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NEW DEVELOPMENTS TO THE ROMANIAN COMPETITION LAW

In August 2010 the Romanian Government brought significant changes to Law 21/1996 on Competition by means of Emergency Ordinance 75/2010 ("**Ordinance**"). The amendments introduced by the Ordinance came into effect in August 2010; still, the Ordinance had to undergo parliamentary approval being approved almost one year later by Law 149/2011, which introduced additional amendments to Law 21/1996 on Competition. We explore them in more detail below.

Rebuttable Presumption of Dominance

The Ordinance has introduced a rebuttable presumption that an undertaking whose relevant market share does not exceed 40% is not dominant. This does not, in any way, imply that a market share exceeding the 40% threshold would automatically be considered as dominant or signal dominance.

However, this situation was short-lived as Law 149/2011 revised Law 21/1996 on Competition Law, as amended by the Ordinance, to the effect that undertakings having a market share in excess of 40% are now presumed dominant, although this is a rebuttable presumption. The Competition Council ("**Council**") tried to defend this approach during recent public discussions by presenting this rebuttable presumption as a means to increase the awareness of undertakings with significant market share as to their responsibility in maintaining a competitive marketplace.

Notwithstanding the Council's stated intention, this mechanism runs counter to the European Commission's approach as it shifts the burden of proof on the undertakings, which must now prove, in case they are subject to a Council investigation for abusive market conduct, that they are not dominant despite market shares exceeding 40%.

New Thresholds for the Merger Clearance Fee

Prior to Law 149/2011, the economic concentrations cleared by the Council pursuant to its merger control regulation required the payment of a merger clearance fee amounting to 0.04% of the total turnover of the undertakings concerned during the previous financial year, which amount was capped to EUR 100,000. Irrespective of the ceiling, the merger clearance fee was viewed as being too onerous, increasing unnecessarily the transaction costs.

Thus, Law 149/2011 lowered the ceiling to only EUR 25,000 but introduced a minimum threshold

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of EUR 10,000 for the merger clearance fee. The manner in which this fee will be calculated will be dealt with in subsequent guidelines to be issued by the Council.

Reduction of the Court Deposit for Suspending the Payment of Fines

The Ordinance attempted to deal with vexatious litigation aimed at delaying the payment of fines, and to this end mandated that such suspension could not be granted by the courts unless claimants paid an upfront court deposit representing 30% of the fine.

The parliamentary review of the Ordinance replaced the cumbersome automatic 30% court deposit with a deposit to be decided by the court, which in any event shall be only up to 20%. While this may look as a step backward for the Council, it nevertheless will likely make access to a court's review of the Council's decisions less onerous for the undertaking.

Revised Rules on Investigation Hearings

The Council has increased the number of investigations opened or completed in the past few years, in line with its more aggressive policy agenda. Nonetheless, this came at a price, as the Council's Plenum (its deliberative body for cartel, dominance or merger control investigations) got its hands full with the resulting hearings.

This is why Law 149/2011 introduces two significant changes, designed to give the Council more flexibility in dealing with investigations.

First, the Council Plenum may delegate the hearing competencies for cartel, dominance abuse or merger control investigations to a panel of three Council members.

Second, the investigation hearings are no longer mandatory in that the undertakings receiving the Council's statements of objections are no longer guaranteed the right to appear before the Council and argue against the statement of objections' conclusions. They still retain the right to submit a reply to the Council's statement of objections and have the right to request a hearing before the Council Plenum, but the Council retains full discretion in granting such a hearing.

Guilty Admissions: More Appeal and Broader Use

The Ordinance enabled undertakings admitting their breach of competition rules to benefit from a reduction of their fine ranging from 10 to 25%. However, this was available only for the more serious breaches of the Competition Law, such as competition restrictive agreements, concerted practices and decisions, or dominant abusive conduct. Breaches pertaining to merger control were not covered by the admission of guilt benefits, although some of them resulted in similarly hefty fines.

This discrepancy is now removed by Law 149/2011 so that certain merger control violations (e.g. the failure to notify an economic concentration for which merger clearance is required, implementing a concentration while it is still under the Council's review, or implementing an economic concentration vetoed by the Council) are eligible for similar reductions.

Furthermore, the maximum reduction that can be granted by the Council has been increased from 25% to 30%. Council officials have, however, disclosed the intention to offer cartel members reductions which are closer to the lower limit (i.e. 10%) so as not to discourage leniency applicants, which if not eligible for full immunity may still benefit from a reduction of up to 50% of the fine if they fully cooperate with the Council and provide significant added value.

The Council seems to think that offering substantial reductions in exchange for admissions of guilt may deter leniency applications for reductions of fines, as undertakings would have the possibility to opt for a "wait and see" strategy, preferring to wait until the Council finalizes its investigation and at that time plead guilty rather than cooperating with the Council sooner. For this reason, the Council indicated that it will likely offer a high reduction of fines only in those situations where a leniency application is not an option, such as abuse of dominance cases.

Unfair Competition Law

Law 11/1991 on Unfair Competition was enacted as an early attempt to ensure fair play amongst competitors at a time when Romania was commencing its transition to a market-based economy and its enforcement was entrusted to the Ministry of Finance.

Given the Ministry of Finance's different enforcement priorities, most notably in the field of tax evasion, Law 11/1991 on Unfair Competition which deals with issues such as the solicitation of a competitor's employees, libel and illicit use of business secrets, was not assertively implemented.

This seems to be the reason Law 149/2011 entrusts the Council with the enforcement of Law 11/1991 on Unfair Competition in an attempt to better equip the Council to tackle various forms of market behavior that may hinder competition.

It is expected that the Unfair Competition Law will also receive a significant facelift, so as to bring it up- to-date with the current market conditions.

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