

## The Romanian Competition Authority imposes an 8% fine to an Association of undertakings for price fixing and refers for the first time to criminal investigation bodies (*Association of the Depositories of Cereals*)

**KEY WORDS:** ROMANIA - ANTICOMPETITIVE PRACTICES - ASSOCIATION OF UNDERTAKINGS - PRICE FIXING – LIABILITY (PERSONAL) - SANCTIONS/FINES/PENALTIES - SERVICES

**Price fixing** by associations of undertakings is no novelty in the competition world. Neither are **heavy fines**, although it is not often that a competition authority reaches an **8% fine** for a **short term infringement** (be it price fixing), and **without** application of any **aggravating circumstances**.

But while **criminal liability for competition infringements** has so far existed only in theory in Romania, the practice seems to be on its way, with issuance by the Competition Council of its Decision 63/2009.

### A. The road from the statement of objections to the Competition Council's decision

Following price increases of bakery products in several counties in Romania, on 23 May 2007, the Competition Council launched an investigation regarding a potential breach of article 5 (1) of the Competition Law by the undertakings and associations of undertakings active on the bread market in Romania and on related markets. Dawn raids were of course a usual ingredient of the investigation.

The statement of objections was issued by the case team 2 and a half years later, which, considering the number of undertakings involved, and especially compared with certain 5-year investigations in the Competition Council's portfolio, seems to indicate a more efficient handling of investigations.

It concluded that (a) the 17 undertakings active on the wheat storage market were part in an anti-competitive understanding to fix prices and (b) the association of undertakings took an anti-competitive decision to fix prices. The two conclusions were given a different treatment by the Plenum of the Competition Council: the statement of objections was overturned due to insufficient evidence insofar as the first conclusion was concerned, and upheld for the second conclusion.

### B. Again on the standard of proof - too high? Insufficiently proven?

The **first major question** raised by the Decision: **how high is the standard of proof required from the case team?**

With respect to its first conclusion, not supported by the Decision, the statement of objections argues that within a meeting of the Association held in 2004, the undertakings «*expressed their*

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*common wish to act on the market in the same manner, respectively decided by consensus to charge a (...) tariff».*

The **case team brought as supporting evidence** for the conclusion that 17 undertakings dealing with wheat storage agreed to fix the storage tariffs during the meetings of the association several documents:

- ▶ the agenda of a general meeting of the association (*which, if judged critically, to the author's opinion, did not actually include any decisive proof*);
- ▶ a letter from the president of the Association regarding the respective meeting, mentioning that several members requested that the issue of tariffs is included and on the agenda (*again, not decisive*);
- ▶ the letter accompanying the meeting minutes in which the president of the Association mentioned that it is necessary that the Association decides on a unitary structure of tariffs, and requested the members to transmit the tariffs so that they can be synthesized and sent to the members (*to the author's opinion, no proof of actual understanding between the members*);
- ▶ the meeting minutes, which actually state that the president of the Association proposed that the reference tariff remains at the same percentage level, taking into account that most of the members set the tariff at a 8-10% level of the wheat price (*insufficient to establish an understanding between the members*);
- ▶ an answer transmitted in December 2004 by the Association to another association, mentioning that storage tariffs differ from one member to another (*this seems to prove anything but an understanding*), but that the matter of reference tariffs was discussed within the Association (*insufficiently clear*);
- ▶ the list of decisions taken during that meeting, providing that the general meeting of the Association approved that the level of tariffs remains at the level of the previous years, of 8-10% (*this seems to provide more than the meeting minutes do*);
- ▶ a press release issued by the Association mentioning the decrease in tariffs.

The statement of objection further notes that the members did not challenge the decisions in the meeting (there was no attempt to publicly distance themselves).

The statement of objections seems to acknowledge that the documents listed as evidence are not conclusive, each taken separately, since it mentions that it is sufficient that the entire set of evidence, viewed as a whole, meets the standard of proof, by way of corroboration.

The **parties argued in their defense** that:

- ▶ the meeting minutes were drafted by the president of the Association after the meeting, they do not accurately reflect the debates, they only mention the aspects proposed by the president, and not the debates or discussions with the members;
- ▶ the list of decisions provides that the Association approved, while the meeting minutes provide that the president of the Association proposed that the level of tariffs remains at the same level;

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- ▶ the meeting minutes and the list of decisions were prepared by the president of the Association (the members often challenging his manner of preparing them) and transmitted to the members in 32 days instead of 7, as per the statutes, so they were ignored;
- ▶ the price policy was determined by each undertaking in January, and made public at the beginning of June; the communication of the meeting minutes in the second half of June could not determine the price policy;
- ▶ the documents subsequent to the 2004 meeting clearly show that there was no understanding on prices in that meeting.

The **Competition Council's conclusion**: the evidence could not demonstrate the parties' will in committing the anticompetitive act, also taking into account the fact that in 2004 the state authorities intervened on the market, by way of subvention of the storage tariffs, and no measures or actions taken by the parties proving their will could be identified.

The **standard of proof required is described by the Council** as «*sufficiently precise evidence to determine a firm belief*». While «*sufficiently precise*» is rather moderated, «*firm belief*» seems to raise the standard of proof to a higher level, more re-assuring for undertakings.

### C. How wide is the competition authority's discretion in setting the fines?

The **second major question** raised by the Decision: **how wide is the discretion of the competition authority in setting the fines?**

Within the limits of the 10% maximum level allowed under the applicable rules, the effects of the 2006 revised **Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation n° 1/2003** (OJEU C 210, 1st September 2006, p. 2-5) are quite clear: we have seen significantly higher fines imposed by the Commission to the undertakings breaching competition rules.

One could think that the 8% fine is the result of this pattern. However, the Competition Council's guidelines for setting the fines were issued in 2004, following the model of the older EU guidelines, and have not (yet) been brought to the level of strictness of the EU rules.

This could be either because, as it is the case of all national competition authorities, the Competition Council retains full discretion insofar as the fining policy is concerned, or because it is only now that the regulations and guidelines are in the process of being revised (starting with the revised Leniency Guidelines, in September 2009).

The setting of fines therefore takes into account the classical rules: assessment of gravity and duration for determining the basis level (between 4% and 8% for very serious infringements, such as price fixing, and no additional increase for short duration infringements, of less than 1 year), followed by application of aggravating and mitigating circumstances.

Looking at the result and at the above mentioned rules, the reasoning of the Competition Council in this case seems to be quite straightforward: very serious infringement (although the Decision erroneously refers to the infringement as «serious», which would only have allowed it to apply a 4% basis level) + short duration + no aggravating circumstances = 8%.

Should we expect that from now on the Council will go for the maximum level allowed by the guidelines (including for understandings/decisions not implemented)? Or should we place this fine

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in the context of the bigger picture: the level of the revenues to which the fine was applied was so reduced in this case, that the Council sought to maximize the effects of the fine? The second alternative seems to provide a more reasonable answer.

## D. Criminal liability for competition infringements - an open door

The **third question** raised by the Decision resides in the conditions for triggering criminal liability for competition law infringements.

The Competition Council ascertains the «*determining role*» of the (former) president of the Association in «*conceiving, organizing or performing*» the actions infringing competition rules (i.e., the price fixing decision taken by the Association in July 2004, not implemented by the members), which represents an indication of possibly committing the criminal offence provided by the Competition Law, and refers the matter to the criminal investigation bodies.

It became evident throughout the Decision that the president proposed the agenda of the meetings, and sent regular mandatory instructions on the members' market conduct; but the decisions were taken by the council of the Association, which included other persons too, and not only by the president.

The **Decision**, which is **the first to refer the matter to the criminal investigation bodies**, does not give other detail, but **raises many questions**:

- ▶ Which is the standard for the «determining role»? Will it only be taken into account the effective action, or will failure to act (if «determining») have a role too?
- ▶ Will criminal liability act as deterrence, more effective than fines?
- ▶ How will criminal liability put in practice impact on leniency?
- ▶ Which is the most exposed level of management in a firm?
- ▶ What happens when the decisions are taken by several persons? Does sharing the decision result in making it difficult to establish a determining role? Or does it create the risk of potential criminal liability of all decision makers?
- ▶ How will the procedure initiated by the criminal investigation bodies correlate with a potential challenge of the Competition Council's decision?

The Decision is merely an open door, through which have already entered many questions, to be answered by the continuation of proceedings in this case, and probably by future cases of application of the criminal liability for competition infringements.

## E. How important are sector inquiries?

The **fourth question** raised by the Decision is **the importance of sector inquiries**. More often than not, lately, sector inquiries triggered the launching of targeted investigations after or at the same time with the market analysis. This time, the targeted investigation was launched before the sector inquiry, and both of them took place at the same time. In June 2007, the Competition Council also initiated an analysis of the entire sector and in September 2009 it issued a Report, with two conclusions relevant for the context of the Decision:

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- ▶ First, the Report mentions that while storage tariffs are freely determined on the market on the basis of demand and offer, between 2004 and 2005, there were two state interventions regarding the price (by means of subventions of storage costs) which could lead to an alignment of prices. It is no coincidence that the price fixing dates from 2004.
- ▶ Second, the Report states that the situation in 2007, when historical maximum levels were reached, had a preponderantly '*conjoncture*' nature, being linked to the extremely reduced level of worldwide production. And yet, the investigation having led to the issuance of the Decision was launched due to price increases having occurred in the same period.

Sector inquiries seem to be therefore the more and more useful and relevant for targeted investigations.

## F. Open questions, for the next decision

All the above questions, and many others, will for sure find (significantly or slightly) different answers, and will have new other (related) questions added to them, in the next decisions to be issued by the Competition Council. And judging from the number of investigations already pending and of investigations recently launched by the Competition Council, this will be not before long.

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