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Competition Compliance Programmes – Note by Romania

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More documents related to this discussion can be found at http://www.oecd.org/daf/competition/competition-compliance-programmes.htm.

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Romania

Executive summary

1. This presentation will lead you through the legislative framework in Romania concerning compliance matters in competition law, ranging from a short history of the first provisions introduced in 2011 to further practice developments, for an insight of the developments in this field. Then, the focus will be on the Romanian Competition Council's efforts to promote a compliance approach in the business environment starting from the three guides drafted and published by the authority – an action meant to make compliance familiar to the undertakings and the general public, stressing the importance of prevention and making the competition rules known. Afterwards, we will inquire whether there is any link between compliance and rehabilitation, by means of some examples and in the end, we will get straight to a short conclusion.

1. Introduction

2. Competition between companies plays a very important role in ensuring the well-being of consumers, in achieving an optimal distribution of resources and in streamlining some parameters such as price, production, quality, variety or innovation.

3. In recent years, the Romanian Competition Council (hereinafter referred as RCC) made consistent efforts in order to prevent infringements of competition law, by developing some tools to help businesses promote a compliance culture. These mainly refer to educating businesses towards compliance and competition laws, which can be improved through efforts which include drawing up consistent compliance programmes and effective implementation.

4. The Romanian competition authority encourages companies to develop effective compliance programmes to avoid infringements of competition law, to prevent participation in violations of the law that would expose companies to financial or other sanctions or image damage.

2. Legal Framework in the Romanian Competition Law Regarding Compliance

5. As provided for under the Guidelines regarding the individualization of the sanctions for the contraventions provided for under Art. 55 of the Competition Law no. 21/1996 ("The Guidelines"), the basic level of the fine may be reduced when the Competition Council finds that there are mitigating circumstances such as "(...) the company proves the existence and effective implementation of a compliance program."[1]

6. Thus, since December 29, 2011, the existence and effective implementation of a compliance program is a mitigating circumstance that reduces the fine applied in case of an infringement of up to 10% of the basic level established depending on its gravity and duration.

[1] See paragraph 22 (f) of *The Guidelines.*

7. If in the beginning, the RCC's approach was more formal, in that the mere existence of a compliance program was enough for the mitigating circumstance to be considered, the developments in this field made the application more nuanced, so that the authority not only looks at the existence of a compliance program, but also to the proves that it is fully implemented and even disseminated among business partners.

8. From the necessity of an effective implementation, another mitigating circumstance has recently been derived, namely promoting competition rules by preparing and disseminating compliance programmes at the level of the undertaking's trading partners.

9. If this action is assumed by the company and fulfilled at the latest until the adoption of the Decision by the RCC, or in a timeframe established in the Decision regarding the infringement, a supplementary reduction of the basic level of the fine, of up to 10%, may be granted by the Board of the RCC for the dissemination of the compliance policy among business partners.

10. This is due to the fact that dissemination among business partners has a preventive role and making a public statement (through dissemination of conformity plans) concerning one's commitment to respect the law further educates the business environment.

3. Latest Developments

11. In order to help undertakings adopt a compliance approach, the RCC published three guides, namely the „Guide on Compliance with Competition Rules", the „Guide on Compliance with Competition Rules by Business Associations" and the „Guide on Detection and Deterrence of Anti-competitive Practices in Public Procurement Procedures".

3.1. Brief Overview of the „Guide on Compliance with Competition Rules"[2]

12. The Guide on Compliance with Competition Rules is addressed to all companies, either multinational corporations or small or medium enterprises, so that they be aware of the benefits of compliance and the risks of violating competition law. The Guide is comprised of a set of good practices that can help create effective training programmes, also with a view to their effective implementation.

13. The purpose is to raise awareness of the need to comply with competition law rules and to provide practical advice in this regard. The guide is indicative and is not intended to replace the relevant legislation in the field, also containing illustrative examples. Also, the RCC will not evaluate the individual compliance programmes of the companies outside an investigation.

14. The Guide strikes the importance of a proactive approach by undertakings, as their plans are based on compliance manuals meant to nurture and develop a compliance culture, but should also include effective alert mechanisms, comprising audit, warning and responsibility, all of which contribute to an effective implementation. The Guide also underlines that a compliance program should be tailor made, based on the company's needs and specificity, as well as adequate to its organizational structure.

[2] The Guide is available here: http://www.consiliulconcurentei.ro/uploads/docs/items/bucket12/id12280/ghid_privind_conformarea_cu_regulile_de_concurenta.pdf

15. No one-size-fits-all strategy could be implemented. Elaborating a plan is preceded by a thorough risk analysis, depending on the activity and the economic sector where the undertaking is active. The risk analysis is meant to determine vulnerabilities and assess their gravity, while a special focus should be on the employees, especially those interacting with third parties or competitors.

16. Among the elements of an efficient compliance program, one could list tackling the subjects of compliance with the competition requirements, the main requirements for the program's efficiency and the compliance manual (comprising practical examples).

17. The essential elements of an effective compliance program are the following:

- the clear, firm, public position of the company's management in the sense of compliance with the rules of competition;
- designation of one or more persons responsible for the compliance program of the company;
- effective information, adequate training and awareness measures on the need compliance with competition rules;
- control, audit of compliance and prompt information on non-compliance with the competition rules;
- creating a system for monitoring and evaluating compliance with competition rules.
- For this purpose, a compliance manual, or a similar document (e.g., code, guidelines, guide) is meant to be a reference tool for both management and employees of the company, as well as for the business partners, taken into consideration for day-to-day decisions.

18. It should be noted that allegations according to which the undertaking was not aware of the anti-competitive implications of its actions or did not know about its legal duties cannot exonerate it from sanctioning. The same applies to SMEs, as the dimension and the place in the trade chain where the undertaking operates are irrelevant when it comes to enforcing the Competition Law.

19. Also, the effective implementation of a compliance program requires identifying risks, risk evaluation and risk management, as well as due diligence in competition matters. Other topics reached in the Guide are the costs of failure to comply with competition law and the efficiency of compliance programmes.

3.2. Brief Overview of the „Guide on Compliance with Competition Rules by Business Associations"[3]

20. The Guide is addressed to business associations as they are defined for the purpose of enforcing competition regulations. It is important to mention that Competition law does not prohibit the establishment of associations of enterprises or membership in such associations.

21. However, the functioning of associations creates repeated opportunities for direct contacts between competitors, thus representing a favourable framework for anticompetitive agreements. By bringing together competing companies, some actions

[3] The Guide is available here: http://www.consiliulconcurentei.ro/wp-content/uploads/2021/02/Ghid-FINAL-ian-2021-SITE.pdf .

carried out within the association may, in certain circumstances, result in a restriction of competition.

22. Participation in the activities of the associations is a way for competitors to meet to carry out and promote initiatives for the proper functioning of the industry they belong to. These meetings or discussions, even if they had initially a legitimate aim, that of fulfilling the proposed objectives of the association, must not have as object or effect the coordination of the individual commercial behaviour of member undertakings.

23. The Guide is mainly meant for business associations, professional associations (e.g. bar associations, other associations gathering members of other liberal professions) and self-regulatory associations, mainly in the field of advertising practices, which adopt and apply to their members codes of good practices regarding sales or online advertising in order to protect consumers from immoral or unethical behaviour.

24. The Guide develops on typical cases of anti-competitive behaviour in which business associations may be involved, presenting what is prohibited (price fixing etc.), sensitive activities (such as developing and promoting industry-level standards or standardized terms and conditions, on the condition that they do not restrict competition on the market; recommendations made by associations of undertakings, boycott, codes of conduct or best practices issued by associations of undertakings; exchange of information; acquiring membership; press releases, newsletters and circulars; conducting meetings within the association), as well as practical advice for the business associations.

3.3. Brief Overview of the „Guide on Detection and Deterrence of Anti-competitive Practices in Public Procurement Procedures”[4]

25. The Guide refers to the most common forms of anti-competitive practices in public procurement – closed bid, retention of the bid, alternative bidding, exclusion of qualified bidders, arranged specifications, manipulation of bidding procedures and the inclusion of fictitious companies in the bidding process, market allocation.

26. It also extensively describes market characteristics that favour anti-competitive practices in public procurement, such as a limited number of bidders - as a result of the small number of market competitors or too restrictive qualification and selection criteria, homogeneity of products - different products, especially by quality, symmetry of market shares (when competitors of different sizes do not have motivation to resort to anti-competitive practices) and cost symmetry (if efficient businesses do not have the motivation to enter in an anti-competitive practice), recurring bidding (the bidding frequency facilitates distribution contracts between bidders), market transparency (if competitors can easily observe essential elements of the activity of others: prices, cost structures, sales, etc.) and professional associations.

27. It also includes behavioural markers which may indicate an anti-competitive practice and measures to prevent anti-competitive practices specific to contracting authorities.

[4] The Guide is available here: http://www.consiliulconcurentei.ro/uploads/docs/items/bucket11/id11008/ghid20042016.pdf.

4. Compliance and Rehabilitation

28. In the last years, the RCC and the National Agency for Public Procurement faced the need to clarify the ways in which an economic operator can demonstrate credibility in a sustainable manner, as provided for in public procurement law, in a situation of exclusion from the bidding procedure for committing a serious professional misconduct, consisting of violation of competition regulations, by participating in a cartel aimed at bid rigging.

29. This aspect is also tackled by competition legislation, which contains provisions granting certain benefits to undertakings that, in relation to the provisions on public procurement, could be relevant in proving active cooperation with the RCC, as the authority that carries out the investigation. A Common Opinion by the two above mentioned institutions was adopted[5].

30. The public procurement law[6] provides for the obligation of the contracting authority / entity to exclude from the award procedure for public procurement contracts, sectoral procurement contracts, concession contracts of works and service concession contracts, the undertaking who committed a serious professional misconduct that calls into question his integrity, the notion of "serious professional misconduct" including infringement of competition rules aimed at bid rigging.

31. However, the legislator also established the possibility of rehabilitation, in the sense that the company, which is in one of the situations of exclusion from the award procedure, can provide evidence to the contracting authority that the measures taken are sufficient for demonstrating its credibility in relation to the reasons for exclusion.

32. In this regard, given the competences of the RCC as investigative authority, the undertaking may provide the contracting authority / entity, in principle, with decisions issued by the RCC in the last 3 years, which show the application of a more favourable sanctioning regime to the economic operator, respectively as a result of the application of the leniency policy and / or the procedure for acknowledgment of the anti-competitive behaviour, as tools available to the RCC, which involve effective cooperation of undertakings with the competition authority.

33. Besides the above-mentioned tools, the undertaking may also provide proof of the effective implementation of a compliance program, that needs to be drafted according to the RCC's Guide on Compliance with Competition Rules[7] and includes clear measures to prevent cartels in the bidding procedures.

34. In this respect, contracting authorities / entities, applying the principle of proportionality, are free to assess, on a case-by-case basis, the measures taken by undertakings and the evidence in support of them, taking account of the gravity and particular circumstances of the misconduct in question, depending on the specificity of the situation that is the object of the analysis.

[5] See http://www.consiliulconcurentei.ro/wp-content/uploads/2020/08/Opinie-comuna-CC-ANAP.pdf.

[6] Law no. 98/2016 on public procurement, with subsequent amendments and completions, Law no. 99/2016 on sectoral procurement, as subsequently amended and supplemented, and 3 Law no. 100/2016 on works concessions and service concessions, with amendments and completions.

[7] See above, footnote no. 2.

35. When making the assessment in accordance with these provisions, contracting authorities / entities may request support from the RCC, on a case-by-case basis, when it deems necessary.

36. Also, to support the contracting authorities / entities that make the assessment, the RCC publishes on its website an updated list, which includes the names of the undertakings involved in cartel investigations concerning bid rigging, the decisions finding the infringement, as well as indications on how to cooperate with the authority, respectively by applying the leniency policy or acknowledgment of the anti-competitive practice for each undertaking.

5. Compliance in Numbers

37. According to the results of a market study[8], the practice of competition authorities is predominantly essential in the following sectors: energy and utilities, automotive and retail & e-commerce. Still, according to the findings of the market study, 67% of companies with a turnover less than 50 million RON never organizes training sessions for employees, but the percentage of compliance efforts rises with the turnover.

38. Also, when asked if they have a compliance program in competition matters, elaborated according to the requirements of the RCC, the answers were positive relating to 52% of the subjects and negative for the rest of 48%. As to the draft of the compliance program, 43% of those surveyed declared that the program was made locally, with external assistance, 36% stated that it was made by the group, as a specific program adapted to the company, 14% that it was made by the group, as a general program of the business group, while only 7% developed the program locally, with internal resources.

6. Conclusion

39. From all the above, one may derive that businesses become more and more aware of the need to reduce risk and exposure for the company and that implementing an effective prevention strategy always involves extremely low costs compared to the fines which may be established by the competition authorities (tort liability should also be taken into consideration).

40. Also, the focus is moved to safeguarding the rules, e.g., through the effective role of compliance officers, the development of the compliance culture or the traceability of employees.

41. We could foresee a very important educational dimension of compliance programmes, as their daily presence through dedicated staff, behavioural dimension and periodical trainings will definitely raise awareness and will make them more popular and more adapted to the company's specifics. All these should indeed foster the preventive dimension of competition law.

[8] Quoted on the website: https://govnet.ro/uploads/files/36_Prezentare_GovNet_7_Noiembrie%202019_Adrian%20Ster.pdf .