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Business Guide

INVESTING IN ROMANIA

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LEGAL BACKGROUND

In the context of Romania's preparations for its adhesion to the EU, by the end of 2006, there was completed the restructuring process of the institutional framework of the competition and state aid policy in Romania, and there were republished in the Official Gazette of Romania, no. 742/August 16, 2005 the Competition Law no. 21/1996, previously successively amended by Emergency Ordinance no. 121/ December 4, 2003, Law no. 184 /May 17, 2004, and Law no. 538/ November 25, 2004, rendering new numbers to the texts.

The competition legal framework was supplemented in 2005 after four new instructions were adopted and published, referring to:

- technology transfer agreements,
- settling complaints regarding the provisions of articles 5 and 6 in the Competition Law,
- application of the provisions of article 5 (2) in the Competition Law,
- the guidelines addressing the new issues arising from the application, in individual cases, of articles 5 and 6 in the Competition Law, where the provisions of the acquis communautaire are transposed into the national legislation.

ANTITRUST PROVISIONS

To create and maintain a normal competitive environment, Romanian legislation provides for a strict control over deeds and actions, that result or may result in the restriction, prevention or misrepresentation of competition conducted by business entities or the representatives of business entities (Romanian or foreign individuals or legal entities), as well as by bodies of the central or local public administration, to the extent that the same, through the decisions issued or regulations adopted, should interfere in market operations and influence competition in a direct or indirect manner. This control is performed through the Competition Council, as an autonomous administrative authority.

Insofar as they affect or may affect the competitive environment, the following actions are considered anti-competitive by the law and are prohibited:

Anti-competitive Practices

By article 5, similar to article 81 of the Treaty establishing the European Community, Competition Law prohibits any express or tacit conclusion of agreements between business entities or business entity associations, by means of association decisions or united practices between the same, especially those that contemplate the unified setting of sale or purchase prices, the limitation or control of production, distribution, technological development or investments, the sharing of sale markets or of supply sources, according to the territorial criterion, the criterion of sale and acquisition volume or other criteria, the united participation with forged offers in auctions or in any other forms of offer competition, the elimination of other competitors from the market, the limitation or prevention of the access on the market and of freedom of other business entities to exercise competition.

According to secondary legislation (Instructions and Regulations) adopted by the Competition Council for the application of the provisions of the Competition Law, updated upon the acquis communautaire in 2005, "agreements" stand not only for the contracts entered into by business entities but "gentlemen's agreement" – like verbal agreements to act in a certain way. In this case, such agreement may be taken into consideration by the Competition Council during an investigation even where a third party acquiesced thereto involuntarily.

Unlike agreements, concerted practices are coordinated actions between business entities, which, in terms of competition on a certain market, without being agreements, supersede cooperation to such extent that, although not reaching the point where a contract is entered into by the business entities, they practically imply the undertaking of certain obligations.

Such agreements may be exempt from the application of the prohibition if they meet certain requirements provided for under the law, depending upon the advantages and the significance they have for the development of the Romanian economy.

The new regulations in the secondary legislation eliminate the obligation to notify the block exemption, as research-development agreements, specialized agreements or anti-competitive practices forbidden by article 5 paragraphs 1 and 2 in the Competition Law, agreed upon by two or more business entities operating at different levels of the production-distribution chain, regarding to the conditions under which the parties can buy, sell or resell certain products or services. Despite all this, Competition Council shall have to be informed of the agreements between business entities the relevant market quotation of which exceeds the limits set by secondary legislation, and the Competition Council will grant exemption benefit individually by exemption decision.

These provisions do not apply to agreements between business entities whose turnover for the fiscal year previous to the date of such agreement does not exceed the de minimis threshold set by the Competition Council[1] and,

[1] *This ceiling was set to RON 4 million by Order of the Competition Council published in the Official Gazette of Romania, Part I, no. 1.172/23.12.2005*

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cumulatively, the total market quotation of the business entities involved does not exceed 5% on none of the relevant markets affected by agreements or concerted practices between competing business entities or 10% in the event of agreements or concerted practices between non-competing business entities.

Where the business entities meet the two cumulative conditions, they are exempt from the provisions of article 5 of the Competition Law, and for this purpose, there is no need to follow the notification procedure and for the Competition Council to adopt a decision to this effect.

Each business entity has now the right to self assess the agreements entered into, the decisions made by the business entities associations and the concerted practices in which it is involved, in order to determine whether it benefits from block exemption, or whether it meets the de minimis threshold eliminating the application of the provisions of article 5 in the Competition Law.

In order to obtain the confirmation of the outcome of such self assessment, business entities have the possibility (and not the obligation), prior to the enforcement of an agreement or a concerted practice, to ask for prior certification from the Competition Council if there is no grounds for the intervention of the Competition Council under the provisions of article 5 of the Competition Law.

Following this procedure does not exclude the opening of a probe by the Competition Council into such agreement or concerted practice.
Regarding the relation between the national and community law, as a consequence of the supremacy of the community law over national law, the agreements or the concerted practices which may affect the trade between the member states will be subject primarily to the community law, while the national laws cannot prohibit agreements of concerted practices which are allowed under community law.

It is important to note that, while the current Romanian competition legal framework still uses the individual exemption procedure, which must be obtained for agreements/concerted practices that do not fall under the scope of block exemptions, the community law only relies on the "self assessment" procedure[2] .

Therefore, in respect of agreements/concerted practices which are not of community dimension and which are not covered by block exemptions, the involved parties have the obligation to ask that the Competition Council issue an individual exemption, before implementing the concerned agreement/concerted practice.

Regarding the agreements/concerted practices which are of community dimension and which are not covered by block exemptions, the parties may implement such agreements/concerted practices provided their own assessment of the case indicates that they benefit from the exemption stipulated in section 81 (3) of the Treaty establishing the European Community (respectively they represent agreements/concerted practices which, even though might have anti-competitive effects, contribute to the improving of the production or the distribution of goods, or to promoting technical or economic progress, allowing the consumers to benefit from such advantages). Under the community law, the parties do not have the right to request that the European Commission issue an individual exemption.

Abuse of Dominant Position

By article 6, similar to article 82 in the Treaty establishing the European Community, Competition Law forbids abusive use of dominant position held by one or more business entities on the Romanian market or on a substantial part thereof, by resorting to anti-competition acts having as object or likely to negatively affect the trade or be detrimental to the consumers.

It is not the dominant position in itself that is sanctioned by the competition authority, but the abusive exercise of the dominant position by a business entity, which is likely to negatively affect free competition and impose on business partners and competitors certain clauses that they would not normally, have accepted.

Competition Law does not provide explicit definition of the term "dominant position" nor does it specify the market quotation for a business entity to be deemed to have dominant position.

Being an abstract concept, the abuse of dominant position can be construed as the Competition Council finds proper, using for this purpose both certain juridical and economic principles, and some specific examples. To this effect, an important part in the classifications the Competition Council may develop is played by the mechanism of prior consultation with the European Commission, which in 2005 facilitated the enhancement of juridical argument and, implicitly, the quality of the decisions in the competition field.

Similar to the case of the agreements/concerted practices, the abuse of dominant position will be subject primarily to the community law when it might affect the trade between the member states, while the national law may not implement a stricter regime.
The community law allows the implementation of more severe national regulation only in case

[2] *According to Council Regulation no. 1/2003, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*

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of unilateral conduct, which represent a type of anti-competitive conduct specific to undertaking which, not having a dominant position, may affect the competition by practices such as abusive conditions imposed on the economically dependent partners.

Economic Concentrations

The conclusion of any legal deed for the transfer of ownership or use, over the entire or a part of the patrimony of a business entity, or the object or effect of which is to allow a business entity or a group of business entities to exercise, directly or indirectly, a determining influence over another business entity or several other business entities, represents an economic concentration. Economic concentrations that have as an effect the creation or the consolidation of a dominant position, result or may result in the restriction, elimination or significant misrepresentation of competition on the Romanian market or on a part of the same are prohibited.

The compatibility with a normal competitive environment is assessed by the Competition Council on the basis of certain pre-set legal criteria. The economic concentration may be admitted if the parties interested in the concentration prove the fulfillment of the requirement regarding the curing of a normal competitive environment.

Following the accession of Romania to the EU, the economic concentrations having a community dimension, which produce effects (inclusively) on the Romanian territory, will be subject to the exclusive jurisdiction of the European Commission and assessed solely under the community law[3].

SANCTION REGIME AND LENIENCY POLICY

Applicable Sanctions

The breach of the provisions under applicable laws, for instance the conduct of anti-competitive practices, the omission to inform the Competition Council on economic concentrations, or the abuse of dominant

position, constitute minor offences and are sanctioned with significant fines, of up to 10% of the total turnover achieved in the financial year prior to the application of such sanctions.
In addition to the sanctions applicable by the Competition Council, individuals and/or legal entities that incurred a prejudice as a result of an anti-competitive practice prohibited by law are entitled to act against those business entities at fault in order for the incurred prejudice to be remedied.

Leniency Policy

By way of exception, business entities may obtain, by implementing the leniency policy, either a reduction or an exemption from the sanctions applicable by the Competition Council.

In Romania, the Instructions on the conditions and criteria for the implementation of a leniency policy were adopted, pursuant to the provisions of article 51 (2) of the Competition Law no. 21/1996, published in the Official Gazette no. 610 of September 7, 2009 (the "Instructions"), whereby it is established the legal framework under which the cooperation between business entities and the Competition Council is to be rewarded, provided that such business entities are or used to be part of a serious arrangement that affected the Romanian territory or any part thereof.

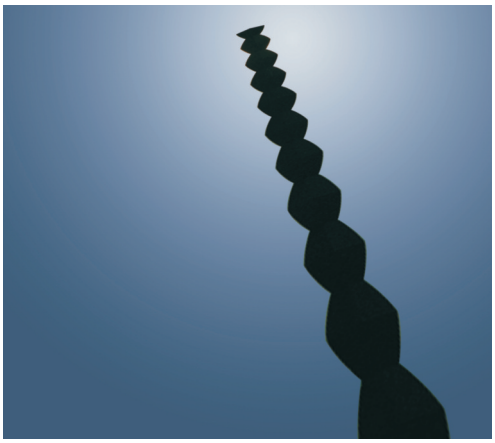
Within the framework of the leniency policy, the Competition Council grants fine immunity or may apply a reduction of such fine for those business entities that decide to cooperate for identifying and fighting against serious anti-competitive arrangements.
According to these Instructions, serious arrangements are:

(a) horizontal concerted arrangements and/or practices, between 2 or more competitors, directed towards or entailing the coordination of competitive behavior on the market and/or towards influencing the relevant parameters of the competitive framework, through the adoption of practices such as the setting out of sale or of purchase prices or of certain business conditions, the allotment of production quotas or of sale quotas, the share-out of markets or clients, including bid-rigging, restrictions on imports and/or exports and/or other anti-competitive deeds directed against competitors; these are generically known as cartels;

(b) vertical concerted arrangements/ practices between business entities, in relation to the conditions in which the parties may purchase, sell or re-sell certain goods or services, the scope of which being that of limiting the purchaser's freedom to set out the selling price and/or of limiting the territory or the number of clients, conferring thus full territorial freedom.
The business entity may benefit from leniency should it meet the following conditions on a cumulative basis:

(a) it actually, fully, continuously and promptly cooperates with the Competition Council, throughout the entire investigation procedure, and namely:
(i) it provides the Competition Council with any and all relevant information and evidentiary elements that it possesses or that it could possess in relation to the alleged infringement;
(ii) it makes itself available to the Competition Council in order to address any request that might contribute to the establishment of the facts of the matter;
(iii) it does not destroy, forge or hide relevant information or evidentiary elements regarding the alleged arrangement; and
(iv) it does not reveal the existence of the application for leniency or the contents thereof before the competition authority transmits the

[3] *Pursuant to the provisions of the Articles 21 (2) – (3) of the Council Regulation no. 139/2004 on the control of concentrations between undertakings*



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investigation report to the parties, unless the Competition Council has otherwise decided;

(b) it ceased any involvement whatsoever in the alleged arrangement upon the request of the Competition Council;

(c) it disclosed its intention to submit an application for leniency or any other elements of the application only before other competition authorities.

Business entities that proceed to the disclosure of their participation in an arrangement affecting the Romanian territory, but that do not meet the requirements to be granted fine immunity, may benefit though from a reduction of the amount of such fine as compared to the value thereof which would have been normally inflicted.

STATE AID

In the process of harmonizing the Romanian legislative framework with the acquis communautaire, most of the state aid regulations were abrogated, and particularly the former fundamental state aid regulation – Law 143/1999.

The new Romanian regulation pertaining to state aid, Emergency Governmental Ordinance no. 117/2006 (EO 117/2006), does not provide for substantial provisions on state aid, but only for a series of procedures rules applicable at the national level.
As a direct consequence of the Romania's integration into the EU, EU regulations on the state aid became directly applicable, based on the current articles 87-88 of the Treaty on the European Union.

Basically, the institution entitled to verify the legality of the state aid is the European Commission, which shall assess any state aid granted by the Romanian state, inasmuch as such state aid is subject to the notification requirements.

According to EO no. 117/2006, the Romanian Competition Council (which previously had approval and control responsibilities), will only act as the contact authority between the European Commission, on the one hand, and authorities/public institutions and Romanian state aid beneficiaries, on the other hand.

Henceforth, the notifications/notices regarding state aid shall be delivered to the European Commission through the medium of the Competition Council, which might first make eventual recommendations in order to ensure the compliance of the state aid with the EU regulations.

As a general rule, state aid not exceeding equivalent of Euro 200,000 during 3 fiscal years are exempted from the notification requirements. In the field of road transport sector the threshold is Euro 100,000In case the value of a certain aid exceeds the above mentioned threshold, the whole aid value shall be subject to notification requirements, including the amount below the threshold.
In addition, the aid should be "transparent", respectively its whole value be exactly determinable in advance.

The above mentioned threshold is applicable in all sectors, except for fishery and aquaculture, agriculture (under certain conditions), coal, acquisition of road freight transport vehicles, undertaking in difficulty.

The European Commission has also enforced a series of regulations which provide for the possibility of granting state aid without any notification obligation (block exemptions), in certain sectors:

- Small and medium sized enterprises;
- Research and development;
- National regional investment;
- Training;
- Employment.

The European Commission may decide the recovery of a state aid already granted to a Romanian undertaking, following which the Romanian beneficiary shall have to reimburse the whole amount, including an interest determined according to the EU regulations.

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