

# Clients & Friends Alert

## February 2016

### Bucharest Court of Appeal Trashes Antitrust Fines for Being Time-Barred

There are exciting news regarding recent developments in antitrust enforcement in Romania, pertaining to the judicial review of fining decisions issued by the Romanian Competition Council ("Council"). Specifically, the Bucharest Court of Appeal ruled on the statute of limitation rules applicable to the imposition of antitrust fines by the Council.

#### Background

The Council fined in December 2014 four major food retailers Mega Image (Delhaize), Metro Cash & Carry, Auchan and Selgros Cash & Carry, and certain suppliers following a targeted investigation launched in September 2009 and concluded five years later, in August 2014, when the investigation team released its statement of objections to the concerned parties, which contained accusations of vertical price fixing during promotional campaigns that have occurred before and during year 2009. A summary decision containing the main findings and the fines was released to the concerned parties in December 2014 and a comprehensive written decision was handed down in April 2015, with fines totaling some EUR 35 million.

Lawyers for retailers and suppliers alike scrambled to challenge the fining decision at the Bucharest Court of Appeal, on procedural and substance grounds. The legal proceedings thus launched are running in parallel, with the Council acting as defendant in each of those cases, and all are still pending before said court, except for one ...

A supplier of dairy products moved swiftly and successfully argued that the Council's right to impose fines was time barred at the time of the summary decision, December 2014. As such, there was no need for the Bucharest Court of Appeal to go deeper into a substantive analysis of the Council's findings. Likely, the Council will seek a second review by the Supreme Court, which will have the final say.

#### The Romanian Limitation Periods Rules

In supporting its claim, the supplier brought forward the explicit provisions in the Romanian Competition

Law dealing with the limitation periods and the interruption events. Those provisions set a five-year limitation period on the Council's right to impose fines and lists certain events whose occurrence interrupt the running of the limitation period. Pursuant to said provisions, any Council action taken with a view to carry out a preliminary inquiry or to formally open an investigation, interrupts the running of the limitation period. Thus, any action taken prior to or upon the formal opening of an investigation, at the latest, would qualify as an interruptive event. Conversely, a request of information notified to the investigated parties after the investigation was started, let alone the notification of the statement of objections, could not interrupt the five years limitation period.

#### Procedural Autonomy Benefiting Members States

What is interesting is that, since the investigation targeted violations of both Article 101 TFEU and the corresponding article of the Romanian Competition Law, the Court of Appeal requested the litigating parties to express their views as to the potential direct applicability of Articles 25 and 35 of the Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 TFEU. Under Regulation (EC) No 1/2013, any request of information sent to the concerned undertakings after a formal inquiry was opened as well as the notification of the statement of objections itself, is an action which may interrupt the running of the limitation period. After deliberation, the Court of Appeal upheld the supplier's position and resolved to exclusively apply the Romanian Competition Law provisions on limitation periods, in line with the principle of procedural autonomy that Member States enjoy.

Most notably, the Court of Appeal agreed with the supplier in that the interruption events listed in Article 25 of Regulation (EC) No 1/2003 would kick in only if an investigation were to be conducted by the European Commission, independently or with assistance from national competition authorities, which would thus explain the reference made in Article 25 paragraph (3) to such authorities.

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Consequently, the Court of Appeal held that the Council's right to impose fines had become time-barred, because the five-year limitation period, starting in September 2009, had lapsed before the date when fines were imposed, be it December 2014 or April 2015.

### What May Happen Following This Ruling

The Council may have expected such outcome and obtained a Romanian Competition Law amendment in June 2015 aimed at aligning the national limitation period rules with those under Regulation (EC) No 1/2003. These changes will not affect the ongoing litigation cases or investigations already started by the Council.

For the ongoing investigations that near five years from their commencement the Council may need to rush out the statement of objections and make sure a decision is issued not later than five years from the commencement of the investigation.

As to the existing fining decisions (most notably the food retail investigation) there will likely be a domino effect and most of the fines will be quashed in court. If the Supreme Court will uphold this position, it will be a terrible blow for Council's track record and competition advocacy efforts.

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