

# Proposal on the sale of local food products: competition concerns

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### **Introduction**

One of the most hotly debated proposals in Parliament these days is an amendment to Law 321/2009 on the sale of food products. The proposed amendment will compel all authorised retailers of food products to ensure that 51% of products in the meat, fruit and vegetable categories are acquired from the short food supply chain, as defined in the Common Agricultural Policy. An exception will apply to the winter months (ie, December to February), during which imported fruits and vegetables may amount to 70% of a retailer's overall offering. Failure to fulfil this obligation will result in fines ranging from approximately €6,000 to €12,000.

While there are a number of definitions of 'short food supply chain', the main characteristic of such chain is the virtual or actual absence of intermediaries. Further, taking into account the wording of the above exception, which is defined in reference to quantities of imported fruit and vegetables, it seems clear that the immediate purpose of this proposal is to support domestic producers of meat, fruit and vegetables (to the detriment of foreign producers).

Notably, the proposal initially concerned only sales by cash and carry stores, hypermarkets and supermarkets.

The proposal has been approved by the Senate and is currently under examination in the Chamber of Deputies, which is the decisional chamber of Parliament.

### **Potential issues**

In its current form, the proposal raises a number of legal and practical issues. Indeed, the measure risks being qualified as directly discriminatory or constituting a quantitative restriction (or having an equivalent effect), and thus infringing one of the four basic freedoms of the EU common market: free movement of goods.

Further, the adoption of the legislative measure may arguably disrupt competition in the market. Depending on the goods offered, retailers and wholesalers may find themselves obliged to restructure their entire product portfolio, which could result in significant additional expenses and adversely affect their position in the market.

### **Competition Council position**

The Competition Council has opposed this proposal from the beginning. It first issued a non-binding negative opinion regarding the proposal's compliance with the applicable legal framework, including the Treaty on the Functioning of the European Union, as well as with the requirements of a competitive market.

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After its negative opinion was ignored and the proposal was adopted by the Senate, the Competition Council continued publicly to oppose the proposal. It raised the following questions identifying the proposal's main legal and practical shortcomings:

- Are Romanian producers capable of ensuring product distribution in such a manner as to ensure timely access to domestic products to all authorised retailers, since no functioning warehousing system exists at a national level?
- Will the 51% threshold be applied to meat as a single category or to every single sub-section in the category? What happens regarding those sub-sections in which there is no domestic alternative?
- What happens if domestic producers cannot cover 51% of demand?

Finally, the Competition Council pointed out that there are other ways to achieve the same result – small Romanian producers could enter into cooperation agreements and jointly commercialise their products, thereby gaining a significantly higher degree of market power.

### **Next steps**

Article 8 of the Competition Law (21/1996) expressly forbids acts by the central or local public administrative bodies whose object or effect is the restriction, prevention or distortion of competition – in particular by limiting freedom to trade or establishing discriminatory operating conditions. In such case the Competition Council may issue a decision finding that an infringement has taken place and, if the infringing body does not restore the competitive environment, may file an action before the Bucharest Court of Appeals requesting it to set aside the infringing action.

However, the Competition Council cannot – and arguably should not – act against a legislative act issued by Parliament; consequently, should the proposal be adopted by the Chamber of Deputies, the most likely consequence may be an infringement action by the European Commission against Romania for breach of the principle of free movement of goods.

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