

## Competition & Antitrust - Romania

### Competition Law amendments under new government emergency ordinance

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#### Introduction

Government Emergency Ordinance 31/2015 was published in the *Official Gazette* on June 30 2015 and introduces a number of significant changes to the Competition Law (21/1996).

The amendments concern, among other things:

- the substantive provisions of Articles 5 and 6 of the Competition Law (the domestic equivalent of Articles 101 and 102 of the Treaty on the Functioning of the European Union);
- the merger notification obligation;
- the organisation and structure of the Competition Council;
- the settlement procedure; and
- the duration of certain time limits.

#### Amendments to Articles 5 and 6 of Competition Law

Articles 5(1) and 6(1) of the Competition Law have been amended to be identical to Articles 101(1) and 102(1) of the Treaty on the Functioning of the European Union, insofar as the examples of infringement are concerned. With regard to Article 5(1), this entailed the elimination of two examples: participation in bid rigging and the elimination of certain competitors from the market through boycott-type agreements. Article 6(1) was amended to eliminate two potential abuses of dominant position: excessive or predatory pricing and refusal to deal to economically dependent companies.

While the amendments to these articles are not necessarily a negative development and make logical sense, considering that the Competition Council applies Articles 101 and 102 of the Treaty on the Functioning of the European Union, they may raise certain concerns. In principle, there is nothing to prevent companies that are litigating against Competition Council penalty decisions based on the deleted provisions from arguing that those particular infringements have been decriminalised and, based on the 'most favourable law' principle, the penalty decisions must be annulled. While this argument is by no means bulletproof – the lists contained in Articles 5 and 6 are not exhaustive and contain examples – it can certainly be raised and it will be interesting to see how the courts will react in this situation.

#### Merger notification thresholds

The new ordinance introduces the possibility for the Competition Council to modify the merger control thresholds provided under the Competition Law. Following the amendment, the existing thresholds – at least two companies each having a turnover exceeding the Romanian lei equivalent of €4 million in Romania and a total worldwide turnover (ie, of all involved companies) exceeding the lei equivalent of €10 million – can be modified through a decision issued by the plenum of the Competition Council, which must be applied by an order of the chair of the Competition Council, following approval by the Ministry of Economy, Commerce and Tourism. The new thresholds will enter into force six months after publication in the *Official Gazette*.

This amendment gives the Competition Council a certain degree of flexibility to respond to what has been one of the most common requests raised by the business community – the low thresholds which lead to the obligation to notify. There is thus always a possibility that the Competition Council will lower the thresholds through a decision of the plenum, as approved by order of the chair of the

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Competition Council.

### **Organisation and structure of Competition Council**

Under the new ordinance, a new position has been introduced to the structure of the Competition Council – the office of general manager, who will act as a leading public servant and whose duties and competences are to be provided under the Competition Council regulation governing its organisation, functioning and procedures.

While the new ordinance contains little to no information regarding the scope of the office or the eligibility criteria for the position, the general manager will hopefully fulfil a role similar to that of a hearing officer, in which case he or she will respond to common requests of the business community and competition practitioners.

### **Admitting infringement**

The new ordinance extends existing mitigating circumstances, whereby a company which admits a violation of competition rules and proposes remedies to mitigate the breach may receive a fine reduction of between 10% and 30%. Following adoption of the new ordinance, companies may now admit to the infringement before the investigation report has been issued (whereas previously, companies could admit to the infringement only after issuance of the investigation report and, at the very latest, during hearings).

In light of this, an investigated company is likely to admit infringement before receiving the investigation report and being granted access to the investigation file only if the Competition Council grants the maximum fine reduction on the condition that the admission be made before issuance of the investigation report.

### **Timeframes**

The new ordinance has extended the timeframe in which a court order approving a dawn raid can be challenged before the High Court of Cassation and Justice to up to 72 hours from its communication (previously 48 hours).

Further, the Competition Council now has 120 days following deliberation in which to communicate its motivated issued decision to the parties (up from 30 days before the amendment).

### **Shelved proposals**

While the existing amendments are significant, the Competition Council had proposed further modifications to the Competition Law. A number of these proposals were highly controversial, as they concerned the calculation of fines, the imposition of fines on group companies, dawn raids and limitation periods.

#### ***Fines***

Under the proposal put forth by the Competition Council, fines were to be assessed with respect to a company's worldwide turnover. The existing case law of the Competition Council has elicited much controversy, as fines have been calculated – in a somewhat arbitrary manner – using either the Romanian or worldwide turnover of the penalised company. Hopefully, the elimination of this provision from the new ordinance is a sign that the Competition Council will take into account the Romanian turnover of penalised companies.

#### ***Companies penalised***

Another controversial proposed amendment envisaged the setting of fines in relation to the worldwide turnover of the entire group to which the penalised company belonged. This provision would have apparently been unique in the world and would have resulted in an extreme level of exposure for any multinational company with a subsidiary or business activities in Romania.

#### ***Dawn raids outside investigation procedure***

According to the Competition Council proposal, dawn raids were to be carried out by the Competition Council without launching an investigation. The adoption of this proposal would have legalised the use of fishing expeditions, depriving companies of their right to defence and raising questions over the limit of the Competition Council's powers – after all, if there is no investigation, what is the object of the dawn raid and how can the raided company assess the relevance of the documents taken by Competition Council inspectors?

#### ***Limitation period***

Legislation provides for two limitation periods regarding Competition Law infringements: the Competition Council must commence investigations within five years of the cessation of infringement and impose any penalties within 10 years of the cessation of infringement.

The Competition Council had proposed to eliminate the second limitation period regarding the imposition of penalties, even though the same principle applies to criminal law and its elimination would have exposed companies active on the market to a perpetual risk of punishment for historical facts. This would have both conflicted with EU Regulation 1/2003 and breached European Court of Human Rights case law regarding legal certainty.

While the abovementioned proposed amendments were not included in the final version of Government Emergency Ordinance 31/2015, the mere fact that they were considered shows that the

Competition Council is focused on both increasing its powers and imposing significantly higher penalties for infringement of the competition rules.

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