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Alternatives to Leniency Programmes – Contribution from Romania

- Session II -

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

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Alternatives to Leniency Programmes

- Contribution from Romania -

1. Romanian legislation set the framework for a leniency program in 2009 and is convergent to the European Model of Leniency. Following the experience gained, aimed to boost the leniency program, RCC amended in 2019 the legislation and brought more clarity about basic concepts such as the notion of undertaking, the registration of the marker, introduced simplified procedure in relation to the RCC (e.g. the confirmation of receipt of documents only upon request, not automatically) and also extended the sphere of the infringements including horizontal and vertical agreements, prohibited by object or by effect.
2. Although considered below other national competition authorities' experience, the number of leniency applications in front of RCC has risen constantly over the years, mostly type B (after a formal investigation was opened and dawn raids performed) and only a few type A. For example, in 2020 RCC registered 2 leniency applications, in 2021- 5 applications for leniency and in 2022 – 9 leniency applications. We consider this evolution as a natural result of the deterrence effect created by the RCC's proactive approach related to the discovery of cartels and the fines applied to the companies involved.
3. Aimed at encouraging companies to use the leniency program, RCC accepted immunity from fines including in cases of type B applications, if the undertakings offered supplementary evidence that allowed RCC to prove the infringement against a larger number of companies involved in the infringement or to extend the duration of the infringement (ex. the case against electric meter producers and distributors- Decision 77/2017 or the case against travel agencies -Decision 76/2018)
4. As a result of this limited practical experience with leniency, RCC shifted part of its efforts towards improving other instruments that can have as a result an efficient detection of cartels and those that can offer a comparable economy of procedure such as the settlement procedure.
5. As such, the settlement procedure is considered to have a better success than leniency in Romania, since the companies prefer to wait for some preliminary results of the RCC analysis. For example, in 2022 approx. 90% of the companies that were fined for antitrust breaches entered into settlement agreements with RCC.

1. The settlement procedure

6. The RCC has the power to settle antitrust investigations through a settlement procedure in which a reduction of the fines is granted in exchange for the party's cooperation with the RCC's investigation and its admission of being part of the infringement. As a result, if the company expressly acknowledges the anticompetitive

behaviour, the RCC can apply a reduction of the fine by a percentage between 30%¹ and 10%² of the base level.

7. These procedures aim to encourage cooperation between the parties and the RCC, having a direct effect of resolving competition concerns and producing investigative savings (ex. limited duration of investigation procedure, economies from procedures in front of the judicial courts).

8. In general, these negotiated/consensual procedures can be applied when the RCC has reasonable grounds to suspect that an infringement of competition law has taken place, and there is sufficient evidence to support this suspicion. They can be particularly useful when the parties involved are willing to cooperate and actively seek to remedy the competition concerns raised by the RCC.

2. The Whistleblower Platform

9. Starting from 2015, this platform has been one of the main instruments used by RCC to collect information voluntarily provided by individuals about anticompetitive behaviours of undertakings.

10. Using this channel for communication, individuals³ can inform the RCC about possible anticompetitive infringements and upload, if this is the case, documents to support the allegations, yet remain anonymous, unless they wish to communicate their identification data.

11. The system runs in a technical solution - web-based - guaranteeing the confidentiality of those who use it. The *Whistleblower*, as in the person who wants to send information to the RCC, has to log in via the internet in an encrypted connection to be assured that no one can collect the data sent via this platform, except for the persons authorized. This means no one can track the user's IP or detect its identity.

12. Through the online platform, a wide category of issues was reported in various areas, such as the energy market, the insurance market, e-commerce, the operation of online platforms, medical services, ride-sharing services, the labour market, the wood market, possible acts of unfair competition and others. The purpose of the RCC is to obtain relevant information and, if possible, documents that could offer solid evidence about the infringement (ex. e-mails, WhatsApp conversations, contracts etc).

13. The main challenge for the RCC, to create awareness among possible informants about this platform, is the effort to steadily advocate this instrument, granting anonymity, and improving the quality of the information received in terms of relevance. Since 2015, the RCC efforts have brought growth both in the number of notifications and their quality.

14. When we talk about the range of individuals who address topics through the Platform, we need to mention the fact that this is a wide range: they can be consumers who observe through their personal experience coordinated behaviours of companies in different sectors, individuals who are former or current employees of undertakings involved

¹ If the request for settlement is formulated by the undertaking within the first 6 month from the opening of the formal proceedings of the investigation

² If the request for settlement is formulated by the undertaking in the timeframe after the first 6 month from the opening of the formal proceedings of the investigation

³ The Romanian legislation does not allow the possibility to remunerate the whistleblower.

in anti-competitive practices (cartels, RPM etc), or individuals that represent companies who are clients or consultants for undertakings involved in cartels.

15. Regarding the efficiency of the tool, 70-80% of the notifications received have relevance to RCC activity and some of this information proved to be especially valuable, helping RCC to open 5 formal investigations aiming at different markets like travel agencies –2,5 mil. euro fines, agricultural machinery— 26,5 mil. euro fines, work protection equipment- 1 mil. euro fines, respectively electronics and IT&C, which is still ongoing.

16. Another recent example is the information provided by several actual or former engineers in the automotive sector that RCC successfully used to open a formal investigation concerning a possible cartel in the market of specialised labour for the automotive sector, in December 2021. The Platform was used to also obtain documents from those individuals, such as labour contracts, emails, and internal memos of the companies involved, indicating an agreement between competitors not to hire each other's employees. The instrument was considered safe for the individuals who wanted to keep their name anonymous, being afraid of possible retaliation from their employer. The investigation is still ongoing.

3. Cooperation with other relevant authorities -the Bid-Rigging Module (MLT)

17. To detect possible infringements of competition rules related to public procurement procedures, the competition authority cooperates with other public authorities and, for this purpose, founded the Bid-Rigging Module (MLT) in 2010. Under this structure, RCC experts cooperate and exchange information with representatives of the national regulator on public procurement (ANAP), the National Council for Solving Complaints, the Prime Minister's Control Body, the Romanian Court of Accounts, the Authority for the Digitalisation of Romania (ADR), the Prosecutor's Office attached to the High Court of Cassation and Justice (Romanian Supreme Court), and the Antifraud Division.

18. Within the cooperation with ANAP, RCC contributed to the reform of the Public Procurement Law; the new law entered into force in 2016. In its current form, the law has a series of provisions⁴ which have contributed to the advocacy and enforcement efforts of RCC.

19. Among other important actions and steps undertaken, so far, are also the permanent cooperation with ADR (SICAP) regarding RCC access to public tender files through a simple request; with the CNSC regarding RCC access to the CNSC database for viewing decisions and attached information; and with the Court of Accounts and ANAP through periodic information issued by them to use it in the RCC own analyses in the field of public procurement helping to detect possible anti-competitive behaviour.

20. The MLT strengthened cooperation with other authorities- working closely with the contracting authorities for early warnings of bid rigging.

21. One specific form of cooperation between RCC and the public contracting authorities (central or local) is represented by ex-ante assessment of possible anticompetitive behaviours of the undertakings during the public procurement procedures.

⁴ Art. 167 Law 98/2016 regarding public acquisitions (transposing Directive 2014/24 EU) stipulate that *Prior to the exclusion of an economic operator pursuant to par. (1) lit. d), the contracting authority requests in writing to the Competition Council its point of view regarding the identified suspicions that aim to distort the competition within or in connection with the award procedure in question, which it will submit within a maximum of 15 days.*

The RCC issues a formal opinion, within 15 days, every time there is a request from contracting authorities concerning indicators about possible infringement of the competition rules and the possibility to exclude them⁵.

22. The RCC opinion is not mandatory, so the decision to act upon our advice stays with the contracting authority. On the other hand, RCC retains discretion to open an investigation if new elements of the case arise later on.

23. This legal provision proved to yield benefits for both contracting authorities and the competition authority since experience showed that what is obvious for one authority might not be the same for the other. It provided better awareness for contracting authorities while bringing a lot of insight into the public procurement cases for the RCC, which gained access to a lot of specific aspects, documents and data for further screening. Some of these opinions later led to bid rigging investigations. For example, in 2022 out of 33 requests of opinion from local/regional contracting authorities, 4 investigations concerning bid rigging allegations were opened by the authority.

24. Another initiative aimed to support public contracting authorities was the joint guidance provided by RCC and ANAP related to the interpretation of exclusion grounds of undertakings which were already fined for breaching the competition law.

25. The law regulates a series of mandatory grounds for exclusion from public procurement procedures of companies whose performance in previous tenders/contracts was suboptimal or whose actions may raise suspicions about their integrity. Among these cases are situations in which companies have committed severe professional misconduct that casts doubt on their integrity, i.e. violations of competition law. The legislation mandates that these violations be acknowledged by adequate means of proof, such as a decision of a court or administrative authority. Exclusion based on this ground operates for a three-year term with important consequences on the activity of the companies concerned. To ensure the proportionality of the exclusion measure in relation to each company, the law establishes the possibility of "self-cleaning" through concrete/specific measures taken to prove credibility.

26. The guidance to contracting authorities concerns mainly how companies may prove rehabilitation (such as application for settlement procedure, leniency, improved compliance programs etc). To avoid any disproportionate exclusion from tenders, the contracting authorities have also the possibility to seek specific guidance from RCC on the case at hand.

4. The Big Data Platform – Screening public procurement procedures

27. One of the most recent instrument developed by RCC is the Big Data platform, which is intended to create faster, better, proactive decision-making, by making use of screening tools in bid-rigging screening, cartel screening and advanced analytics, merger control with a focus on properly identifying control holders or previously un-notified transactions, sector inquiries for the structural assessment of industry sectors to flag industries which are more prone to collusive practices, networks of firms for the use of

⁵ art. 167 Law 98/2016 regarding public acquisitions (transposing Directive 2014/24 EU) stipulate that *Prior to the exclusion of an economic operator pursuant to par. (1) lit. d), the contracting authority requests in writing to the Competition Council its point of view regarding the identified suspicions that aim to distort the competition within or in connection with the award procedure in question, which it will submit within a maximum of 15 days.*

social networks to identify structures or connections between firms that may go undetected by traditional analytic tools (with considerable less resources).

28. The system will also give the possibility to streamline and automate internal processes/business flows of the authority, to have shorter administrative procedures, efficient resource and knowledge management and it will be capable of processing large amounts of structured and unstructured data.

29. Also, the Big Data system is designed to signal three main categories of red flags⁶ for the bid rigging analysis (depending on the quality and availability of data).

30. Many of the statistics and indicators (especially the automatically calculated ones) are based on public procurement data⁷, but other dimensions are useful filters that include, among others, the company financial statistics, the company management⁸ and/or the company ownership⁹.

5. Conclusion

31. The RCC's experience highlighted the need for diversifying methods and new instruments, as mentioned, available to the enforcement activity, in facilitating the prosecution of anticompetitive conduct.

32. Therefore, we consider that the efforts dedicated to any new instruments should function in parallel with the constant promotion of already established instruments such as the leniency program, since their efficiency in terms of detection, instrumenting and proofing of cartels has already been proven.

⁶ *Price based* - if bid prices are available, bid price distribution can flag high-risk tenders; *Bidding patterns* - bidding patterns can flag some of the most elementary rigging techniques, like withheld bids and *Market structure* - data on public contracts contain key market characteristics such as product or regional codes.

⁷ Such as the following variables: CPV code, Geographical area - based on NUTS-codes, buyer city or postal code, Contract size - based on final contract size or estimated contract size, Tender date - call for tender publication date or contract award publication date, Companies - based on company names or company IDs, Buyer name - based on buyer names or company IDs, Procedure type, bid status: winning/losing bid and Tender/contract ID.

⁸ Companies that are linked to the same managers even if not at the same time.

⁹ Companies that have explicit cross-ownership links.