Romania

15

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15.1 The Evolution of the Grocery Market in the Market Economy Context

Prior to the political changes of 1989, agricultural production and sale of grocery products were the exclusive attribute of the State via its empowered agencies. With the agricultural reform of 1991,[1] individual property over agricultural lands was restored, but many individual owners sought different forms of joint ventures in order to make their ownership economically profitable. Thus, a large number of agricultural associations were established, mostly encouraged by the 1994 Law on the Lease of Agricultural Lands.[2] Following the 2005 Law on Land Reform[3] and the enabling of foreign citizens to acquire agricultural lands in Romania, more associations were established alongside large ownerships. Notwithstanding the above, the majority of large agricultural exploitations focus on grain cropping, due to the specific qualities of the soil in Romania; less interest is being manifested towards cropping of vegetables. This is also due to the fact that alongside the dissolution of the socialist agricultural property, in the very first years after 1990, the vast majority of facilities making up the national irrigation system—which is crucial to vegetable cropping—were rendered nonusable while the State (the owner thereof) did not perform any investments whatsoever in this particular respect.

[1] Performed via Land Law no. 18/1991, republished in Official Gazette no. 01/05 January 1998.

[2] Law no. 16/1994 on the lease of agricultural lands published in the Official Gazette no. 91/07 April 2005.

[3] Law no. 247/2005 on the reform in the fields of private ownership and justice and certain ancillary measures published in the Official Gazette no. 653/22 July 2005.

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On another hand, a considerable portion—if not the majority—of the Romanian agricultural land is still individually exploited for the purposes of satisfying individual consumption needs. However, the costs of individual exploitation of land for agricultural purposes usually exceed the economic power of its owners, and the Government consequently supports such exploitation via biannual subsidies aimed at partially (and, practically, insufficiently) financing the spring and autumn agricultural campaigns. As a result, much land is left unexploited, irrespective of legal provisions sanctioning the passivity of landowners.

As to the processing sector, the socialist units (such as farms, slaughterhouses and dairies) were privatized following the abandonment of the socialist economic model. Some of these units were privatized and converted into successful businesses, while others were simply closed down. A tendency that was noticeable at least in the last 15 years was the preference of private investors to invest in Greenfield processing sites. Nevertheless, not all socialist units were overlooked, but given their economically strategic locations and dimensions the acquisition, reconditioning and refurbishment thereof proved in many instances cheaper and more economically feasible than a Greenfield investment.

Lastly, the grocery retail sector has experienced in its own turn important changes as compared to the socialist period. While the 1990s was marked at first by the dissolution of state-held retail units and by the establishment of numerous privately held corner shops, the first decade of the twenty-first century was marked by the entry on the Romanian market of a series of large retailer chains at both cash & carry and retail (hypermarkets, supermarkets, discounters) levels. The late entry on the Romanian market of the modern forms of grocery retail has determined a strong competition at client level between the two. Pursuant to a 2009 Report of the Competition Council, in 2009, a majority of 60 % of Romanians preferred to acquire their grocery from a traditional trade unit (corner or neighborhood shop), while only 40 % preferred modern retail. However, the data and information comprised in said report might have changed with the expansion of different retail chains in Bucharest and the larger cities.

15.2 Impact of Competition Rules on the Grocery Sector

15.2.1 Romania's Competition Laws and Regulations

Competition is regulated in Romania via two major enactments.

The first and most important one is Competition Law no. 21/1996, as republished and further amended and supplemented (the "Competition Law").[4] The Competition Law captures under its ambit acts and facts perpetrated on the Romanian territory or possibly affecting the Romanian territory irrespective of the nationality of the natural or legal persons responsible thereof (pursuant to Article 2). The

[4] Republished in the Official Gazette no. 742/16 August 2005.

authority vested with enforcing the Competition Law is the Competition Council (the "RCC").

Article 5 paragraph (1) of the Competition Law contains a general prohibition of anticompetitive practices and does not distinguish between different industry sectors or fields of the economy. As such, the general prohibition of anticompetitive practices (be they horizontal or vertical) applies to all acts and facts that go against such prohibition (bid rigging, resale price maintenance, market sharing and limitation of output). Of the aforementioned, resale price maintenance deserves a special attention, as there is a fine distinction between recommended and imposed resale prices, an issue that is subject to scrutiny by both national and EU competition authorities.

Article 6 of the Competition Law sets forth a general prohibition of any abuse of dominance. Dominance is legally presumed to exist whenever an undertaking holds a market share of more than 40 %. Neither in respect of this particular prohibition does the Competition Law make any distinction as to specific conditions for its enforcement in respect of given sectors of the economy.

Similarly, the rules on merger control, laid down in Articles 10–15 of the Competition Law, are of general and mandatory application in all sectors of the economy, the RCC exposing a wide decision-making practice in mergers in the grocery retails sector.

The second major enactment is Law no. 11/1991 on the fight against unfair competition ("Law no. 11/1991").[5] It provides a general prohibition on unfair competition and exemplifies what acts or facts constitute unfair competition. However, given its broad and interpretable provisions, it was not practically enforced on a large scale. Currently, the RCC is vested with its enforcement (acting in such capacity as of 2010 when it took over from the Ministry of Finance) and has initiated a legislative process for the amendment thereof with a view to giving way to private enforcement of the law rather than a State-directed one.

15.2.2 Modernization of the Laws Governing the Sale of Perishable Goods in Romania

Although the Competition Law does not contain provisions particularly aimed at the retail market, the Competition Law was construed and developed by the RCC on the occasion of various decisions rendered in the field of retail. On a separate note, there are some enactments governing specific issues concerning competition in the retail market.

Government Ordinance no. 99/2000 on product commercialization and market services (the "GO no. 99/2000")[6] is one such example. It regulates both general aspects of conducting commercial businesses (functioning hours, public authority

[5] Published in the Official Gazette no. 24/30 January 1991.

[6] Republished in the Official Gazette no. 603/31 August 2007.

endorsements, the role of public authorities in the commercialization activity, etc.) as well as certain competition-related aspects such as the rules on different types of discounted sale. Specifically, Article 17 of GO no. 99/2000 prohibits predatory pricing practices. In the optic of the law, predatory pricing takes the form of sale of products at prices equal or inferior to the acquisition costs. Nevertheless, GO no. 99/2000 allows certain exceptions from such rules, one of them being in the case of perishable goods (food/grocery products).

In 2009, Parliament adopted Law no. 321/2009 on the commercialization of food products ("Law no. 321/2009")[7] in order to settle different dissonances between suppliers and the large retail chains. Essentially, it provides for specific rules on commercialization of groceries while also consecrating an entire chapter to prohibiting certain anticompetitive practices in the field such as (1) reciprocal obligations of sale and purchase of products to and from a specific third party, (2) charging and payment for services that are not directly related to the sale process, (3) charging and payment of fees aimed at supporting the expansion of the retailer's facilities, (4) the requirement by the retailer that the supplier not sell its products to other retailers at an equal or lower acquisition cost and (5) unlawful delisting of products by the retailer.

GO no. 99/2000 and Law no. 321/2009 are the only enactments governing the grocery retail sector. Nevertheless, there are sector-specific norms and regulations, all of which comply with the general rules laid down by the two aforementioned enactments.

As described above, the grocery retail sector is subject to the provisions of the Competition Law in the same manner as all other sectors and economy fields.

15.3 The Romanian Grocery Retail Market Under Scrutiny by the Competition Council

15.3.1 Background

Unsurprisingly, the RCC paid due attention to the grocery retail sector, given the tensions between modern and traditional forms of retail and between suppliers and retailers altogether, which existed in the sector after the year 2000 (landmark year for the consolidation of modern forms of retail in Romania). The RCC Chairman issued Oder no. 97/18.03.2008, whereby a sector inquiry was launched with a view to analyzing the food retail sector in Romania (the "Sector Inquiry"). The 200-page (annexes included) Sector Inquiry Report (the "RCC Report") was released to the public on September 2009 and proves to be a useful instrument for Competition Law enforcement in the grocery retail sector.

Before the RCC launching of the Sector Inquiry, there were certain points of contention between the retailers and the suppliers, which were brought to the

[7] Published in the Official Gazette no. 705/20 October 2009.

attention of the RCC. Moreover, the RCC was confronted with several merger control and individual exemptions (an institution now repealed under the current form of the Competition Law) that were taking place or were affecting the grocery retail sector. Officially, the RCC motivated its launching of the Sector Inquiry on the necessity for the authority to hold a clear image of the overall sector, and it covered the years 2005–2008.

15.3.2 Scope of the Sector Inquiry

Pursuant to the RCC Report, the Sector Inquiry covered six major aspects, as follows:

(i) the identification and assessment of the markets that make up the grocery retail sector;
(ii) the assessment of the application and practical functioning of the "most favored client" clause (the "MFN clause");
(iii) the analysis of slotting allowances as part of the contractual relationship between retailers and their suppliers;
(iv) the clarification and assessment of the concept of "category management";
(v) the identification of the manner in which costs are determined, prices are set and profits are achieved on the production–distribution–retail chain for certain important products;
(vi) the identification of potential competition law issues.

15.3.3 Conclusions and Recommendations Made by the Competition Council

As a preliminary remark, the period under assessment from the RCC was limited to 2008 (or, in some cases, 2007), and the conclusions thereof were made public on September 2009. Therefore, the below must be read while having in mind the aforementioned:

(i) The *scales of modern and traditional forms of trade* are clearly tipped in favor of the traditional ones (corner and neighborhood shops), which cover 60 % of consumer preferences as compared to 40 % covered by hypermarkets, supermarkets and discounters. Considering the period covered by the RCC Report, we deem that such results may have been altered due to different factors such as the proliferation of discounter chains on the Romanian market, price competition, variety of products, etc.
(ii) The *importance of sales via the cash & carry format has decreased* due to the significant number of entries by hypermarket/supermarket/discounter chains, consumers being more attracted by the easiness of access (cash &

carry stores require holding of a membership card as their target clients are resellers and not final consumers).

(iii) There is *no competition between the cash & carry format and small retailers*, given that (a) the latter generally procure their merchandise from the former (see (ii) above) and that (b) there are clear differences between the number and variety offered by the two formats to the final consumer.

(iv) *Modern forms of trade compete against traditional ones* based on the fact that the latter represent the initial form of trade present in the Romanian market. However, this conclusion is valid only until modern forms of trade will have a majority in the Romanian market, this particular point in time marking a shift in the behavior and preferences of the end consumer. After such moment will be reached, traditional forms of trade will no longer compete with the modern ones but will be perceived by the end consumer as complementary thereto.

(v) The *value of the Romanian trade of groceries* was estimated at the level of 2008 to be the following: (a) RON 83 billion (roughly EUR 21.2 billion) was the total value of current consumption goods, (b) RON 54.4 billion (roughly EUR 13.9 billion) was the total value of Romanian grocery trade, while (c) RON 22 billion (roughly EUR 5.6 billion) was the total value of Romanian modern grocery trade.

(vi) The assessment performed by the RCC's inspectors indicated that certain of the *slotting allowances* were not directly linked to the services provided by the retailers to their suppliers, while others presented such necessary connection. The RCC Report provides a nonexhaustive list of permitted and prohibited slotting allowances.

(vii) The analysis of the *MFN clause* led the RCC to recommend the elimination thereof from the retailer–supplier commercial relationships based on the existence of slotting allowances (permitted following the assessment in the RCC Report). For this specific reason, the RCC issued an endorsement concerning the 2009 amendment of the GO no. 99/2000, whereby it recommended the prohibition of the MFN clause in the grocery retail sector.

(viii) *Category management*—over the analyzed period, the increase in the sales of the competitors of category captains has exceeded the sales of the latter. Nevertheless, the RCC Report recommends that the responsibility for managing the shelf space be further assumed by the retailer and not by the category captain.

(ix) The *negotiation power* manifested by certain retailers in relation to their suppliers does not represent a point for consideration from the RCC as long as the retailer does not hold a dominant position on a given market. The RCC sees no point in a distinct and supplementary regulation of the abuse of superior negotiation power. The examples provided by the EU Member State show a scarce, if not totally absent, intervention by the State authority based on such provisions.

(x) At the moment when the RCC Report was issued, *private brands* held a mere 10 % share among the total number of brands commercialized by retailers, and as such they exercised no competitive pressure. This particular conclusion may have also been altered with the passage of time.

(xi) *Sales at loss and discounted sales* have also formed the object of the RCC's assessment. The RCC recommended that the Government repeal the prohibition on sales at loss (Article 17 of the GO no. 99/2000), but instead the Government opted to maintain unchanged said prohibition (with certain exceptions covering also the grocery retail activity).

(xii) The *increase of prices* charged by the retailers to the final consumers is consistent with the increases of the prices charged by the producers to suppliers in relation to the retail segment. The RCC points out that bread commercialization is a specific segment in which prices charged to end consumers rise more often than the prices charged in the upstream market. In fact, the RCC investigated two so-called bread cartels in the Maramures and Vrancea counties, following which significant fines for price fixing were imposed on bread producers, distributors and retailers.[8]

(xiii) Merger control is the best tool for prevention of potential competition distortion, given the entries of numerous retailers on the Romanian market.

(xiv) Following the finalization of the Sector Inquiry, the RCC launched four new investigations in the retail sector, cash & carry chains, retailers and suppliers being altogether subject to these proceedings. From the data and information available, the RCC is planning on finalizing the investigations in 2013.

15.4 Merger Control in the Grocery Sector

15.4.1 Turnover Thresholds that Trigger the Intervention of the Competition Council

The Competition Law provides for a double turnover threshold that needs to be met in case of an economic concentration operation in order for the latter to become subject to the RCC's clearance before implementation (subject to a standstill obligation). At present, these thresholds are as follows:

– the worldwide combined turnover of all the undertakings that are parties in the economic concentration operation exceeds the RON equivalent of EURO 10,000,000; and

[8] Decision no. 61 of 7.12.2009 concerning the infringement of Article 5 paragraph (1) of the Competition Law by 17 undertakings active on the bread market in the Maramures county; Decision no. 62 of 7 December 2009 concerning the infringement of Article 5 paragraph (1) of the Competition Law by 31 undertakings active on the bread market in the Vrancea county.

– at least two of the undertakings involved in the economic concentration operation individually achieve in Romania a turnover that exceeds the RON equivalent of EURO 4,000,000.

Such turnover values refer to the fiscal year prior to the one in which the merger takes place.

The RCC is the autonomous central administrative body in charge of the review and clearance of economic concentration operations that meet the above-mentioned thresholds. In such capacity, it issues a series of regulations and guidelines for the conducting of merger control notifications and the assessment thereof.

An innovation brought via an amendment to the Competition Law in 2011 refers to the power of the Country's Supreme Defense Council (the "CSDC") in merger control operations. When considerations of national safety so demand, it may request the Government to issue a decision prohibiting an economic concentration operation from taking place. This rule was detailed upon via CSDC Decision no. 73/2012 (the "CSDC Decision"), which provides that RCC is bound to inform the CSDC of all the merger notifications that it receives. Nevertheless, even if an economic concentration operation does not meet the above-mentioned thresholds, the CSDC still needs to be informed if the transaction takes place in one of the 13 sectors listed in the CSDC Decision. Although the grocery retail is not expressly listed therein, the protection of agriculture and environment is one of the mentioned sectors.

15.4.2 Defining the Relevant Market, a Cornerstone Task

The statutory definition and relevant steps for the assessment of the relevant product and geographic markets are laid down in the Guidelines on defining the relevant market enforced via Order no. 388/2010 of the RCC Chairman. Pursuant to this enactment, the relevant product market is to be defined as consisting of all products and/or services that the consumer deems interchangeable or substitutable due to their characteristics, prices and final use. The relevant geographic market consists of the area in which the concerned undertakings are involved in the request and demand of products and services, in which competition conditions are sufficiently homogenous and which can be delineated from neighboring areas due to the appreciable differences in terms of competition conditions.

The RCC's decision-making practice in merger control cases in the grocery retail sector deals with the taking over by well-established international retail chains of certain stores pertaining to their local competitors. Although quite extensive, this practice is marked by constancy, especially in what the definition of the relevant markets is concerned. As a rule, the RCC defined the relevant product market as being *the market for the retail of groceries via hyper/supermarkets, discounter stores and other similar shops (such as corner or neighborhood shops)*. As it results from this definition, the cash & carry stores are excluded from the definition of the relevant product market since—as the RCC puts it in both

decisions and the above-cited Report—this trade format addresses other types of clients than end consumers. Moreover, in all the RCC decisions rendered in this particular field of the economy, the RCC opted to also define, in line with European Commission practice, a separate market for the *procurement of grocery for daily use*. The rationale behind this dual definition of the relevant product market consists in the different types of vertical relationships of the retailers (1) with their suppliers and (2) with their clients (end consumers).

The constancy indicated above in respect of defining the relevant product market was naturally maintained by the RCC when defining the dimension of the relevant geographic market in respect of such. Thus, the RCC considers, in line with the relevant European Commission decision-making practice, that the geographic dimension of the market for retail of grocery is usually local and is determined by the boundaries of a territory where the outlets can be reached easily by consumers (radius of approximately 10/20–30 min of driving time). As to the geographic dimension of the market for the procurement of grocery for daily use, the RCC adopted the European Commission position that it should be national in scope.

15.4.3 Market Evolution in Light of Recent Developments

The RCC Report indicates that at the level of 2008, there were 52 retailers engaged in activities of grocery retail at the level of Romania. This shows that—at least, at that time—no argument in favor of market concentration to the benefit of any of such retailers could have been made. Although some of the retailers have opted to expand their networks via different take-over of businesses (Profi, Mega Image) or via different cooperation agreements (Carrefour–Angst), the RCC has found that no such economic concentration operations posed any threats to the maintenance of a status quo normal competitive environment on the grocery retail market.

Nevertheless, should the RCC find—when analyzing a notified merger operation—that a dominant position on the grocery retail market is either created or consolidated thereby, it has the capacity to avoid such from occurring. Thus, the RCC may, under the terms of the Competition Law [Article 46 paragraph (4) letter c)], impose different remedies in respect of an economic concentration operation. The Guidelines on commitments in merger control operations, enforced via Order no. 688/2010 issued by the RCC Chairman, provide that the national competition authority may adopt either behavioral or structural remedies, i.e., it may either impose a given course of commercial conduct (setting up or terminating different supply relationships) or order the divesture of a given part of the business forming part of the economic concentration operation.

The Competition Law also provides that in case an economic concentration operation is implemented and that it is incompatible with a normal competitive environment or when it is implemented in disregard of a conditional clearance decision, the RCC has the power to order the parties to dissolve the economic

concentration operation. As per the data and information that we hold, the RCC has not made use of such legal prerogative so far.

The RCC adopted one decision[9] specifically concerning the taking over by a large grocery supplier of the goodwill pertaining to smaller competitors thereof, but it does not insist on the grounds for merger. It nevertheless results that the rather insignificant impact of the operation on the relevant market was the main argument for the RCC's clearance, rather than the countervailing force of retailers. The other decisions passed by the RCC concerning mergers between grocery suppliers concern different change of control in the share capital of retailers active on the Romanian market.

As the Romanian retail market was marked by the late entry of the modern forms of grocery retail, the large retail chains opted for Greenfield investments and have only recently pursued the acquisition of preexisting brick-and-mortar shops. In the cases of Profi, Mega Image and Carrefour, all three retailers notified the RCC with respect to the acquisition of stores and goodwill that pertained to local competitors. On the other hand, in the case of Profi (having its national headquarters in Timisoara, a city in Western Romania), its acquisition of the "Albinuta" stores located in Bucharest represented the gateway into the largest urban retail market.

None of the RCC decisions rendered in the cases mentioned above has retained as grounds for clearance the need to counterbalance the increasing (negotiation) power of the grocery suppliers.

The RCC may either, on one hand, oppose and prohibit a merger or, on the other hand, clear it subject to behavioral or structural remedies. Although RCC has always benefitted from such power, in its entire 17-year history it opposed a single proposed economic concentration operation and imposed remedies on a limited number (under 10) of such operations. However, from the data and information that we hold, the RCC never imposed remedies in respect of economic concentration operation taking place in the grocery retail market.

Nevertheless, at the date hereof, the RCC assessed the proposed take-over by Auchan of all but four Real hypermarkets in Romania. The RCC held a public consultation on the matter and has rendered a much-debated conditional clearance in respect thereto.

From another perspective, the business of selling grocery via the Internet is rather novel to the Romanian market. There are several online platforms offering such services, but Romanian consumers usually prefer to purchase groceries from traditional brick-and-mortar stores. Moreover, at the moment of 2009, the RCC Report did not even take into consideration this particular form of modern trade when assessing the degree of competition between traditional and modern forms of retail or between different types of modern retail.

[9] Decision no. 247/22 December 2006 concerning the economic concentration operation achieved by the acquiring of joint control by S.C. Angst-Ro S.A. over S.C. Discovery Prodimpex S.R.L. and S.C. 2T Prod S.R.L.

Nevertheless, one has to consider the specific types of businesses conducted via Internet stores. If we are to refer to issues of fairness, there have been situations in which online stores were selling different branded products that were proven to be counterfeit or in respect of which IP rights protection was not exhausted. However, such incidents have been scarce and did not fall under the scope of the Competition Law so as to be reviewed by the RCC.

As mentioned above, the general legal framework applicable to the sale of grocery is consecrated in both GO no. 99/200 and Law no. 321/2009. Although they concern mainly the sale of grocery (and nonfood products) via the classic brick-and-mortar shops, their provisions must be applied *mutatis mutandis* to the activity of the Internet stores (e.g., sale at prices below costs or discounted sales).

15.5 Dominance and Abuse

15.5.1 Legal Framework

The Competition Law provides in Article 6 that the abuse of dominant position is prohibited. Paragraph (1) thereof exemplifies the forms that such an abuse may take, and among those forms is the "exploitation of a state of economic dependency of an undertaking that does not have an alternative solution under equivalent conditions." Although the RCC issued a series of guidelines and regulations for the application of the provisions of Article 5 (prohibiting anticompetitive practices) and merger control rules, a secondary legislation detailing the scope of Article 6, which prohibits abusive conducts, was enacted. Thus, there is no statutory definition of the buying power or of the exploitation of dependency. However, a number of the RCC's previous decisions follow the decision-making practice of the European Commission and the case law of the European Court of Justice.

For instance, in one of its landmark decisions on the abuse of dominance, concerning the National Post Company,[10] the RCC indicated (paragraph 193) that the prohibition of exploiting a state of dependency is incident inasmuch as alongside the general conditions that must be met for the identification of an abuse, certain cumulative conditions are also satisfied:

- the existence of a state of economic dependency of an undertaking towards another while the former does not have an alternative solution under equivalent solution, and
- the exploitation of such state of dependency.

Whether a state of dependency exists or not depends on the existence of an alternative solution under equivalent conditions for the company in question. The RCC further points out that the lack of an equivalent solution can be argued where

[10] Decision no. 52/16.10.2010.

the market does not provide for a supply source or where eventual substitutes compromise the competitiveness of the dependent undertaking. The RCC further points that the exploitation of the state of dependency is achieved via one of the conducts listed at letters a)–e) of Article 6, to which the termination of contractual relationships due to the undertaking's refusal to submit to unjustified commercial conditions is added. Consequently, the RCC indicates that the exploitation of dependency is absorbed in the content of the deeds listed under letters a)–e) of Article 6 and operates as a circumstance that qualifies the subject that performs the abuse. In other words, excessive pricing and discrimination absorb within their contents the exploitation of a state of economic dependency, fact that may be taken into account as an aggravating circumstance when sanctioning the abuse. As such, it could not be considered as a distinct misdemeanor.

The above-cited RCC decision is currently reviewed by the competent courts.

Article 6 paragraph (1) of the Competition Law is clear in providing that any abuse of dominance on the Romanian market or on a substantial part thereof is prohibited. Given such wording, there have not been any discussions on whether abuses of dominance are prohibited only in the cases in which they restrict competition on a given market. The general opinion of both RCC and courts is that abuses of dominance are per se prohibited under Article 6 of the Competition Law.

The only point of intense discussion is the recent enactment in the Competition Law [Article 6 paragraph (3)] of the rebuttable presumption that a market share of 40 % is a clear indication of dominance. Therefore, defining the relevant market and the allocation of the corresponding market share are points of debate in Article 6 cases.

There are no statutory definitions for the concepts listed above. Therefore, the RCC follows the decision-making practice of the European Commission and the case law of the ECJ.

15.5.2 Abuses of Buying Power or Dependency from the Perspective of the Competition Council

The following have been identified by the RCC as cases in which of economic dependency was exploited by a dominant company:

- the charging by the National Post Company to different publishing houses and other undertakings of unreasonably high prices for the services of delivering advertisements via post to end consumers,
- the increase by a producer of wooden products of increased prices to its clients on the Romanian market immediately after finalizing an economic concentration operation concerning to top Romanian producers of wooden products and the eventual acquisition of a dominant position of the market despite the conditional clearance of the merger operation by the RCC,

– the charging by an undertaking active on the market for natural-gas-related services of tariffs for issuing necessary endorsements for works undertaken by third parties that were ten times higher than the tariffs charged for similar work undertaken thereby.

15.5.3 Recommended Resale Prices & RPM

As a general rule, minimum and fixed resale prices are prohibited under Article 5 paragraph (1) of the Competition Law, in line with the rules laid down in the European Commission Guidelines on Vertical Restraints, which are of direct application by the RCC following the 2010 amendments to the Competition Law. Nevertheless, under the provisions of Article 5 paragraph (2) of the Competition Law (the national correspondent of Article 101(3) TFEU), price recommendations that are generally considered to be anticompetitive may theoretically be exempted when three cumulative conditions are met: (1) they contribute to the improvement of production while ensuring an advantage to the end consumer, (2) the restrictions imposed are indispensable for attaining such objective and (3) they do not give way to eliminating competition on the relevant market or on a part thereof. Although such a solution is not impossible, the RCC did not render any decisions in this respect.

Resale price maintenance (*RPM*) is a clear-cut prohibition under the Competition Law. Reselling below costs is a form of predatory pricing also prohibited under the Competition Law. Nevertheless, as previously mentioned, reselling below costs is also prohibited via GO no. 99/2000. It is also prohibited under Law no. 321/2009 via a text in the chapter on prevention of anticompetitive practices. Lastly, delisting of a supplier by a reseller is prohibited without just cause, such prohibition being laid down in the same chapter of Law no. 321/2009.

15.5.4 Treatment of Abusively High Prices Under Competition Law

Excessive pricing is regarded as a form of abuse of dominance under the provisions of Article 6 paragraph (1) letter e) of the Competition Law. It prohibits a company in a dominant position from charging excessive or predatory prices with a view to eliminating competition.

In determining whether prices charged by a dominant undertaking are excessive or not, the RCC follows in the footsteps of the European Commission as far as the applicable standards are concerned. For instance, in a 2004 decision,[11] the RCC found that an undertaking that has just achieved its dominant position on the Romanian market of wooden products (following a conditional clearance decision

[11] Decision no. 329/22 December 2004 concerning the infringement of Article 6 letter a) of the Competition Law by S.C. Kronospan Sepal S.A.

from the RCC itself) was charging excessive prices to its clients. In order to find that prices charged were excessive or not, the RCC proceeded to investigate whether the level of prices was supported by the level of production costs.

15.5.5 Confrontations Between Private Grocers and Large Retail Chains

Public records show no official complaints filed on such subject with the RCC. However, there have been different initiatives from associations (customarily referred to in Romania as "unions," although such is incorrect in terms of legal language) for the protection of Romanian producers against competition from lower priced imported grocery. From our information, such situations were to be found prior to 2009—the year when the Ministry of Agriculture launched the Code for Best Practices in the Trade of Grocery Products, an initiative later materialized in Law no. 321/2009.

Although the RCC has to our best knowledge no decision-making practice covering this particular aspect, applying *mutatis mutandis* other decisions, a few assertions can be made. An understanding aiming at limiting supply may be found to be restrictive of competition. It need not affect the entire Romanian market, the Competition Law being applicable even in the case where a substantial part of the national market is affected (the question of defining a substantial part of the market is to be determined on a case-by-case assessment). In such a case, the discussion from the perspective of competition law will most likely focus on whether it is a restriction of competition by object or by effect. Following the trend established by the European Commission and upheld by the ECJ, the effects of said practice should also be assessed in order to determine an infringement of competition rules.

15.6 Highlights of the Competition Council's Work

15.6.1 Grocery Sector

Apart from the two above-mentioned cases of "bread cartels," in the past 5 years the RCC has rendered a single decision relating to the behavior of grocery retailers.

Thus, in 2011, the RCC sanctioned[12] Profi (one of the main grocery retailers), Interfruct (a supplier of fresh fruit) and Albinuta Shops (a local retailer from Bucharest) for price fixing. Specifically, the RCC found that the fresh fruit supply agreements concluded by Interfruct with Profi and Albinuta Shops on March 2009 (for a duration of 8 months) contained a price-fixing clause whereby the shelf prices

[12] Decision no. 18/31 May 2011 concerning the infringement of the provisions of Article 5 paragraph (1) letter a) of the Competition Law by S.C. Interfruct S.R.L., S.C. Albinuţa Shops S.R.L. and S.C. Profi Rom Food S.R.L.

of the fruits supplied by Interfruct were to be determined by the latter. Following the expiry of said agreements and the launching of the investigation, the contracts were replaced and the price-fixing clause was eliminated. Nevertheless, the RCC sanctioned Interfruct and Profi (which in the mean time took over Albinuta Shops) with fines amounting to EUR 4 million.

The RCC launched four investigations in the grocery retail sector following the initiation of the Sector Inquiry. The outcome of these four proceedings, involving four of the major food retail chains in Romania (Metro, Selgros, Billa and Mega Image) and their suppliers investigated for alleged anticompetitive pricing practices, is expected in 2013.

Under the Competition Law, the RCC has the prerogatives of enforcing competition rules at any level and in any field of the economy. As such, it may deal with horizontal anticompetitive practices at local level.

Specifically, the RCC has undertaken two investigations on local markets for bread production and distribution in the Maramures and Vrancea counties of Romania, further to which sanctions have been imposed on a total number of 48 companies. The anticompetitive practices that were investigated concerned the price formation on the production–distribution–retail chain of bread products in the two counties.

As per the Competition Law, the RCC may act either *ex officio* or further to complaints being lodged therewith. In order to have a clear image of competition on the entire Romanian territory and for the purposes of prompt and coherent law enforcement, the RCC operates regional offices in all of Romania's 42 counties. Such offices may conduct investigation proceedings, may depose witnesses and may receive complaints.

15.6.2 Other Leading Cases Concerning Abuse of Dominance

In the past 5 years, the RCC rendered two decisions that are concerned with the issue of excessive pricing:

(i) *a decision of 2010, finding the National Post Company* (the "NPC") *guilty of abuse of dominance*[13]—the case was brought by seven undertakings alleging an abuse of dominance by the NPC on the market for internal delivery of advertisements via post—"Infadres," one of the charges brought against the NPC being that of excessive pricing for its dedicated services. The decision at hand contains an entire section dedicated to the issue of excessive prices and the RCC's standpoint in respect thereto. It is the RCC's view (based on the ECJ ruling in *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*[14]) that "a price is excessive when

[13] Decision no. 52/2010.

[14] ECJ of 14 February 1978, case 27/76, *United Brands Company and United Brands Continentaal BV v Commission*, ECR 1978 207.

it is significantly higher than the level of effective competition or than the economic value of the product concerned." The RCC further cites the ECJ case law in *Case COMP/A.36.568/D3 – Scandlines Sverige AB v. Port of Helsinborg* and underlines that the method for determining the existence of an excessive price supposes two steps:

- the analysis of production cost-price, which ought to reflect the profitability of providing the service, and
- the assessment of the situation in which the price is either *per se* inequitable (either there is an unreasonable difference between the price charged and the economic value of the product/service concerned or such inequitable character derives via a comparison with the prices of other products).

In determining the economic value of the product, one has to consider both cost-related and non-cost-related elements deriving from the interaction between supply and demand in the context of existing market conditions. If there is a positive difference between the price and the production cost and such difference exceeds what can be considered a reasonable profit margin, that price is not excessive. This finding is conditional upon the existence of a reasonable relationship between said price and the economic value of the product/service.

Notwithstanding the above, it is the RCC's optic that it is not necessary to undertake the entire test should the completion of the first step indicate the existence of an excessive price.

(ii) *a decision of 2012 finding that a company active in several local markets for natural gas distribution, design of gas installations and execution of gas installations was abusing its dominant position via excessive prices charged for (i) the activity of endorsing projects for the execution of gas installations and (ii) for the activity of final reception of natural gas installations in three communes of the Prahova and Ilfov counties.*[15]

In this case, the RCC proceeded to the comparison of the tariffs charged by the investigated company for the endorsement of projects and the reception of works undertaken by its personnel with the same tariffs charged should the project and/or works had been performed by third parties. The RCC found that in the first case (endorsement) the tariffs were 3–18 times higher and in the second case—reception of works—they were 3–10 times higher if the services gas installation services were performed by third parties and not by the investigated company.

[15] Decision no. 50/05 September 2012 for the acceptance of commitments offered by S.C. PROGAZ P&D S.A. in the course of the investigation launched via Order no. 342/2010 of the Chairman of the Competition Council.

The case was settled via a commitment procedure without any fines being imposed.

15.7 The Intertwining Relationship Between Competition Laws and Regulations and the Enactments Governing the Sale of Groceries

15.7.1 Main Rules in the Grocery Retail Market Structures

The main general enactments governing the grocery retail sector are, as previously indicated, GO no. 99/2000 and Law no. 321/2009. On one hand, GO no. 99/2000 governs the general conduct of business on the retail market while containing certain competition law provisions necessary for the maintenance of a normal competitive environment, and, on the other hand, Law no. 321/2009 has a prominent competition law character, regulating certain specific behaviors from part of retailers in relation to their suppliers.

As detailed in the paragraphs above, the provisions of the Competition Law are of general application and, as such, manifest a public order character. Therefore, the legislator was always cautious so as not to derogate via sector enactments from the spirit of the regulations in the Competition Law. Therefore, the principles laid down in Articles 5 and 6 thereof were adapted so as to fit specific situations, as is the grocery retail.

GO no. 99/2000 provides for rules in the following fields of grocery retail: (1) criteria to be observed for the purposes of undertaking grocery trade; (2) hourly schedule for operation; (3) duties and obligations of public (regulating) bodies in respect of grocery retail; (4) commercial practices—covering the issue of discounted sales (such as timing, implementation or advertising); (5) rules on labeling, price indications, abusive clauses; and, lastly, (6) sanctions for the infringement of GO no. 99/2000. Of such principal lines of enactment, the following provisions are paramount:

- sales can be undertaken only by qualified personnel that has been duly authorized pursuant to the law;
- sales can be performed either from brick-and-mortar shops or from itinerant outlets;
- sale outlets may be open to the public on all weekdays;
- discounted sales can refer either to the retailer's entire merchandise or only to a part thereof (duly notified to the local authorities as such) and may take – *exempli gratia* – either one of the following forms: liquidation sales, seasonal discounted sales, sales via factory outlets, promotional sales. All such forms of sales abide by the prohibition of predatory price cutting (sale at loss), rule which admits several exemptions (liquidation sales, seasonal discounted sales, sales via factory outlets, sales of products subject to rapid deterioration etc.);

- all advertisements related to discounted sales must clearly indicate the period within which such are undertaken by the retailer;
- seasonal discounted sales may be undertaken only twice a year, each such period covering maximum 45 days and may only be undertaken by the retailer from the outlets it normally uses for the sale of its merchandise.
- certain commercial practices are prohibited: (i) pyramidal sales, (ii) snowball sales, (iii) any other type of sales that entail the offering of products/services by making the client believe that it will obtain them for free or at a price much lower than the real value thereof, while conditioning the sale by the placing of coupons (or other similar tickets) to third parties or by the collection of adhesions or subscriptions and (iv) the deed of proposing to a person to collect adhesions or to enlist by making such person hope for winnings pursuant to the growth of the number of recruited or enlisted persons.
- sales' networks are prohibited from requiring the adherent to pay a fee for the entry in the network.
- sale lotteries are admitted inasmuch as the participants are not required any expense supplementary to the price paid for acquiring the products/service.

The legal provisions detailed above, as well as the rules laid down in the Competition Law, are of general application, irrespective of the dimension and market power of the retailer.

Generally, Internet stores abide by the same rules as brick-and-mortar stores and itinerant outlets relating to the indication of prices and quantities, the restriction on sale lotteries, the prohibition of pyramidal sales and of the other unlawful commercial practices mentioned above, etc.

15.7.2 Sector-Specific Perspectives on Resale Below Cost, Delisting of Suppliers and RPM Practices

Reselling below costs is caught by all three major enactments that have been presented herein: the Competition Law, GO no. 99/2000 (which provides for the necessary exemptions from such prohibitions) and also Law no. 321/2009 (which refers to the provisions of GO no. 99/2000 and thus acknowledges the necessity—from the perspective of competition law—of the exemptions provided therein).

Delisting of suppliers is a practice caught as anticompetitive by the provisions of Article 7 of Law no. 321/2009. The practice was also indicated as such by the RCC Report, which indicated this practice as being abusive in the supplier–retailer relationship. Nevertheless, delisting of a supplier does not fall under a general prohibition, and it may be undertaken by the retailer for just cause. Delisting must be undertaken following a notification being served by the retailer to the supplier, with the exception of the case in which the supplier falls under contractual responsibility. Delisting must in any case be fair to the supplier, and thus the retailer is under the obligation of refunding the supplier with any moneys the latter has paid for the listing of its products as per the agreement concluded with the retailer.

In its turn, RPM is only caught by the provisions of the Competition Law.

15.7.3 Price Control

To our best knowledge, there are no regulations concerning price controls. The Government issued Decision no. 947/2000 concerning the manner of price indications on products offered for sale to consumers,[16] but this particular enactment contains provisions related only to the technical aspects of price display on food products.

As to the role of the RCC in such cases, under the procedure of adopting legislative texts, the point of view of the RCC—usually rendered by the latter in the form of an official consultative (and thus not binding) endorsement—must be sought on all economic regulations that are likely to impact the competitive environment in the Romanian marketplace.

15.8 Aspects Concerning Large-Scale Food Retailing and Vertical Relationships Between Suppliers and Retailers

15.8.1 No Statutory Limitation of Market Power in the Grocery Retail Sector

To our best knowledge, neither Parliament nor Government has issued regulations with regard to the contractual relationships between large-scale food retailers and small suppliers or small-scale retailers.

In the adoption of such rules, the role of the RCC would be that of rendering a nonbinding formal endorsement (which can be either in the positive or in the negative) with respect to the adoption of such enactments. In what the eventual enforcement of such legal provisions would be concerned, the RCC would not intervene should it not be empowered in that respect via such text of enactment.

Although rather specific to common law legal systems, the concept of "level-playing field" may be found in several texts of enactment of the Romanian legal system. Article 1 of Law no. 11/1991 provides that persons engaged in commercial activities (be they legal or natural persons) must undertake such activities in good faith, pursuant to honest commercial uses, also abiding by the interests of the consumers and the prerequisites of fair competition. Apart from being consecrated as a principle of commercial activities in the wake of the passage from socialist economy to market economy, "fairness of transactions" is also a guiding principle of Romanian Law, being a pillar for safeguarding the civil circuit of goods.

[16] Republished in the Official Gazette no. 643/09 September 2008.

The Competition Law makes no distinction whatsoever as to the addressees of its provisions. Nevertheless, in an economy such as the Romanian one, the need to foster individual private initiative and to stimulate individual production has determined the Government to render certain rules concerning the conducting of grocery retail inapplicable inasmuch as individual private producers are concerned.

Thus, Article 3 paragraph (3) of GO no. 99/2000 expressly provides that the provisions thereof are inapplicable inasmuch as the agricultural and food products sold by individual agricultural producers pursuant to a producer certificate are concerned. The producer certificate is an endorsement issued by the local public authority attesting to the fact that the individual retailer is a producer of the goods its sells.

From our perspective, such a provision enacted in the key legislative text for the retail sector ensures a public policy in favor of individual producers and retailers that are exempted from said rules.

15.8.2 Negotiating Practices and Unfair Trade Law

As previously mentioned, the Romanian enactment on unfair competition, Law no. 11/1991, was adopted by Parliament at the beginning of the transition of the Romanian economy to the level of market economy, and as such it misses out on certain relevant aspects of competition specific for the achievement of a normal competitive environment.

Article 5 of the Competition Law contains prohibitions on pricing practices that may prove anticompetitive (at either vertical or horizontal levels), as does Article 6 with respect to the conduct of dominant undertakings. Nevertheless, following the issuance of the RCC Report and the adoption by Parliament of Law no. 321/2009, a bit of light was shed upon the competition law regime of certain pricing practices.

Thus, Article 4 of Law no. 321/2009 provides that retailers are prohibited from requiring the suppliers to pay for services that are not directly linked to the sale operation. Moreover, the retailers are also precluded from requesting the payment of any fees or tariffs related to the expansion of the retailer's network, the development of its sale space or the operations and events for promoting the retailer's activity and (brand) image. Thus, from this perspective, slotting allowances that are not directly related to the services offered by the retailer are prohibited. The instrument that is to be used in determining the issue of permitted and prohibited slotting allowances is the RCC Report, which contains a comprehensive list thereof. Additionally, the RCC Report also recommended the elimination of the use of MFN clauses from the pricing practices of the retailers, given that certain slotting allowances are nevertheless permitted.

Article 8 of Law no. 321/2009 regulates the issue of payment terms in the supplier–retailer relationship. As a general rule, the payment term is subject to mutual agreement between the supplier and the retailer and consecrated via the supply agreement that the two parties conclude. The exception from such rule is represented by meat, milk, eggs, fruits, vegetables and fresh mushrooms in respect

of which the payment term may not exceed, in any circumstance, 30 days. Delayed payment terms are subject to contractual liability.

15.9 Conclusion

Although it would be best to await the RCC's conclusions concerning the four investigations on the grocery retail and supply markets, there is at least one thing that needs more clarification in order to be consistently enforced.

Pricing practices at the supplier–retailer level are of paramount importance to the safeguarding of a normal competition environment in the relevant market. Therefore, we deem that it would be appropriate for the RCC to issue a set of guidelines on the matter of slotting allowances, MFN clauses and buying and negotiation power. Although the RCC argues in its Report that such should not acknowledge an overregulation, we deem that such guidelines—a tool of enforcement of the Competition Law nevertheless—would serve suppliers and retailers as well.