

Unclassified

English - Or. English

21 November 2024

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

The Standard and the Burden of Proof in Competition Law Cases – Note by Romania

5 December

This document reproduces a written contribution from Romania submitted for Item 7 of the 144th OECD Competition Committee meeting on 5-6 December 2024.

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

JT03555990

Romania

1. The “Bread and Milk” Case

1. An initial investigation¹ focused on identifying a concerted practice of market-sharing among dairy-producing companies Dorna S.A., Albalact S.A., Simultan S.R.L., Deltalact S.A. and Lacta S.A., as they participated in tenders organized by the Giurgiu County Council, Ialomița County Council, and Dolj County Council for the award of the framework agreement “Supply of dairy products for students in grades I–VIII in both public and private education, as well as for preschoolers in public and private kindergartens with a regular 4-hour program.”

2. In 1977, the European “Milk in Schools” Program was launched as part of the community policies promoting healthy eating and supporting milk producers. This European program found its counterpart in Romania through the “Bread and Milk” Program, implemented under the provisions of Government Emergency Ordinance no. 96/2002². Thus, all preschoolers and primary and middle school students attending educational institutions benefit from dairy and bakery products within a daily value limit.

3. At the national level, more than 2 million children benefit from this program, with approximately 435 million RON (around 100 million euros) allocated annually from the state budget for its implementation³. From 2002 to 2007, the program was funded by the Romanian state budget, and starting in 2007, the milk component of the national program became eligible for European Union funding, allowing a part of the budget for milk portions to be reimbursed by the EU.

4. The conduct of the involved undertakings showed a pattern: they generally submitted bids for all lots designated by the contracting authority. During the electronic bidding phase, they acted in a way that, without competing against each other for any lot, they only improved their financial offers for the lots they were evidently going to win, with no competitive pressure from the other companies.

5. The undertakings’ choice of lots was explained by random selection or by avoiding already-bid lots. In some cases, their lot choices contradicted their economic interests. In these instances, an analysis was conducted to reasonably explain why the four bidders acted in ways that, in some cases, went against their economic interests.

6. An initial probabilistic analysis was carried out regarding the public procurement procedure organized by the Giurgiu County Council, with similar analyses later performed for other public procurement procedures, yielding comparable results. For example, Albalact, Dorna and Simultan each bid on 2 of the remaining 6 lots, and the total number of portions for these 6 lots was used to calculate all possible combinations of two lots based on the number of portions.

¹ Concluded with the finding of a competition law infringement through Decision No. 83 of 24.11.2016 and the imposition of a total fine of approximately 2 million EUR.

² Regarding the provision of dairy and bakery products for students in public and private primary and secondary education, as well as for preschool children in public and private kindergartens with a standard 4-hour program.

³ According to the study “The Milk and Bread Program in the Context of the European School Milk Scheme,” developed by the Romanian Center for European Policies and published in 2015.

7. The conduct of the four qualified bidders during the electronic auction phase was consistent: they submitted offers for all lots and then improved their financial bids by only 0.01 lei for 1 or 2 lots without competing with each other for any lot.
8. The bidders' justification for this behavior was also uniform, primarily citing maximum production capacity limits and an adaptive approach to competitors' behavior. However, the arguments presented by the four undertakings did not demonstrate or support that this behavior was the result of each bidder's individual strategy. Therefore, a probabilistic calculation was needed, taking into account production capacity constraints.
9. Given that the companies faced maximum production capacity limits, lot 1 (5,987 portions) could not be combined with another lot without exceeding 8,500 portions, meaning one company would only bid for lot 1. Also, no company could select more than two lots without exceeding the 8,500-portion limit.
10. As shown in the analysis, 11 combinations of lots met the production capacity constraint. The total number of possible outcomes for the electronic auction, assuming the participants randomly selected which lots to bid on in the electronic auction phase and had no shared plan or engaged in concerted market-sharing practices in the Giurgiu public procurement procedure, was $11 \times 11 \times 11 \times 11 = 14,641$.
11. The 11 lot combinations could be allocated to the companies without overlap in only 2 ways. The identification of the non-overlapping lot sets was carried out sequentially as follows:
12. The total number of possible outcomes without overlapping lots (assuming the participants randomly selected which lots to bid on, had the same number of lots, and did not engage in concerted market-sharing practices in the 2010 Giurgiu public procurement procedure) was given by the formula: permutations for the lot combination set [1, 2+3, 4+7, 5+6] + permutations for the lot combination set [1, 2+6, 4+7, 3+5] = $P_4 + P_4 = 4! + 4! = 1 \times 2 \times 3 \times 4 + 1 \times 2 \times 3 \times 4 = 48$.
13. The probability that Albalact, Dorna, Simultan, and Lacta would bid without overlapping lots in the electronic auction resulted in a value of 0.3% (the probability of an event occurring is the ratio of favorable cases to possible cases, $48/14,641=0.3\%$). This result suggests that the probability of the parties bidding independently in the electronic auction without overlapping lots is very low (3 in 1,000). This finding indicated that the likelihood of such a situation occurring repeatedly is very low. In other words, if this pattern is observed in other public procurement procedures, it substantially reduces the probability of selecting non-overlapping lots in the absence of anti-competitive practices.
14. Similar results obtained in procedures from other counties strengthened the evidence showing the existence of an anti-competitive market-sharing practice.
15. Following the investigation report, Albalact S.A. and Simultan S.R.L. explicitly admitted to committing the anti-competitive act.
16. RCC's decision was upheld in court, including the evidentiary value given to the economic analysis conducted, as confirmed by the highest court of Romania

2. The “Apple and Milk” Case

17. A second case⁴ also involved bid-rigging in tenders organized by the Botoșani County Council as part of a similar government program, also dedicated to school children, by the undertakings Five Continents Group S.R.L., Spicul 2 S.R.L., and Lival Import-Export S.R.L. on the market for supplying dairy products and apples for students in primary and secondary public and private education, as well as for preschool children in public and private kindergartens.

18. The contracting authority decided to divide the contract into 7 lots based on the areas where the schools and kindergartens in Botoșani County were located. From the 7 lots set by the contracting authority, Five Continents submitted bids for 3 of them—specifically lots 1, 6, and 7—while Spicul submitted bids for 4 lots, namely lots 2, 3, 4, and 5, together covering the entire requirement for Botoșani County. In the electronic bidding stage, the involved parties maintained the financial offers they had initially submitted, without competitive pressure to improve them, resulting in the contracts being won at the maximum value set by the contracting authority.

19. Five Continents and Spicul, competitors in the dairy product procurement procedures, entered into lease agreements before the bid submission deadlines with Lival (a company involved in the apple procurement), followed by additional contracts, under which each company leased storage space from Lival in Blândești. This storage space was declared in the dairy product procurements to meet the tender requirements. In a reciprocal arrangement, Lival rented storage space from Five Continents (through Emanuel Com S.R.L.—part of the Five group) in Răchiți, fact declared in the apple procurement process.

20. These agreements were closely linked, with the companies supporting each other in meeting the tender requirements to qualify for public procurement procedures (e.g., by leasing warehouses) and, subsequently, in executing contracts jointly (e.g., after award, Lival handled the transport and distribution of dairy products to the schools and kindergartens covered by the winning bids of Five Continents and Spicul).

21. The behavior of the three companies in the apple procurement (Five Continents, Spicul, and Lival) involved each one bidding as the sole bidder for selected lots, without competition. In the dairy product procurement, although Lival did not submit bids, in practice it conducted the transport and distribution of dairy products for the lots won by Five Continents, even though Five Continents had committed in its bids to fully execute the contracts (supply, transport, and distribution) without naming any subcontractors or third parties.

22. Thus, after contract awards, Lival was simultaneously executing both the apple contracts it had won (supply, transport, distribution) and the dairy contracts won by Five Continents and Spicul (transport and distribution).

23. In conclusion, the three companies submitted bids only for certain lots, which they later won at the maximum value set by the contracting authority, without competing with each other. During the electronic bidding stage, the involved parties maintained the initial financial offer values, as there was no competitive pressure compelling them to improve their offers, leading to contracts awarded at the maximum value.

24. The parties justified their participation in bidding only for the lots they won, and by default their inaction on other lots, by citing limitations due to production capacity,

⁴ Concluded with the finding of a competition law infringement through Decision no. 52 of 22.09.2020 and the imposition of a total fine of approximately 323,173 euros.

ongoing contracts, available transport means, and distance to delivery points. Additionally, the parties claimed that lot selection was based on the economic advantages generated.

25. To verify the claims of the involved economic agents—that lot selection for public procurement was based on generated economic advantages—a probabilistic calculation was deemed necessary.

26. Analyzing the tender conditions, we found the following assumptions reasonable for each involved party:

- Each company had available product quantities up to 110% of the amount for which it actually bid;
- From an economic perspective, it was efficient to participate down to a minimum limit of 90% of the quantity for which it bid.

27. Thus, by establishing these two assumptions regarding capacity to bid on lots, we considered that the companies could offer bids on lots whose combined quantities fell within a $\pm 10\%$ margin of the quantity for which they actually bid.

28. To justify the capacity limits of the involved parties in the dairy and apple procurements under the "Milk and bread" program, the following limits of the quantities possible to be offered were considered reasonable:

- Maximum limit = 10% more than the actual quantity offered, allowing a margin for options without including an entire additional lot beyond their actual choice. We assumed that if a company could have added another lot to the lot group it bid on, it would have done so to maximize profit. A smaller upper margin would yield a lower probability.
- Minimum limit = 10% less than the actual quantity offered, assuming that even with this margin, the contract would remain economically attractive.

29. The constraints of maximum available capacity and minimum acceptable quantity generated the following possible lot groups, which would have met the bidders' criteria for participating in the tender:

- 21 groups of 2, 3, 4, or 5 lots respecting Five Continents' quantitative constraints;
- 16 groups of 2, 3, 4, or 5 lots respecting Spicul's quantitative constraints.

30. No groups of one or six lots met these constraints. The number of possible results was $16 \times 21 = 336$ combinations of groups, including overlapping lots. The number of favorable cases—combinations of lot groups meeting the maximum and minimum capacity restrictions for both Five Continents and Spicul, with no overlapping lots and covering the entire Botoșani County—was 16.

31. The probability of this event occurring was close to zero. The cumulative probability for the period 2015–2018 (the period of the infringement) was 0.00017, indicating that the occurrence of this event under conditions of uncoordinated behavior by the economic agents is very unlikely.

32. The results of the probabilistic calculation for 2015–2018, along with other documents and information in the investigation file, demonstrate a very low probability of the same behavior being repeated randomly (without coordination) each year during the analyzed period, suggesting that this event's occurrence under conditions of uncoordinated behavior by the economic agents is extremely unlikely.

33. Therefore, the probabilistic calculation supported the hypothesis of coordination between the companies Five Continents and Spicul when submitting bids in the analyzed public procurement procedures, allowing them to win contracts without competing against each other.

34. In this case, all three companies admitted the infringement and did not challenge the RCC decision in court.

3. Conclusion

35. As conclusion, we consider that the future of the standard of proof and standard of burden will be directly related to both improving tools for the efficient collection of relevant probes and adding new analysis that consolidate the demonstration of the infringements.