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**COMPETITION LAW AND STATE-OWNED ENTERPRISES – Contribution
from Romania**

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Competition Law and State-Owned Enterprises

- Contribution from Romania -

1. In relation to the application of the competition law to the activities of state-owned enterprises this submission focuses on the Romanian Competition Council's (hereinafter RCC) jurisdiction to apply the competition rules governing anti-competitive agreements and abuse of dominance and its practice.

1. The definition of State-owned Enterprises

2. In accordance with the definition of undertaking or enterprise provided by Romanian competition law and EC competition law, state-owned enterprises (SOEs), also known as public enterprises, are economic entities owned or controlled by the government or local authorities, which provide goods and services on the market, regardless of their legal status or the way there are financed.

2. Merger cases

3. In Romania, mergers are reviewed exclusively by the national competition authority. The national merger control regime does not operate a distinction between SOE and POE. However, if merging parties are all SOEs and they were part of the same economic unit prior to the merger, the merger is considered as being an internal reorganization. If, prior to the merger, the merging parties belonged to different economic units having decisional independence, the merger is subject to RCC merger control. However, if the involved SOEs continue to have decisional independence after the merger, this operation is also considered to be an internal reorganization.

4. It should be mentioned that, according to the national merger regime, the prerogatives exerted by the state, which operates more like a public authority limited to protect a public interest than a shareholder, does not constitute the right of control in the meaning of competition law to the extent that they do not have neither the purpose nor the effect to empower the state to exert a decisive influence over the economic activity of the SOE.

5. In Romania there are SOEs which have a dual role as regulators (i.e. SOEs which manage the ports) but until now they were not subject to a merger. Nevertheless, it is worth to mention that RCC always advocated for the separation of the regulatory functions which entitle the entity to act as a regulator from the operational ones which allow the entity to act as SOE on the market. In this situation, if a structural separation of the entity is not possible or viable for carving out the regulatory function, the analysis of the merger will cover also the impact of the regulatory role of the respective SOE on the markets involved or related to those markets.

6. Mergers with a foreign SOE may create theories of harm related to national security. According to the national merger control regime, RCC cooperates with the national competent security authority that reviews the merger only from the perspective of national security. The cooperation mechanism covers mainly the exchange of information

between RCC and national security agency and has no impact on the competitive assessment of RCC.

3. Anticompetitive behaviour

7. Romanian competition law and TFEU apply equally to state-owned companies as to private companies. In these cases, SOEs bear alone the responsibility for breaching competition law.

8. Romanian competition law applies also to government or local authorities' interventions that may have anticompetitive impact on the markets. It is important to stress that the interventions/administrative bills that are issued by the government or local authorities in application of a law or to protect a public general interest (i.e. universal services, protection of the environment etc.) are exempted from the application of national competition law. But even in these cases RCC advocates for competitive neutrality or at least for the minimum distortion of competition (i.e. proportionality of the intervention).

4. Collusive agreements

9. Until now, RCC has had no case law regarding collusive agreements between SOEs. Nevertheless, in such cases a key factor is to assess whether the agreement is between separate entities or not.

10. However, SOEs may enter in anticompetitive agreements with POEs. The reasons of these agreements may consist in the parties' intention to consolidate their position in the market and gain some economic benefits without being exposed to risks afferent to a competitive market, even though the competition in the market is distorted.

4.1. Hidroelectrica cases

11. In 2012 RCC opened an ex-officio investigation regarding collusive agreements, both vertical and horizontal, between Hidroelectrica SA and 10 contractual partners.

12. State-controlled Hidroelectrica is a major hydro energy producer in Romania, operating more than 200 hydro power plants with a combined installed capacity of over 6,400 MW. During the investigation, RCC analysed the long-term contracts concluded between Hidroelectrica and some electricity suppliers and eligible consumers on the wholesale electricity market. The analysis took into account the scope, the market conditions, the position of parties on the market, the duration of contracts, the contractual provision regarding the amount of electricity, the price and the lock-in effect (the producer's impossibility of unilateral denunciation).

13. The competition authority found that these contracts restrained the competition in the market, affecting other electricity producers and suppliers and eligible consumers and thus impeding market development during liberalization process¹. The contracts were

¹ It must be emphasized that, in the period 2003-2012, Hidroelectrica SA had received about 450 requests for electricity supply and it was unable to meet them. At the same time, these agreements also affected Hidroelectrica's competitors active on the electricity production and trading market that did not have the possibility to make offers at prices that could had compete with the prices

concluded preferentially, without an objective selection process and in the absence of transparent procedures for electricity trading. The contracts provided for trading of a higher quantity of electricity than Hidroelectrica could produce (95-175% of the quantity of electricity produced).

14. The prices charged under long-term contracts were permanently lower than those charged on the trading platforms as CMBC (Centralized Market of Bilateral Contracts) and DAM (Day-Ahead Market)².

15. Moreover, the conclusion and performance of long-term contracts, the quantity of electricity contracted by Hidroelectrica SA on the regulated market had declined, this reducing the quantity of low price electricity afferent to "regulated basket" and implicitly affected the electricity price for households.

16. Also, the investigation revealed the fact that some of Hidroelectrica's contractual partners had exercised in common their purchasing power during the contracts in question and coordinated their competitive behaviour setting trading conditions. Thus, Energy Holding SRL, Alpiq Romindustries SRL și Alpiq Romenergie SRL had coordinated their behaviour during the long-term contracts concluded with Hidroelectrica to determine trading conditions, including related prices. The same behaviour was proved in case of Elsid SA and Electrocarbon SA, they had established in common the contractual terms with Hidroelectrica SA.

17. RCC has sanctioned Hidroelectrica SA and its 10 contractual partners, mainly electricity traders, with fines amounting 165,843,604 lei (approx. Euro 37 million) for concluding anticompetitive agreements on the electricity producing and trading market. Hidroelectrica SA, Elsid SA și Electrocarbon SA admitted their anticompetitive behaviour and benefited thus from a fine reduction.

18. In September 2018, RCC opened a new investigation involving a possible abuse dominant position from Hidroelectrica on the Romanian electricity generation and trading market. RCC suspects that Hidroelectrica, through its market behaviour, limited the amount of energy sold in some market segments (mainly on the Day Ahead Market) in order to get higher prices on the Balancing Market (PE).

19. DAM is a component of the wholesale electricity market, the main spot electricity market in Romania, and represents the centralized platform where transactions with electricity take place for the next day (the delivery day). The DAM closing price is commonly used as the reference price for electricity.

20. The Balancing Market (PE) is also one of the components of the wholesale electricity market, organized by the Transmission System Operator (TSO), which has the role of balancing the real-time production-consumption balance for the purpose of maintaining safe and secure functioning of the national energy system.

provided in long-term contracts. Thus, the access of other producers to Hidroelectrica's group of clients was restricted.

²The contractual terms on the electricity supply provided in long-term contracts, in conjunction with contracting significant quantities representing almost the entire quantity of electricity available severely limited the option of Hidroelectrica SA to participate in the DAM which led to liquidity reduction and distortion of reference price on the Romanian electricity market.

21. The balancing market is meant to mainly meet the need for market participants to adjust their energy to the demand and has a strong technical component. On the balancing market, the TSO buys and/or sells electricity from/to market participants with dispatchable units and/or consumption. The price on the balancing market is generally higher than the closing price on DAM
22. During the investigation, unannounced inspections were carried out at the premises of Hidroelectrica and Transelectrica (the Romanian TSO).

5. Abuse of dominant position

5.1. Maritime ports case

23. In another case, RCC identified and sanctioned the complex anticompetitive behaviour of a SOE entrusted with regulatory powers which led to a collusive agreement between POEs and raised barriers to entry in the markets (exclusionary conduct) and allowed the respective SOE to engage in exploitative conduct.
24. In November 2012, RCC opened an investigation against National Company „Administrația Porturilor Maritime” SA Constanta (CNAPM) and six POEs³ on the market of ships pilotage and towage services in ports which are managed by CNAPM.
25. CNAPM is a state-owned enterprise, with the Ministry of Transport holding 80% of the shares. It was established by Government Decision and due to its attributions and activities has a dual quality – regulator and economic operator.
26. From the analysis of the information in the case file, the regulatory part regarding the establishment of the access criteria and the supervision of the manner in which the safety services are performed qualifies CNAPM as public authority, whereas in order to ensure the provision of these services by entrusting them to operators in return for a price from which it generates profit, it is considered an undertaking in the sense of the Competition Law.
27. Following the investigation, RCC found the existence of several anti-competitive acts (collusive agreements and abuse of dominant position) on the market of ships pilotage⁴

³ Canal Sea Services SRL, Black Sea Pilots SRL, Maritime Pilot SRL, Black Sea Services SRL, Coremar Maritime Towage Company SA, Logistic Remo Services SRL.

⁴ Pilotage services in ports managed by CNAPM are assured by concluding service contracts with private operators. To conclude these contracts, the companies must meet certain criteria on the number of pilots and pilot boat (boats accompanying large ships when get in and out the ports). Thus, in 2012, CNAPM signed contracts with three independent operators: Canal Services Sea, Black Sea Pilots and Maritime Pilot. The three operators have agreed to exclude any form of competition both with other companies and between them. Basically, they agreed to coordinate their efforts through a pilot head and share the pilot boats. Moreover, there is a penalty clause according to which the operator that does not observe the agreement must pay euro 5 million. This practice led to increased tariffs for pilotage service. This aspect is also mentioned in the Report on the impact of existing regulations over the competitive environment elaborated by OECD and published in June 2016. The document shows that pilotage services tariffs charged in Romanian ports are 2 to 3 times higher than those charged in other EU ports which manages comparable volume of goods (gross weight) such as Barcelona, Valencia, Genoa and Koper.

and towage⁵ services in ports which are managed by CNAPM that eliminated competition in the ports of Constanta, Midia and Mangalia, blocked the entry on the market of other operators and made these services less attractive for potential investors.

28. Although pilotage services were entrusted by CNAPM to private operators which provide the services according to a working schedule (by turn, each of them three consecutive days), CNAPM invoices these services although it performs no such activity. CNAPM retains 25% from amounts collected, dividing equally the remaining amount to three operators regardless of the number of manoeuvres executed by each of them. Through this behaviour, any form of competition between the companies providing pilotage services was eliminated, directly disadvantaging the customers. As a result, RCC sanctioned CNAPM with a fine of 11,922,385 lei (2,649,419 euro) for abuse of dominant position on the maritime pilotage services market.

29. As regards towage services, the port authority, CNAPM, imposed more restrictive conditions than those provided by the law on getting the authorization. For example, the minimum number of tugs set by CNAPM is higher than the minimum required by law. In this way, the port authority has restricted competition by creating barriers to entry on the towage market.

30. To avoid such situations, RCC advocated for the implementation of the OECD recommendation on setting-up an independent regulating authority in the field to set the conditions of access to port services market and ensure financial transparency of the ports.

5.2. Posta Romana cases

31. RCC identified and sanctioned abusive practices of SOEs. One very complex case concerned four joint investigations of several anticompetitive practices of the National Company „Posta Romana” (hereinafter referred to as „Posta Romana” or the incumbent) covering the period between the 18th of April 2005 and the 31st of December 2009. The assessment of the application of Article 102 TFEU concerned the period between January 1, 2007 and December 31, 2009. Since the case was also presented in other RCC contributions to the OECD Competition Committee roundtables, for the purpose of this paper, only the excessive price allegations and the discriminatory treatment of Posta Romana will be presented.

32. Posta Romana is the incumbent operator of postal services in Romania entrusted with the provision of postal universal services. In fact, among several markets, the investigation concerned the market of direct mail services and bulk mail services. The latter was and still is included in the sphere of postal universal services.

33. A key factor of the investigation was the assessment of substitutability between those two services. Even though these two services have similarities including the technological

⁵ Towage services are provided by CNAPM in the same way through contracts with private operators who meet the criteria on the number of tugs and structure. For towage services, CNAPM concluded a contract with Remo Logistic Services, a company set up for this purpose by the three operators: Canal Sea Services, Black Sea Services and Coremar.

In this way, the three companies assured themselves that they will be the only ones to provide towage services (no other operator could meet the criteria of CNAPM alone, only in association with one of the three companies). Thus, Canal Sea Services, Black Sea Services and Coremar obliged themselves not to leave the association, otherwise they would have to pay damages of euro 10 million to the others two companies.

flow and value chain (these services generate economy of scope for Posta Romana), there were several factors that placed the services in two separate relevant markets:

- The regulatory regime: the reserved right covered only bulk mail services. Also, the definitions put into place by the regulator contributed to a clear distinction between these services;
- These services satisfied different needs for the consumers;
- The pricing policy was different. Even though the price per unit was the same, the rebates scheme was more favourable for direct mail services, mainly due to the fact that direct mail services generates secondary traffic from the end users to the firms that used direct mail services to promote their products.

34. Another key factor for the definition of relevant market and for establishing the dominant position of Posta Romana on the relevant markets was the assessment of barriers to entry. Both structural and administrative barriers to entry were identified. The network coverage, the economies of scale and scope and the notoriety were identified as structural barriers to entry. To achieve economic efficiencies, the provision of the postal services on the relevant markets requires the existence of a network with national coverage. For historical reasons, the incumbent's infrastructure is developed at the national level and it has national coverage. The creation of such infrastructure entails high costs. So, the presence of such network is a structural barrier in itself. Most alternative postal operators had only a regional coverage (several towns or regions). Even though some of the alternative operators have extended their postal networks (by acquisitions and/or by contracts of agent with other postal operators), their coverage of the national territory was still reduced as compared to the incumbent's network. At the same time, a part of the alternative postal operators either use the incumbent's network when they do not have local points of presence at the place of destination or charge higher tariffs for the delivery of the items to such places. In this respect, it results that the potential investments made by an alternative postal operator cannot be recovered in a reasonable time frame.

35. In addition, the incumbent benefits from notoriety in respect of the provision of the services included in the sphere of universal postal service.

36. RCC identified as an administrative barrier to entry, the fact that the incumbent was the historic beneficiary of the reserved right with regard to the domestic delivery of correspondence, including bulk mail, up to 50g.

37. The investigation revealed that, even though the reserved right only covered the bulk mail services, its effect spilled over the market of direct mail services. Also, the capacity of its postal network allows the incumbent to process large volumes of postal items and to provide the whole range of the postal services. In fact, beside the traditional postal services, the incumbent provides also value added postal services and other services (money transfer). These services enabled the incumbent to achieve economies of scale and scope. The amount of the economies of scale allows the incumbent to grant rebates for the provision of the postal services on the relevant markets. In fact, the possibility of the incumbent to achieve economies of scope and scale was the reason for the national regulator to impose the obligation on the incumbent as universal services provider to have a uniform tariff at a national level for the universal postal services.

38. The assessment of dominance of Posta Romana also took into consideration its ability to charge an uncompetitive price, besides its privileged position. In fact, the complainants accused Posta Romana of abusing its dominant position by directly charging

increased tariffs and imposing a new unfavourable scheme of rebates for the direct mail services to a level that could not be economically justified, exploiting the complainants' economic dependence of the services provided by the incumbent on the relevant market (excessive prices).

39. For the excessive pricing allegation, Posta Romana defended itself on the following grounds:

- Identical cost structures for the provision of direct mail services and for bulk mail services, the latter being included in the sphere of universal services;
- The regulatory intervention regarding the prices for the provision of universal service - ANCOM approved a price increase for the provision of bulk mail services, justified by the losses incurred by Posta Romana as a direct result of the increased costs for the provision of this postal universal service;
- Even though the prices per a single postal item were identical, the structure of rebates was even more favourable for direct mail than for bulk mail, at least for lower volumes (up to 2%) and starting from lower quantities.

40. RCC considered the arguments provided by the incumbent as objectively justified. Moreover, ANCOM's intervention on a similar regulated market with the aim to ensure the provision of universal services at affordable prices led RCC to the conclusion that Posta Romana is not responsible for the alleged behaviour.

41. Typically, SOEs pursue goals other than profit maximization⁶. Nevertheless, SOEs compete directly with private own enterprises⁷ in many important markets. Even though they may be less concerned with generating profit, SOEs may have stronger incentives than profit-maximizing firms to engage in anticompetitive activities in a way that disadvantage competitors to expand the scale and scope of their operations. This situation arises especially in the downstream or upstream markets where vertically integrated SOE operate. These SOEs enjoy monopoly/exclusive rights in their value chain but face competition from privately-owned companies in other parts of the value chain.

42. One example is provided by the abovementioned investigation regarding the discriminatory treatment applied by Posta Romana in relation with its beneficiaries (intermediaries).

43. This case started as a possible pure-second line discrimination case. In this respect, the incumbent applied a favourable treatment to a particular customer (Infopress) in contrast to another customer (Mailers) for the direct mail services, without a reasonable economic justification. This positive discrimination created an economic advantage for the favoured undertaking that was used to subsidise its offer for the services on upstream market. Both customers of the incumbent for the direct mail services were active on upstream market - the market of direct mail preparation services.

⁶ In the literature, the assumption that private firms are generally driven by profit is not always valid for SOEs because some of their functions may be based on non-commercial objectives. As discussed including in OECD papers, some objectives for SOEs may include employment, social goals, or wealth distribution. As a result, SOEs' incentives can be significantly affected as is their performance on the market.

⁷ Sometimes called profit-maximizing enterprises.

44. Following the analysis of the circumstances in which the preferential treatment was granted to Infopress, the following resulted:

- Posta Romana was an unavoidable trade partner;
- The discrimination was significant - the favoured part, namely Infopress, paid significantly less than the other clients of Posta Romana's services. This conclusion was reached following the assessment of the invoices;
- The product/the service provided by Posta Romana represents a large proportion in the total cost of the services of direct marketing by post provided by Infopress and by its competitors (including Mailers). In these circumstances, obtaining a tariff rebate plays an important role in the activity of the direct marketing companies;
- The discriminatory treatment was persistent, and it had a duration long enough (14 July 2005 – August 2009) as to have a direct and significant impact on the activities of the disadvantaged beneficiaries/clients. This discriminatory treatment started from the moment when Posta Romana and Infopress entered into commercial relations concerning the direct mail service Infadres.

45. Consequently, the preferential treatment granted by Posta Romana to Infopress made it impossible for Infopress' competitors to efficiently replicate the service of preparation of Infadres items offered by Infopress. Thus, Infopress' offer was not the result of a real competition between this undertaking and Mailers but a result of a favourable treatment to Infopress in comparison with its competitors. Consequently, it was noticed that between 14.07.2005 and August 2008, Infopress held a significant competitive advantage as compared to its competitors⁸.

46. This favourable treatment granted by Posta Romana to Infopress was not a result of achieving a high level of economies of scale⁹ (generated by costs reductions that may be passed on to this particular undertaking and hence become relevant to an efficiency defence), but due to the fact that this undertaking was the biggest client of Posta Romana for direct mail services. In fact, the rebates granted by Posta Romana to Infopress were fidelity rebates aiming to keep this undertaking as client of the incumbent. Consequently, on the one hand, this anticompetitive behaviour had a foreclosure effect on the relevant market (maintaining the dominant position on the relevant market), and on the other hand, it distorted the competition on the upstream market of direct mail preparation services.

47. This abusive behaviour was worsened by a complex discriminatory treatment applied by Posta Romana between March 2008 and August 2009 on the market of direct mail services and the market of bulk mail services which had an exploitative dimension and an exclusionary one. The aims of this behaviour were:

⁸ Between March 2008 and August 2009, Posta Romana engaged in a major discriminatory practice with regard to the granting of tariff rebates for the Infadres and commercial correspondence services. The application of the preferential treatment to Infopress even after the implementation of the new scheme of tariff rebates by Posta Romana was likely to enhance the anticompetitive effects of the preferential treatment granted by Posta Romana to Infopress, by significantly reducing the possibility of other direct marketing companies to provide their services in competition with those of Infopress by matching the offer of this company.

⁹ Posta Romana granted Infopress uniform and maximum level of the tariff rebates (32.5% or 37.5% depending on the sorting degree of the postal items), regardless of the monthly volumes.

- To prevent the major customers to shift to alternative suppliers on the markets open to competition (i.e. the market of direct mail services);
- To exclude the rivals on the upstream markets (i.e. the market of mail preparation services).

48. The mean used by Posta Romana in order to achieve these goals was by granting targeted fidelity rebates to major customers and preventing intermediaries to get rebates

49. This had the effect of tying major customers and rising rival's costs, 'foreclosing' the upstream market of mail preparation services and downstream market of direct mail services.

50. Posta Romana tried to use regulated conduct defence to get immunity for its behaviour. In this respect, Posta Romana stated that its discount policy was based on the definitions for direct mail service and for the bulk mail service in the regulatory framework.

51. RCC initiated a series of meetings and discussions with the national regulator in order to remove any legal provisions that may induce an anticompetitive behaviour of the incumbent. In April 2009, during the public consultation on the draft decision regarding the appointment of the universal services provider, RCC made public its opinion about the necessity of changing the definition of the direct mail services and the transposition of Art.12 par 5 of the Amended Postal Services Directive. Such amendments were seen as necessary in order to prevent any exploitative or exclusionary conduct from the universal services provider. Subsequently, the regulator amended the provision in question accordingly.

52. However, Posta Romana did not comply with RCC's opinion immediately. Moreover, even though RCC made its opinion public and warned the incumbent about the potential infringement of competition law by implementing such discriminatory discount policy, the incumbent put an end to its behaviour only in August 2009, shortly before RCC opened a new procedure.

53. The documents sent by the incumbent in its defence revealed that Posta Romana proposed to the National Regulatory Authority some legislative measures with the aim to enforce its discount policy. Moreover, the regulatory measure proposed by Posta Romana would have granted the incumbent the freedom to implement any type of discount policy it considered appropriate in order to maintain its market position, to keep the large senders as its clients and also to have the possibility to attract new customers. Amendments proposed by Posta Romana to the regulatory framework clearly showed that the incumbent was aware of its flawed interpretation of the regulation.

54. RCC considered that the regulatory provisions invoked in the defence were not mandatory and, as already described above, they gave Posta Romana a certain level of discretion. Nevertheless, RCC considered that the regulatory framework offered the possibility for the incumbent to apply these legal provisions in an abusive manner. This fact was considered as a mitigating factor in the establishment of the fine, granting Posta Romana a 10% reduction of the basic level of the fine.

55. RCC decide to impose a fine¹⁰ for the discriminatory behaviour of Posta Romana and corrective measures (i.e. obligation of non-discrimination¹¹ and transparency¹²) in order to prevent new similar actions. RCC's decision was upheld in court.

56. Nevertheless, during the monitoring procedure it was revealed that Posta Romana did not comply entirely with the obligations imposed by RCC. Also, several intermediaries submitted complaints to the Ministry of Communication and Information Technology (the main shareholder) for allegedly favourable treatment granted by Posta Romana to its own subsidiary and to Terradox Solutions SRL (a competitor on the market of mail preparation services). Posta Romana entered into an agreement with Terradox Solutions SRL regarding the provision of hybrid mail services.

57. Romanian competition authority launched an in-depth analysis focussed on the evolution of the markets and the impact of the obligations on the capacity of Posta Romana to fulfil its obligations as universal service provider. In this respect RCC cooperated with the national regulatory authority. The analysis conducted by RCC revealed no economic justification for breaching the obligation imposed in the burden of Posta Romana and no other possible justification related to a public interest. Following the conclusion of the in-depth analysis RCC sanctioned¹³ again Posta Romana. The case is pending in the Romanian supreme court; the first instance court upheld the decision of RCC.

6. Conclusions

58. There are two main sources of competition distortions:

- SOE anticompetitive behaviour and
- Government or local authorities' interventions in the marketplace (e.g. in regulating markets; procuring public services and providing subsidies or other support).

59. RCC's competition enforcement powers allow it to address anti-competitive behaviour of both privately-owned enterprises as well as state-owned enterprises. RCC can and does apply the competition rules regarding anti-competitive agreements and abuse of dominance to both privately-owned enterprises and state-owned enterprises equally. In this respect, RCC uses the same standard of proof as in the cases where privately-owned enterprises are involved. Also, in both cases, RCC verifies whether the anticompetitive behaviour is generated or facilitated by regulation (regulated conduct defense).

¹⁰ The amount of the fine is 24,066,612 Euro, representing 7,2% from the 2009 total turnover.

¹¹ The obligation of non-discrimination:

The tariff rebates policy and the condition attached to this should be based on avoided costs and applicable to all beneficiaries on a non-discriminatory basis;

if the Romanian Post offers better tariffs and rebates or other conditions to an undertaking or to its own subsidiaries, it should make a similar offer to all competitors

¹² The obligation of transparency – all the offers for the postal services of delivery provided by Posta Romana on the relevant markets should be published on its website, in order to be accessible to all beneficiaries or potential customers.

¹³ The amount of fine is 7,382,652 Euro, representing 2,94 % from the total turnover of the year 2014.

60. RCC operates the following distinctions:

- If the behaviour is mandatory, RCC does not apply competition law for past regulated behaviours. In such situations, the regulated conduct defense may be used in response to RCC-initiated enforcement cases. Nevertheless, RCC sends its report (and binding opinion) to the regulatory entity in question to take appropriate measures in order to stop the incriminated practice and remove competitive concerns. Such measures must then receive an approval from the RCC before entering into force. If the regulatory entity does not comply with RCC's binding opinion, RCC will start legal proceedings against the regulator, including opening a judicial procedure to restore competition on the market;
- If the behaviour mentioned in the regulation is not mandatory or is rather vague, besides the cease-and-desist order, the undertakings may be fined by RCC. Regulated conduct defense may be used in response to RCC enforcement actions. However, such a defense would only be regarded as a mitigating circumstance, resulting in a reduction of the fines (up to 10% from the base level of the fine). In private enforcement cases, the undertakings in question will continue to be considered liable for damages. Where the undertakings in question are already subject to several obligations imposed by NRA, but those may be insufficient, ineffective (too general) or may address only some services due to the limited area of NRA's competences. In its decision RCC may impose supplementary obligations in order to restore the competitive environment. In that situation, RCC considers that it is inefficient to just duplicate the obligation in question; remedies imposed by RCC are, as much as possible, complementary to those already imposed by the regulator and cover only markets where the undertaking is dominant.

61. The analysis of RCC takes also into consideration other aspects whenever this is necessary for the assessment of competitive conduct. This may be the case when a SOE or POE may be entrusted with the provision of public services or universal services or services of general economic interest, may be subject to the policy of government or local authorities related to a certain public interest (i.e. defense, public safety or public health etc.) or is entrusted with the regulatory powers.

62. Romanian competition law applies also to government or local authorities' interventions that may have anticompetitive impact on the markets. It is important to stress that the interventions/administrative bills that are issued by the government or local authorities in application of a law or to protect a public general interest (i.e. universal services, protection of the environment etc.) are exempted from the application of national competition law. But even in these cases RCC has specific powers to provide advice and make proposals to the Romanian Government to ensure competition neutrality or at least for the minimum distortion of competition (i.e. proportionality) of the intervention.

63. It is worth to mention that the government and local authorities have the obligation to submit to RCC draft administrative acts that may have anticompetitive impact on the markets. RCC issues an opinion regarding the administrative measures in question including proposals to amend the bills in order to ensure compliance with the competition law.

64. RCC monitors government or local authorities' intervention on behalf of owned or controlled SOEs especially when: (i) it raises barriers to entry¹⁴ and/or to expansion¹⁵ in the market for competitors, (ii) creates a regulatory protection of SOEs¹⁶.

¹⁴Typically, exclusive or special rights.

¹⁵I.e. undue direct or indirect subsidies and support (preferential access to credit and other financial services, information advantages) or other preferential treatment of SOEs that may lead to overcapacity and market distortions or through procurement policy.

¹⁶ SOEs face different regulatory burdens than private own firms. Also, government may grant privileges and immunities for SOE. In this respect, SOEs may benefit from regulatory exemptions, lowering their operating costs or are not subject to the same costly regulatory regimes as private firms. These exemptions may range from compliance with disclosure requirements to securities regulators, to exemptions from building permit regulations or from zoning regulations, to exemption from local or national taxes.