

## **PROCEDURAL LEGAL RELATIONSHIP IN THE FIELD OF COMPETITION. THE CASE STUDY - MOLDOVAN COMPETITION COUNCIL**

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### ***Abstract***

*The procedural legal relationship in the field of competition is a superstructure relationship that develops depending on the social order. Large variety of different countries conditions requires modernization of criteria, norms and standards of competition regulation and methods of enforcement. The elements of competition procedural legal relationship are established in the paper and developed the application of competition legislation in Republic of Moldova. Originality and practical applications of research are based on empirical studies completed by Moldovan Competition Board.*

**Keywords** *Competition criteria; Competition norms; Antimonopoly authorities.*

**JEL classification:** *K2, K4*

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### **1. Introduction**

In this paper we continue the application of competition law issue addressed in the previous issue. These case studies activity of Competition Council of the Republic of Moldova.

The multitude of social relations governed by the competition procedural rules forms a distinct category of legal relationships. The procedural legal relationship in the field of competition is a superstructure relationship that develops depending on the social order, being subordinated to the general objectives and principles of the society, reflected in the Constitution of the country.

## **2. Study case Moldovan Competition Council**

In the Republic of Moldova the Competition Council is entitled with powers of investigation the cases of competition legislation violation. Competition Law No. 183 of 11 July 2012 strengthens the powers of investigation and also provides a mechanism for obtaining relevant evidence. The powers, duties and responsibilities of the Competition Council of the Republic of Moldova are described in art. 39-41 of the Competition Law.

The following procedures to collect evidence are used within the investigative process:

- Information request.
- Conducting inspections.

The Competition Council of the Republic of Moldova has powers in conducting investigations, using all legal tools for achieving an objective and prompt result.

The competition authority may request information whenever necessary, from any person in order to get a better view of the relevant market for the products or services concerned. Undertakings that are suspected of infringement, the complainants (for clarification) and third parties other undertakings possessing useful information for the conduct investigative process are obliged to provide the requested information. The Competition Council is entitled to decide on the necessary information to clarify the situation under investigation, the gravity and duration of the infringement etc.

Thus, within investigation files are used both primary and secondary sources. If the primary sources are expressly requested from the parties to the case, the secondary may be obtained from other companies (even non-competing), state authorities etc. However, the information referring to the communication of the company suspected of infringement with its attorney is not liable to be requested by the competition authority.

Requests for information must be in writing. They must be in a form that can be copied to the competent concerned authority. In practice requests are sent in a form by mail in a registered letter or by courier or fax. The deadline set by the authority for presenting information must be reasonable given the circumstances of the undertaking, the nature and amount of the requested information. If the time to prepare an adequate response is inadequate, this should be explained in the authority to grant an additional period.

Competition legislation in the Republic of Moldova provides several methods to request information:

- a) The information obtained in writing, requested by letter (fax, e-mail etc.);

- b) Picking up information on the spot;
- c) Getting information during the interview

When requesting information it is mandatory to indicate the legal basis and purpose of the request of information, setting a reasonable time limit, as well as the sanctions in case of failing to provide information, or for submitting inaccurate, incomplete or misleading information.

The obligation to provide information lies on the owners or authorized representing them persons under the law. The information can be also submitted by authorized lawyers, but which are to be responsible for the veracity of the information. Request of information on the spot, requires an additional procedure to speed up obtaining information. A team of Competition Council's employees go to the company, collect the necessary information, according to the letter, which is submitted to the undertaking. This procedure allows saving human resources by the undertaking, as well as less jeopardizing its economic activity.

The interview to obtain information is conducted at the premises of the Competition Council (may be also within inspections). The procedure is similar: before the interview the Competition Council's employee is obliged to announce the legal basis and purpose of the interview as well as the intention to take audio or video records of the interview. Also, the interviewee is acknowledged on the right to refuse the interview.

The statements made during the interview must be made available to the interviewee for approval and shall be given a reasonable period of time for certain corrections. The requested information may have confidential character. The fact that the sought information contains commercial secrets is confidential and goes under the obligation of professional secrecy does not constitute a reason refusing to provide information.

The information which may constitute a commercial secret is defined in Law No. 171-XIII of 6 July 1994 on commercial secret. This information must be properly marked as required by law by the complainant. Other information, except that with commercial secret can be qualified as confidential by the Plenum of the Competition Council, if the complainant submits a motivated request in this regard.

#### Conducting inspections

The inspections are another means of collecting information and therefore many of the problems discussed above are equally relevant for inspections, as they are referring to requests for information.

The undertaking can be informed in advance, usually by phone or fax about the proposed investigation. If not requested any element of surprise, there is an obvious advantage: the undertaking can prepare and have ready their representatives to meet the inspectors. On the other hand, warning parties about inspection involve the risk that evidence may be destroyed. If arriving by surprise, inspectors will ask at the door to speak with a certain director or senior employee by name or rank, whom they identify themselves and announce the purpose of their presence. The undertaking may decide then and there to refuse admission. There is no model set for inspection, but inspectors normally ask to see the offices and original files before examining specific files and documents. It is good for undertakings from the beginning to allocate management personnel to be present to monitor the investigation. They should follow where inspectors went, what files they looked at, what copies they took, what questions they asked and what answers they have been given.

Inspections under the Moldovan law (especially unannounced inspections) are carried out only by the Order of the President of the Competition Council; based on available disposition to initiate the investigation. The order contains the purpose, goal, time and duration of the inspection, as well as sanctions for preventing inspections. The order must be accompanied by an official delegation of powers. Moldovan legislation does not provide other ways to conduct inspection. When in inspection the employees of the Competition Council are entitled to:

- a) to have access to premises, land and means of transport owned or used by undertaking, associations of undertakings or public administration authorities, except for the natural persons living spaces, land related to it and the transport means of the natural persons;
- b) to examine the record books and other documents related to the business, to the subject-matter and the purpose of investigation, irrespective of the physical or electronic support they are kept;
- c) to take or obtain in any form copies of or extracts from such books or documents stipulated at let b). It is admitted to take registers or documents only if such a measure is necessary for preventing the hiding, removal of modification or destruction thereof or if it is not possible to take copies from them in the premise at issue;
- d) to seal any activity premises, books and documents relating to the subject-matter and the purpose of investigation, for the inspection period, but not more than for 72 hours and to the extent necessary for

the inspection, without suspending the activity of the undertaking subject to inspection;

e) to ask any representative or member of staff of the undertaking or association of undertakings or public administration authority for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record their answers;

f) to ask the information relating to the subject-matter and purpose of the inspection, kept on the computer and available in the premise, to be submitted in a form so that it may be taken and may be visible and readable.

g) if necessary, ask explanations of request explanations from representatives or staff members of the undertaking. During the inspection the team members are obliged to:

h) inform the person subject to the inspection about its rights and obligations;

i) conduct the inspection actions in compliance with the entitled powers and in accordance with its object and purpose.

The undertaking, association of undertakings, central public administration authority has the obligation to obey to the inspection of the Competition Council. The inspection shall be conducted within 9.00-18.00 o'clock. The inspection results are recorded in its minutes.

It is said that usually inspectors cannot "fish" information, but the right to "examine the books and other documents," even within the parameters under investigation, allows inspectors to be inquisitive during an inspection and random decisions to inspect the contents of cabinets and other furniture items gave some striking results. The Commission requests routinely records of telephone and fax numbers used in a certain period of time and nowadays it is also interested in electronic mail communications, all these records revealing evidence of contact with potential competitors.

The Competition Council can obtain a number of documents during an inspection, some of which may prove to be irrelevant to the case. These documents may be returned to the parties from which they originated. Certainly, it is unlikely that the Competition Council returns the documents if their relevance remains current.

According to the national law, inspections may be also conducted in other premises, lands, means of transport, if there are signs that there might be found evidence of abuse. This can be achieved by the disposition of the Plenum of the

Competition Council. If an inspection of accommodation or lands of a natural person is needed, a legal mandate is mandatory.

One of the fundamental rights that is respected, including in the competition legislation is the right of defence of the undertaking. It can include:

1. Access to personal case files;
2. The right to express their views and proposals on the conclusions of the investigation report.
3. A person's right to be heard;
4. The right to appeal administrative provisions of the Competition Council;
5. The right to leniency;
6. Assuming commitments.

The Community Courts have recognized that rights of defence include: the right of everyone to be heard, the right of access to personal files and the principle of good administration<sup>1</sup>. Respecting the right to be heard in all proceedings which are initiated against a person and are liable to culminate in a measure affecting that person is a fundamental principle of Community law which must be guaranteed even in the absence of any specific regulation. These are summarized in the European Union Charter of Fundamental Rights: Article 41 (Right to good administration) states the following:

(1) Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

- (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- (c) the obligation of the administration to give reasons for its decisions.

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<sup>1</sup> See, e.g. T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line v Commission* [2003] E.C.R. 11-000, judgment of September 30, 2003. Furthermore, the Courts have pointed out that the right to abstain from self incrimination and the protection of confidentiality of written communications between lawyer and client are part of the rights of defence (Case T- 112/98 *Mannesrohrenwerke AG v Commission* [2001] [ E.C.R. 11-729, at paras 60-67; [2001] 5 C.M.L.R. 1; Case 155/79 *A.M.&S. Europe v Commission* [1982] E.C.R. 1575, para.23; [1982] 2 C.M.L.R. 264. These aspects of the rights of defence are considered in Ch.3 above.

The right to be heard in cases concerning competition before the Commission shows two important issues: the Commission's obligation to inform the undertakings concerned about their cases and the right of the undertakings to reply.

It is part of that principle that, in order to enable the effective exercise of the right to be heard, the person concerned is entitled to be informed of the facts and considerations on the basis of which the authority is minded to act. This is not just a matter of seeing the evidence, but also all information in the possession of the Competition Council that may be relevant for the defence of the alleged infringer.

The Competition Council should fairly conduct proceedings. It will not be obliged to act as a judicial tribunal but its administrative procedures must comply with fundamental procedural guarantees provided by Community legislation.

The Competition Law No.183 of 11 July 2012 contains clear provisions on access to the file. In this regard, on written request, the complainant will be given one time access to the documents the Competition Council based its preliminary examination following the information made by the Competition Council in accordance with art. 53, paragraph (3)

In turn, undertakings and associations of undertakings subject to proceedings by the Competition Council have the right of access to the file of the Competition Council, under the legitimate interest of businesses to protect their commercial secrets. Access to the file will be provided once, on written request, following the submission by the Competition Council of the investigation report for comments.

Access to the file is granted provided that the information in the file is to be used only within that procedure conducted by the Competition Council or any legal proceedings related to this case.

However, the right of access to the file does not extend to the confidential information and internal documents of the Competition Council, to the Competition Council's correspondence with the competition authorities in other countries.

The President of the Competition Council will allow the parties concerned to have access to the file at the Secretariat of the Competition Council and to obtain, on request, at a cost established by the decision of the Competition Council, copies and extracts of the files. However, the Competition Council is not obliged to provide translations of the documents in the file.

The date set for access to the file will be notified to the parties within maximum 3 working days from filing the request.

The documents collected during the inspection carried out by the Competition Council, proved to be unrelated to the investigation as a result of further investigations, shall be returned to the undertaking from which have been collected and are no longer part of the case file.

In case of documents with limited access from the Competition Council's file, the access will be granted, if possible, to non-confidential version of those documents, submitted by the company benefiting from the protection of confidentiality. When confidentiality can be assured by summarizing the relevant information, access will be granted to a summary.

The minutes and records during interviews, confirmed by the signature of the person or undertaking concerned, will be accessible after the removal from their contents of commercial secrets or other confidential information.

The manner of appealing the administrative acts of the Competition Council is specified in art. 47 (1):

The decisions and provisions of the Competition Council as well as the orders may be appealed within 30 days from the date of receipt by the parties, including in the competent administrative court, without a prior request. (2) Dispositions for initiating alleged cases of violation of competition, state aid and advertising legislation may be appealed only together with the decision or the prescription adopted in the case at issue, except the prescription ordering interim measures.

However, unless the court otherwise provides, initiating a legal action does not suspend enforcement of the Competition Council's decision until the settlement of the case in the court.

If the appealed decision in respect of the implementation of sanctions was cancelled in whole or in part, by a final and irrevocable court decision, the appropriate amount of the fine will be returned to the payer from the state budget within 45 days.

The right to use the instrument of leniency is not only a right to be exempted from a fine, but also an opportunity for awareness and to correct the situation. The procedure is fully described in art. 84-92 of the Competition Law.

The undertakings or associations that cooperate with the Competition Council may qualify for a reward (leniency), where they were part of an anti-competitive agreement.

The undertaking or associations of undertakings which have initiated an anti-competitive agreement and forced other businesses to participate in the

agreement cannot benefit from immunity from a fine. But still they can enjoy the right to reduce the fine if legal qualify.

To qualify for a leniency the undertaking must submit an application to the Competition Council in this regard. To submit the request, the undertaking must cooperate effectively with the Competition Council continuously and promptly throughout the investigation (eg. provides the necessary information, does not falsify and destroy evidence, does not conceal information, does not reveal the existence of the application for leniency until the report is transmitted to the parties, etc.) and is obliged to cease its involvement in the agreement.

The right to assume commitments by companies is outlined in the Commission Communications on acceptable remedies under the Regulation (EC) N B9 / 2004 of the Council and Regulation (EC) N 802/2004 (2008 / C 267/01) of the Commission published in the Official Journal of the European Union C 267/1 of 22 October 2008.

The provisions of these European Union Regulations are transposed in Regulation No 2 of 01.22.2015, approved by the Competition Council decision on accepting commitments proposed by undertakings. The procedure of assuming commitments by the undertaking and the procedure of acceptance of commitments by the Competition Council Plenum are contained in the above regulations. Commitments may be assumed in cases of if anti-competitive practices and mergers.

It is important to realize that the commitments are a tool that can be used when it is possible to quickly restore the competitive space by the good will of the undertaking.

The initiative to formulate commitments rests solely with the undertaking on which the investigation was initiated. They expose the proposals on the content and duration of the commitments.

The commitments may be behavioural, related to behaviour change; they are more flexible and cannot be independently accepted without those of structural nature. The structural commitments imply an immediate change in the structure of the market.

After submitting the form the Competition Council notify within 60 days about the possibility / impossibility of initiating discussion. The refusal is communicated within 3 days.

As a result, the Competition Council issues a letter to the undertaking with competition problems to be resolved and sets a deadline. If within this period the undertaking does not present the remedies, the Competition Council refuses to accept commitments.

Requiring commitments cannot be qualified as the omission of infringement. After receiving the form, the Competition Council examines the conditions and makes an assessment.

If the proposal is received, the Competition Council issued a decision accepting commitments. After accepting commitments the monitoring phase follows. If there is a significant change referring to the decision, it is acting contrary to the commitments or the decision was based on incomplete, misleading information, the Competition Council Plenum may reopen investigation procedure

### 3. Conclusions

The efficiency of "traditional" and antimonopoly regulatory instruments is challenged and reviewed by regulatory and judiciary authorities. It generates active discussions concerning broad competitive processes among researchers of different markets and among the leading practitioners. State authorities are responsible for appropriately regulating the competitive considering changing situations. Jonathan B. Baker (2007) Disturbances within the competition process lead to inefficient use of resources, a decrease in innovation and can break consumer welfare. Competition authorities are meant to preserve a truly competitive environment. To this end, there are two possibilities: punishing those who violate the rules of fair competition and prevention of these violations.

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