

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****The standard of review by courts in competition cases – Note by Romania****4 June 2019**

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More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

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Romania

1. Introduction

1. This paper explores the standard of review by Romanian Courts in competition cases and the experience of the Romanian Competition Council (hereinafter referred to as *RCC*) on the issue.

2. Resume of contribution

2. The Romanian competition enforcement system is one where the Romanian Competition Council acts as an integrated public authority - it investigates and decides on cases by administrative decision of the decision-making body (e.g. Plenum), subject to full judicial review by the Bucharest Court of Appeal.

3. As regards the enforcement of art.5 (corresponding to art. 101 of the TFEU) and art.6 (corresponding to art. 102 of the TFEU) of the Romanian Competition Law and of art.101 and art. 102 of the TFEU, the RCC investigates potential infringements of competition rules and adopts binding decisions, including the imposition of fines.

4. The competition directorates represent the area within the RCC that investigate under the supervision of the General Director, while decisions are taken by the decision-making body, independent of political and business interests.

5. With respect to merger control, the Romanian Competition Law also provides for a regime of integrated public enforcement, whereby the RCC is vested with exclusive jurisdiction to decide upon concentrations under its authority, subject to the control of the Courts.

6. These decisions are subject to judicial review before the Bucharest Court of Appeal – a generalist court - on all points of fact and law, including review of evidence, factual findings derived there from, legal qualification of the evidence and procedural accuracy carried out by the RCC. Economic evidence is also to be assessed by the Court. With regard to the fines imposed by the RCC, the Court may annul them or reduce their amount.

7. In order to help judges interpret and assess different technical aspects, courts may appoint, *ex officio* or at the request of the undertakings, external independent experts.

8. The enforcement acts issued by the RCC (such as orders initiating/closing the investigation, decisions on merger control, including merger remedies, decisions making commitments binding etc.) are subject to the same standard of review by courts, with a slightly different approach on decisions imposing fines, in that the courts also evaluate the proportionality of the sanctions.

9. Charging documents, such as statements of objections, and procedural acts, like request for interviews etc, cannot individually be challenged before court.

10. The average duration of a competition case before the Bucharest Court of Appeal is, in the recent period, of 1.5 years.

11. Judgments of the Bucharest Court of Appeal may be appealed on points of law only before the High Court of Cassation and Justice – a generalist court as well. If the appeal is admissible and well founded, the High Court of Cassation and Justice may set aside the judgment of the Bucharest Court of Appeal. Where the state of the proceedings so permits, the High Court may itself decide the case. Otherwise, it refers the case back to the Bucharest Court of Appeal, which is bound by the judgment adopted by the High Court of Cassation and Justice.

12. The average duration of a competition case before the High Court of Cassation and Justice is, in the recent period, of 2.5 years.

3. The administrative procedure before the Romanian Competition Council

13. The Romanian jurisdiction is an administrative enforcement system, which results in that the RCC is an autonomous administrative authority, with both investigative and decisional powers.

14. As regards the enforcement of art.5 (corresponding to art. 101 of the TFEU) and art.6 (corresponding to art. 102 of the TFEU) of the Romanian Competition Law and of art.101 and art.102 of the TFEU, the RCC investigates potential infringements of competition rules and adopts binding decisions, including the imposition of fines.

15. The order issued by the President of the RCC marks the initiation of the investigation.

16. The competition directorates represent the area within the RCC that investigate under the supervision of the General Director.

17. Investigations are carried out by independent case handlers, essentially responsible of handling all the acts of the procedure, elaborating the statement of objections, presenting the statement of objections during oral hearings and formulating substantiated proposals to the decision-making body.

18. As to the the decision – making process, decisions are adopted by the decision-making body (e.g. Plenum), responsible for competition law enforcement and independent of political and business interests.

19. With regards to merger control, the Romanian Competition Law also provides for a regime of integrated public enforcement, whereby the RCC is vested with exclusive jurisdiction to decide upon concentrations under its authority, subject to the control of the Courts.

4. Enforcement acts subject to review by court

20. Once issued, the RCC's enforcement acts may be challenged before the Bucharest Court of Appeal (first instance). The judgment of the first instance court may be appealed before the High Court of Cassation and Justice (appeal court).

21. The enforcement acts issued by the RCC are subject to the same standard of review by courts, with a slightly different approach on decisions imposing fines, in that the courts also evaluate the proportionality of the sanctions.

22. Essentially, the RCC's enforcement acts to be reviewed by courts are as follows:

4.1. Orders issued by the President of the RCC

23. *Orders initiating the investigation* may only be appealed together with the RCC's decision on the investigation (e.g. decision imposing fines).

24. *Orders on closing the procedure on investigations opened ex officio* (for not identifying sufficient evidence) may be subject to the appeal before the Bucharest Court of Appeal – the Administrative Section – and, subsequently, the ruling may be challenged before the High Court of Cassation and Justice - the Administrative Section.

25. *Orders on conducting dawn raids* may be challenged before the Bucharest Court of Appeal – the Administrative Section - within 15 days from the notification of the order to the involved undertakings. The ruling of the Court may be reviewed by the High Court of Cassation and Justice - the Administrative Section. The judgment of the Bucharest Court of Appeal is to be challenged within 5 days from the communication of the ruling to the addressees.

26. *Orders on access to confidential information* may only be challenged with the final decision.

4.2. Decisions of the President of the RCC on legal privilege

27. *The decisions on legal privilege* may be appealed before the Bucharest Court of Appeal – the Administrative Section - within 15 days from its notification to the undertakings. The judgment of the Bucharest Court of Appeal may be challenged before the High Court of Cassation and Justice - the Administrative Section - within 5 days from its communication to the parties.

4.3. Decisions adopted by the decision-making body

- decisions on infringement of competition rules, ordering the ceasing of anticompetitive practices, recommendations and imposing fines;
- decisions imposing penalty payments;
- decisions on merger control, including merger remedies (merger remedies as well may be subject to appeal before court);
- decisions imposing specific measures;
- decisions regarding the withdrawal of the benefit of the exemption in case of exempted agreements;
- decisions making commitments binding
- Commitments are quite common in the RCC's jurisdiction. Given that the RCC acts as an integrated public competition authority, commitments are not to be reviewed by courts before they become binding. Once the decision-making commitments binding is issued, third parties have the possibility to challenge it before court.
- decisions ordering interim measures;
- decisions rejecting complaints;
- decisions closing the procedure on investigations opened to complaint.

28. The RCC's decisions may be appealed before the Bucharest Court of Appeal (first instance) – the Administrative Section – within 30 days from the notification of the enforcement act to the involved parties or from the publication of the decision, when challenged by third parties.

29. The ruling of the Bucharest Court of Appeal may be challenged before the High Court of Cassation and Justice - the Administrative Section - within 15 days from its communication to the addressees.

30. Neither charging documents, such as statements of objections, nor procedural acts, like request for interviews etc, can individually be challenged before court.

5. Standard of review by courts

5.1. Standard of review in first instance

5.1.1. General findings

31. As stated herein, the RCC's decisions are subject to judicial review before the Bucharest Court of Appeal (first instance) – the Administrative Section – within 30 days from the notification of the enforcement act to the involved parties or from the publication of the decision (e.g. on the RCC's website), when challenged by third parties.

32. The Bucharest Court of Appeal fully reviews the findings of fact and the RCC's application of the law, with a considerable margin of appreciation being accorded to the competition authority with regard to the assessment of evidence and a certain margin of appreciation as respect to complex economic analysis.

33. To be specific, the Bucharest Court of Appeal performs a review on all points of fact and law, including review of evidence, factual findings derived there from, legal qualification of the evidence and procedural accuracy carried out by the RCC.

34. Economic evidence is also to be assessed by the Court, the extent of the review depending on the complexity of the matters brought before court. Due to the continuous encountering of economic methods applied to competition cases, judges reviewing RCC's decisions are knowledgeable in the fundamental economic concepts which typically frame competition cases (e.g. theory of harm, market characteristics).

35. In order to ensure the comprehensibility of complex economic analysis (e.g. highly specialized markets, assessment of effects), courts may appoint independent economic experts.

36. In the case of decisions imposing fines, the Court also examines the proportionality of the sanctioning measures enforced by the RCC.

37. With regard to the fines imposed by the RCC, the Court may annul them or reduce their amount, the *non reformatio in peius* principle preventing the increasing of the amount during the judicial review.

38. The average duration of a competition case before the Bucharest Court of Appeal is, in the recent period, of 1.5 years.

5.1.2. *Suspension of execution of RCC's decisions*

39. The mere appealing of the decision does not suspend its execution, therefore in the case of decisions imposing fines, the fine is to be paid within 30 days from the communication of the enforcement act.

40. Nevertheless, upon request of the plaintiff, the Court can order the suspension of execution of the appealed decision, provided that two conditions are met:

- the existence of a well-grounded case (*prima facie* illegality, without an analysis on the merits of the case) and
- the occurrence of an imminent damage.

41. Regarding the RCC's decisions imposing fines, the suspension is to be granted solely if a bail is being paid under the conditions laid down in the Fiscal Procedure Code.

5.1.3. *Settlement*

42. With respect to the settlement procedure, which is quite common in the RCC's jurisdiction, the Romanian Competition Law states that an undertaking's express acknowledgment of having participated in an anticompetitive practice will allow for a 10%-30% reduction of the level of the fine (art. 57 of the Romanian Competition Law). The settlement procedure is not limited to cartel cases.

43. The undertakings may challenge the decision following a settlement procedure, in which event the plaintiff loses the benefit of the fine reduction resulting from the settlement. In such a case the RCC can use the undertaking's acknowledgement in order to support its arguments in court.

5.2. **Standard of review in appeal**

44. Judgments of the Bucharest Court of Appeal on points of law may be appealed only before the High Court of Cassation and Justice – Administrative Section (appeal court) within 15 day from the communication of the ruling to the addressees.

45. The High Court of Cassation and Justice is the highest court and its role is not to review the merits of the case, but to decide instead whether the law has been correctly applied, based on the facts reviewed by the Bucharest Court of Appeal.

46. If the appeal is admissible and well founded, the High Court of Cassation and Justice may set aside the judgment of the Bucharest Court of Appeal. Where the state of the proceedings so permits, the High Court may itself decide the case. Otherwise, it refers the case back to the Bucharest Court of Appeal, which is bound by the judgment adopted by the High Court of Cassation and Justice.

47. As mentioned herein, the review performed by the High Court of Cassation and Justice is only possible on reasons of law, namely on the grounds set forth by the Code of Civil Procedure, as below referred to:

- a series of procedural irregularities regarding the first instance itself or the judgment to be reviewed;

- the judgment of the Bucharest Court of Appeal does not comprise the reasons substantiating the ruling or comprises contradictory arguments or no reasoning at all;
 - the judgment was given with the infringement or misapplication of substantive law.
48. The average duration of a competition case before the High Court of Cassation and Justice is, in the recent period, of 2.5 years.

5.3. Case examples

5.3.1. *The pharmaceutical case*

49. In 2009, the RCC started several investigations regarding the possible infringement of article 5 of the Romanian Competition Law and of art. 101 of the TFEU, by a series of producers of medicines and their distributors in Romania on the market of wholesale medicine distribution.

50. Following the investigations, the RCC found that the undertakings had concluded distribution agreements containing anticompetitive clauses prohibiting exports (both active and passive sales), infringing art.5 of the Romanian Competition Law and art.101 of the TFEU, and imposed fines.

51. The undertakings challenged the RCC's decision before the Bucharest Court of Appeal.

52. The Bucharest Court of Appeal performed a review on the merits of the case and confirmed the RCC's decisions, finding that the evidence on the infringement consisted in direct evidence, such as contracts containing anticompetitive clauses, e-mails between undertakings etc.

53. The Court thoroughly examined the economic analysis on prices and accepted it as evidence.

54. The first instance also focused on the lawfulness of the action of the authority and concluded that the RCC acted in a manner which was consistent with that established in the law.

55. The Court also decided that the fine was legally applied.

56. The High Court of Cassation and Justice affirmed the lower court's judgment, citing the same reasons, considering that the previous instance had correctly applied the law in relation to the facts.

5.3.2. *The electric and electronic equipment case – Gemini v. Romanian Competition Council*

57. Gemini was an undertaking specialised in the sale of electric and electronic equipments.

58. Following an investigation opened by the RCC, Gemini was found to have concluded an agreement with five other competitors, by controlling the sales of their products in buy-back campaigns organized in 2009, thus infringing art.5 of the Romanian Competition Law.

59. The RCC consequently imposed fines on the undertakings.

60. Gemini submitted an appeal on the RCC's decision to the Bucharest Court of Appeal, requesting the annulment of the enforcement act.
61. After fully assessing the case, the Court upheld the RCC's decision.
62. According to the judgment, the infringement was proved at the legal standard and the agreement had an anticompetitive object.
63. The Court also confirmed the RCC's approach on market definition, namely taking into account the potential competition in analyzing the relevant market.
64. Furthermore, the first instance held that the authority followed the right procedure in adopting the decision, rejecting the undertaking's arguments related to an alleged procedural inaccuracy of the enforcement act.
65. The Court decided on the legality of the fine.
66. The ruling of the Court was maintained by the High Court of Cassation and Justice, which examined in detail the issues of law challenged by the undertaking and affirmed the lawfulness of the judgment.

6. Courts' access to competition expertise

67. Both the Administrative Section of the Bucharest Court of Appeal and the Administrative Section of the High Court of Cassation and Justice are generalist courts, reviewing administrative matters that include a wide range of issues. The two courts review all competition law cases.
68. *The main advantages* of the review system above referred to consist in that:
- - the courts have broad knowledge, skills and experience on different legal areas,
 - - are linked to the whole judiciary system,
 - - the potential bias in the judges' decisions is diminished,
 - - the possible professional capping of judges is reduced due to the extensive matters subject to review, different to competition law.
69. *The main disadvantages* of the general jurisdiction consist in serving longer terms, appointing of economic experts, a large number of cases to be reviewed, the potential decreasing of uniformity of judgments in similar cases.
70. In order to help judges interpret and assess different technical aspects, courts may appoint, *ex officio* or at the request of the undertakings, external independent experts.
71. For the acquiring of expertise to adjudicate competition law and economic matters, Courts have access to tailor-made training for judges organized by the National Institute for Magistrates, to national and international conferences, seminars and workshops (such as those financed by the European Commission – tailor-made for judges).
72. Additionally, the formal interaction between courts, the RCC and competition lawyers, which takes place in the context of a judicial review, can contribute to achieving expertise in competition law and economic matters.