Competition & Antitrust - Romania

Recent amendments to Competition Law and Unfair Competition Law

Contributed by **Musat & Asociatii**

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Government Ordinance 12/2014 was published in the *Official Gazette* on August 6 2014, making significant amendments to the Unfair Competition Law (11/1991) and the Competition Law (21/1996).

Unfair Competition Law amendments

The Unfair Competition Law was adopted in 1991 and, despite a series of amendments since, was in dire need of modification. The previous version of the law listed as unfair competition conduct a series of activities which were regulated by other laws and enforced by state authorities other than the Competition Council, thus creating overlapping competences and uncertainty when it came to identifying the authority best placed to deal with a particular case.

Types of unfair competition

The new version of the Unfair Competition Law lists two specific and one general type of unfair competition practice:

- denigration of a company or its products or services through the dissemination by a competitor (or its representatives/employees) of false allegations regarding the company or its products or services which may harm the company's interests;
- diversion of a company's client base by a former or current representative or employee (or a third party) through the unauthorised use of business secrets which the company has taken adequate measures to protect and whose disclosure may harm the company's interests; and
- any other commercial practices which breach the principles of fair dealing and good faith, and either cause or may cause losses to any market participant.

Notably, both of the specific unfair competition practices above involve detriment to the targeted company and a certain element of bad faith, by either spreading false allegations or disclosing protected business secrets. However, the onus is on the company alleging the infringement to show that the conduct both occurred and can harm its interests.

Enforcement

Regarding enforcement of the Unfair Competition Law, the Competition Council may reject a complaint over unfair competition practices within 30 days of filing where it finds that:

- no unfair competition conduct occurred; or
- the effects of the conduct in question are minor, taking into account the gravity of the conduct, the circumstances in which it occurred and the importance of the affected economic sector to the national economy.

The Competition Council thus has a high degree of discretion when it comes to choosing unfair competition cases to pursue. Presumably, the Competition Council will be more open to cases in which the alleged unfair competition conduct falls within the two specific types of unfair competition conduct identified above.

Should the Competition Council decide to investigate a case of unfair competition conduct following receipt of a complaint, it may do so using the same investigatory powers at its disposal for breaches of the Competition Law and the Treaty on the Functioning of the European Union, including the use of dawn raids and questionnaires and the imposition of fines for refusing to cooperate during a dawn raid, failing to provide requested information or providing false information.

While investigating unfair competition conduct, the Competition Council may:

- adopt an interim measure and order the cessation of the unfair competition conduct;

- prohibit the unfair practice in question; or
- impose a fine of Lei5,000 to Lei50,000 (approximately €1,200 to €12,000) on legal persons or Lei1,000 to Lei10,000 (€240 to €2,400) on natural persons for undertaking either of the two specific types of unfair competition practice identified above.

This third point raises issues. The wording of Government Ordinance 12/2014 seems to imply that companies will be fined for denigrating a competitor or divesting a competing company's client base where all of the other conditions are met, but will not be fined for undertaking other unnamed unfair competition practices. If this was the intention, it is a curious approach; however, it is more likely that this is an oversight to be corrected in the adopting law.

Uniform application of all provisions governing direct and indirect unfair competition practices will be supervised by a newly established entity, the Inter-ministerial Council for Fighting Unfair Competition Practices. This body will include representatives of the Ministry of Finance, the National Audiovisual Council, the National Consumer Protection Authority, the State Office for Inventions and Trademarks and the Copyright Protection Regulatory Authority. Although not yet vested with an exhaustive set of prerogatives, this body will be tasked with applying public policy in fighting unfair competition and providing analytical support.

Issues in need of clarification

Most of these amendments are welcomed. It is helpful that the legislature has seen fit to specify what amounts to unfair competition and to limit the number of unfair competition practices to those which are most harmful and cannot be justified as being carried out in the normal course of business.

However, several other issues should be clarified through secondary legislation, including:

- the manner in which the Competition Council will exercise its discretion when choosing cases to pursue;
- the criteria used in the overall assessment and the weight given to each criteria; and
- the manner in which the Competition Council will cooperate with the Inter-ministerial Council for Fighting Unfair Competition Practices.

Fortunately, the Competition Council is in the process of adopting such secondary legislation.

Competition Law amendments

Government Ordinance 12/2014 has also introduced, somewhat unexpectedly, a series of small but relevant modifications to the Competition Law. Under procedural terms, amendments to the Competition Law can be made only through an emergency government ordinance – not a simple government ordinance such as the one in question – since the Competition Law is an organic law. This raises questions over the legality and enforceability of the amendments.

Competition Council quorum

Government Ordinance 12/2014 has changed the quorum requirement for the plenum of the Competition Council. The plenum is now considered validly constituted in the presence of a majority of its members, rather than a minimum of five members as was previously the case. The plenum may now adopt decisions with a majority of the members present.

Case prioritisation

Further, the Competition Council is now entitled to prioritise pending cases to ensure effective use of its resources. In prioritising cases, the Competition Council will consider the potential impact of each case on competition, the general interests of consumers and the strategic importance of the economic sector concerned. It will be interesting to see in practice whether the Competition Council uses this provision as grounds to avoid investigating certain complaints which may concern potential anti-competitive agreements or conduct, but are not considered a priority. However, the Competition Council's refusal to pursue a case due to lack of interest should not preclude interested parties from pursuing the matter in court. To ensure transparency and reliability, the Competition Council should follow the lead of other competition authorities and adopt secondary legislation which elaborates on the criteria used in the prioritisation process.

Access to investigation files

Another relevant modification concerns access to investigation files. Before Government Ordinance 12/2014, companies that received a statement of objections were entitled to receive copies of the investigation file and request that the chairman of the Competition Council grant them access to the documents deemed confidential – documents including business secrets of the companies which provided information during the investigation. If the chairman rejected the request, the rejection could be challenged in court, in which case the entire procedure would be suspended (including hearings and issuance of the decision). In practice, use of this challenge mechanism delayed the investigation procedure for several months. With the adoption of Government Ordinance 12/2014, the rejection of a request for confidential information may now be challenged in court only alongside the final decision of the Competition Council.

It remains to be seen whether the ability to challenge rejections of confidential information requests only after issuance of the final decision sufficiently safeguards companies' right to defence. A better solution would be to ensure that the courts address challenges of rejections in a timely manner through fixed deadlines.

Other amendments

Another amendment provides that investigations launched following a complaint may be closed for lack of evidence through an order of the chairman of the Competition Council (and not necessarily through a Competition Council decision, as was previously the case). Moreover, companies that receive a statement of objections may now access an electronic version of the file, eliminating the need for hard copies and related costs.

Issues

While the modifications brought by Government Ordinance 12/2014 appear to streamline procedures and ensure swifter resolution of competition cases, it is worth wondering whether such perceived efficiency has been achieved at the cost of companies' right to defence.

The Competition Law is scheduled to undergo another – much more significant – round of modifications during the course of this year.

Comment

Most of the modifications to the Unfair Competition Law clarify what used to be an unnecessarily dense and unclear piece of legislation. The full scope of the amendments will be known only after the Competition Council has adopted secondary legislation outlining the manner in which it will exercise its discretion in pursuing unfair competition cases and prioritise certain cases.

The timing of the changes to the Competition Law, the manner in which they were introduced and the amendments themselves are all surprising. A more substantive amendment of the Competition Law is in the works and the nature of these recent changes do not justify the haste with which they were made. An emergency government ordinance would have been the correct way to amend an organic law such as the Competition Law and most of the amendments themselves appear to be aimed at making the Competition Council's job easier, with little or no regard to companies' right to defence.

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