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Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

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Interactions between Competition Authorities and Sector Regulators

- Contribution from Moldova -

1. Introduction

1. The Competition Council of the Republic of Moldova is the autonomous authority accountable to the Parliament that ensures the application of and compliance with the legislation on competition, state aid, and advertising within **the limits of its competence**. (art. 32 par. (1) of the Law on Competition no. 183/2012[1]; hereafter: the Competition Law). The major question which results from this general provision when it comes to the relations with other public authorities and with sector regulators in particular is about the limits of the Council's powers and their delimitation from the competence of regulators responsible for developing sector specific regulations. How to avoid the conflict of competences which may even result in parallel sanctioning for the same actions and how to ensure cooperation between the agencies in the most efficient way – these are some of the questions that the Council has to answer in the course of its regular activities.

2. As a general rule, the Competition Council is responsible for the enforcement of competition rules in all sectors of economy. There are no limitations as to specific industries covered by its jurisdiction, even in highly regulated markets. Meanwhile, the rules established by sector regulators in the respective markets often go beyond technical regulation and cover many competitions related issues. Promotion of competition is often specifically mentioned in the legislation regulating the activities of many regulators. Therefore, one of the tasks to be ensured by both the Competition Council and other regulators is striking the right balance between their activities and powers to avoid duplication of competences.

3. First and foremost, the Competition Council is responsible for the enforcement of the general competition rules concerning anti-competitive agreements, abuse of dominant position, and merger control. These are regarded as the core competences for competition authorities in most countries that have implemented antitrust regulations. Besides these general competences, the Council deals with individual complaints by competitors regarding '*unfair competition*' (the term used in the Moldovan Competition Law for individual actions by undertakings directed at their competitors, eg. actions that create confusion between similar products, unfair use of trademarks, commercial secrets, dissemination of misleading information about the competitors, etc.).

4. The Council also has certain regulating powers in the advertising sector, which is specifically mentioned in the Moldovan Competition Law. Besides the general enforcement powers (eg., by sanctioning the companies for breaching the relevant legal provisions), it may also develop certain regulatory acts that refer to advertising and soon will carry out general supervision of the advertising market. However, in this sector, other authorities also act as either regulators (eg. the Audiovisual Council) or enforcers (Police, National Inspectorate for the Supervision of Non-Food Products and Consumer Protection).

5. Thus, regardless of the specific sector and the level of its regulation, the Competition Council will intervene insofar as the general issues of competition arise. Certain questions may however be

[1] References to Moldovan legislation in this paper follow the model commonly used in the Republic of Moldova: the title of the relevant legislative/regulatory act, its number, and the year in which it was adopted.

raised where the legislation can create parallelism in the activities of both the competition authority and the sector regulator, where the sector regulations may lead to some limitations of competition, or where the Council itself may assume certain regulating powers.

6. In this paper we will provide an overview of several highly regulated sectors in which the activities of the Competition Council may intersect with the activities of the respective regulators. However, before we turn to them, we have to describe the specific provision of the Moldovan Competition Law which enable the Competition Council to supervise the actions of public authorities.

2. Supervising the activities of public authorities that distort competition

7. Unlike many competition authorities in different countries, and apart from the regulatory and enforcement powers that can be shared with other authorities, the Moldovan Competition Council also has the general power to intervene in cases of the actions (or inactions) of public authorities which lead to the distortion of competition. Art. 12 of the Competition Law prohibits *any actions or inactions by central or local public administration authorities and institutions that* ***restrict, prevent, or distort competition***, such as follows:

- limiting the rights of undertakings to buy or sell;
- establishing discriminatory conditions of activities or granting privileges to certain undertakings, unless they are provided for by law;
- establishing prohibitions or restrictions for the activity of undertakings that are not provided for by law;
- forcing, directly or indirectly, undertakings to associate or concentrate in any form.

8. The actions described above can either take the form of individual acts aimed at specific enterprises or some form of regulatory interventions that distort normal competitive conditions in the relevant markets. In either case, the Competition Council has the right to intervene to restore the competitive environment. The Council can initiate an investigation regarding one of the actions specified above and require certain measures to be taken to restore normal competition in the market. If the relevant authority does not execute or comply with the requirements of the Competition Council, it can bring an action to the court under the Administrative Code to ensure compliance.

9. In one of the latest Decisions (no. APD-13/19-26 of 25 May 2022[2]), the Competition Council found a violation of art. 12 committed by the state entity which provides various services in the field of metrology and certification of conformity. The entity had issued letters to a group of dairy products manufacturers that allowed them to attribute preferential VAT rates to their products (the option which was not available to other manufacturers; hence the distortion of competition). In this case the decision lies on the border between competition legislation and relevant tax regulations[3]. The case also involved the State Fiscal Service which is usually responsible for administering all matters related to taxation.

10. Given the power of the Competition Council to check the actions of public authorities that may have an impact on the markets and competitive environment, the question would then arise as to

[2] The public version of the decision in Romanian is available here: https://competition.md/public/files/Decizie-CMAC2ea0f.pdf

[3] The decision has been challenged in the court; the relevant judicial procedures are still pending.

the limits of this power for the Council not to become a sector regulator itself or not to limit the legitimate competences of regulators in their respective areas.

11. As mentioned earlier, the sector regulator may intentionally decide to limit competition in certain areas or take other decisions that may have an impact on competitive environment. Therefore, it remains an open question as to the extent to which the Competition Council may get involved in the decisions of sectoral authorities without exceeding its own powers under art. 12 of the Competition Law and also diminishing the exclusive regulatory powers of specialised public authorities.

12. Previously, the Competition Council initiated a number of investigations under art. 12 with respect to public procurements procedures, where, in the opinion of the Council, the competition had been distorted by the actions of the contracting public entities. However, under the Moldovan Law on Public Procurements no. 131/2015, the authority which is responsible for ensuring compliance with the relevant legislation in the course of specific procurements is the National Agency for Disputes Resolution (*Agentia Nationala pentru Solutionarea Contestatiilor – ANSC*) which intervenes upon the complaints from the participants to the respective procurement procedures. Therefore, in cases where the Competition Council makes verifications or conducts investigations under art. 12, it is important for the Council not to take over the functions and competences of the *ANSC*.

13. The have also been other situations when the interventions under art. 12 raised questions as to the limits of the Competition Council's powers with regard to the actions of other public authorities/institutions. In order to clarify all such questions, the Council currently conducts evaluation of the previous cases under these legal provisions in order to develop clear guidelines in this respect, which would bring clarity to both public institutions and all undertakings that might be affected.

14. Further in this paper, we will analyse examples of specific sectors where the Competition Council and sector regulators may cross paths. We will not analyse all possible areas where the activities and interventions of the Council may intersect with regulators. We will also provide details about the sectors where the Competition Council has some regulatory powers. Thus, the following areas will be discussed: **energy sector, audiovisual media services**, **advertising,** and **railway transport**.

15. At the end, in a separate section, some aspects relating to inter-agency cooperation agreements and their functionality will be discussed. Although such agreements are supposed to increase the efficiency of the activities of the agencies involved, it is still not clear what the limits of such cooperation are and whether they provide for any specific and practical mechanisms in addition to the mere expression of good intentions.

2.1. Energy sector

2.1.1. ANRE as an independent regulator

16. The energy sector in the Republic of Moldova is highly regulated. Even in more competitive sectors where there are more market participants, such as petroleum-based fuel products, the market remains substantially regulated (with fixed retail price caps established by the regulator based on the formula set out in law which is linked to the Platts quotes). In other sectors (natural gas, electricity), the competition is much more limited and the market is regulated to a much greater extent.

17. The role of the National Agency for Energy Regulation (*Agentia Nationala pentru Reglementare in Energetica – ANRE*) is diverse - it acts as a regulator that sets the rules in the

relevant energy markets and as an enforcer that monitors the behaviour of companies in those markets and sanctions them for the violation of relevant legislation and regulations.

18. The Agency is autonomous, enjoying both functional and financial independence. Its activity shall not be restrained by decisions or actions taken by the Government, any specialised central authorities, other central public authorities, regulators, or any other public administration bodies (*art. 8 par. (3) of the Law on Energetics no. 174/2017*). Although its directors are appointed by Parliament, they should act independently of it and shall not take any instructions from the legislator.

2.1.2. Correlation of powers of ANRE and the Competition Council

19. As mentioned above, *ANRE* enjoys a very high level of independence in both setting the rules and supervising compliance with them acting as both *ex-ante* and *ex-post* regulator. However, the Competition Council has also the right to supervise the activities of undertakings in the markets, including in the energy sector, inasmuch as the general provisions on competition are concerned.

20. Thus, the issue of conflicting competences may arise between the two authorities. Technically, both agencies act independently each being responsible for its own field of competence. However, there are certain areas where the powers of the two may overlap. One of the functions of ANRE is to *promote competition in energy markets* (art. 12 par. (1)-e) of the Law on Energetics), which is also the general objective for the Competition Council.

21. The *Law on Energetics* specifically mentions that, without prejudice to the principle of independence, the Agency cooperates with different public institutions, regulators, central authorities, etc., including the Competition Council (art. 12 par. (3)). Although, technically, there is no common jurisdiction, art. 14^1 par. (4) of the Law on Energetics specifically provides that, when the National Agency for Energy Regulation conducts investigations in energy markets, it may request the support of the Competition Council on issues of the joint (common) competence or in cases where the same circumstances may result in a violation of or non-compliance with the regulatory acts in the area of competition. In that case, both authorities '*may agree on conducting joint controls'*.

22. Nevertheless, there are no clearly established criteria for such cooperation between the agencies. So far, no joint controls have ever been carried out. Nevertheless, there are several areas where such joint controls may be appropriate to avoid the overlapping of powers or to support each other's interventions. There are several specific areas where this can happen:

2.1.3. Electricity and natural gas markets

23. There are several violations under the **Law on Electrical Energy no. 107/2016** (art. 95 par. (1)-e), f), g) and par. (3)-a), b), d)) and **the Law on Natural Gas** (art. 113 par. (1)-e), f), g) and par. (3)-a), b), d)). These provisions set out certain types of violations that may entail sanctioning by the energy regulator in a proportion to their annual turnover. However, under certain conditions, these same actions potentially may also result in establishing the abuse of the dominant position under the Competition Law. Such actions are as follows:

- creating obstacles to consumers or users of system operators, suppliers, or closed distribution system operators, for exercising their right to change the supplier;
- the repeated refusal by the system operator to approve the connection to its network of the applicant's installations;
- non-compliance with the obligation to ensure legal and/or accounting separation of activities, if required by law;

24. non-compliance by the transport system operator with the related obligations to ensure its independent status in its relations with vertically integrated electricity/natural gas companies.

25. These breaches may entail fines of up to 5% and up to 10% of the annual turnover imposed by ANRE. At the same time, should such actions constitute an abuse of the dominant position, they can be sanctioned by the Competition Council under the general rules set out in the Competition Law (art. 11) - up to 5 % of the annual turnover in the year preceding the decision on the application of the fine. Thus, a question may arise about a potential conflict of competences between the agencies. To prevent such a conflict or overlap of powers, conducting joint controls/investigations could be an option.

26. However, a question would still persist as to the procedure to be followed in the course of such joint controls/investigations (as each agency has its own procedures set out in the respective laws regulating their activities). The questions raised above might have been solved through a cooperation agreement between the two agencies. On 23 August 2022, the Competition Council and the National Agency for Energy Regulation signed such an agreement. It has not been fully tested yet. However, there are certain limitations therein which are specific to all cooperation agreements that might render it not efficient enough in order to solve the above questions (see more on cooperation agreements and their efficiency below).

2.1.4. Petroleum-based fuel markets

27. The markets of petroleum-based fuels are much more competitive and are more liberalised as compared to electricity and natural gas. However, the current situation still does not allow full liberalisation and deregulation. This sector remains regulated through the Law on Petroleum Products no. 461/2011 (which sets *inter alia* the **maximum retail prices for both petrol and diesel fuel** and the conditions for issuing licences/authorizations for the import of those products) and subordinate regulations adopted by *ANRE*.

28. The role of the energy regulator in this area is to monitor the activities of fuel suppliers from the perspective of the specialised sectoral legislation. However, given the specific circumstances existing in the Republic of Moldova, certain distortions can arise in these markets and the activities of petroleum-based fuel suppliers can be subject to scrutiny by the Competition Council through the prism of the general competition legislation.

29. The Competition Council can conduct investigations in these markets on the signs of anti-competitive practices. One such investigation was launched in 2021 with respect to several fuel suppliers (including 3 major importers of such products) following the allegations of existing anti-competitive agreements/concerted practices between them and the abuse of their dominant position. The case is still ongoing at the time of preparing this article, so no specific details can be provided at the moment. However, joint efforts of both agencies in such complex investigations can be useful.

2.1.5. Control of the activities of the energy regulator by the Competition Council

30. As mentioned earlier, the Competition Council may intervene, under art. 12 of the Competition Law, in cases of actions by public authorities that limit, impede, or distort competition. The law sets no limitations as to the applicability of art. 12. Therefore its provisions may apply to all regulated sectors, including the energy sector, and to the actions of sector regulators that result in the limitation or distortion of competition.

31. In June 2020, the Competition Council initiated an investigation under art. 12 par. (1)-a) of the Competition Law (*'limitation of the rights of undertakings to buy or sell'*) against the National

Agency for Energy Regulation based on the calculation of tariffs established by *ANRE* for wind energy.

32. This investigation is still ongoing; therefore, no specific details can be provided at the moment. However, one of the questions that are to be considered by the Competition Council is about the limits of the Council's intervention under art. 12 of the Competition Law into the specific area of regulation by the sector regulator (particularly when it regards the tariffs established by the independent energy regulator).

33. Besides answering the questions regarding the limits of intervention by the Competition Council, an important issue of sufficient expertise can also be raised. Being a sector regulator, *ANRE* by its very nature accumulates substantial expertise in the area, which few other public authorities (if any) can have, including the Competition Council. In certain cases, *ANRE* evaluates and confirms the level of the relevant technical expertise of other organizations.

34. Although formally the Competition Council has the right to contract independent experts, given the existing circumstances in which the Council operates, it is extremely difficult for the Council to accumulate its own or have access to independent expertise of the same level which would allow, first, to understand the complex issues related to the energy sector, and then, to take specific decisions in this area.

35. As long as the interests of the two agencies are aligned, the arising difficulties with understanding complex issues relating to the energy sector can be solved by referring to the expertise of *ANRE*. However, when such interests come into conflict, then the Competition Council may end up in a less favourable situation in comparison to ANRE.

2.1.6. The initiative to merge the two agencies

36. In the last several years, both the Competition Council and the National Agency for Energy Regulations had been subject to criticism both from society and from various public officials and actors. The reason for the criticism was the alleged lack of efficiency of both agencies in dealing with specific failures in the relevant markets and fighting with the presumed anti-competitive practices.

37. Following this public criticism, a proposal to merge the two agencies by creating a single authority that would combine the functions of an independent energy regulator and the competition agency was initiated in 2021[4]. Among the reasons for the merger specified in the legislative proposal were:

- the need to harmonise the legal framework to overcome the energy and petroleum fuels crisis mostly caused by the inefficiency of the activity of the Competition Council and the National Agency for Energy Regulation;
- reducing transaction costs in the areas of cooperation and increasing the efficiency and accountability in the enforcement of each of these entities' tasks;
- more efficient use of public funds through lower overall costs;
- increasing the overall level of expertise of the staff of the merged institution.

[4] The initial draft law can be accessed here (in Romanian): https://alaiba.md/wp-content/uploads/2021/11/Draft-PL-ARC.pdf

38. The explanatory note[5] to the draft law indicated the fact the Republic of Moldova is an energy-dependent country marked by monopolies and oligopolies in the energy sector. It was said that the existing model (with two independent authorities) had proved, over time, to be inefficient and unable to respond promptly to the relevant challenges, thus being unable to take measures to address the risks and dangers of unfair competition and cartels in both the energy and oil areas, as well as in other related areas.

39. One of the examples of concerted practices referred to in support of the initiative was the fact that major competitors in the petroleum fuel market colluded to *set prices at the highest levels of the regulated price caps*. It was claimed that both institutions avoided responsibility for tackling the existing anti-competitive practices in the market by passing them on from one to another resulting in a regulatory deadlock.

40. Public hearings on this draft were held in October 2021. However, up until now, it has neither been further promoted in Parliament nor fully withdrawn.

41. There have been divided opinions expressed with respect to this proposal. Representing one of the agencies referred to in the initiative, we are not in the position to provide an opinion on this legislative proposal. Moreover, there is no universal model of regulatory and competition authorities. There are multiple academic and practical works dedicated to this issue.[6]

42. Regardless of the model chosen in the future by the legislator, the operational independence of the competition authority must be assured (as required by art. 335 par. 2 of the EU-Moldova Association Agreement[7]), while the regulator in the field of natural gas and electricity shall be legally distinct and functionally independent from any other public or private entity (art. 353 par. 1 of the Association Agreement).

43. Thus, the principle of operational independence (and the requirement of legal independence in the case of energy regulator) is not simply established in Moldovan legislation but also constitutes an international obligation assumed by the Republic of Moldova in its relations with the European Union based on the Association Agreement. Therefore, any legislative proposal regarding the reform of the Competition Council shall be in line with those obligations.

2.2. Audiovisual Media Services

44. Audiovisual media services are another sector where the activity of the market players is regulated in detail.

45. The respective services are predominantly regulated by a specialised code – the Audiovisual Media Services Code (Law no. 174/2018) which sets out the rules referring to the provision of services, conditions, procedures of licensing and criteria that market participants have to meet. It

[5] Can be downloaded in Romanian via the following link (in .doc format): https://alaiba.md/wp-content/uploads/2021/11/Nota-informativa%CC%86-ARC.doc

[6] The work which the author of this paper specifically referred to on many occasions when discussing the issue of merging the two agencies is: Jenny, Frederic, The Institutional Design of Competition Authorities: Debates and Trends (January 1, 2016). Available at SSRN: https://ssrn.com/abstract=2894893 or http://dx.doi.org/10.2139/ssrn.2894893

[7] The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part; available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2014.260.01.0004.01.ENG

also sets forth the provisions regulating the activities of the sector regulator - the Audiovisual Council.

46. The main task of the Audiovisual Council is to ensure the development of audiovisual media services in Moldova. Some of its specific objectives refer to:

- the application of the relevant licensing and authorization regulations;
- monitoring the content of the services;
- rules regarding audiovisual commercial communications;
- ensuring pluralism;
- etc.

47. However, provided that the regulatory functions of the Audiovisual Council do not cover the economic aspects of market players' activities as is the case in the energy sector and *ANRE*, there are fewer areas where the activities of the Audiovisual and Competition Councils intersect. Nevertheless, there are certain issues on which the intervention from the competition authority is often expected and which cause substantial debates (some of those debates being caused by the lack of relevant legislative regulation).

2.2.1. No more than 2 TV channels and radio stations per beneficial owner

48. Art. 28 pars. (6) and (7) of the Audiovisual Media Services Code provide that one natural person cannot be a beneficial owner of more than 2 television services and 2 radio broadcasting services. Moreover, private media service providers are obliged, annually, by February 1, to publish on their own web pages and provide to the Audiovisual Council the activity report, which includes *inter alia*: the name, citizenship of the beneficiary owner(s), the description of the property structure, the organisational chart and the share capital of the media services provider, as well as the sources of financing (art. 28 par. (13) of the Code).

49. As a general rule, it is up to the Audiovisual Council to check the ownership of media organisations, their structure, and identity of the beneficial owners of TV and radio broadcasting services. However, it is often the Competition Council that is claimed to verify the alleged unnotified concentrations in the media market and take relevant measures. One such case occurred just in October 2022, when it was claimed in the press that the control over two Moldovan TV channels had been indirectly taken by one of the Moldovan politicians. The President of the Audiovisual Council publicly requested the Competition Council, National Anticorruption Centre, and the Security and Intelligence Service to investigate an allegedly hidden takeover[8].

50. Indeed, in situations where certain transactions in the media market comprise the elements of a notifiable economic concentration, then it becomes the obligation of the Competition Council to check the transaction from the economic perspective. The question which is often asked is whether the Competition Council should intervene in cases where notification criteria set out in the Competition Law are not formally met and, most importantly, whether the Competition Council should analyse actual or alleged concentrations in the media market only based on the evaluation criteria set out in competition legislation or it should also take into consideration additional requirements/limitations set out in the media legislation.

[8] https://media-azi.md/banuiala-de-concentrare-mediatica-ca-solicita-sis-cna-si-consiliului-concurentei-sa-investigheze-daca-primul-in-moldova-si-accent-tv-si-au-schimbat-beneficiarul-final/

51. So far, there have not been any concentrations notified to and analysed by the Competition Council in the audiovisual media market. It is possible to admit that, while examining such a notification (should one be submitted), the Council can take into consideration the additional criteria set out in the media legislation and declare a concentration incompatible based just on them.

52. However, a much more complex question refers to situations of unnotified transactions that may potentially breach media legislation regarding the ownership of media services, which do not meet the criteria for notification (or being "hidden" concentrations carried out through proxies who act as formally independent persons while being *de facto* controlled by other persons who act as real beneficial owners - the situation commonly present in various markets in the Republic of Moldova). It is exactly the situation to which a reference has been made above (about a politician alleged to have taken indirect control over 2 TV channels).

53. The questions raised above remain so far unanswered. It is an ongoing discussion about the limits of the Competition Council to intervene on issues specifically regulated by the media legislation in situations when the signs and criteria of economic concentrations are not present for the transaction to be examined from the perspective of traditional merger control.

2.2.2. Dominant situation in the formation of public opinion

54. Several provisions of the Audiovisual Media Services Code set out the rules that aim at preventing situations of domination in the formation of public opinion. Under art. 29 par. (4) of the Code state, a natural personal or legal entity is considered to hold a *'dominant situation in the formation of public opinion'* if their weighted audience share at the substantial market exceeds 35 %.

55. It is not fully clear what the notion of '*dominant situation in the formation of public opinion'* is from the perspective of competition legislation. The Competition Law traditionally deals with the term "*dominant position in the relevant market*". Moreover, under art. 29 par. (7) of the Audiovisual Media Services Code, it is up to the Audiovisual Council (not the Competition Council) to evaluate and determine such a 'dominant situation'. Furthermore, should the Audiovisual Council determine such a position, it should enter into a conciliation procedure with the relevant licence holder on the measures to remedy the situation and ensure the pluralism of opinions (if no agreement is reached as a result of the conciliation procedure, the Audiovisual Council may even impose certain sanctions).

56. Nevertheless, the provisions of the Code specifically mention the Competition Council with regard to the aforementioned '*dominant situation in the formation of public opinion*'. Art. 29 par. (8) of the Audiovisual Code provides that if the Competition Council identifies an anti-competitive practice related to the provisions on the 'dominant situation in the formation of public opinion', it will inform the Audiovisual Council. The Code also states (in art. 85 par. (3)) that the two Councils will cooperate to ensure fair competition in the market of audiovisual services, to prevent and exclude dominant situations in the formation of public opinion.

57. Thus, the Audiovisual Code specifically attributes some role to the Competition Council in combating the phenomenon of 'dominant situation in the formation of public opinion'. Alas, this role is not clarified by the Code. Firstly, it is hard to imagine anti-competitive practices (from the perspective of competition legislation) which would refer specifically to the formation of public opinion. The Competition Council does investigate the alleged cases of abuse of dominant position in the market, but it does so strictly from the perspective of classical principles of competition (antitrust) legislation on anti-competitive unilateral conduct.

58. The analysis performed within the investigations conducted by the Competition Council is limited to the economic consequences of the behaviour of undertakings in the market (including

the media market). One such example is the decision of the Competition Council of August 2020 by which it found the abuse of the dominant position in the market of TV advertising services.[9]

59. Meanwhile, the concept of 'dominant situation in the formation of public opinion' remains too vague and unclear from the point of competition legislation. No guidance in legislation is given as to what kinds of anti-competitive practices can there exist concerning such a 'situation' and what should be the steps for the Competition Council to take (solely or together with the Audiovisual Council) to prevent and exclude the situations of dominance in the formation of public opinion.

2.2.3. Competition Council as sector regulator

60. In the above two situations, we have described the role of the Competition Council as the competition authority in its relation with sector regulators and the limits of involvement in the relevant areas. We have not examined all the regulated markets, where other sectoral regulators exist and certain specific competences are provided to the Competition Council (eg. telecommunications). The examples of the energy sector and audiovisual media services have been selected as they are awlays at the centre of public attention in Moldova, and therefore, analysing the way the Council cooperates with other authorities in those sectors is of particular importance.

61. In some other sectors, however, the Competition Council itself plays, to some extent, the role of the designated market regulator. We will further consider two such markets: advertising and railways transport.

3. Advertising

62. Under the Moldovan Competition Law, advertising is listed among the three main areas of competence of the Competition Council, alongside competition and state aid. In detail, the powers of the Council are regulated by the Law on Advertising (no. 1227/1997). It says, in art. 28, that the Competition Council carries out expert assessments of advertising with regard to its compliance with the relevant legislative requirements, issues prescriptions to undertakings to cease infringements of the legislation on advertising, refers to other authorities with respect to violations in the area of advertising. The Council may submit claims to the courts to invalidate the transactions related to inadequate advertising.

63. The Council may also apply fines for a number of misdemeanours related to advertising, as follows:

- Advertising of products and services subject to certification or licensing if their manufacturers (providers) do not hold the relevant certificate or licence, as well as advertising of products and services whose manufacturing or selling is prohibited;
- Unauthorised use of state symbols in advertising;
- Exterior advertisements that do not meet the conditions provided by law;
- The presentation, production, or dissemination of dishonest, inauthentic, amoral, sexist, or any other advertising that contradicts the law and public order by advertising agents.

64. The procedure for the application and enforcement of fines in the field of advertising differs from the general investigation and sanctioning procedures applied by the Competition Council in the case of competition infringements. If the Council establishes the infringement, it refers the case

[9] Decision no. APD-06/18-39 of 04 August 2020; available in Romanian here: https://competition.md/public/files/decizie-APD99c65.pdf

to the court of law which then examines the files provided by the Council and then may impose a fine the amount of which is determined within the fixed range established in the Misdemeanour Code (*Contravention Code*) and which is much lower than the fines imposed for anti-competitive practices (calculated as a share of the annual turnover).

65. In the case of dishonest, inauthentic, amoral, and sexist advertising as well as other types of advertising which are contrary to the legal requirements, the Council may apply the remediation procedure. Under this procedure, a remediation plan is made by the authority which provides the liable person with a period of 30 to 90 working days to remediate the infringement. If the person does not ensure compliance with the plan, then a fine may be imposed. The law does not specify what the remediation measures should be taken and they can be decided at the discretion of the Council.

66. In March 2022, a new Law on Advertising (no. 62/2022) was passed by Parliament (which will become effective in January 2023). Under the new Law, the Competition Council will perform additional functions with respect to advertising. Most notably, it will have to include in its annual activity report the following information on the advertising market:

- general description of the market;
- relevant data about the market, including its size;
- necessary actions that have been or are to be taken to ensure compliance with the advertising legislation;
- the impact of the actions taken or which will be taken on the situation in the advertising sector;
- other relevant information.

67. These new provisions mean that the Competition Council will have to prepare and present an overview and analysis (in other words - a market study) of the advertising market every single year.

68. The enforcement competences regarding the advertising legislation is shared by the Competition Council with other authorities, most importantly with the State Inspectorate for the Supervision of Non-Food Products and Consumer Protection and the Audiovisual Council.

69. The Inspectorate sanctions the same misdemeanours as the Competition Council in situations in which consumer rights are affected (as the Competition Council gets involved in case of the infringements that affect the interests of undertakings). As to the Audiovisual Council, its powers are much wider and more important in the case of advertising in audiovisual media.

70. The Audiovisual Media Services Code sets out detailed requirements for advertising (‘commercial communication’ in the language of the Code) in audiovisual media. It also provides substantial regulatory and supervising powers to the Audiovisual Council. The Code also establishes specific sanctions for infringing the aforementioned rules.

71. In theory, there might be a potential conflict between the powers of the Competition and the Audiovisual Councils. However, in practice, such cases have not arisen yet, and should there be a complaint against certain advertising materials broadcasted through the audiovisual media, they would usually be referred to the Audiovisual Council.

4. Railway transport

72. In February 2022, the Moldovan Parliament passed a new Code of Railway Transport (no. 19/2022), which will become effective in February 2024. The new Code introduces the notion of

the Railway Transport Market Regulatory Body (*Organul de reglementare a pieței transportului feroviar*). The Code says (in art. 50 par. (1)) that this regulatory body is the autonomous public authority in the area of competition (ie. Competition Council). Thus, as of February 2024, the Competition Council will start exercising certain regulatory functions in the area of railway transport.

73. Its functions will be to monitor the railway transport services market, supervise the use of public railway infrastructure and railway services, and ensure fair competition in the field of railway transport in the Republic of Moldova.

74. Meanwhile, the Code also provides for the creation and activity of the Railway Authority, which is a spate regulator independent from the Regulatory Body.

75. The Code provides for the right of railway transport operators to challenge at the Regulatory Body the decisions by which they were treated unfairly, discriminated against, or were wronged in any way, particularly by the decisions of the infrastructure administrator or by a service infrastructure operator. The scope of this activity will be to prevent the abuse of influence over the operators in the market of railway transport applying to infrastructure administrator/operator.

76. The Competition Council (as the Regulatory Body) will be responsible for:

- Verifying the conformity of the tariffs for the access to the railway infrastructure with the provisions of the Code;
- Verifying and controlling the correct and non-discriminatory application of the tariffs by the Infrastructure administrator;
- Monitoring and supervision of negotiations regarding the aforementioned tariffs;
- Controlling the compliance with the requirements of financial separation of the infrastructure administration activities and the provision of railway transport services;
- Holding consultations regarding the railway transport market, the content of the business plan of the Infrastructure administrator, the multiannual contract for infrastructure administration, etc.;
- Formulating relevant recommendations.

77. As mentioned above, besides the Regulatory Body, a separate Railway Authority is established. Its role is to implement policies in the field of railway transport and railway security. It will be responsible for carrying out controls, issuing authorizations for railway transport, security authorizations and certificates, etc. It will also be in charge of ensuring compliance with the obligations resulting from the relevant international treaties that Moldova is part of.

78. Under art. 4 par. (2) of the Code of Railway Transport, the Railway Authority will cooperate with the Regulatory Body in order to secure competition and prevent discrimination in the market of railway transport services.

79. The Code provides for a number of procedures where the two institutions will have to cooperate and take either joint or coordinated action. For example, the Railway Authority may limit the right of access to the railway infrastructure, if exercising such right may put in peril the economic balance of one or more public services contracts. However, it is the Regulatory Body that shall determine, based on the objective economic analysis, whether such economic balance can be at peril (art. 19 of the Code). If there is a request with regard to the allocation of infrastructure capacities, both institutions are to be consulted by the Infrastructure Administrator when making the relevant economic assessment (art. 38 of the Code).

80. Thus, the new Code will provide for completely new regulatory/controlling functions for the Competition Council in the field of railway transport. It also sets out the rules for cooperation with other sectoral institutions, particularly with the Railway Authority.

81. Although, at first sight, the competences of the two institutions are clearly divided in the Code, it is yet to be seen how the cooperation between them will function in practice.

82. It is necessary to say, that the implementation of the provisions of the new Code will constitute a substantial challenge for the Competition Council. *Firstly*, it has very limited experience in the field of railway transport. Currently, it completely lacks any knowledge or expertise with respect to specific issues for which the Council will become responsible when the Code enters into force. *Secondly*, the nature of the tasks that it will have to carry out exceeds the limits of the Council's current activities that it is used to perform as the competition authority. *Thirdly*, the Competition Council in any case will not completely turn into a sector regulator. It will continue to exercise its usual general functions related to competition and state aid, which constitute its core activities. Therefore, taking over some substantial regulatory functions in a very narrow and complex industry may pose the risk of diminishing the role of the Competition Council as the general competition authority for all industries and sectors of the economy.

5. Cooperation agreements with sector regulators

83. In the end, several remarks should be made on cooperation agreements with other institutions.

84. Such agreements are often seen as an effective instrument of inter-institutional cooperation for competition authorities. However, our experience shows that, although agreements with other sector regulators may improve the quality and intensity of working relations with other public institutions, their expected results are often overrated. They rarely allow overcoming certain ambiguities in legislation and do not create any working mechanisms in the absence of direct communication and close relationships at the management level at the institutions involved, while such direct and open communication may often provide great results even without formal agreements.

85. The Competition Council signed in 2022 two cooperation agreements - with the National Agency for Energy Regulation and the Audiovisual Council. However, it is hard to claim that the level of cooperation with both regulators has substantially improved after the signing. And it is still mostly based on interpersonal relations with the top management representatives from the respective institutions. Moreover, it is hard to imagine that the cooperation between them would remain the same in the absence of such personal contacts, simply based on the existing agreements. On the contrary, we may suggest that the level of cooperation with regulators would be the same based on those personal contacts even without any formally signed agreements.

86. It is often the case that cooperation agreements do not go too much beyond basic memorandums of understanding that set out basic principles of cooperation. Certainly, the re-confirmation of the relevant principles might be important and greatly appreciated. It may bring new impulses to inter-institutional cooperation. However, it does not provide for clear and well-functioning mechanisms for joint actions, more effective communication, provide working instruments that would target specific problems and challenges that the relevant authorities face and deal with.

87. To produce actual tangible effects, the cooperation agreements should establish clearly defined and detailed procedures and mechanisms that would allow the authorities that are parties to the agreement to conduct joint actions, to take specific measures in their respective areas of intervention which would not be possible in the absence of the agreement.

88. However, setting forth such procedures in cooperation agreements may prove problematic. Public institutions act within the strict limits established in the legislation that regulates their activities and are very cautious to stay within those limits. However, the relevant legislation which refers to inter-institutional cooperation is usually rather general and vague (unless specific procedural rules are expressly established in relevant regulatory acts), which makes the authorities quite reserved in designing and establishing their own rules and procedures. Such ingenuity may be regarded or interpreted as an excess of powers, including in the procedures before courts-of-law, should specific enforcement actions be taken based on the procedures designed by the authorities themselves.

89. By way of example, we may refer to the possibility of taking joint actions by the Competition Council and *ANRE*, the energy regulator, described above. Although the law does provide for such a possibility, it is not fully clear what are the limits of such joint actions, the situations in which joint interventions may be performed, and who should be the leading institution of each individual case.

90. Ideally, the relevant laws should expressly allow the institutions signing the cooperation agreements to make the exchange of information (including sensible/confidential information where relevant), regulate their specific forms of common actions and procedures, distribute certain tasks and share the results, etc. In other words, the law should expressly provide for the right of the institutions involved to design by themselves certain mechanisms and procedures of cooperation. In that case, the relevant institutions might overcome the natural reticence in taking pro-action and be more ingenious in finding the most appropriate forms of cooperation that the legislator might have not even envisaged.

91. Having said that, it would still be necessary to maintain certain forms of control over the liberty of autonomous institutions and prevent them from becoming all-powerful mega regulators through the use of cooperation agreements.