



## **INFRINGEMENT OF COMPETITION LAW BY PUBLIC BODIES**

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# Competition Law

## According to Article 8:

- any actions of the central or local public administrative bodies which have as an object or may have as an effect the restriction, prevention or distortion of competition are prohibited:
  - limitation of the freedom of trade or autonomy of undertakings, exercised under the legal regulations;
  - setting of discriminatory conditions for the activity of undertakings.
- If the public administrative bodies or the entities to which they delegated their duties do not comply with the measures ordered through RCC decision for the purpose of re-establishing the competitive environment, RCC may challenge an action before the Bucharest Court of Appeal

# Competition Law

## According to Article 8:

- RCC may request the court:
  - to cancel, the document which led to the prevention, restriction or distortion of competition;
  - to compel such authority to issue an administrative document or to carry out a certain administrative procedure.
- the public administration authority has the obligation to take all the measures in a certain period of time established by RCC decision
- RCC may address to court within 6 months from the expiry of the given period of time

## Effectiveness of decisions against public bodies

- RCC might decide to use “soft” advocacy efforts to remove public restraints of competition before bringing a “hard” enforcement case
- However, the Competition Law provides for sanctions against public bodies, only for failure to supply information or if such information is deemed inaccurate or misleading
- Therefore, RCC decisions against public bodies have no immediate effect and are insufficiently deterrent
- Restoring the competitive environment requires the intervention of courts

## Combined interventions against public bodies

- besides making use of Art. 8 and other provisions of Competition Law, RCC has the power to issue advisory opinion on State aid measures
- Joint application of EU State aid Law (and national procedures) and Competition Law represents a stronger enforcement tool of RCC

## RCC advocacy interventions

Type of intervention- 2017	Competition	State aid
Advisory opinions	8	8
Points of view	46	12
Opinions	67	27

- Recently, the RCC has adopted a more pro-active and systematic approach in its competition advocacy efforts
- Competition impact assessment has become a standard element in the regulatory assessment of draft legislation
- RCC's opinions cover a wide range of industry sectors:
  - new pricing system for pharmaceutical products
  - amendments to the Law regarding public notary profession
  - restrictions on the establishment of retail outlets

# RCC advocacy interventions

## **Amendment of the Law on community services of public utilities:**

- State aid measures could be granted only after receiving the advisory opinion of RCC
- The delegated management contracts could be directly awarded after receiving the advisory opinion of RCC
- If the value of contracts is below the threshold established by the Public Procurement Law, no advisory opinion is requested
- For contracts on services in water supply and sewage sector, financed by structural funds, the opinion of RCC is not required

## **Law no 51/2006 on community services of public utility:**

- Management of municipal waste services:
  - imply a certain degree of monopoly
  - fulfill a public interest
  - infrastructure owned by local administration

### Current legal provisions:

- I. self-management of the public service (benchmark "well-run company" is necessary)
- II. delegated management (tender procedure or direct award)

# RCC advocacy interventions

## **RCC proposals to revise the Law on public sanitation services:**

- Clear separation between sanitation services and other municipal waste services
- Limitation of exclusive rights granted to suppliers of sanitation services only to public sanitation services
- Removal of the maximum duration of 35 years and introducing the obligation to establish the contract duration based on feasibility study
- Award of contracts only through tender procedures

## **Law no. 101/2006 concerning public sanitation services of localities:**

- municipal waste services are within the scope of public utilities
- the specific activities are conducted under the control, management and coordination of the local public administration (municipalities).
- collection, removal and disposal of municipal waste is mandatory for municipalities and that consumers are obliged to make use of
- local authorities are in charge of drawing up and regulating the sanitation service, taking into account the local particularities, as well as the current and perspective interests of the respective community.

## RCC priorities for 2016-2017

Due to the increase of cases against public bodies and new provisions of both Competition and state Aid laws on the power of RCC to issue formal and informal opinions :

- Public utility services is one of the 14 key sectors established by RCC in 2016
- 2 sectoral inquiries on water supply and sewerage services, and public lightning services were launched in 2017
- 15% of the investigations opened in 2016 are related to actions of public bodies



## Example of investigations on Art. 8

### **Bucharest Taxi services case (2014):**

- 8 companies have agreed to charge the same tariff for taxi services
- RCC made recommendations to the Bucharest Mayor's Office, such as:
  - to perform monitoring and controlling actions at taxi operators (tariff setting method)
  - to conclude a Cooperation Protocol with the Ilfov County Council regulating the taxi services provided by Ilfov operators in Bucharest (after RCC issues a positive opinion)
  - to submit for advisory opinion the draft Regulations establishing the delegated management of taxi services
- in 2016, RCC and Bucharest Mayor's Office concluded a Cooperation Protocol, aiming at a better observance of the Competition Law, State aid national procedures and measures imposed through RCC decisions

## Example of investigations on Art. 8

### **Maritime Port Administration case (2016):**

- abuse of dominant position and anticompetitive agreements on market of pilotage and towage services
- more restrictive conditions to obtain the authorization than those provided by the law
- increased tariffs for pilotage service
- Recommendation to the Ministry of Transport: to establish an independent regulatory authority in the field to set the conditions of access to port services market and ensure financial transparency of the ports.

### **Ongoing cases 2017:**

- 5 On-going investigations: wastewater analysis, water supply and sewerage water, port land rental, medical services reimbursed by the National Health Insurance House, access to physical infrastructure for electronic communication networks
- 1 investigation finalized in 2017 (water supply and sewerage water)

# Case Study – local municipal waste collection

## Overview

**Competition between operators** providing sanitation service takes place during the selection procedure

**Tender procedures** should be open and based on transparent and non-discriminatory criteria

**Awarded contracts** must be of limited duration and objectively justified:

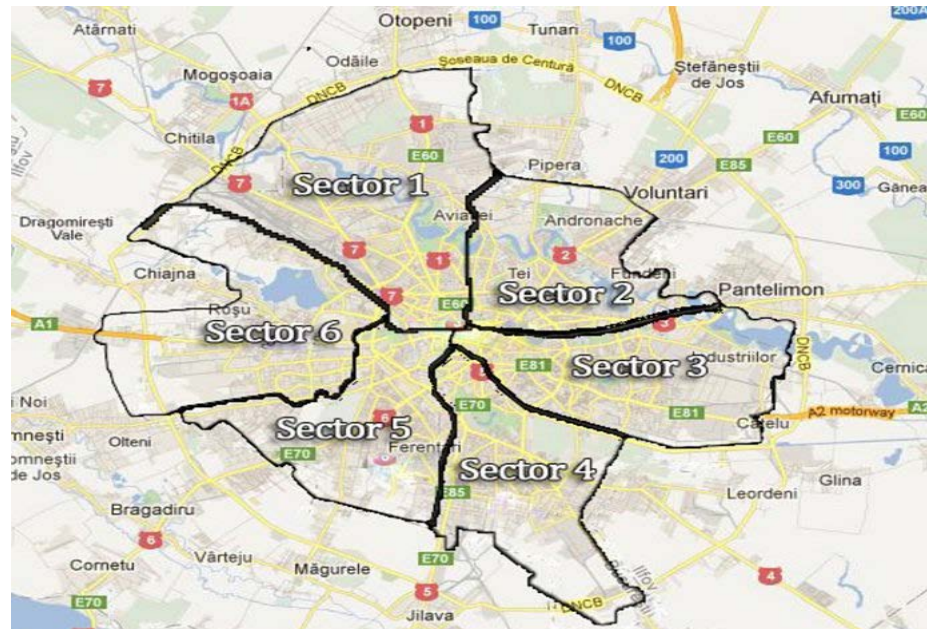
- to ensure the economic and financial stability of the project
- not limiting free competition beyond what is necessary to ensure recoupment of the investments required for the provision of the public service in question (proportionality).

**Long-term contracts:**

- create competitive advantage for the service provider selected
- establish unjustified barriers to entry for other operators that could provide the same service more efficiently

# Case Study – local municipal waste collection

- following the investigation procedure in 2008, RCC decided that the interventions of 5 public local authorities from Bucharest on the local municipal waste collection markets infringed art. 8(1) of Romanian Competition Law
- Bucharest has 6 administrative districts, with their own Mayor and Local Council.
- the geographical market is represented by each of the 6 administrative districts of Bucharest, which were responsible for municipal waste collection within their territories



## Case Study – RCC findings

### Competitive advantage for the contractors

- 4 districts extended through addenda the initial contracts of 5-year duration
- new duration of contracts was of 4 years (2004-2007)
- local authorities did not organise competitive tenders
  
- in 2008, 1 district awarded the collection of municipal waste to a private operator for a period of 25 years
- no clear identification of the specific investments to be made by the respective private operator for the activities entrusted

**Interventions of local government had the effect of restricting and distorting competition in the market of municipal waste management on the territory of Bucharest.**

## Case Study – measures proposed by RCC

To restore the competitive environment, RCC imposed the following actions:

- the respective municipalities should end the extension of contracts
- transparent tenders should be organised to delegate the waste collection services
- to review the 25 years 'service contract based on clear and objective grounds
- contract duration should be established based on the time required for the private operator to recoup the investments

Within 90 days after the communication of RCC's Decision (2009), the public local authorities were required to inform the competition authority on the measures taken in order to comply with the provisions of the above-mentioned decision.

## Case Study – action in Court

### 2010

- RCC filed an action to the Bucharest Court of Appeal against the local authorities concerned
- RCC requested the court to pronounce the termination of contracts and to require the authorities to organize public tenders
- The authorities have contested the sentence pronounced by the Bucharest Court of Appeal.

### 2015

- the Bucharest Court of Appeal decided that one Local Council fulfilled the obligation imposed by RCC in 2009
- Moreover, it decided the following:
- Local authorities of 4 districts should approve their own regulations on public sanitation services, in maximum 3 months
- In maximum 4 months, local authorities should establish by decision the type of management for these services
- If delegated management is chosen, local authorities should elaborate the tender dossiers and begin the procurement procedure (within maximum 3 months after deciding upon the type of management)
- The new awarded contracts shall annul the existing ones

### 2017

- the case is examined by the Supreme Court

**Thank you!**

