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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN ROMANIA**

-- 2009 --

*This report is submitted by Romania to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 16-17 June 2010.*

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## **Executive Summary**

1. This report addresses the activities undertaken by the Romanian Competition Council (hereinafter referred to as “RCC”) and the competition law and policy developments in Romania from January 1, 2009 to December 31, 2009. Where appropriate, later developments have been included and reported on.

2. During a year when the effects of the economic and financial crises were fully experienced by the business environment and by consumers, RCC’s activity focused intensively on identifying and sanctioning anticompetitive practices, as well as on fulfilling all the commitments resulted from Romania’s accession to the EU. In the field of competition, 27 investigations were initiated, twice as much compared to 2008. The proactive activity of the competition authority resulted also in a significant boost in the number of ex-officio investigations, which increased in 2009 by 130% compared to the previous year.

3. In 2009, significant resources were dedicated to a proactive market monitoring; as a result, 5 sector inquiries were initiated, compared to 2 in 2008 and to only one in 2007. The markets to be analysed in 2009 are: maritime transport services, milk commercialisation between producers and processors, auto spare parts, drugs wholesale distribution and electrical energy. 3 sector inquiries opened in the previous years on the following markets were finalised: the market for cereals used for the production of general bakery products; food products commercialisation market; real estate market and the market of ancillary services for real estate transactions. As a result, the Competition Council issued recommendations and intervened to the competent public institutions in these fields. The results of the sector inquiries in the drugs wholesale distribution and food products commercialisation were also the starting point for enforcement actions.

4. Apart from law enforcement, RCC took very seriously its advocacy role and it continued to concentrate its resources so to ensure that the business community but also, all decision-making factors understand correctly the Community mechanisms and the rules in the field. Moreover, the prevalence of competition law over any other normative acts was ensured by issuing 8 binding opinions, 9 points of view and 10 interventions for amendments of normative acts.

5. The administrative capacity of RCC was further strengthened through training activities especially relating to the use of economic and econometric analysis in antitrust cases, activities aiming at optimising the internal management system and the staff’s career and performance based on accomplishment of individual objectives.

6. At a wider international level, the renewal of the observership of Romania in the work of OECD Competition Committee and its two working parties for the next biennium was another 2009 challenging objective Romanian Competition Council accomplished at the end of the year. Briefly, we can state that RCC’s work within OECD Competition Committee facilitated by the observership has been very beneficial for the development of the competition law and policy in Romania. Our participation allowed us to show our approaches to enforcement and advocacy tools and in turn, it provided us with an unrivalled source of policy analysis and exchange of experience through discussions amongst like-minded authorities.

### **1. Changes to competition laws and policies, proposed or adopted**

#### ***1.1 Proposed revision of the national competition law***

7. After almost two years of intensive work in screening EC latest legislative evolutions, best practices of other competition authorities within the European Competition Network and last but not least

the OECD and ICN best practices and recommendations, RCC is now in the position to ask to the Government to initiate the amendment of the Romanian Competition Law (Law no.21/1996, republished)<sup>1</sup>. The law was lastly amended in 2004.

8. RCC's initiative aims to further increase the convergence of the national competition law with EU competition law, to clarify certain provisions and to correct certain shortcomings identified over time in practice.

9. In 2009, a draft was prepared by RCC's working group with the support of our German partners within the Twinning project. Subsequently, the draft was posted on the institution's website for comments, the comments and suggestions received from various stakeholders were taken under review. Currently a draft incorporating also the suggestions accepted by the Council is available, and RCC intends to submit it to the European Commission for an informal opinion.

10. The main changes to the current legislative framework include:

- abolition of the individual exemption system;
- express powers for the Council to accept commitments and to adopt interim measures, to carry out sector inquiries and to assist the Commission in inspections;
- increase of the notification thresholds for mergers<sup>2</sup>,
- change of compatibility test in merger cases, from "dominance test" to the "SIEC test"<sup>3</sup>,
- clarifications with regards to:
  - access to file, including provisions that exclude from access to file the ECN network internal documents,
  - the courts competent to hear actions against various types of administrative acts issued by the Council<sup>4</sup>.
- introduction of supplementary financial penalties & incentives in order to stimulate co-operation with RCC ( see case no. 1. below) .

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<sup>1</sup> RCC does not have legislative initiative.

<sup>2</sup> Currently, merger control is exercised in respect to economic concentrations where the aggregate turnover of the undertakings concerned exceed EUR 10 million and there are at least two undertakings involved in the operation that achieve, on the Romanian territory, a turnover exceeding EUR 4 million each. RCC will propose that the threshold be increased to EUR 15 million and EUR 7 million, respectively.

<sup>3</sup> (SIEC = substantial impediment of effective competition test). This change will align the national law to the EU merger regulation and will allow RCC to approach mergers in coherence with the practice at the EU level.

<sup>4</sup> The aim is to bring all the actions against RCC's acts under the jurisdiction of the Court of Appeal Bucharest, as a first instance court. This will bring more coherence in the judicial review and will facilitate a specialisation of judges in competition law.

### **Envisaged Changes Concerning RCC's Sanctioning Regime**

RCC has the power to impose pecuniary sanctions and periodic penalties similar to those provided for in the Regulation 1/2003 (up to 10% of the company's turnover, in case of the infringement of competition rules, and up to 1% in case of the so-called "procedural infringements").

RCC operates a leniency programme which was updated in 2009 in line with the ECN Leniency Model.

The law provides also for criminal sanctions<sup>5</sup>. National judicial authorities investigate such criminal offences at RCC's formal request. RCC used this power in 2009 after the conclusion of a cartel investigation on the bread market.

In addition to the existing system, RCC is contemplating the prospect to propose the introduction of other types of financial incentives/penalties aimed to stimulate the co-operation with RCC.

There are discussions about the introduction of:

- Provisions allowing RCC to grant a 10% reduction of fines applicable to companies if they acknowledge their participation in a practice prohibited by competition rules. This reduction is to be offered to a company for its co-operation (different from the co-operation required in the framework of the leniency programme);
- Provisions allowing RCC to impose pecuniary sanctions (administrative fines) to the companies' managers, directors etc.;
- Provisions allowing RCC to impose pecuniary sanctions (administrative fines) to other public authorities that fail to submit to the Council information and documents necessary in the proceedings. The law on national procedures in the field of State aid contains similar provisions.

## **1.2 Presentation of anticipated changes in the organisation of RCC**

11. In 2009 the Regulation on the organisation and functioning of the Competition Council was taken under revision by the authority. (The Regulation was last amended in 2004). The main purpose of the revision was to further increase the authority's efficiency and to streamline the internal decision making process. The revision was also a clean up exercise. Obsolete provisions, e.g. those concerning the competences related to the authorisation of State aid, were removed.

12. The revision was concluded in early 2010 and the newly amended Regulation came into force in April 14, 2010. The main changes of RCC's organisation, that will take place in the following months, are the following:

- Creation of a single directorate to deal with State aid issues. This directorate will incorporate the two existing directorates with State aid competencies, which currently deal with the analysis of State aid measures in the pre-notification phase and with the State aid monitoring, respectively.
- Creation of a new directorate, in charge with the investigation of anticompetitive practices in the context of tender procedures and with the petitions received by the Competition Council<sup>6</sup>.
- Creation of a special service to deal with communication issues. This will function within the Directorate for External Relations and Communication.

<sup>5</sup> Criminal sanctions are applicable to natural persons that participate with fraudulent intent and in a decisive way in conceiving, organising and putting in practice of anticompetitive agreements or abuse of dominant position.

<sup>6</sup> Petitions are letters by which legal or natural persons bring to the attention of the Competition Council various issues which do not fall within the Council's jurisdiction.

- Reorganisation of the existing RCC territorial structure. RCC has 41 territorial branches (inspectorates), one in each county. The 41 inspectorates will be reorganised in 8 regional centres, corresponding to Romania's NUTS II regions. The regional centres will get the competence to investigate alleged anticompetitive practices in markets having regional or local dimensions. This will free up resources of the central antitrust directorates allowing them to focus on infringements having national scope.

### **1.3 Modifications to the national leniency programme**

13. As part of its moves to adopt EU enforcement methods, in September 2009 RCC replaced its original 2004 leniency programme, which has not produced any result, with a new amended version. The amendments offer clearer guidance for businesses, setting out new elements that will allow a unitary approach with EU Member States for leniency applications. Given the current economic situation, RCC decided to expand the scope of its leniency policy to hard-core vertical agreements (resale price maintenance and absolute territorial protection). The next step was to set up a leniency unit within the authority in order to ensure a proper interface between our NCA and businesses.

14. Similar to RCC's 2004 Leniency Instructions, only the first undertaking to submit information about the cartel can obtain immunity from fines. For subsequent applicants, co-operation with RCC may justify a reduction of a fine under the following conditions:

- the undertaking must provide RCC with evidence of the alleged infringement, representing a significant added value; evidence requiring little or no corroboration provides greater value for proving the case than evidence which requires corroboration if it is contested.
- the undertaking must end its involvement in the suspected infringement.

15. The reduction level an undertaking will benefit from, relative to the fine which would have normally been imposed, will be granted within the following intervals: 30- 50 %, 20- 30 %, 0- 20 %.

16. 2009 Leniency Instructions introduce a marker system for immunity applicants. RCC accepts an immunity application for an undertaking which preserves its place in the queue on the basis of limited information. Thus, when applying for a marker, the applicant is only asked to provide the following information: the applicant's name and address, the parties to the alleged cartel, the affected products and territories, the estimated duration of the cartel and the nature of the cartel conduct. The system allows thus applicants supplementary time to gather required information to qualify for immunity.

17. For the new programme to be effective, in 2010 RCC intends to perform an intensive leniency campaign in the media, in order to make sure that the companies understand what constitute hard-core violations of competition law for which leniency might be available.

## **2. Enforcement of competition laws and policies**

### **2.1 Actions against anticompetitive practices, including agreements, abuses of dominant positions and mergers**

#### **2.1.1 Decisions adopted in 2009**

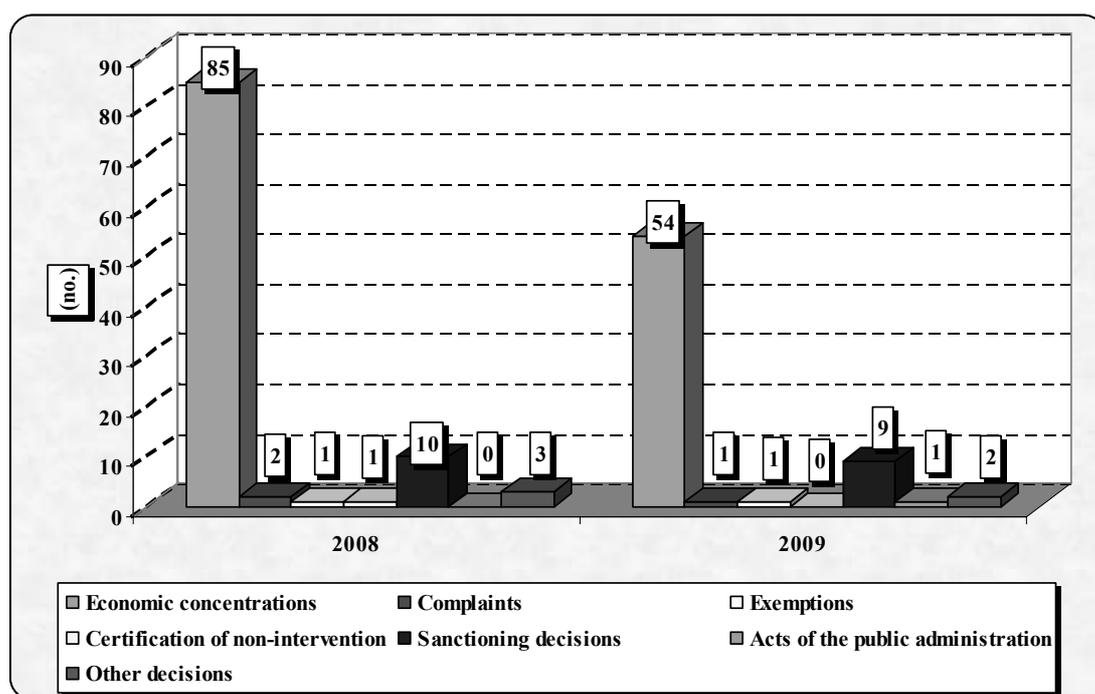
18. In 2009, RCC issued 68 decisions, as shown in Table no. 1 below.

**Table no. 1 Decisions issued in 2009 and their classification on different types of infringements**

Type	Total
<b>Decisions issued</b> , out of which:	<b>68</b>
<b>A. Economic concentrations</b>	<b>54</b>
a) Decisions following <b>notifications</b> :	43
- authorisation decisions	1
- non objection decisions	32
- negative clearance decisions	10
b) <b>Other decisions</b> on economic concentrations:	11
- recalculation authorisation fee	9
- derogation	2
<b>B. Complaints</b>	<b>1</b>
- Abuse of dominant position (art.6)	1
<b>C. Individual exemption</b>	<b>1</b>
<b>D. Negative clearance</b>	<b>0</b>
<b>E. Sanctions</b>	<b>9</b>
- Failure to notify	3
- Agreements (art.5)	4
- Refusal to submit to a dawn raid	1
- Implementation of a merger prior to an authorisation decision	1
<b>F. Public administration acts</b>	<b>1</b>
<b>G. Other decisions:</b>	<b>2</b>
- annulment of comminatory fines;	1
- corrigendum	1

19. Compared to 2008, the number of decisions decreased by 33% as a result of a significant decrease in decisions on economic concentrations (by 36% in 2009, compared to 2008, as shown in Graph no. 1 below). This evolution was generated by the declining number of economic concentrations falling under the scope of Competition Law.

**Graph.no.1. Evolution of the decisions issued by Competition Council - 2008-2009**



### 2.1.2 Sanctioning decisions in 2009

20. In 2009, RCC applied total fines of 8,755,512 Lei (€ 2,084,645<sup>7</sup>), out of which 90% were fines applied in the “driving schools”<sup>8</sup> and “bread market”<sup>9</sup> cases. In these cases, 80 undertakings and an association were sanctioned for tariff/price fixing practices. In total, 87 undertakings and an association were sanctioned in 2009 for their involvement in anticompetitive agreements and for failing to notify or for implementing certain economic concentrations, compared to 20 undertakings in 2008 and to only 3 in 2007.

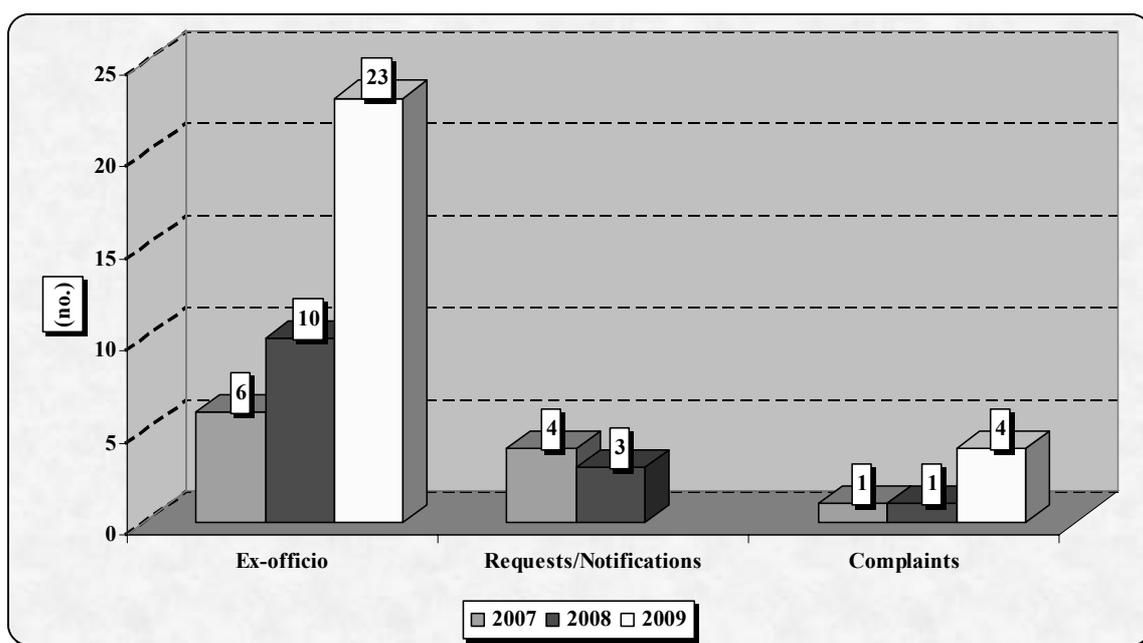
### 2.1.3 Investigations opened in 2009

21. During 2009, 27 investigations were opened, out of which:

- 23 ex-officio investigations;
- 4 investigations following a complaint.

22. The number of ex-officio investigations increased by 92.9%, compared to the previous year (see Graph no.2 below).

**Graph no.2. Evolution of the number of investigations initiated during 2007-2009**



23. Out of 27 investigations initiated in 2009, 45% of the investigations have as object the possible infringement of art.5 of Competition Law no.21/1996, republished, and of art.101 TFEU; the remaining 55% are envisaging possible infringements of the national legislation.

<sup>7</sup> An average exchange rate of 4.2 Lei /1 Euro was used to convert figures from national currency into Euros

<sup>8</sup> See chapter 2.1.7 for a detailed presentation of the case.

<sup>9</sup> See chapter 2.1.7 for a detailed presentation of the case.

24. Within the ongoing investigations, dawn raids were performed on 50 locations, as follows:

- Car repairing and servicing services provided within the city of Slobozia (6 locations);
- The services provided by the Romanian expert and licensed accountants and the specific firms (4 locations);
- Romanian market of cement sort CEM I 52.5R (3 locations);
- Accommodation services and watering treatments provided in Băile Olănești (7 locations);
- Oil and related products (10 locations);
- Wholesale drug distribution (2 locations);
- Commercialisation of prepaid mobile phone products (11 locations);
- Implementation of an economic concentration in the pharmaceuticals sector prior to a decision issued by Competition Council (1 location);
- Distribution of “D&P Perfumum” perfume products (3 locations);
- Commercialisation of vegetables and fruits in the city of Bucharest (3 locations).

#### 2.1.4 *Market studies*

25. Along the year 2009, on the basis of the attributions conferred by Competition Law no.21/1996, RCC continued to make more use of another important enforcement tool, market studies.

26. Thus, 5 sector inquiries were initiated in 2009 (compared to two in 2008 and to only one in 2007) on the following markets:

- Maritime transport services;
- Commercialisation of milk between producers and processors;
- Auto spare parts;
- Wholesale drug distribution;
- Electric energy.

27. For the competition authority, this type of investigation represents a pro-active market monitoring instrument, namely a complex analysis used to evaluate at a certain point in time the competition on a national market or on an activity sector. Following such investigations, Competition Council can establish to what extent the identified problems have as source anticompetitive practices and what their impact is over these markets. Two of the sector inquiries carried out in 2009 resulted in the initiation of 8 investigations on possible infringements of Competition Law no. 21/1996, republished, out of which 4 investigations in the retail sector and 4 investigations in the pharmaceuticals field. Moreover, the conclusions of the finalised sector inquiries allowed the formulation of recommendations to the responsible factors involved in surveying the analysed markets.

28. All three sector inquiries initiated in 2007 and 2008 were concluded in 2009. The markets under review were: the market for cereals used for the production of general bakery products; food products commercialisation market; real estate market and the market of ancillary services for real estate transactions.

2.1.5 *Investigations finalised in 2009*

29. During 2009, 6 investigations were finalised, out of which 4 ex-officio procedures and 2 investigations as a result of certain requests/notifications (Table no.2).

**Table no. 2. Investigations concluded in 2009**

No.	Manner of initiation	Legal framework	Affected market	Type of decision
1		Art.5(1) <sup>10</sup> of Competition Law no. 21/1996, republished	Bucharest market of driving school services	Sanctioning decision
2		Art.5(1) of Competition Law no. 21/1996, republished	Bread market and the related markets	3 sanctioning decisions Measures for restoring the normal competitive environment
3	Ex-officio	Art.9 <sup>11</sup> of Competition Law no. 21/1996, republished	Market of public sanitation services	Sanctioning decision
4		Art.15(4) <sup>12</sup> of Competition Law no. 21/1996, republished	Production and commercialisation of eggs; commercialisation of poultry meat as resulted from the specific processing; commercialisation of live poultry	Authorisation
5	Requests/Notifications	Economic concentration, according to art.15 of Competition Law no. 21/1996, republished	Perforating services; analysing services concerning the drilling fluid; sampling services; drilling services.	Individual exemption granted
6		Individual exemption from art.5 of Competition Law no. 21/1996, republished	Sugar based products	

<sup>10</sup> Art.5(1) of Competition Law no. 21/1996, republished, prohibits any express or tacit agreements between undertakings or associations of undertakings, any decisions made by associations of undertakings and any concerted practices, which have as object or as effect the restriction, prevention or distortion of competition on the Romanian market or on a part of it, especially concerning: a) concerted fixing, directly or indirectly, of the selling or purchase prices, tariffs, rebates, mark-ups, as well as any other terms of trading; b) limiting or controlling production, distribution, technological development or investments; c) allocating distribution markets or supply sources according to territorial criteria, sales-and purchase volume or other criteria; d) imposing unequal terms for equivalent services to trading partners, thus causing a competitive disadvantage to some of them; e) conditioning the conclusion of contracts by imposing upon partners the acceptance of certain clauses stipulating additional services which, either by their nature or by commercial usage, do not relate to the object of such contracts; f) participating, in a concerted manner, with rigged bids in auctions or any other forms of competitive tendering; g) eliminating competitors from the market, limiting or preventing access to the market and the free exercise of competition between other undertakings, as well as agreements not to buy from or to sell to certain parties without reasonable justification.

<sup>11</sup> Art.9 of Competition Law no. 21/1996, republished, prohibits any actions of the central or local public administrative body which have as an object or may have as an effect the restriction, prevention or distortion of competition, especially: a) making decisions which limit the freedom of trade or the undertakings' autonomy which are being exercised under the law; b) setting discriminatory business conditions to undertakings.

<sup>12</sup> Art.15(4) of Competition Law no. 21/1996, republished, prohibits the implementation of an economic concentration, prior to a Competition Council's decision, according to art.46 of Competition Law no. 21/1996, republished.

### 2.1.6 *On-going investigations at the end of 2009*

30. At the end of 2009, 56 investigations were ongoing, out of which 51 procedures on possible competition law infringements (93%) and 5 sector inquiries (7%). Based on the manner of initiation, the 51 investigations on possible competition law infringements are divided as follows:

- 36 ex-officio investigations (71%), initiated proactively by the competition authority for identifying possible anticompetitive practices;
- 13 investigations following certain complaints (26%);
- 2 investigations initiated as a result of certain requests for individual exemption (3%).

### 2.1.7 *Description of significant cases*

- **The “driving schools” case**

By Order no.143/30.04.2008, the President of the Competition Council initiated an ex-officio investigation on the Bucharest driving school services, concerning the possible infringement of art.5 (1) of Competition Law no.21/1996, republished.

Following the investigation, it was concluded that, starting with February 1<sup>st</sup>, 2008, an anticompetitive agreement was implemented by several driving schools, having two aims:

- to increase, starting with 01.02.2008, tariffs for driving school services provided in Bucharest for a “B” category driving permit;
- to fix a minimum tariff of 800 Lei for this category.

RCC fined with over 1.5 million Lei (around € 360,000) the 32 undertakings involved in the cartel agreement concluded on the Bucharest market of driving school services.

According to the decision of the Competition Council, for two years, the driving schools must transmit to the competition authority all the modifications of the tariffs and the date of their effective implementation.

RCC Decision no.35/2009 is published on the website of the Romanian competition authority at: [www.consiliulconcurentei.ro/documenteoficiale/concurenta/decizii/servicii](http://www.consiliulconcurentei.ro/documenteoficiale/concurenta/decizii/servicii)

- **The “bread market” cases**

In May 2008, RCC opened an ex-officio investigation on the possible infringement of art.5(1) of Competition Law no.21/1996, republished, by the undertakings and the associations of undertakings operating on the Romanian bread market and its related markets.

This investigation was initiated on the background of the increasing prices of bread products, registered in several counties of the country. In addition, other existing issues on the related markets of the bread market were also taken into consideration, namely the raw materials markets.

During the investigation, dawn raids were carried out at the headquarters of several undertakings and association of undertakings operating on the bread market and ancillary markets.

a) The bread market of the Maramureş County

Following the investigation carried on the bread market, it was concluded that, in 2006, 17 undertakings operating within Maramureş County concluded an anticompetitive agreement. This agreement aimed at fixing a minimum selling price of the white bread.

The price fixing was concluded within meetings of the Association of the Employers in the field of Milling, Bread Production and Flour-based Products of the Maramureş County. Within the official meetings of the association, the involved undertakings expressed their joint determination to act similarly on the market: for their products, they agreed to establish and apply a certain selling price situated over a certain minimum threshold.

By this joint action on the selling prices, the involved undertakings planned to eliminate the competition risks that could result from unilateral price increases, namely to lose certain clients; in another words, the risk of having lower sales and profits. By establishing jointly a minimum price threshold, prices would have increased in the advantage of the producers, to a level above the one normally established through the free competition.

Following the investigation, RCC sanctioned the behaviour of the 17 undertakings with a total fine of 624 086 lei (€ 169 464.3).

RCC Decision no.61/7.12.2009 on the infringement of art. 5(1)(a) of Competition Law no.21/1996, republished, by the 17 undertakings operating on the bread market of the Maramureş County is available on the website of the Competition Council at: [www.consiliulconcurrentei.ro/documente\\_oficiale/concurenta/decizii/bunuri\\_de\\_consum/61](http://www.consiliulconcurrentei.ro/documente_oficiale/concurenta/decizii/bunuri_de_consum/61)

b) The bread market of the Vrancea County

The investigation of the competition authority found that, at the beginning of April 2007, the majority of the undertakings operating on the bread market of the Vrancea County increased the white bread prices. The price increases were implemented so as to lead to a level of around 2.1 Lei/kg of bread for almost all the undertakings questioned by RCC.

31 undertakings operating on the market of bread and flour-based products of the Vrancea County were involved in this agreement. Similar to the case on the market of Maramureş County, the agreement between the 31 undertakings was concluded within a meeting on establishing price increases for bread. These increases were justified by the existence at that time of certain “serious problems” for the milling and bread sector.

Following the investigation, RCC sanctioned the 31 undertakings operating on the bread market of the Vrancea County for the infringement of art.5(1)(a) of Competition Law no.21/1996, republished, through a concerted practice having as object and effect the fixing of a certain price level for the bread commercialised on the market of the Vrancea County. The value of the fines was of 5 666 627 Lei (€ 1 538 715.4).

RCC Decision no.62/07.12.2009 on the infringement of art. 5(1)(a) of Competition Law no.21/1996, republished, by the 31 undertakings operating on the bread market of the Vrancea County, is available on the website of the Competition Council at: [www.consiliulconcurrentei.ro/documente\\_oficiale/concurenta/decizii/bunuri\\_de\\_consum/62](http://www.consiliulconcurrentei.ro/documente_oficiale/concurenta/decizii/bunuri_de_consum/62)

### **3. Judicial review of RCC decisions in 2009**

31. In 2009, RCC had locus standing, active or passive, in 118 court files. Out of the total of 118 court files, 92 court files regarded administrative acts issued by the competition authority in the antitrust field, 14 of them already finalised in courts by the end of 2009 as follows:

- 11 files were irrevocably solved by the High Court of Cassation and Justice in the favour of the Competition Council;
- 3 files were irrevocably solved against the decisions issued by the Competition Council;

32. As a result, out of the total fines applied through the acts contested in the 14 cases (in quantum of 14 404 819.1 Lei), 11 697 544.1 Lei were irrevocably confirmed by the courts.

#### **3.1 Judicial review of the Ely Lilly case**

33. In July 2005 RCC initiated an ex officio investigation into the Romanian insulin market, focused on certain public procurement procedures:

- the manner in which in 2003 the national tender was conducted for human insulin used in the National Diabetes Programme
- electronic tenders conducted by hospitals for procurement of insulin outside the national diabetes programme.

34. The investigation revealed that the producer Eli Lilly Export SA and A&A Medica SRL, Relad Pharma and Mediplus Exim, its authorised distributors, concluded an anti-competitive agreement to share markets, by dividing the diabetes products portfolio of Eli Lilly.

35. To prove the agreement, RCC made use of a document found during a dawn raid conducted at the headquarters of Eli Lilly Romania. The document was issued by Eli Lilly and comprised an overview of the status of the insulin market prior to the national tender conducted in 2003, a presentation of the terms and conditions of the National Diabetes Programme, alternate scenarios regarding the manner in which Ely Lilly would participate in the national tender conducted in 2003 and the recommendations of Ely Lilly to its distributors in this respect.

36. The parties claimed that the participation of each distributor with a single product was due to the lack of technical capacity and logistics necessary to distribute product quantities required by the tender documentation. However, such defences were not accepted by Competition Council which proved that, in fact, the distributors legally and contractually supported the decision of Ely Lilly to authorise the distributors for their manner of participation in the tender.

37. In 2008, RCC fined the four pharmaceutical companies for partitioning the publicly funded section of the insulin market in 2003 with approx. EUR 22.6 million. Upon the determination of the fine, the competition authority noted a per se infringement regardless of its effect on the market, which lasted for two years (from 2003 until 2005).

38. Eli Lilly appealed in court and requested the annulment of RCC's Decision no.15/2008, the annulment of the administrative acts grounding this decision and the annulment of the fine. Eli Lilly invoked the nullity of the contested decision mainly because it did not take into account the legal provisions on prescription and it did not establish the starting moment of the alleged anticompetitive

agreement. As regards the prescription of the competition authority's right to apply fines for contraventions, Eli Lilly stated that the prescription term was of 6 months – as provided for by G.O. no.2/2001 – and not of 5 years – as provided for by art.58 of Competition Law no.21/1996, republished. In the undertaking's opinion, RCC initiated the investigation almost 2 years after the alleged anticompetitive agreement ended, and that, at the time the agreement was implemented, Competition Law did not provide for any prescription term. Eli Lilly argued also that RCC's decision had no grounds since there was no concerted agreement between Eli Lilly and its distributors, the relevant market was defined wrongly and, as a result, the fine was individualised incorrectly. In a nutshell, Eli Lilly held that RCC used simple assumptions and unconvincing evidences which can not prove in a reasonable manner the existence of an agreement between Eli Lilly and the three distributors.

39. The court decided that the exception of the prescription of the right to apply sanctions was not grounded. The Bucharest Court of Appeal appreciated also that the invoked exceptions require the categorisation of the anticompetitive deed so as to decide if the respective practice was instantaneous or continuous, namely when it started and when it ended. By examining the arguments of the parties and the presented evidences, the court concluded that Eli Lilly and its three distributors were involved in a market allocation agreement to divide Eli Lilly's portfolio of diabetes products. The court concluded that the contravention was continuous and it was implemented through actions and inactions with a certain purpose. As a result, the court disagreed with Eli Lilly's argumentation according to which the contravention was simple and instantaneous. Taking into account the abovementioned reasons, the court concluded that, in this case, Competition Law no.21/1996 amended by G.E.O no.121/2003 is applicable. In this form, Competition Law no.21/1996 provides for special prescription terms in respect to RCC's right to apply fines for contraventions related to the infringement of competition law.

40. In respect to the nature of the practice, the court concluded that the legal contestation of the undertaking had no grounds and stated that the practice was continuous, between April/May 2003 and the 20th of May 2005. The court held that the market allocation agreement was clearly proven by the „Overview” document presented as evidence by RC and that this document represents solid evidence, especially since it illustrates Eli Lilly's envisaged strategy for distributing its products. The court considered this evidence as being especially relevant when correlated with the behaviour of Eli Lilly's General Director during the dawn raid, when he invoked that the pertinent copied pages of the document were replaced. After a fine was applied to the undertaking, the representatives of Eli Lilly România submitted the original document to RCC. The Bucharest Court of Appeal also stated that the „Overview” document does not prove the actual conclusion of an agreement between Eli Lilly and the three distributors. However, the court appreciated that this document, alongside other written evidences (such as Eli Lilly's and its distributors' responses to RCC queries) and certain actions, such as the manner of participating within the tender indirectly proves the consensus of the producer and its 3 distributors on dividing the portfolio of diabetes products.

41. Eli Lilly contested the decision of the Bucharest Court of Appeal. At this moment, the litigation is being judged by the High Court of Cassation and Justice, the Fiscal and Administrative Contentious Section.

#### **4. The role of RCC in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies**

42. RCC, based on the competences conferred by the law, surveys the prevalence of the competition law over other normative acts for the benefit of the competitive environment.

43. Its advocacy tools include activities within the framework of co-operation protocols and legislative interventions made ex-officio or at the request of various bodies. A RCC representative

participates in preparatory governmental meetings at technical level in order to identify potential anticompetitive effects unforeseen by the legislator and most adequate solutions to correct or eliminate such effects. For the same objective, a competition inspector takes part in Advisory Committees of regulatory authorities.

44. Competition Council currently manages 21 co-operation protocols with national public institutions, including regulatory authorities, governmental agencies and professional associations. In the framework of these protocols, over 17 exchanges of information ensured a correct interpretation and application of the competition rules.

#### **4.1 Legislative interventions**

##### *4.1.1 Binding opinions issued for draft normative acts*

- Binding opinion on the draft Law for amending and completing Pharmacy Law no.266/2008, submitted by the Ministry of Public Health;
- Binding opinion on the draft Law for amending and completing Government Ordinance no.99/2000 on the marketing of goods and services, submitted by the Ministry of Agriculture, Forests and Rural Development;
- Binding opinion concerning *the draft Emergency Ordinance for the amendment and completion of certain normative acts concerning the railway transports* (the draft normative act is intended to introduce the amendments brought by Directive 2007/58/EC of the European Parliament and Council of 23 October 2007 for amending Directive 2001/14/CE on the allocation of the railway infrastructure capacities and the tariffs for using this infrastructure);
- Binding opinion concerning *the draft Government Decision on the establishment of the National Company “Bucharest Airports” S.A.* by merging the National Company “International Airport Henri Coandă Bucharest” S.A. and the National Company “International Airport Bucharest Băneasa- Aurel Vlaicu” S.A.;
- Binding opinion regarding *the draft Government Emergency Ordinance on the commercialisation of food products*, submitted by the Ministry of Agriculture, Forests and Rural Development;
- Binding opinion on the draft Government Emergency Ordinance regarding the amendment and completion of Government Emergency Ordinance no.19/2006 on the exploitation of the Black Sea beach and the control of the activities carried out on beaches;
- Binding opinion on the draft Government Decision on the entrustment of the Ministry of Communications and Informational Society to carried out an open/limited tender or negotiation with prior announcement of participation, by case, in order to conclude a framework agreement having as object the acquisition of the right to use software products through leasing, submitted by the Ministry of Communications and Informational Society;
- Binding opinion on the draft Government Decision on the organisation and functioning of the National Authority for Consumer Protection and for the Promotion of Good Commercial Practices, submitted by the Ministry of SMEs, Trade and Business Environment.

4.1.2 *Points of view issued by RCC*

- Point of view concerning Decision no.173/27.05.2009 of the General Council of Bucharest for the approval of the Methodological norms for the application of the Decision no.252/2008 of the General Council of Bucharest on the underground placement of electronic communication equipments and networks in Bucharest;
- Point of view on the draft Decisions of the President of the National Authority for Administration and Regulation in Communications;
- Point of view concerning the proposal of the Agency for Governmental Strategies on the organisation of a national public information campaign;
- Point of view transmitted to the Romanian Government, Department for the Relation with the Parliament, concerning *the draft Law on the enhancement of contractual discipline between retailers and their suppliers*;
- Point of view concerning the draft Government Decision on the establishment of certain measures for the reorganisation of electrical and heating energy producers subordinated to the Ministry of Economy;
- Point of view concerning *the draft Government Emergency Ordinance* for the amendment and completion of *Gas Law no.351/2004*;
- Point of view concerning the provisions of Government Decision no.1.088 of 30 September 2009 for the amendment and completion of the Framework contract on the conditions for granting medical assistance within the 2009 social health insurance system;
- Point of view concerning the provisions of the Government Emergency Ordinance no. 104/2009 for the amendment and completion of Law no.95/2008 on the reform in the health system.
- Point of view concerning the draft Government Decision on the approval of the Methodological norms for the application of Government Emergency Ordinance no.77/2009 on the organisation and operation of gambling.

4.1.3 *Interventions for the amendment of certain anticompetitive normative acts in force*

- The amendment of certain provisions of Government Ordinance no.99/2000 on the marketing of goods and services;
- The amendment of certain provisions of the Law on the organisation and operation of the veterinary doctor profession no.160/1998, republished;
- The amendment of the legislation in the field of taxi and rental transportation, so as to be in accordance with the provisions of the Competition Law;
- The recommendation addressed to the Romanian President, proposing the refusal to enact *the Law on the amendment of the Pharmacy Law no.266/2008*, because, in its present form, the normative act does not observe the conditions imposed by the binding opinion issued by RCC in February 2009;

- The opinion addressed to the Bucharest City Council concerning the provisions of the Draft methodological norms on the application of the Decision of the Bucharest General Council no.252/2008 on the underground placement of electronic communication networks and equipments in Bucharest;
- The amendment of the Norms on the organisation and operation of road transportation and of its related activities;
- The amendment of certain provisions of the Decision on the appointment as universal services supplier of the National Company Romanian Post and of the Decision of the President of the National Authority for Communication no.2858/07.08.2007 on the general authorisation regime for supplying postal services;
- The amendment of certain provisions of the normative acts included by the Documentation for the appointment of certain suppliers of universal services that offer to final consumers an information service concerning its subscribers and a register of subscribers issued by the Regulatory Authority for Communications;
- The opinion addressed to the local authorities of the city of Piatra Neamţ concerning the prevalence of Competition Law no.21/1996, republished, over the provisions of the *Decision of the Local Council no.228/2005 on the obligation of underground placement of electronic communication networks*;
- The opinion addressed to the Ministry of Communication and Informational Society on the draft Government Decision for the approval of the Strategy for transition from terrestrial analogical TV to digital terrestrial TV and for the implementation of the multimedia digital services at national level.

## **5. Resources**

### **5.1 Budgetary allocations**

45. The consolidation of the administrative capacity was for RCC a permanent activity, aiming at increasing the efficiency of the institution in fulfilling its legal attributions.

46. In 2009, RCC benefited from State funding of approx. EUR 10 million, out of which 82.8% - personnel expenses, 11.1% - goods and services, 1.3% - other transfers and 4.9% - nonfinancial assets. In dynamics, the budget of the institution increased in nominal terms by 87.4% during 2005-2009.

47. For the third consecutive year, sufficient financial and material resources were allocated based on projects; in 2009, the Competition Council carried out 6 projects specific to the activity of the institution, with a total budget of EUR 170,104, divided on the following projects:

- The establishment of the National State Aid Network – EUR 44,140;
- Improving the knowledge on the national and Community competition environment - EUR 37,692;
- Stimulating the interest of the academic environment for the competition field – EUR 10,238;
- Competition advocacy – part of the competition –EUR 51,844;

- Aligning the procedures on public procurement to the rules, policies and practices of the European Union – EUR 13,809;
- Optimisation of the performance management system – EUR 12,381.

## 5.2 *Professional training*

48. In order to respond to the training needs, the Competition Council organised during 2005-2009 a total number of 72 training courses on different themes. The total cumulated value of the training courses in 5 years is of 332 162 Lei (EUR 79,086), out of which 41% in 2009.

49. The total number of trainees increased continuously from 119 in 2005 to 165 in 2009, thus over 50% of the personnel benefiting from such training courses.

50. In 2009 19 types of courses were organised, out of which the following ones should be mentioned:

- economic and econometric analysis;
- management (public administration and project management);
- Community law and European integration;
- public accounting;
- protection of classified information;
- public acquisitions;
- foreign languages;
- IT training courses (Microsoft Share Point and Microsoft Windows 2008 Server) etc.

51. Additionally to these training courses, the competition inspectors attended 60 training seminars, out of which 50% organised within the Twinning Project.

52. A special role within the consolidation of the administrative capacity in 2009 had the Economic Analysis Group, which focused on:

- applying economic and econometrical methods of analysis within sector inquiries;
- creating an system of assessment in respect to the efficiency of the competition authority;
- estimating the damages caused to consumers by the bread market of the Vrancea County;
- estimating the potential benefits of the measures proposed following the sector inquiry in the real-estate market and its related services.

53. The construction of this group, which was established in 2008, was grounded on the importance of the profound economic analysis in defining properly the markets affected by anticompetitive practices and especially, in performing a superior assessment of their effects over trade and competition; in this

manner, a classification can be made – the cases which raise concerns from the very beginning and the other cases (ex-ante and ex-post impact studies). The Economic Analysis Group plays an important role within sector inquiries too. It applies modern econometrical methods and co-operates actively with the other competition authorities for solving certain issues in various sector inquiries. In the next years, the Economic Analysis Group is expected to be enlarged by recruiting specialised personnel so as to extend its area of activities and the involvement of the group within the activity of the competition authority.

54. During 2009, the internal managerial control system was further developed, by elaborating operational and system procedures; the aim was to achieve a correlation of processes carried out within the institution with the internal control standards provided for by the legal framework in force.

## **6. Summaries of references to new reports and studies on competition policy issues**

55. RCC continued in 2009 to raise awareness of the role of competition in general terms. Through public speeches and by making presentations at conferences, members of the RCC Plenum and RCC staff participated in the advocacy campaign and continued to draw attention to identified specific problem areas.

56. In autumn 2009 RCC launched for public debate a report on the competitive situation in several key areas of national economy. Designed in close collaboration with the Academic Society of Romania, “*Single Market, National Market: Competition Policy in Key Sectors*” intends to bring into public attention the main competition issues identified within certain economic sectors, critical issues which are distressing the well functioning of national markets.

57. The co-operation with an independent think tank from the civil society (the Romanian Academic Society – SAR,) in drafting such a report is a premiere; however the success of this initiative determined the RCC to take steps in order to issue such a report on an annual basis. The report includes three sectors analysed by the experts of the Competition Council (banking, retail and pharmacy) and four by our SAR partners (liberal professions, energy, concessions and taxi services). By this co-operation, our goal was to achieve a common view on certain competition sensible issues. Moreover, together with our partners, we intended to underline certain problematic aspects for the free competition within varied economic sectors. These aspects must be taken into account by the public policy makers before formulating reform strategies within the analysed fields.

58. This report was designed as a first step in developing a more active co-operation between all decision makers and social partners. The aim is to raise their awareness on the fact that the course of the economy towards competitiveness and performance involves observing the legal rules, deference for the business partners, and, in the first place, for the principles of functional free market, which is favouring the common citizens as final consumers of goods and services.

59. Other publications issued in 2009 included a quarterly activity bulletin, RCC Competition Policy Magazine, RCC annual report (2008), “*Competition - studies and researches*” bulletin of the RCC territorial offices etc.