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Application by the Romanian courts of the CJEU's judgement in the Whiteland case – new developments

The High Court of Cassation and Justice of Romania has today vacated the decision rendered by the Bucharest Court of Appeals in Friesland Campina Romania's claim for the annulment of Romanian Competition Council's ("RCC") 2015 sanctioning decision in the food retail sector (RCC's Decision no. 13/2015). The High Court, which is the highest appeals court in the Romanian judicial system, retried the case on the merits and found that the competition authority's right to impose the penalty was time-barred under applicable national law, thereby apparently confirming that a strict interpretation of the national legislation prohibiting the interruption of the limitation period by acts adopted after the decision to open an investigation does not lead to a systemic risk of impunity for antitrust practices as those concerned by the case at hand.

This is the first solution of this kind pronounced by the High Court following the Court of Justice of the European Union's judgement in Case C-308/19 (*Consiliul Concuren?ei v Whiteland Import Export SRL*), as this is the primary reason why a large number of the pending cases for annulment of the same RCC decision are currently either referred back to the Court of Appeals or are still awaiting a decision from the High Court.

NCA investigation

The NCA investigation was initiated in 2009 and targeted allegedly anticompetitive price fixing and exclusivity agreements concluded between several retail chains and their suppliers of food products. The Competition Council's decision concerned 25 undertakings, 19 of whom filed claims for annulment of the decision in court.

Preliminary ruling

The High Court's decision follows a stay of the national proceedings for the duration of a preliminary ruling procedure before the Court of Justice of the European Union requested by the NCA with respect to a core argument of the case, i.e. the limitation period and actions interrupting the limitation period (*Case C-308/19, Whiteland*) applicable to investigations into allegedly anticompetitive agreements.

The issue raised was whether a strict interpretation of the imperative provisions of national applicable law pertaining to calculation of the statute of limitations should be disapplied by the national court as it would be contrary to the principles of loyal cooperation and effective implementation of EU competition law. The interpretation at stake referred to whether the last act interrupting the limitation period for the application of sanctions for infringement of competition rules is the formal act of opening the investigation into the anticompetitive practice, without regard to any subsequent act carried out for the purposes of that investigation, or whether such interpretation would run counter to the effective implementation of EU competition law.

The Court of Justice of the European Union ruled that a strict interpretation of the national legislation, as was, in some cases, upheld by the Bucharest Court of Appeals, which precluded actions undertaken by the NCA after the investigation has started, to interrupt the course of the limitation period, could be liable to jeopardise the effective implementation of the EU competition rules if it can lead to a systemic risk of impunity of certain types of anticompetitive practices.

Current status of cases for annulment of the NCA's decision

The nineteen claims for annulment of the NCA's decision were settled on the merits by the Bucharest Court of Appeals, with a wide variety of results. While some of them were allowed on the grounds that the right of the Competition Council to impose penalties for the alleged anticompetitive behaviour was time-barred (4 out of 19), many of them were rejected (8 out of 19). The other 7 files were either allowed or allowed in part, but for reasons other than the application of the limitation period.

In general, the limitation period argument was the main argument raised in these cases, having been relied on by nearly all of the sanctioned undertakings.

Therefore, The High Court has referred a request for a preliminary question in this regard to the CJEU.

After most cases were stayed in appeal proceedings for about one year and a half, the proceedings were resumed starting summer 2021 following the CJEU's ruling in the Whiteland case.

So far, the High Court has dismissed the claim for annulment of the RCC's decision in eight of the nineteen cases, five cases having been sent back to the Court of Appeals for a retrial. Friesland's claim is the only one where the

claim for annulment was allowed by decision rendered after the CJEU's decision in *Whiteland* and, presumably, in consideration of the test proposed by the European Court for the existence of a systemic risk.

Commentary

Three other cases concerning the annulment of the same NCA decision are currently pending before the High Court of Cassation and Justice. Two of the five cases sent for retrial have had their first hearing set for beginning of 2022.

Another of the parties sanctioned by RCC has lodged two extraordinary appeals against the High Court's decision on appeal, both due to be also ruled upon in the first part of 2022.

We eagerly await to see all these various legal explorations of procedure and substantive law come to fruition and ponder on the intended and unintended effects of the CJEU's intervention in the application of rules that were, traditionally, within the exclusive realm of the law of the Member States.