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## **Global Forum on Competition**

### **ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT**

#### **Contribution from Romania**

-- Session II --

*This contribution is submitted by Romania under Session II of the Global Forum on Competition to be held on 8 and 9 February 2006.*

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## **ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT**

1. Romanian Competition Council has at present legislative instruments which allow it dealing with competition issues similar with the competition authorities from European Union, the Romanian antitrust legislation being in line with the provisions of the communitarian one.

2. The enforcing of the Competition Law and secondary legislation in this field is a major objective of the Competition Council; to achieve it, the Council has focused its resources principally on the most serious distortions of competition. As any competition authority, Romanian Competition Council applies oneself to discovering and stopping the agreement for fixing prices, output, for sharing the markets or clients, big-rigging or such like practices realised by competitors.

3. Cartels are forbidden by the Romanian Competition Law no.21/1996. Without an evident definition of “the cartel”, Art. 5 par. (1) of the Law (which is similar with the Art. 81 of the EU Treaty) provides a non-exhaustive list of the most severe violation of the competition, such as:

[...] Any express or tacit agreements between undertakings or associations of undertakings, any decisions by associations of undertakings and any concerted practices, which have as their object or have as their effect the restriction, prevention or distortion of competition on the Romanian market or on a part of it, shall be prohibited, especially those aimed at:

- Concerted fixing, directly or indirectly, of the selling or purchase prices, tariffs, rebates, markups, as well as any other terms of trading;
- Limiting or controlling production, distribution, technological development or investments;
- Allocating distribution markets or supply sources according to territorial criteria, sales-and purchase volume or other criteria;

[...]

- Participating, in a concerted manner, with bids rigged in auctions or any other forms of competitive tendering.

4. An indirect definition is done also through establishing a lower “de minimis” threshold for agreements between competitors (the total market share < 5% comparative with 10% for non-competitors’ agreements) and through the provision according to which in the case of the agreements regarding prices, sharing the markets and the procurements, the “minimis” condition is not applied.

5. The distinction between the agreements which have as their object and those which have as their effect the restriction of the competition is very important, taking into consideration the probative evidences which the prosecutor must discover/constitute. If it is found that the agreement has as its object the restriction of competition, meaning that it is an agreement prohibited “per se”, it is not necessary to prove the concrete harmful economic effects, knowing already that this conduct is leading to an inefficient repartition of the resources, rising in prices and to prejudices for consumers.

6. This principle is not provided for in the Law's text but by the secondary legislation, and until now the Courts have held the Competition Council decisions, meaning that the anticompetitive effects of such agreements on competition should not be demonstrated.

7. Regarding the type of the agreement, which leads or may lead to a restriction or elimination of the competition on a market, this can be an express one – a document which reflects very clearly the purposes of the subscribers – or a tacit one. The evidence of the parties' intention to restrict competition is an important element but does not represent a necessary condition in sanctioning a cartel, in the case of the Romanian legislation. In spite that, the indirect evidence of an agreement, such as correspondence between competitors, telephone logs, together with any other evidence of a meeting between cartel operators, which must be very carefully connected with economic analysis of the market (the evolution of the prices in a certain period, characteristics of the market, similar comportments of the competitors) can constitute evidence for prosecuting a tacit cartel. These indirect evidences should be enough consistent to cover the lack of the document or the explicit prove.

8. The experience of the Competition Council in the field of hard core cartels emphasises that, for the most part of the cases, a document which was describing very clearly the intention of the subscriber to act concerted and to distort competition on the market was the basis for prosecuting. Nevertheless, there were situations when these kinds of practices were incriminated only with indirect evidences.

9. In this manner, in the case of the tendering organised by the Minister of Home Affairs of Romania for the procurement of laser equipment for surgery, three firms were sanctioned for participation, in a concerted manner, with rigged bids. The evidences of the prosecutor were the following:

- For all 5 auctions organized by the Minister, in the same year, only one firm won – Wilhelm;
- The Minister asked for offers from Wilhelm, Temco and a National Institute of research, receiving offers only from Wilhelm and other 2 companies which had not been asked for an offer, Ducatex and Master; these two companies sent the biddings following the information received from Wilhelm;
- The offers of the two companies, Ducatex and Master, were realised on the Wilhelm's type and even sent from the Wilhelm's fax;
- The offer of Master was signed by an associate of Wilhelm;
- The activities of the two firms did not have any connection with the medical field not with laser equipments; the firms did not have the special notice from the Ministry of Health necessary for commercialisation of medical equipment;
- The representatives of Ducatex and Master sustained the fact that they sent the offers for promoting but they could not prove the connection with the medical field both prior to the auction and afterwards;
- On the Romanian market of the laser equipment were present many undertakings, in special importers.

10. The conclusion of the investigative team was: Wilhelm contacted the two firms informing them about the intention of the organiser to purchase medical equipment and the other details regarding the auction especially to eliminate the competition; the two firms participated in the tender without any

intention to obtain the order from the Minister but for permitting Wilhelm to win. The sanctions applied were low having in view that the maximum threshold provided by Law at that time was ROL 250 million (through modification of the law in 2003 the maximum amount of the sanction became 10% of the total turnover of each undertaking). The decisions of the Competition Council through which the three firms were sanctioned have not been appealed before the Court.

11. Regarding the objective to prosecute hard-core cartels as aggressively as possible, the fact that it does not exist or it have not been funded an explicit agreement between the competitors on a certain market, instead existing many other evidences which proves the behaviour of those in the direction of eliminating the competition between them, this fact should not represent an impediment for meeting the goal.

12. On the other part, it is theoretically possible that an in-depth economic analysis might reveal the fact that a price fixing cartel, for example, had no considerable effect on prices despite the explicit intent of the participants. Since this will be rather exceptional in practice because these kinds of practices have always or almost always a negative effect on competition, it can be justified by limiting the costs of proceedings and saving up the resources which should have been used in the case of analysing the effect of the cartel on the consumers.

13. Having regard that until now it has not been made a profile of the market characteristic for secret agreements but it has been marked out some features, as the existence of a high concentration or the existence of homogenous products, prove that it can not exist a standard in persecuting the cartels but only some directive lines.

14. Besides, the studies on negative effects of hard core cartels show the difficulties in calculating the effective prejudice, in most cases being required the use of various proxies and assumption.

15. The Romanian legislation in the competition field provides high sanctions in the case of discovering some "cartels". These can amount up to 10% of the total turnover for each cartel operator. Both Romanian and European legislation operate against undertakings not individuals, so the sanctions are applied only to undertakings part of the cartel. These are culpable of committing a contravention.

16. However, there are situations which permit the sanctioning of an individual, when participates with fraudulent intent and in a decisive way to the conceiving, the organisation or the realisation of any of the practices prohibited under Art.5 (1). These individuals are culpable of committing a criminal offence being convicted to jail from 6 months to 4 years or fined.

17. The criminal action starts following the Competition Council's notification.

18. Through the guidelines issued by Competition Council on individualisation of the offenses it is made a clearly distinction between vertical restrictions – deeds of minor and medium gravity – and horizontal restrictions as cartels – very serious infringements. More, in establishing the amount of the sanction both the duration and the aggravating circumstances or attenuating circumstances are taking into account. However, the guidelines and the sanctions do not make a distinction between cartel cases in which there is direct evidence and those in which direct evidence is lacking, the infringement being proved on the basis of indirect proves and economic analysis.

19. In the year 2004, Romanian Competition Council adopted the *Guidelines regarding the conditions and application criteria of a leniency policy*, which give complete amnesty to the first conspirator to come forward and reveal the inner workings of the cartel, permitting to the Competition Council to initiate proceedings. Having in view the experience of other countries which implemented this program before, this policy can help fight the most egregious competition law violation.