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**CONTESTATION OF THE COMPETITION COUNCIL'S ACTS
ADOPTED IN THE ADMINISTRATIVE PROCEDURE FOR DETECTING
ANTI-COMPETITIVE AGREEMENTS**

This communication is focused on the research of the subject on contestation of the acts issued by the Competition Council (further the Council) within the administrative procedure of identifying the anti-competitive agreements, in the context of entry into force of the Administrative Code No. 116 from 19 July 2018 on 1st April 2019, which represents a revolution in the area of administrative litigation and contains norms that come into contradiction with those set out by the Competition Law No. 183 from 11 July 2012 or which cannot be applied by the Council within the administrative procedure. Undoubtedly, this summary cannot provide clarity to all the matters that require our attention, but we'll attempt to summarize the main particularities on contestation of the acts issued by the Competition Council in the court.

In order for the cartel agreements to be identified, the Competition Council has to start an investigation, and according to the Competition Law, „through the disposition of starting an investigation, the Plenum of the Competition Council appoints a Rapporteur responsible for writing up the investigation report, for making it known to the parties, for receiving the remarks and submitting the report to the meeting of the Competition Council Plenary. The report investigates all the acts of the investigation procedure and proposes to the Competition Council Plenary the disposition of the measures that are within its competence”.

The Competition Law includes provisions on the form and content of the Disposition of starting the investigation, by this it is only disposed the carrying out of an investigation and the appointment of a Rapporteur in charge of carrying it out,

respectively, there are neither obligations/tasks imposed on third parties, nor sanctions applied.

Thus, in our opinion, in the light of the Administrative Code, this does not represent either a detrimental individual administrative act or a beneficial one. If the Disposition of starting the investigation is not an individual administrative act, then what is it?

Upon examination of the definition of the administrative operation of art. 15 of the Administrative Code, we consider the Disposition of initiating the investigation as a written administrative operation conducted by the Plenum of the Competition Council that does not produce legal effects as such. Moreover, this thesis is supported by the Competition Law itself, which stipulates in art. 47, para. (2) that, the dispositions laid down in art 46, para. (4) can be appealed only along with the decision or prescription adopted in that case, except for the prescriptions through which interim measures are applied. Taking into consideration the Competition Law's provisions, we think that the Disposition of starting an investigation can be appealed directly in court within 30 calendar days from the receipt of the Decision or Prescription, without the need to submit a prior application. An important aspect is that with the entry into force of the administrative Code, the Plenum of the Competition Council will have to substantiate the Disposition of initiating the investigation, since this is a written administrative operation and according to art.31 of the Administrative Code, it has to be given reason for.

After initiating the investigation, it is necessary to accumulate evidence regarding the anti-competitional agreement statement, which can be accumulated by conducting unannounced inspections at the companies headquarters suspected of cartel agreements. Inspections are the most efficient instrument of the Competition Authority in collecting information/evidence that can prove directly/indirectly that some cartel agreements were organized. Therefore, according to the Competition Law, carrying out inspections at the premises of the company or at other offices of theirs, is disposed by the Order issued by the Chairman of the Competition Council which indicates the purpose and object of the inspection, the starting date of the inspection as well as the sanctions provided for in articles 68-70 of the Competition

Law, and also the right to appeal the order in court. In addition to the Order, the Chairman of the Competition Council sends an Inspection Delegation that contains the powers of attorney in the name of the Council's employees.

According to art 47, para. (1) of the Competition Law, the Orders of carrying out an inspection can be appealed within 30 calendar days from their date of receipt by the parties, directly in the competent administrative court, without the need to submit a prior application.

With the entry into force of the Administrative Code, several questions have arisen as to whether the Inspection Order can be suspended and what the procedure would be, what the grounds for annulment of such an Order are, whether the Inspection Order is an unfavorable individual administrative act, etc. Likewise, in the light of the new provisions of the Administrative Code and the existing practice, it is found that the Inspection Delegation and the minutes of the inspection can be challenged separately from the Council Decision and suspended, which in our opinion creates a major problem in the Competition Council's work, because inspection is basically the most efficient method of accumulating evidence, widely used by all competition authorities, not only in the Republic of Moldova.

The result of the inspection shall be recorded in a minutes of the inspection, which shall be drawn up in duplicate, numbered and signed on each page by all employees of the Competition Council who carried out the inspection. A copy of the minutes shall be handed over to the party subjected to inspection. Thus, during the inspection procedure at the headquarters of the company subjected to inspection or in other spaces belonging to it, 3 documents are issued: Order, Delegation and minutes on the inspection, and in case of inspection in other rooms that do not belong to the company subjected to inspection both the Decision of the Competition Council to carry out the inspection in these rooms and the Judicial Mandate is required.

It should be mentioned that the Competition Law does not expressly provide for if they can be challenged and if so, in what term and where the Delegation, the Minutes and the Judicial Mandate are contested.

In this context, we believe that the legislature is to amend the Competition Law so as to provide the Council with an efficient inspection procedure and expressly stipulate a special way of suspending administrative acts, and for companies the possibility to challenge only some abusive actions by the Council in the inspection process. The lack of provisions in the Competition Law to regulate in detail the procedure for contesting and suspending the Orders, Delegation, minutes and Judicial Mandate, led to the appearance of quite dangerous judicial precedents that can obstruct the Council's activity in detecting anti-competitive agreements.

After accumulating all the evidence, the Rapporteur appointed by the Order initiating the investigation prepares the Investigation Report, which must contain the object of the investigation, the facts found, the evidence, conclusions and proposals of the rapporteur following the completion of the investigation. The report is submitted to all parties involved, giving them 30 working days to comment on the findings of the Rapporteur. Thus, according to the provisions of the Competition Law and the Administrative Code, the Investigation Report cannot be challenged in court, the objections to it are to be submitted directly to the Competition Council. Moreover, the parties may also request hearings until the adoption of the Decision, in which they may describe and defend once again their position as a result of the investigation.

Analyzing the content of the Investigation Report and the new provisions of the Administrative Code, we conclude that it is a written administrative operation that can be challenged only at the same time with the Competition Council Decision, that makes it clear whether the Competition Law was broken or not.

The decision of the Competition Council to impose sanctions for anti-competitive agreements is an unfavorable individual administrative act and can be challenged directly in the administrative court without the need to submit a prior application, within 30 days of notification. With the entry into force of the new provisions of the Administrative Code, in practice there is a problem in the part concerning the execution of Council Decisions by which sanctions are applied for anti-competitive agreements, which often constitute very large sums. The decisions of the Council are suspended through the courts, and until the adoption of final

decisions by the court, some legal entities are liquidated, but the economic activity continues through other legal entities that are most often newly formed.

Thus, we consider that the Competition Law must lay down a special way to suspend Council Decisions, for example the Special Laws regulating the activity of the National Bank of Moldova and the National Financial Market Commission contain exact provisions on how administrative acts issued by these authorities can be suspended.

Conclusion. Legislative changes by approving the new Administrative Code are able to affect the investigative activity carried out by the Competition Council. In this context, the legislator is to examine the current provisions and come up with some amendments to the Competition Law and the Administrative Code, so that the administrative activity performed by the Competition Council is fully strengthened and there are no contradictory legal provisions. We consider that the administrative activity of the Competition Council should be regulated only by the special law, namely by the Competition Law, and the Administrative Code should be applied only in the part of the third Book of the "Administrative Litigation Procedure", because its activity is a specific one aimed at protection, maintenance and stimulating competition to promote the legitimate interests of consumers. Respectively, through the administrative activity carried out by the Competition Council, the legitimate interests of the consumers are defended, but not of an individual, and the opposition of the anti-competitive agreements leads to some enormous benefits for the state economy and for the consumers.

References:

1. Competition Law no. 183 of July 11, 2012. In: Monitorul Oficial of the Republic of Moldova, 14.09.2012, no. 193-197.
2. Administrative Code of the Republic of Moldova no. 116 from 19.07.2018. In: Monitorul Oficial of the Republic of Moldova, 17.08.2018, no. 309-320.