Firstly, we consider it necessary and appropriate to structure the process of examining competitive practices, which we have developed and called **the procedural division matrix**.
3. We will, hereby, present the procedural division matrix of the examining anticompetitive practices, which reflect practices applied by the Competition Council of the Republic of Moldova in correlation with European practices.
4. The process of examining infringements of competition law is unique, but the procedures acts will vary depending on the type of infringement.
5. Thus, the process of examining the infringements of competition law was structured into three phases, divided into several levels.
6. **The first phase, the examination of the competition law infringements by the competition authority, consists of three levels:**
 1. The preliminary examination of the case, divided into two stages:
 - i. Preliminary examination by the specialized subdivisions of the Competition Council;
 - ii. Preliminary examination with the participation of the Plenum of the Competition Council.
 2. Investigation of the specialized subdivisions of the Competition Council divided into two stages:
 - i. The closed stage of the investigation conducted by the specialized subdivisions of the Competition Council;
 - ii. The open stage of the investigation conducted by the specialized subdivisions of the Competition Council.
 3. Investigation under the aegis of the Plenum of the Competition Council:
 - i. Conducting hearings
 - ii. Deliberation of the decision
7. **The second phase, the examination process of the competition law infringement, judging the case, consists of two levels:**

1. Trial before the first court;
 2. Use of legal remedies.
8. **The third phase** of the process is **the enforcement of the decision**, which may be: voluntary or forced, with particularities in the case of existing extraneous elements.
9. In the article we will provide details on these phases and the importance of obtaining evidence at each phase and stage.
10. The need for a systemic approach to the investigative process is a result of the fact that the collection of evidence for each procedure and for various competitive infringements has its own specific features. Therefore, it is important to analyze the evidence collection tool in each phase and stage of the procedural division matrix.
11. We will further extensively present the compartments of the competition law review process and the corresponding procedural documents.
12. In the first phase, *the examination of the competition law infringements by the competition authority*, its activity is governed by the regulations of competition procedural law. The purpose of the activity in this phase is the complex procedural examination of anticompetitive practices, using legal procedural acts. It is the phase in which the relations get formal, between the Competition Council and other market actors, such as: enterprises, associations and public authorities, for the efficient conduct of the investigation.
13. The steps used in the first phase can be divided into 3 levels:
1. The preliminary examination of the case. The preliminary examination procedure (1.1) can be carried out:
 - Upon request of a person affected by the anticompetitive practice;
 - Ex officio, based on information gathered by the authority.
14. According to the internal procedure, **the preliminary examination of the case (1.1)** was divided into 2 stages:
- 1.1. The preliminary examination by the specialized subdivisions of the Competition Council;
 - 1.2. The preliminary examination with the participation of the Plenum of the Competition Council.
15. During the preliminary examination, the Competition Council may request documents and information from all parties involved in this examination. In the outcome of the examination of the materials, the executor, if no reasonable basis is found, may end the stage I.1.1. by informing the complainant about the lack of reasons. The Competition Council of the Republic of Moldova offers the complainant 10 days to examine the point of view and present additional evidence and comments. If the complainant does not respond in legal terms, the complaint is deemed tacitly withdrawn and the information provided shall be considered by the Competition Council as general information, which may be useful in initiating ex officio investigations.
16. In the case of relevant comments, *the preliminary examination with the participation of the Plenum of the Competition Council* stage begins (I.1.2.). The preliminary examination by the members of the Plenum of the Competition Council of additional observations and evidence can lead to two key points:

- The need to initiate an investigation can be argued, and then, the disposition of initiating an investigation is issued;
 - The submitted observations are not considered relevant and the decision of rejecting the complaint is adopted.
17. The following procedural acts are used to prove the infringement of the competition law:
- Requesting information: in written form and on the spot;
 - Requesting and obtaining information through interview;
 - Carrying out inspections.

18. The powers of official investigation in the European Union have the General Directorate of Competition, in Romania - the Romanian Competition Council, and in the Republic of Moldova - the Competition Council. The mentioned institutions refer to competition authorities. The investigative powers of the competition authorities are stipulated accordingly in the EC Regulation, No. 1/2003, in the Competition Law No. 21/1996 of Romania and in the Competition Law No. 183/2012 of the Republic of Moldova. These normative acts enhance investigative powers and provide a formal mechanism for obtaining relevant evidence.

19. Due to the harmonization of legislation, as well as, the use of the same procedural acts in the investigative process, the competences of the competition authority in the Republic of Moldova are similar to those of the competition authorities in the EU. Furthermore, it should be noted that, in case of community dimension investigations, these are carried out by the European Commission's Directorate General for Competition.¹

20. The gathered evidence will generally include either existing behavior records of the parties or statements made during the investigations. However, regardless the type or form of investigation, enterprises have to cooperate, in accordance with their fundamental rights,² and respond to requests for information. Nevertheless, the effective cooperation does not absolve the parties from the obligation to respond to requests.

21. The Competition Council may request information from competitors to an agreement or concerted practice in order to get a better picture of the relevant market for the concerned products or services, and will use the competences to obtain such information. In the same way, the competition authority can obtain information from customers on the practices and behavior of undertakings. Third parties are an important source of information for competition authorities.

22. So therefore, both primary and secondary sources are used in the case files. If the primary ones are explicitly requested from the parties involved in the case file, the secondary ones can be obtained from other enterprises (even non-competitors) or state authorities.

¹ Cătălin Grigorescu, Control of Economic Concentrations - Additional Procedures after Accession to the European Union // R.B.L.M. No.5 / 2007 p.64-72.

² Case 374/87 Solvay & Cie against Commission of the European Communities, Collection 1989; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P against Commission of the European Communities, Collection 2004.

23. Information is provided by the managers of the enterprise. Specified officials have the responsibility to provide information. In the case when provided information is not correct or the information is not provided within the time limit set by a decision, then, the enterprise is the one that can be fined, and not the individuals in case.

24. Trust is given to the person who provides the information to make the company responsible. Also, in order to make this clear, the enterprise will want answers to requests for information to be made by authorized officials or by lawyers working for the enterprise. In order to trust any statement made as evidence against other enterprises, it is very likely to insist that the evidence be provided by a person whose evidence is probative.

25. Requests for information have to be in written form, so that it is possible to send a copy to the competent authority concerned. In practice, requests are sent in a form, by registered mail, by courier or by fax. The request has to specify the legal basis, the purpose and the subject of the investigation.

26. In practice, it is enough to identify the alleged violation. It is not necessary to list all the deeds and reasons to suspect the infringement. The request should also mention the legal sanctions for providing incorrect information in response to the request. The requested information should be identified as accurately as possible.

27. Any deadline set by the competition authority must be reasonable in the light of the circumstances of the undertaking, the nature and the amount of information requested. If the time to prepare an adequate response is insufficient, this has to be explained to the authority along with the additional time request. Experience shows that reasonable requests are usually complied with.

28. Any statement is incorrect if it gives a distorted picture of the truth of the facts requested and significantly moves away from reality on major aspects.

29. National competition legislation provides two ways of obtaining information:

- The information can be obtained in written form, requested by mail (fax, e-mail, etc.) or it can be obtained on the spot;
- The information can be obtained in the interview.

30. After, phases 1.1 and 1.2 are completed, and the investigation report with the objections of the parties and the table of difference are submitted to the members of the Plenum, the third level of the first phase, (I.3) Investigation under the aegis of the Plenum of the Competition Council begins.

31. It is worth to mention that at this level, the procedures applied by the Competition Council of the Republic of Moldova and the Romanian Competition Council are different. This fact is determined by the structural differences and the competences granted. Thus, in Romania, the decision for stating the infringements can be adopted both by the Plenum and by the Commission, consisting of three members of the Plenum. The President of the Competition Council determines the structure of the commission for each individual case and appoints one of the members to lead the proceedings. At the request of a member of the commission, or of the president of the Competition Council, the case with which the commission was entitled is examined by the Plenum of the Competition Council.

32. In the Republic of Moldova, decisions for stating the infringements are adopted only by the Plenum, thus, each member of the Plenum is obliged to study the submitted case file and should participate in hearings on this case file.

33. Investigation under the aegis of the Plenum of the Competition Council consists of two stages: conducting hearings and deliberation of the decision.

34. The deliberation stage is one of the most significant, because it summarizes all the operations that determine the elaboration of the most important procedural act³ of the Competition Council.

35. The deliberation is the operation in which the members of the Plenum establish solutions which follow to be stated based on carried out investigation. This stage takes place after the administration of evidence when the members of the Plenum will consider that they have sufficient data for the adoption of the decision.

36. As a result of the deliberations, the Plenum of the Competition Council or the Resolution Commission adopts the decision on the investigated case.

37. Decisions on the case are taken by majority of the members of the Plenum of the Competition Council votes or, depending on the case, by members of the Resolution Commission, the president of the meeting being the last one to state the opinion.

38. After the deliberations are closed, the president of the meeting shall communicate to the secretary of the meeting the solution adopted by the Plenum of the Competition Council or, as the case may be, by the Resolution Commission. Further, the president of the meeting records the outcome of the deliberations, as well as the member of the Competition Council Plenum or the member of the Resolution Commission, who will further coordinate the activity of reasoning of the decision taken.

39. Thus, a common feature of the competition authorities functioning is identified, and namely, the fact that the European Commission, the Competition Council of the Republic of Moldova and the Romanian Competition Council act both as an investigator of the case and as the first court judge. This requires greater responsibility of competition authorities in complying with procedural rules to ensure a fair trial.

40. Above, we have described the first phase of the competition investigation that takes place within the Competition Council. Concerning the second phase of the infringement investigation process, and namely *judging the case*, we can see that this phase can be omitted if the economic agent does not contest the Competition Council's Decision. The third phase, that is the *enforcement of the decision*, can also be omitted if the economic agent willingly implements the decision. At the last phases, we cannot talk about collecting evidence but only about the emergence of new ones, in case of exception. This brings us to the conclusion that collecting evidence is done only at the levels of the first phase.

41. We are further providing an example of how evidence is gathered in the 2.i stage, that is the closed stage of the investigation conducted by specialized subdivisions of the Competition Council. The tools for the accumulation of evidence used by the Competition Council at this stage, are the interview and the hearing.

42. The interview can be conducted via any means, including the telephone or the internet. The Competition Council may record in any form the statements made by the persons interviewed. A copy of the record shall be made available to the interviewee for approval. At the same time, the Competition Council establishes a reasonable period within which the interviewee can communicate any correction to be made in the statement. Corrections shall be communicated in written form.

³ Leș Ioan, Treaty of Civil Procedure, 5th Ed., Rev.- Bucharest: Ed.C.Beck, 2010, p.644.

43. For example, in the case of „JLC” JSC in the interview of 05.05.2017 at the Competition Council headquarters, the representative of „Linella” LLC confirmed the negotiating power of „JLC” JSC in relation to the retailers’ network. Thus, he mentioned that "... all the time in the negotiations „JLC” JSC came with the proposal to grant rebate if a certain quota is respected. They (n. "JLC" JSC) came and measured each time. Then we receive letters that the bonus will not be awarded if the quota is not respected. Every week, we were announced that we would not receive a bonus because the quota of the shelf is not respected. Being small and not knowing how to earn money, of course we were reacting to their letters. "(This proof was not used because „JLC” JSC enforced for the commitments).

44. In the case of „Apa-Canal Chisinau”, during the interview of 19.03.2018, the representative of "Apa-Canal Chisinau" informed that the Methodology regarding the calculation of the payments for exceeding the maximum admissible concentrations in the waste waters is not approved.

45. The hearing is recorded on magnetic tape or in an official record containing the main statements made by the parties and attached to the case file. Statements must be signed by the party that made them. The Competition Council shall inform the person heard of its intention to record the statements made at the hearing.

46. For example, in the case of "MGH Ground Handling" LLC vs. "Avia Invest" LLC (Competition Council Plenum Decision No 59 of 10.09.2015), during the hearings of 24.03.2015 and of 03.09.2015, the representatives of "Avia Invest" LLC communicated that no lease contract had been concluded for a period of 36 months between "Chisinau International Airport" and "Avia Invest" LLC. Thus, concluding lease contracts for a period of 36 months would privilege "MGH Ground Handling" LLC in relation to the other 38 undertakings that own premises in the "Chisinau International Airport", and they would have the right to go to court or to the Competition Council. However, taking into account the extension of the contract no. 7/14-AR concluded on 01.01.2014 with "Airport Handling" LLC for the period 01.01.2015 - 31.12.2017, it has been found that there was at least one case when "Avia Invest" LLC signed lease contracts for a period of 36 months.