

Competition

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1. Relevant legislation

Since Romania's accession to the European Union, competition has been governed by both the domestic and the EU legislation.

The relevant domestic legislation on merger control (control of economic concentrations), anti-competitive agreements, concerted practices and abuse of dominant position includes Competition Law no. 21/1996, as well as the secondary legislation issued by the Competition Council. The national legal framework regulating national state aid procedures is mainly Emergency Government Ordinance no. 117/2006.

The Competition Law applies to all companies (regardless of nationality) in connection with activities performed in Romania or outside Romania if such activities have an effect in Romania, as well as to central or local public administration authorities involved in economic operations and influencing, directly or indirectly, competition on a certain relevant market.

2. Competition Authority

The Competition Council is an autonomous administrative authority responsible for the secondary legislation in the competition field, and the enforcement of competition regulations in Romania. The Competition Council has been very active over the past years, issuing a significant number of regulations and guidelines and constantly opening ex officio investigations on various competition related issues.

3. Main aspects

The main aspects to be considered as regards competition matters are:

1. Merger control (control of economic concentrations);
2. Antitrust (anti-competitive agreements and concerted practices);

3. Abuse of dominant position;
4. State aid.

3.1 Merger control (control of economic concentrations)

The underlying principle is that economic concentrations which, by way of creating or consolidating a dominant position, lead or might lead to the restriction, elimination or significant distortion of competition on the Romanian market or on a part thereof are prohibited.

According to the Law, a concentration occurs when:

- two or more previously independent companies merge;
- one or more persons who already control at least one entity or one or more undertakings acquire - directly or indirectly - control of one or more entities or parts thereof, either through direct participation in its share capital, by acquisition of assets, by contract or by any other means. Control may be exercised by one entity (sole control), or by two or more entities who agree to adopt important decisions in connection with the entity they control (joined control).

Mergers and acquisitions of companies that are members of the same group are not qualified as economic concentrations.

Concentrations exceeding certain turnover thresholds must be notified to, and inspected by the Competition Council. These thresholds, the level of which is periodically subject to amendment by the Competition Council depending on the market evolution are as follows: (i) an aggregated turnover of EUR 10,000,000 in RON equivalent generated by the entities involved and (ii) a turnover of EUR 4,000,000 in RON equivalent generated in Romania by each of at least two of the entities involved. International transactions that produce effects in Romania must also be notified to the Competition Council if the worldwide aggregate turnover exceeds Eur 10,000,000 and the turnover realized in Romania by at least two of the companies involved in the economic concentration (including their group) exceeds Eur 4,000,000. The turnover is assessed for the year preceding that in which the operation was performed and the applicable exchange rate is the one published by the National Bank of Romania for the last day of the same year.

Where there is an obligation to notify the Competition Council, such notification must be made:

- by each of the parties involved, for mergers;
- by the party acquiring control, in any other case.

After the notification of the Competition Council, the companies involved in such operation may not implement the economic concentration concerned until after the competition authority has adopted a decision in connection with the envisaged operation.

Following notification, economic concentrations are authorized to operate, provided that they prove to be compatible with a normal competitive environment. The criteria for evaluating this compatibility are: (i) contribution to an increased economic efficiency, to the promotion of production, distribution and technical development and to the competitiveness of exports; (ii) the benefits of the concentration are significant and prevail over the negative effects caused by the

restriction of competition; (iii) the concentration reasonably benefits consumers, especially in terms of lower prices.

Once an economic concentration has been notified to the Competition Council, this authority may also consider that the envisaged economic concentration does not fall under the scope of the Law (a non-intervention decision being issued) or that such concentration does not distort competition (by adopting a non-objection decision).

Additional procedural rules are enforced under regulations issued by the Competition Council.

3.2 Antitrust (referring to anti-competitive agreements or concerted practices)

As a rule, any agreements, partnership decisions or concerted practices that are aimed at or result in the restriction, prevention or distortion of competition on the Romanian market or on a significant part thereof are prohibited. In this respect, the agreements regarding prices, tariffs, auctions or the agreements to divide the market are strictly prohibited.

Exemptions

Firstly, the antitrust provisions under the Competition Law do not apply to the companies or groups of companies that do not meet certain levels in terms of annual turnover (currently the RON equivalent of approximately EUR 1 million) or market share (5 % as total market share of the participants where agreements, partnership decisions or concerted practices are entered into by competitors and 10 % for each participant, for agreements, partnership decisions or concerted practices between non-competitors).

In addition, not all agreements, partnership decisions or concerted practices which comply with the above conditions are considered illegal - some of them can benefit from exemptions if their implementation proves to have positive results (e.g. contribution to the improvement of production or to products distribution, contribution to technical progress, improvement in the quality of products). Accordingly, the Competition Law allows for group as well as individual exemptions from the above prohibition.

Group exemption regulations, reflecting those stipulated under the EU Competition regulations, have been adopted for both vertical and horizontal agreements (specialization agreements, research and development agreements, and technology transfer agreements). Agreements, partnership decisions or concerted practices which fall in the categories exempted from prohibition are deemed to be legal with no notification or resolution to be obtained from the Competition Council. The responsibility to prove conformity with the legal criteria and requirements so as to benefit from such exemption rests with the concerned companies.

The Competition Council may consider that a certain agreement, partnership decision or concerted practice does not result in the restriction, prevention or distortion of competition. In such a case, a decision to grant an individual exemption may be issued by the Competition Council, indicating the effective date and validity term of the exemption, as well as the requirements and obligations to be met by the companies to benefit there from.

3.3 Abuse of dominant position

A company holds a dominant position where it has the capacity to act independently in relation to its competitors (current or potential) and customers, on the relevant market. Holding a dominant position on the Romanian market or a substantial part thereof is not prohibited by the Competition Law, except where such a position is abusively used through anti-competitive behaviour. The object or potential effect of anti-competitive behaviour is prejudice caused to economic activities or to end-consumers, and specific examples of abusive conduct are listed under art. 6 of the Law:

- setting of prices whether directly or indirectly, the imposition of inequitable contractual terms and refusal to deal with certain suppliers or beneficiaries;
- limitation of production or distribution;
- different contractual conditions for similar undertakings.

3.4. State Aid Control

Following Romania's accession to the European Union, the Community legal framework regarding State aid has become directly applicable in Romania. Therefore, as a general rule, granting and implementing State aid in Romania is now subject to the European Commission's prior approval, inasmuch as such State aid falls under the legal notification requirements.

According to the Romanian legislation and EU law, State aid is any supportive measure which meets all of the conditions below:

- It is granted by the State or by its territorial-administrative units from State resources or from resources of the administrative-territorial units or by other bodies that administer sources of the State or of the local collectivities, irrespective of the form;
- It is selective;
- It ensures a benefit to the enterprise in question;
- Distorts or threatens to distort competition or affects the trade among the European Union Member States.

In principle, State aid is granted to undertakings on a selective basis by national public authorities in a variety of forms such as grants, interest and tax relief, guarantees or the provision of goods and services on preferential terms etc.

The EC Treaty generally prohibits State aid unless it is justified by reasons of general economic development. In this respect, State aid granted in Romania is subject to the notification of and prior approval by the Commission (notification is made via the Romanian Competition Council).

However, not all State aid is subject to the notification requirements and the prior approval of the Commission. Thus, according to the *de minimis* rule, State aid not exceeding the equivalent of EUR 200,000 over three fiscal years is not subject to the notification of and prior approval by the Commission (in the road transport sector the threshold is EUR 100,000).

The *de minimis* rule does not apply to undertakings acting in certain fields set out under the EC regulations, such as the fishery and aquaculture sectors, the coal sector and the primary production of certain agricultural products. In addition, certain categories of state aid may be

exempted from the notification and authorization requirements, provided that the conditions set forth under the block exemption regulation are met. This regulation creates exemptions for the following types of state aid: small and medium-size enterprise investments, aid in the form of risk capital, regional investment aid, environment protection aid, research, development and innovation, disabled and disadvantaged workers, employment, training.

4. Sanctions provided by law for the non-compliance with legal provisions on competition

Failure to notify economic concentrations may generate strict investigations by the Competition Council which may lead to fines of up to 1% of the total annual turnover for the year preceding the sanction. The fines can go up to 10% of the total annual turnover for the year preceding the sanction if the legal provisions in this field are not met. Under specific regulations the Competition Council has also established the criteria and requirements to be met by various parties in order to benefit from the leniency policy.

Failure to comply with the rules regarding anticompetitive agreements and concerted practices (antitrust) may trigger criminal sanctions and fines of up to 10% of the total annual turnover for the year preceding the sanction.

Failure to comply with the rules regarding the abuse of dominant position may trigger criminal sanctions and fines of up to 10% of the total annual turnover for the year preceding the sanction.

Any state aid illegally granted or abusively used must be reimbursed along with the related interest.