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TAKING ANTITRUST REGULATION SERIOUSLY: ROMANIAN COMPETITION LAW GETS A NEEDED FACELIFT

Romania recently amended its Law no. 21/1996 on Competition (the "**Competition Law**"), with the amendments effective as of 6 August 2010 (the "**Amendments**"). The changes are significant and affect many areas of the competition law, driven by the Romanian Competition Council's (the "**Council**") stated agenda to become a more efficient and active authority, as well as to further align domestic legislation with EU standards.

The Amendments make three important changes:

- clarify the scope and content of the legal professional privilege, thus giving companies the much-needed comfort of having certain communications with its lawyers beyond the reach of the Council or courts;
- shed light on the role of self-assessment in case of potential market-restrictive conduct and smoothes the merger clearance procedure, while simultaneously increasing the costs; and
- strengthen the Council's enforcement powers and creates hurdles for companies seeking to challenge in court the fines levied by the Council.

We explore in more detail these changes below.

Legal Professional Privilege No Longer Clouded

The Amendments transpose into domestic legislation the legal professional privilege as redefined in the *Akzo Nobel* case by the European Court of First Instance in September 2007. The Amendments codify the concept and outline the procedure to be followed in case of dispute between an investigated undertaking and Council inspectors as regards the protected nature of certain attorney-client communications. The protection (and the related right not to provide these documents to the Council during an investigation) applies to communications between an investigated undertaking and its outside attorneys, which are made for the exclusive purpose of exercising the rights of defense in the context of a Council investigation. This includes not only communications made after the opening of an investigation but also prior communications, to the extent they are exclusively related to the investigation's subject matter.

The protection extends also to an undertaking's preparatory documents drafted exclusively for exercising the rights of defense, even if such documents were not yet sent to the undertaking's attorneys or were not actually prepared so as to be physically sent to such attorneys.

Neither the communications nor the preparatory documents may be copied or used as evidence by the Council, and the investigated undertakings may invoke the legal professional privilege whenever Council inspectors attempt to copy or even review such communications and documents.

For a more in-depth look on the topic of privilege, see our July 2010 Client and Friends Alert.

Guilty Admissions Reduce Fines between 10 to 25%

If found in breach of the Competition Law, an undertaking may receive a reduction of the fine by up to 10 to 25% if it makes an express admission of guilt at the time of receipt of the

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Council's statement of objections or during the investigation's hearing. The incentive seeks to fast-track the collection of fines and to deter protracted litigation over the fines imposed.

Undertakings Asked to Pay a 30% Deposit to Suspend the Payment of a Fine

In a further attempt to discourage vexatious litigation aimed at delaying the payment of fines, the Council lobbied into law a hurdle in the way of the undertakings' ability to suspend the payment of the fine. From now on, undertakings will have to pay upfront a court deposit amounting to 30% of the imposed fine in order to seek in court the suspension of the payment.

Minimum Threshold for Fines

The Amendments set forth minimum fines of 0.1% of the previous fiscal year's Romanian turnover for procedural breaches of the Competition Law, such as submission of incomplete or misleading data during a merger clearance review proceeding, an investigation or dawn raid, or the refusal to submit to a dawn raid. Similarly, the minimum fine threshold for substantive breaches of the Competition Law, such as illegal agreements, abusive conduct or implementing an economic concentration prior to the Council's merger clearance, is now 0.5% of the transgressor's Romanian turnover in the previous fiscal year.

Presumption of Non-Dominance

The Amendments stipulate a specific threshold allowing one or more undertakings to gauge whether they have *sole* dominance or *collective* dominance on the market. Specifically, undertakings holding a market share below 40% are now presumed not to be dominant. However, undertakings holding market shares above the 40% market share threshold are not automatically presumed to be dominant. At the same time, the Council or third parties may still try proving that an undertaking is dominant even if it holds a market share of less than 40%.

Previously, the Competition Law did not offer any clear indication as to what particular market size threshold should trigger concerns of dominance.

Merger Control Filing Flexibility

In a transaction between undertakings whose turnovers exceed the *de minimis* merger control thresholds, the signing of the transaction documents constitutes the event triggering the obligation to apply for merger clearance with the Council.

The previous merger control rules required the concerned parties to file for clearance no later than 30 days from signing the transaction documents, and failure to do so could have resulted in fines of up to 1% of their previous fiscal year's Romanian turnover. After having been rightfully criticized for being unnecessary, the 30-day notification requirement was removed. This provides more flexibility and room for the concerned undertakings, which now have the liberty to decide when best to notify a merger. This is particularly relevant where the fate of a planned transaction depends on due diligence findings or fulfillment of other conditions precedent.

Also, the Competition Law now explicitly allows a merger control filing to be submitted before signing the transaction documents, if the concerned parties demonstrate a good-faith intention in reaching an agreement. This recent clarification allows merger filings in advance of having signed a legally binding document, thus allowing the concerned parties a head-start in the merger review process and better control over the transaction's timing.

The concerned parties may not, however, actually implement the planned transaction before obtaining the merger control clearance from the Council.

Stricter Test Broadens Council's Powers in Merger Control Review

When analyzing the potentially anti-competitive effects of a merger or acquisition, the Council has the authority to block transactions which would create or strengthen a 'dominant position' on the relevant market. A firm may be deemed holding a 'dominant position' if it is able to conduct its business to an appreciable extent independently of its competitors, customers and ultimately of consumers.

The Council's powers to challenge a merger or acquisition were significantly broadened by the introduction of a new merger test in line with

the 2003 European Union test, the so-called *significant impediment to effective competition* (SIEC). SIEC is a stricter test for merger clearance than the previous one, and from now on concentrations on the Romanian market will be also reviewed by the Council so as not to create oligopolies (in addition to its existing aim of not creating dominant position undertakings) that impede effective market competition.

Revised Merger Authorization Fee

Before the Amendments, the merger authorization fee was 0.1% of the total turnover of the concerned undertakings on the relevant market. The recent amendment reduced the authorization fee to 0.04%, however to be calculated on the total Romanian turnover (meaning the relevant market on which the merger occurs as well as the other markets where the concerned parties are active) of the concerned undertakings.

Since this may result in a significant increase in the amount of the merger authorization fee, the amendment caps it to EUR 100,000. Still, in most cases the practical effect will be that the concerned undertakings will end up having higher transaction costs than before the Amendments.

Clarifications on Self-Assessment of Trade Restraints

Prior to its amendment, the Competition Law allowed undertakings entering market arrangements that restrained competition to seek an individual exemption from the Council, in case they desired legal certainty as to the arrangement. The so-called 'self-assessment' was to be performed on the basis of detailed rules and guidelines issued by the Council, and the undertakings, whenever in doubt or desiring absolute legal certainty, had the possibility to request a case-specific analysis by the Council. This process was laborious and applicants had limited or no control over its timing or outcome.

Consequently, the Council had a change of heart and introduced in the law a self-assessment system similar to that under EC Regulation 1/2003. From now on, undertakings will have to exclusively use, for self-assessment purposes, the EU regulations and guidelines, as their Romanian counterparts were repealed. This means that the undertakings lose the option to go before the Council and seek individual exemptions for their conduct, leaving them solely responsible for assessing compliance of their market conduct with the Competition Law.

Private Actions Encouraged

Private actions under the Competition Law are at present almost non-existent. Thus, in an effort to foster the private enforcement of the Competition Law, the Amendments introduced changes designed to encourage undertakings and end-consumers to seek damages from transgressors.

Specifically, private claimants may use a Council decision as a basis for their claims, and the courts have the right to full access to the Council's investigation file. The Council's role of *amicus curiae* in private action court proceedings is now clearly stated, as the Council may provide its views on competition matters to the courts. Further, in case of excessive pricing, damages are presumed to have been incurred even if the product was resold and most likely the losses passed on to the subsequent purchaser, thus enabling resellers to request damages as well.

However, the Amendments set forth a two-year statute of limitation for private actions, running from the moment the Council's infringing decision becomes definitive. Nevertheless, this clarification is expected to spawn litigation, as to date only the Council has pursued violations of the Competition Law.

Half Measure Protection for Leniency Applicants

The amendment to the Competition Law introduces a half-measure designed to protect leniency applicants, and indirectly, advocate the Council's 2009 rebooted leniency program.

Specifically, a leniency applicant receiving full immunity would not be jointly liable with the other transgressors towards third party private actions claimants. Full immunity against private actions would have been preferable; however, the Council opted for a compromise solution.

All in all, we consider that many of the Amendments bring positive changes, as they add necessary clarification to a number of

points. But they also open the door to increased scrutiny by the Council and invite private claims. If there is anything certain from all of this, it is that undertakings must continue to be vigilant and lawyers will continue to keep busy.

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