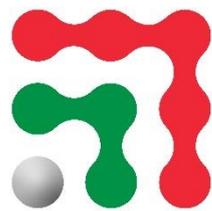


SUSTAINABLE DEVELOPMENT AND COMPETITION LAW
(Special project for the 2021 ICN Annual Conference – Survey)

APPENDIX D

to the Survey Report

Additional contribution by the Romanian Competition Council
(4 June 2021)



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20 YEARS



Submission by Romania

ICN Special Project on Competition and Sustainability

The goal of both EU and national competition rules is to promote and protect effective competition in markets, to the benefit of consumers.

EU antitrust rules prohibit anticompetitive practices by companies, such as anticompetitive agreements or abuses of a dominant position. Antitrust rules are applied in parallel by the European Commission, national competition authorities and national courts. EU antitrust rules already contributes to sustainability by sanctioning restrictive behaviour such as restrictions in the development or roll-out of clean technologies or foreclosing access to essential infrastructure, such as power transmission lines, which is key for the roll-out of off-shore wind parks and other renewable energy sources. EU antitrust rules also contribute to sustainability by facilitating energy flowing freely across borders based on competition between energy operators and a more efficient use of natural resources. Enforcement action relating to transport can also contribute to the greening of the industry and economy.

Businesses can contribute to sustainability objectives by joining efforts to go beyond binding standards. Standardisation agreements frequently produce significant positive effects, in particular, by enabling the development of new and improved products or markets, or improved conditions of supply. When agreeing on standards, companies can put in place safeguards ensuring that the benefits of a standard do not come with unnecessary restrictions on healthy competition. For example, a standard should be applied in a transparent and non-discriminatory manner; it should be accessible to all interested companies, including those that also want to use alternative standards or technologies; and it should not allow for exchange of commercially sensitive information or cover up for cartels. Agreements pursuing sustainability objectives may also in principle enjoy the benefit of the Commission's block exemption regulations (BERs) so long as they do not contain hard-core restrictions and when the joint market shares of the parties to the agreement do not exceed specific thresholds.

Yet, companies have not addressed the RCC (hereinafter referred as *RCC*) any request, by now, on evaluation of their intentions to cooperate for the purpose of sustainable objectives regarding environmental protection, from the perspective of the competition law.

Consequently, the RCC has not had the opportunity to evaluate cases concerning sustainability agreements that pursue environmental or other sustainable objectives. The national competition law does not apply to the regulatory acts aimed at defending a major public interest, in specific circumstances, as adopted by the competent public authorities.

Moreover, the RCC’s decision-making practice is limited in terms of withdrawing the benefit of exemption provided for in the Art. 101 (3) TFEU. In most cases, it indicates on the sanctioning of the anticompetitive behaviour affecting consumers, through competition restrictions, limiting the access of the potential competitors on the market.

The characteristics of agreements that serve sustainability without restricting competition should be therefore evaluated on a case-by-case basis, to assess the compliance with the provisions of Art. 101 (3) TFEU and Art. 5 (2) of the Competition Law no. 21/1996, republished and amended. However, given that the field of sustainability agreements is relatively new, it raises a number of questions, for example as to the scope of the notion of affected consumers from a different perspective than competition, how to calculate efficiencies, etc.

Overall, RCC can argue that by helping to achieve efficient and competitive market outcomes, competition policy contributes by itself to the effectiveness of green policies.

These conclusions are part of the position made available by the RCC on the occasion of the EC consultation process on the competition policy supporting the European Green Deal that covered also sustainability implications over merger control and state aid policy.

Note should be made also that in the period 2015-present, 3 sectorial investigations handled by the Research Directorate have touched upon aspects related to environmental sustainability, even if the subject was not a central one in the analysis, as it follows:

1. Sector inquiry into the management of surface water resources and the effects produced on downstream markets (electricity and irrigation) held within the timeframe 22.01.2014 – 13.11.2017

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|--------------------------|---|
| ID/Title | Order of the President of the Competition Council no. 44 of 22.01.2014 / Sectorial investigation regarding the management of surface water resources and the effects produced on the downstream markets (electricity and irrigation) |
| Product/service/industry | Surface water resources used in electricity generation and irrigation |

| | |
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| Timeframe of the sector inquiry/market study/research | Main part of data covers the period 2006-2015 |
| Investigated phenomena/conduct | The mechanism for determining the specific contributions (fees) charged for the management of water resources and their effects on other downstream economic activities, for which water is an important factor of production (electricity, irrigation for agriculture); identification, from a theoretical perspective, of the economic model of operation of this market and of the possible problems of competitive nature. |
| Date of report/study | 13.11.2017 |
| Weblink of report/study/project (English) | N/A |
| Weblink of the report/study/project (Original) | http://www.consiliulconcurentei.ro/uploads/docs/items/bucket13/id13050/raport_final-13112017.pdf |
| <i>Weblink of press release on report/study (English)</i> | http://www.consiliulconcurentei.ro/wp-content/uploads/2017/10/comunicat_utila_apa_sept_2017_eng.pdf |
| <i>Weblink of press release on report/study (Original)</i> | http://www.consiliulconcurentei.ro/wp-content/uploads/2017/09/utila_apa_sept_2017.pdf |

The subject and the structure of the sector inquiry / market study / research were the following:

a) the title under which the “contributions” regarding the management of water resources are perceived;

b) the cost generated by the activities of water resources administration and the way in which it is distributed by categories of users;

c) the impact of these "contributions" over the costs incurred by energy producers and irrigation operators;

d) identification from a theoretical perspective of the economic model of operation of this market and of the possible problems of competitive nature.

The report is structured as it follows:

- Chapter 1. Water resources;
- Chapter 2. Economic sectors using water;
- Chapter 3. Target-groups involved in the analysis and the problems they signal;
- Chapter 4. Legislative mechanism in the water field;
- Chapter 5. System of contributions for using the resource of water;
- Chapter 6. Impact of the contribution for water over the economic sectors analysed;
- Chapter 7. An economic and legal perspective over the water pricing in Romania;
- Chapter 8. The pricing of the water used in the production of electricity and irrigations in other countries;
- Chapter 9. Findings, conclusions and recommendations.

Notion of sustainability that was involved in the sector inquiry in question / was the subject of research

Water resources and the related range of services support economic growth, poverty reduction and environmental sustainability. From food and energy security to human and environment health, water contributes to increasing social well-being. Water is the most important resource for people and environment, and the water circuit is essential for achieving sustainable water management; the functioning of ecosystems depends on water resources.

The system of contributions, payments, bonuses, tariffs and penalties is based on the principle of "costs recovery" for getting knowledge and managing water resources, on the basis of the principle "user pays" and the principle "polluter pays". The specific contributions of water management are differentiated by categories of sources and users groups and by pollutants from wastewater discharged into water resources.

The main findings of the sector inquiry / market study / research in general as well as concerning sustainability and competition were the following:

- a) the existence of a non-transparent, arbitrary, economically groundless and discriminatory wastewater tariff system;
- b) the absence of the state technological neutrality towards the electricity producers;
- c) the existence of a discrimination of the electricity producers, unjustified either economically or legally;
- d) the existence of a possible distortion in the market due to micro-hydropower plants that sell the energy produced below the cost level, their real gain coming from the amounts collected from the sale of green certificates;
- e) the absence of a system for compensating the amounts spent by water users on the occasion of the execution of water management services.

- **how sustainability was taken into account / analysed;**

In the field of water resources, the price and the market can be used to achieve the following objectives:

- i) a sustainable use of water;
- ii) a minimum waste;
- iii) an efficient allocation;
- iv) incentivising the development of efficient technologies;
- v) the re-use;
- vi) water recycling.

- ***whether the sector inquiry/market study / research resulted in any action by your agency (including the initiation of competition enforcement (i.e. individual case(s)), competition advocacy (e.g. proposing regulation or deregulation);***

Regarding environmental issues, the Government of Romania was advised to set up an interdisciplinary Commission, made up of reputable experts in the legal, economic, technical, fiscal and competition fields, to be tasked with identifying within a reasonable time the optimal pricing method of waste water. It was recommended that a technologically neutral and doubled-quality calculation formula is needed to encourage the rational use of water and to penalize pollution, waste and fraud.

- ***whether there were any broader consequences of the sector inquiry / market study / research and, if yes, what those consequences were.***

RCC is monitoring the implementation of proposals / recommendations resulting from the sector inquiry.

2. Sectoral inquiry on the cement production and trade in Romania held within the period 09.03.2016 – 13.03.2019

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| <i>ID / Title</i> | Order of the Competition Council's President no. 193 of 09.03.2016 |
| <i>Product/service/industry</i> | |
| <i>Time frame of the sector inquiry / market study / research</i> | Main part of data covers the period 2013-2017 |
| <i>Investigated phenomena / conduct</i> | The features of the market investigated and the results of the market mechanisms; the definition of the relevant market; the competition assessment |
| <i>Date of report / study</i> | 13.03.2019 |
| <i>Weblink of report/study/project</i> | n.a. |

| | |
|--|---|
| <i>(English)</i> | |
| <i>Weblink of report/study/project (Original)</i> | http://www.consiliulconcurentei.ro/wp-content/uploads/2019/12/20190514_raport_ciment_neconfidential_final_de_pus_pe_site_cu_anexa_ce_include_observatiile_din_perioada_de_consultare_publica.pdf |
| <i>Weblink of press release on report/study (English)</i> | http://www.consiliulconcurentei.ro/wp-content/uploads/2018/11/utila_ciment_nov_2018_english.pdf |
| <i>Weblink of press release on report/study (Original)</i> | http://www.consiliulconcurentei.ro/wp-content/uploads/2018/11/utila_ciment_nov_2018.pdf |

- ***the subject and the structure of the sector inquiry / market study / research:***

The characteristics of the market under consideration were individually analysed, in separate chapters, focusing on the market shares, the characteristics of the marketed product, the analysis of the customer demand and profile, the legal and regulatory framework applicable to the respective market, industry-specific practices and market history, including recent competition developments, but also other developments considered relevant.

Regarding the analysis of market mechanisms and the results obtained in the investigated sector, aspects related to costs, prices, profitability, variety and quality were evaluated.

The RCC's practice regarding the relevant market was briefly described and in order to highlight some key aspects related to both geographic and product relevant markets, the catchment areas for a cement plant on the Romanian territory were estimated and statistical techniques for analysing prices were presented in order to assess the degree of substitutability between the various assortments of cement.

Four theories of competitive harm have been drawn up in order not to overlook defining core elements in the assessment of the way in which competition works in the investigated sector:

1. high levels of concentration and barriers to entry mean that suppliers can exercise market power;
2. coordination between producers prevents, restricts or distorts competition;
3. vertical integration and exclusionary behaviour;
4. certain regulatory issues have the effect of preventing, restricting or distorting competition.

The report is structured as it follows:

- Chapter 1. Basic concepts regarding the product and methodological clarifications;
- Chapter 2. Guidelines and types of analysis used in the report;
- Chapter 3. Regulations applicable in cement industry;
- Chapter 4. The competitive history of the cement industry;
- Chapter 5. Cement production and trading sector from the supply perspective;

- Chapter 6. Cement industry in Romania - a theoretical perspective and competition analysis;
 - Chapter 7. Cement production and trading sector from the perspective of demand;
 - Chapter 8. Market results;
 - Chapter 9. Conclusions and proposals.
- **notion of sustainability involved in the sector inquiry in question /the subject of research;**

The report includes a separate section presenting the impact of the cement manufacturing activity on the environment.

The report also includes a chapter on regulations applicable to the cement industry, including those on environmental protection. The legal framework requires companies active in the cement industry to comply with certain requirements (environmental, product quality, exploitation and management of natural deposits and occupational security and health), some of which are barriers to entry and exit from the market.

- **the main findings of the sector inquiry / market study / research in general as well as concerning sustainability and competition were the following:**

- a) high barriers to entry (regulatory barriers represent a matter of concern, both in association with the possibility of exercising market power and coordination);
- b) the profit margins of the three main cement producers are high and may constitute indications of market power;
- c) high concentration of market;
- d) symmetrical and constant market shares throughout the analysed period raise competition suspicions;
- e) high degree of transparency in the cement customer-supplier relationship and of low complexity, in terms of demand, giving competitors the opportunity to more easily observe the behaviour of rivals on the market, which can facilitate the adoption of coordinated behaviours;
- f) the possibility of coordination at the level of assortments produced and delivered for the purpose of market sharing cannot be excluded;
- h) the customers are mainly located in the area described by an iso-distance defined at 350 km of road around the point of sale;
- i) the possibility of sharing the geographic market between cement producers cannot be eliminated from the calculation, the distance criterion being extremely important in the choice of the cement supplier;

j) the extended period (maximum 20 years) for which the operating license is granted, as well as the right of unlimited extension for successive periods of 5 years each, blocks access to the market and may lead to its closure for an indefinite period of time, or until the exhaustion of the exploitable resource for which the license has been granted;

k) none of the 4 theories of competitive harm could be refuted following the analyses included in the report.

- **how sustainability was taken into account / analysed;**

In a separate section, the perception of the most important players in the cement production and trading market relating to the barriers to entry and exit, depending on their nature: financial, regulatory (including environmental rules) and other types was presented.

As concerns the barriers to entry, over the period considered (2013-2017), regulatory barriers were perceived at constant levels in the first three years, followed by a slight increase in 2016 and an improvement in 2017. The financial barriers had approximately the same evolution, but, even after their improvement in 2017, they are still at a considerably higher level. Regulatory barriers, as well as other types of barriers are not perceived on average as very restrictive. The overall impression is slightly more optimistic than a neutral position.

Compared to entry barriers, in the case of exit barriers, a much more favourable perception can be observed, the exit from the market being considered by the active undertakings easier from this point of view. Financial barriers remain high from the perspective of industry players, due to the sunk costs associated with leaving the market. Even the sale of these specific assets can lead to a difficult recovery of such costs due to the small number of potential buyers.

Following the construction of a cement plant, the considerable initial investment, coupled with the long period to recoup the investment, turns into factors (barriers) that slow down and even discourage the exit process from such a market. In addition to these considerations, there is a need to meet environmental requirements in order to close such a production facility.

- ***whether the sector inquiry/market study / research resulted in any action by your agency (including the initiation of competition enforcement (i.e. individual case(s)), competition advocacy (e.g. proposing regulation or deregulation);***

As a result of the sector investigation finalized at the beginning of 2019, a series of proposals were made in the sense of amending and / or eliminating those provisions of the Mining Law no. 85/2003 that present risks from a competition point of view (market foreclosure issues). As neither the current legislation nor the proposal to amend it provided for an effective limitation of the period for granting the mining license / concession contract, it was considered appropriate to

introduce legislative provisions in the draft for amending the Mining Law to limit this period, at a margin that can be determined by specialists of the National Authority for Mineral Resources. At the end of 2019, the competition authority reiterated the previous recommendations to the Ministry of Economy, Ministry of Energy and Ministry of Business Environment.

The analyses carried out within the study contributed to the opening of an investigation regarding the possible violation of the national and community competition legislation through cartel-type practices by the main actors on the Romanian cement production and trading market.

- *Whether there were any broader consequences of the sector inquiry / market study / research and, if yes, what those consequences were.*

The RCC is monitoring the implementation of proposals / recommendations resulting from the sector inquiry. The investigation concerning the possible breach of competition legislation is ongoing.

3. The sector inquiry concerning medical waste handled within the period 10.04.2019 – present

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| <i>ID / Title</i> | Order of the President of the Competition Council no. 388 of 10.04.2019/Sectoral investigation on medical waste |
| <i>Product/service/industry</i> | Medical waste |
| <i>Time frame of the sector inquiry / market study / research</i> | 2013-2019 |
| <i>Investigated phenomena / conduct</i> | <ul style="list-style-type: none"> - Getting knowledge on the mechanisms of functioning of the markets under analysis (characteristics, possible dysfunctions/inefficiencies, barriers, etc.); - Setting-up the criteria for defining the relevant product market and the geographic market; - the degree of concentration; - the degree of integration of operators authorized for the treatment/disposal of medical waste and estimation of their market shares - examination of certain theories of competition harm |
| <i>Date of report / study</i> | 02.02.2021 |
| <i>Weblink of report/study/project (English)</i> | n.a. |
| <i>Weblink of report/study/project (Original)</i> | http://www.consiliulconcurrentei.ro/wp-content/uploads/2021/02/Raport-preliminar-sectoriala_-deseuri-med_vers-site.pdf |
| <i>Weblink of press release on report/study (English)</i> | http://www.consiliulconcurrentei.ro/wp-content/uploads/2021/03/Deseuri-medicale-feb-2021-English.pdf |

| | |
|--|---|
| <i>Weblink of press release on report/study (Original)</i> | http://www.consiliulconcurentei.ro/wp-content/uploads/2021/02/Deseuri-medicale-feb-2021.pdf |
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- ***the subject and the structure of the sector inquiry / market study / research***

Regarding the subject of the investigation, please consider all aspects mentioned in the above table under the investigated phenomena/conduct section.

The structure of the report:

Chapter 1 – The legislative framework applicable to medical waste, where the general aspects regarding waste and specific aspects regarding medical waste comprised in the internal legislation as well as the opinion of the authorized operators for treating/eliminating the medical waste and the surveyed sanitary units;

Chapter 2 – The description of the functional process of medical waste management, respectively of the steps taken in the medical waste processing;

Chapter 3 – The segment of treatment and disposal of medical waste from the perspective of supply, with sub-chapters describing:

- the evolution of the number of operators and the geographical positioning of the authorized installations;
- the situation regarding the capacities of the authorized installations;
- the presentation of economic operators;
- the situation regarding the quantities of medical waste managed by the authorized economic operators and the estimated market shares;
- the degree of concentration on the segment of medical waste treatment and disposal services.

Chapter 4 – The segment of treating and eliminating the medical waste from the demand perspective;

Chapter 5 – Criteria on defining the relevant product market and the relevant geographic market;

Chapter 6 – Competitive aspects of the assessed field with sub-chapters regarding barriers to entry on the market and the theories of competitive harm;

Chapter 7 - Conclusions and proposals.

- ***notion of sustainability involved in the sector inquiry in question / the subject of research;***

The legal framework requires companies to comply with certain requirements for the protection of the environment and public health.

- ***the main findings of the sector inquiry / market study / research, in general as well as concerning sustainability and competition were the following:***

- a) high barriers to entry in terms of the costs of purchasing medical waste treatment or disposal facilities and subsequent maintenance costs;
- b) cumbersome and lengthy authorization process, from the perspective of the documents to be submitted and the waiting period for the environmental permit;
- c) high market concentration;
- d) at national level only one company has a market share of over 40%;
- e) the theory of competitive harm consisting in the division of the market by the operators has been confirmed.

- ***how sustainability was taken into account / analysed;***

It has not been separately treated in the investigation.

- ***whether the sector inquiry/market study / research resulted in any action by your agency (including the initiation of competition enforcement (i.e. individual case(s)), competition advocacy (e.g. proposing regulation or deregulation);***

A series of recommendations were made to the responsible ministries, in the sense of reviewing the specific legislation and the unitary application of the environmental legislation, in order to facilitate the access of the operators to a transparent authorization and control process. Given that the specific legislation consists of numerous main and secondary normative acts, difficult to follow, issuing guidance regulations, possibly grouped in a single guide would facilitate operators' access to information /clarifications necessary for carrying out the activities of managing waste, also important from the perspective of the prevention component.

The information obtained in the investigation contributed to the opening of an investigation into a possible infringement of competition law in the medical waste market.

- ***Whether there were any broader consequences of the sector inquiry / market study / research and, if yes, what those consequences were.***

Not the case.

To conclude, currently, competition law does not refer to sustainability and there are not any other pieces of legislation which also relate to competition law matters and refer to sustainability.

Further, RCC cannot anticipate either the introduction of new sustainability related provision into competition law in the near future (2021-2023) or new piece(s) of legislation which also relate to competition law matters and refer to sustainability in the near future 2021-2023.