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**THE OBJECTIVES OF COMPETITION LAW AND POLICY
AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY**

-- ROMANIA --

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ROMANIA

THE OBJECTIVES OF COMPETITION LEGISLATION AND THE OPTIMAL DESIGN OF A COMPETITION AUTHORITY

1. Competition: both God and devil in Western civilisation

The Competition law roots in the tradition of liberalism that has provided the world with strong economic modern structures of which main functioning principles were the hard work, the transparency and the application of gained experience to an identity characterized by its own advantages and needs.

The goal of national competition policies in the market economy system is to achieve a healthy market economy by increasing economic efficiency and consumer welfare through promoting competition rules.

Particularly, the process of European integration has further enhanced competition law's importance. The core of this process has been the creation of a unified market in Europe, and its success has depended on establishing norms and institutions that make that market both economically effective and politically desirable. As David Gerber said, «the competition law has been a major factor in achieving this success, serving as an engine of integration and generating confidence in “European” institutions»¹.

As the globalisation is put forward integrating the world economy in the 1990's, a lot of developing countries and transition economies are rapidly adopting competition legislation while developed countries are strengthening the existing competition policies. Looking at this trend, we can conclude that in the near future, competition policies will be core policies in the countries that pursue constant economic development regardless of their current economic status.

At international level, in 2002, the recognition that there is a strong link between competition policy and the pillars of economic development was growing. Thus, as OECD stressed in its documents, **the building of a competition culture is the most important step to be followed by politicians from all countries that committed to promote a more market based economy**. The stockholders (politicians, public servants, business and judicial communities, academic society and media) must understand the competition's advantages. It is the place where the mass-media and education institutions can plenary manifest their utility. Although there is a possibility for the public to abandon or undermine the support for increasing competition or the resistance of the politicians to the market reform's effort to be difficult to overpass. It is now the time to hear what the European Commissioner Mario Monti clearly underlined, that the globalisation of the economy has made imperative the improvement of global governance in competition matters. Without an improved co-operation between competition authorities, a sufficient efficiency could not be possible.

2. Romanian conditions and related approach: Two laws – the same core objectives

In the 1997 Opinion on Romania's application for EU membership, the EU Commission concluded: “*Romania has made considerable progress in the creation of a market economy*”; however it

¹ David J. Gerber, “Law and Competition in Twentieth Century Europe: Protecting Prometheus”, Clarendon Press Oxford, 1998

“would face serious difficulties coping with the competitive pressure and market forces within the Union in the medium term”.

As concerns the economic developments, in the years following 1997, the average growth rate has been negative, the inflation high and the sustainability of the external accounts frequent sources of concern. Since mid-2000 macroeconomic trends have improved, building, upon the cumulative impact of successive rounds of incomplete structural reforms, a more favourable external environment and the adoption of a more balanced and responsible policy mix.

In its 2002 Regular Report, the Commission found that: *“Romania has continued to make progress towards being a functioning market economy. (...) Sustained and full implementation of planned measures together with the completion of the reform agenda should allow Romania to be able to cope with competitive pressure and market forces within the Union in the medium term.”*

Competition, both as policy and as free acting of economic agents on the market, closely and strongly followed this evolution.

While the first years of the economic reform were characterised by a lot of experiments at both legislative and enforcing level, with a quasi-Brownian movement of economic agents and a high degree of resistance to reform the State owned capital companies, a gradual change occurred as result of the free mechanism of the market.

New connections were constantly established between the market actors: State companies from both public and private sectors consumers. The vigorous competition among companies has important influence on economic development by raising efficiency and expanding social welfare. A functioning market economy can not exist without competition, which represents a guarantee for a free game of the market forces and for building an economic environment able to cope with competitive pressures of the global market.

Since competition plays a crucial role within the market economy, government’s administrative efforts to promote and supervise competition for a sound development of the market economy are essential. The promotion of a Competition Law appears as a normal consequence. The Romanian competition Law’s importance extends beyond the scope of government policy and private economic decision-making.

The Romanian Competition Law set up the legal institutional framework empowered to ensure the proper, effective and efficient enforcement of the Competition Policy in Romania. As the EU standards require, the Romanian Competition Council is defined as an administrative autonomous authority which, according to the same Law “represents Romania in the relationships with specialized international organizations and institutions and co-operates with foreign and community competition authorities.”

According to the provisions of Article 27 (k), the Romanian Competition Council also “gives advisory opinion on state aid policy and state aid schemes from the point of view of the possible effects on competition and controls the observance of the related rules”. On January 1, 2000 the Law on State Aid entered into force and the Romanian Competition Council began to enforce its provisions closely observing the EU practice.

The Objectives of the Romanian legislation on Competition and State Aid fields are clearly expressed by both first article of the Romanian Competition Law no. 21/1996, respectively *„to protect, maintain and stimulate competition and a normal, competitive environment, with a view towards*

promoting consumers' interests” and by the first article of the Law on State Aid no. 143/1999 that “*is creating and maintaining a normal competitive environment*”. This convergence represents a real manifestation of the mature approach of the challenges raised by the economic evolution to the market-based economy. Hence, we could refer to the Competition Legislation Objectives, covering both competition and State aid areas.

The Romanian Competition Council is the sole decision-maker in the field of competition and state aid, while relevant courts/tribunals are judging the way how Romanian Competition Council observes the Laws in competition issues. Therefore, the Competition Objective is given the same important weight by the Romanian Competition Council and by the courts that evaluate the just enforcement of the Laws. The Competition Policy Objectives prevail as concerns any other objectives (especially conflicting ones). However, within the decision making procedure the latter ones are taken into account by the Romanian Competition Council which analyses both their opportunity and lawfulness in the measures it disposes.

As independent competition authority the Competition Council could never be subject to government influence to take other objectives into account. The factors to be assessed for ensuring the observance of the Competition Legislation Objectives are to be found in the provisions referring anti-competitive practices and economic concentrations on one hand and to State aid measures on the other hand, a subjective decision being unlikely.

Having in view the pre-eminence of the promotion of consumers' interest, emphasized clearly and directly by the Competition Law and indirectly by the Law on State aid, any other indirect objective that may be sought by the Competition Law is subordinated to this one.

- Amongst these objectives we may mention: improving the production or distribution of goods, or supplying services; promoting technical or economic progress, improving the quality of goods or services; consolidating the competitive position of the small and medium-sized undertakings on the domestic market; increasing the competitiveness of Romanian goods and services on the international market; charging, over the long run, substantively lower prices to the consumers' benefit; increasing economic efficiency.
- Taking into account that according to article 14 paragraph (2) of the Romanian Competition Law economic concentration may be allowed if it contributes to the increasing of economic efficiency, to enhancing production, distribution or technical progress or to increasing export competitiveness, a net positive result and lower prices for consumers, maximising total surplus may be considered as another goal of competition objectives.
- As for the State aid law enforcement, analysing the cases where a State aid measure could be authorized (Article 14 of the Law on State Aid no. 143/1999), we can identify the following subordinated aims: stimulation of the research and development; supporting the small and medium enterprises; supporting the environmental protection; sustaining the training of employees and the creation of new jobs in economic sectors where there is not overcapacity; the economic restructuring of the sectors facing overcapacity problems; the regional development; promoting cultural and heritage conservation.

In order to avoid the obstacles which could brake or jeopardize the fulfilment of these goals, the foreseen amendments that will be made on Competition and State aid laws should provide that Competition Legislation takes precedence over any anti-competitive business legislation and should confer to the Competition Council the real right to oppose legislation under which State aid is awarded.

3. Relationship between the Competition Policy Objectives and the Optimal Design of the Competition Authority

It is a non-contestable reality that the competition policy gradually becomes a central part of the legal and economic order over the world.

The judicial and political context is different from country to country and the **Optimal Design of the Competition Authority** must take into consideration the particularities of each country, the level of economic and social development, the maturity of the judicial framework, the following factors having to be observed: general conditions and local priorities, specific culture, commercial and trade regional and international relations, possibility of transfer of “anti-trust technology”, level of the “competition advocacy”, existence of some artificial barriers to enter in the market, stage of liberalisation of the public services, experience level a.s.o.

The Romanian economic reform and the Governmental policy core objectives for building a healthy market – based economy were the background of the creation and functioning of the Competition Authority. Firstly it must be praised that **the Competition Council was set up as an autonomous competition body entrusted with the administration of the competition and State aid legislation**, provided with its own apparatus, structured on specialized departments in order to use in the best possible way its human resources in attaining its final objectives.

The Competition Council consists of 10 members as follows: one president, 3 vice-presidents and 6 competition councillors. The Competition Council members are forbidden to exercise, directly or by proxy, trade activities, and to participate in the administration or management of commercial companies, regies autonomes or co-operative organizations. They cannot be appointed experts or arbitrators, either by the parties or by courts or other institutions. The Competition Council members and competition inspectors cannot be members of a political party or other political organizations. Thus, the Competition Council ensures a real, effective and full independence of antitrust decision-making from business and political pressures.

Four operational departments (Department for consumer goods, Department for industrial goods, Department for services and State Aid Department – the last one functioning since the end of the 2002) and two directorates (Legal Directorate and Directorate for International Aspects) were set up for effective enforcement of the two above mentioned laws and related secondary legislation. The co-ordination of each department is ensured by one vice-president and two Competition Councillors.

The internal organisation assures a rational distribution of the staff between these departments and directorates and also between specific activities: cases of infringements of competition principles (analyse of anti-competitive practices, abuse of dominant position), control of economic concentration and, following the case, the granting of individual or block exemption on the competition area and cases of authorizing and controlling the State Aids.

The current approach of the Competition Council’s design, in its position of decision-maker and regulatory body, reflects in the most accurate and appropriate manner the economic reality. However, knowing that everything can be improved, Competition Council is always open to any other approach that could better serve its objective. An effective competition policy definitely requires a well organized and competent organization as well as an efficient interaction between the Competition Authority, the business Community and the Government.

The relations with other national authorities (Parliament, Government, sectoral regulatory bodies) is established in a clear manner for preventing any superposition of the tasks and any obstruction of the Competition Council' actions or implication and influence in different affairs.

Irrespective of the chosen approach, Romanian Competition Council makes independent decisions and cannot be influenced in this process by any political or external interests.

Even if some progresses are needed and foreseen in 2003 on strengthening the administrative capacity of the Romanian Competition Council and a continuous adaptation of the institutional structure and power to the market changes is predictable, we can consider that the Romanian Competition Council is now, after six years of functioning a strong authority, having a recognized position among the "motor institutions" of the economic development design.

We are sure that an important contribution to this favourable evolution was played by the regional and international cooperation within the framework of OECD, WTO, CNUCED, ICN and the bilateral co-operation that permit to share and to learn from other experiences.

The Romanian Competition Council considers that a deeper, more intensive bilaterally and multilaterally cooperation among competition authorities may be the right answer within a globalisation governance. We are convinced and we embrace the position expressed two years ago by the Chairman of Korea Fair Trade Commission, Mr. Nam-Kee Lee: "To let the benefits of the globalizing and knowledge-based economy be shared by all nations in the 21 century, we should work together more to promote competition policy throughout the world and thus vitalize domestic economy as well".