

Competition - Romania

Competition regime overhaul presents mixed prospects for business

Contributed by [Musat & Asociatii](#)

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Introduction

In July 2011 amending legislation⁽¹⁾ came into effect to modernise Romania's competition framework and align it more closely with the EU model. The changes to competition rules affect an array of substantial and procedural matters.

As a result of the amendments, the secondary legislation implementing the Competition Law requires updating. New guidelines have been issued on the calculation of the authorisation fee for merger clearance cases and five amending proposals are about to come into effect. However, much secondary legislation still awaits review.

Unfair competition

Following the adoption of the amending legislation, the Competition Council will be vested with the right to enforce the Unfair Competition Law (11/1991). Furthermore, it appears that the council will be able to use all instruments at its disposal under the Competition Law (21/1990), including dawn raids, to identify and penalise breaches of the Unfair Competition Law. Breaches of the Unfair Competition Law will be dealt with by the competition inspectorate, without the case coming before the full council.

Dominant position

Originally, Emergency Ordinance 75/2010 established a rebuttable negative presumption in respect of dominance for undertakings with a market share of less than 40%, effectively turning the 40% threshold into a 'soft' safe harbour. This position was in line with the European Commission's view that an undertaking is unlikely to be in a dominant position if its market share is below 40%. The amending legislation replaces this position with a positive presumption whereby an undertaking is presumed to be dominant if its market share exceeds the 40% threshold. This shift in the burden of proof puts the undertaking in the potentially difficult position of proving that it is not dominant if its market share exceeds the threshold.

Authorisation fee

One of the main anachronisms of the Romanian competition law regime is the calculation of the authorisation fee payable following the issuance of a merger clearance decision. Under the old rules, the fee was equal to 0.04% of the relevant undertaking's total turnover in Romania in the year before the issuance of the clearance decision, up to a maximum of €100,000. The new fee will range from €10,000 (for a turnover of €4 million) to €25,000 (for a turnover of more than €250 million). The fee will be calculated according to the recently amended guidelines, which provide for it to be directly proportional to the company's turnover.

The new guidelines have changed the term within which undertakings must notify the council of their turnover for the preceding year. This figure must be supplied with the notification application or within three days of the date of effective submission of the

notification application (not 10 days, as previously).

Hearings

Undertakings under investigation will have the right to submit written observations on investigation reports, but not necessarily to participate in hearings before the full council. The council may accept a party's request for hearings if it believes that this may prove useful in establishing the facts of the case; however, it appears to be under no obligation to accede to such a request. This directly and significantly affects an undertaking's right of defence, depriving it of what used to be the most effective method of arguing against the conclusions of an investigation report. It is hard to believe that parties will not request hearings in all cases under investigation.

Provisional measures

The emergency ordinance provided that where an undertaking challenges a decision to impose a fine and seeks a suspension of enforcement, it must offer security amounting to 30% of the fine. The amending legislation reduces the amount to a maximum of 20% pursuant to the Code of Fiscal Procedure.

Penalties

The penalty for supplying inaccurate or incomplete information during proceedings has been considerably reduced from fines of between Lei5,000 and Lei40,000 (under the emergency ordinance) to between Lei1,000 and Lei20,000, thereby limiting the punitive pressure at the council's disposal.

The penalty applicable to a newly established undertaking which had no turnover in the year before the imposition of the fine will be halved in many circumstances.

Reduction in fines

The changes have considerably broadened the scope of cases in which fines may be reduced to reflect the fact that a party has acknowledged an infringement after being granted access to the investigation file. Under the emergency ordinance, such a reduction was available only in respect of breaches of Articles 5 and 6 of the Competition Law; it now also applies where a party has:

- failed to notify an economic concentration before implementation;
- implemented a concentration before issuance of a non-objection decision;
- breached a prohibitive decision; or
- failed to comply with an obligation, condition or measure imposed by a decision issued under the Competition Law.

Moreover, the maximum reduction has been increased from 25% to 30%.

Limitation periods

In relation to the council's right to impose penalties, the application of a penalty for infringements of provisions concerning requests for information by public authorities is subject to a limitation period of three years, as opposed to the previous five-year period.

Comment

The new rules on penalties and fines, and the overall benefit to the business environment, are changes for the better. However, amendments such as the changes on the presumption of dominant position, the right to a hearing and the authorisation fee appear to depart from the EU model.

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Endnotes

(1) Law 149/2011 for the approval of Emergency Ordinance 75/2010, concerning the amendment and completion of the Competition Law (21/1990).

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