

/ Case Study: Competition Council approach on unfair competition & commercial practices in Romania

15.07.2016

Antitrust & Competition | Bucharest

Unfair competition and commercial practices have become a focal point of the Competition Council during recent years, following increasing number of claims submitted for its assessment and investigations initiated thereafter.

According to the annual Activity Report, the competition authority has analyzed during the past year more than 80 claims, out of which 10 required in-depth investigations.

Most of these cases involved denigration of competitors or products and diversion of clientele.

The criteria that the Competition Council needs to observe when evaluating a claim brought for its assessment regard mainly (i) the degree of social danger, (ii) the circumstances in which the relevant infringement has occurred and (iii) the significance of the economic sector where the unfair competition practice has taken place, evaluated within the wider context of the national economy (e.g. relevant market, number of involved undertakings and duration of the infringement, potential effects and affected parties). For a rational and efficient allocation of resources, the Competition Council has the possibility conferred by law to prioritize the claims submitted for its review based on the potential impact on effective competition, the general interest of consumers or the strategic importance of the respective economic sector.

To this end, the Competition Council made public its assessment of two cases, which we summarize below:

Denigration of competitors

A company submitted a complaint with the Competition Council alleging the fact that - after poaching its key employees - a competitor has used them to disseminate misleading and untrue facts about the plaintiff's business and creditworthiness. Apparently, all of its major clients have been contacted by its former employees, stating that the plaintiff is not able to continue observing its contractual obligations and may not render anymore related services.

The main facts analyzed by the Competition Council were whether (i) the denigration has actually taken place, (ii) the disseminated information was untrue and, most importantly, (iii) such practice damaged the plaintiff.

The authority has inquired relevant clients of the petitioner whether they have been contacted and whether any of them terminated ongoing contracts, and the reason for such decision.

Following this investigation, the Competition Council found out that the respective clients have been contacted indeed by former employees, have also received new offers for services, however none accepted such offers or terminated ongoing contracts.

The Competition Council has ascertained that, without a real material adverse effect and in the absence of actual damages (e.g. termination of agreements by clients), this case did not fulfill the mandatory criteria and may not be construed as unfair practice.

Diversion of Clientele

Likewise, former employees hired by a competitor were accused of disclosing business secrets and presenting clients with offers containing the same technical specifics as the one of the previous employer.

For this case, the Competition Council has analyzed not only the state of facts, but also the causation between such actions and the use of trade secrets, and whether for these secrets reasonable measures of protection have been taken and the disclosure negatively affected the interests of the plaintiff.

Although it seems that the claimant could not actually prove the disclosure of its trade secrets, also for this case, the competition authority has concluded that none of the clients terminated ongoing agreements and thus, no real damage was incurred by the plaintiff.

Accordingly, the recurrent element of the aforementioned cases appears to be the existence of a damage, in the absence of which, mere “heckling practices” seem not to be qualified as unfair commercial activities.

Against this background, companies are encouraged to thoroughly document their cases in front of the Competition Council, especially in terms of actual damages caused as a result of alleged unfair practices, and quantify the negative effects, considering the fact that actions only threatening to cause potential damages shall not be construed as incriminating commercial practices.

Contact



Luiza Bedros

Practice Group Antitrust & Competition

Practice Group Healthcare

Avocat

T +40 21 3125888