

News in Competition Regulation in Romania. Institutional Consolidation of the Competition Council

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Abstract. *Upon the coming into force of the Law 149/2011, the recent changes in the Competition Law bestow additional power and authority upon the Competition Council. The competition authority can now expand its sphere of information use obtained during an investigation or inspection, can admit or reject hearing requests at its latitude, delegates new responsibilities to commissions and sanctions unfair competition deeds.*

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A press release of Competition Council made on July 13th 2011 stresses that the new regulation is mainly aimed at: the institutional consolidation of Competition Council, increasing its efficiency when market signals warn about possible anti-competition practices, harmonisation of national provisions regarding competition.

As for the Competition Council institutional position, the main novelties introduced by Law No. 149/2011 is:

- Competition Council can also use the information obtained during an investigation or inspection outside the respective investigation;
- Competition Council decides upon the cases in which hearings can be organized during the investigations on possible law violations;
- Competition Council's Plenum delegates to its commissions significant aspects related to competition related sanctions application;
- Competition Council is no longer endorsing the draft regulatory documents;
- The Consultative College is established.

We shall analyze below each of the main novelties introduced by the new regulation, especially as regards the strengthening of Competition Council's position:

Competition Council can also use the information obtained during an investigation or inspection outside the respective investigation (Art. 35 paragraph 5 of Competition Law, amended and completed)

While until now the information the Competition Council obtained during an investigation or inspection could be used only for the purpose they were obtained, according to the law amendments, these data could now be used "to the purpose of applying competition legislation", that is even for those cases identified by the competition authority which exceed the sphere of the initial investigation.

At the same time, the Competition Council can warn other institutions or authorities based on the gathered information during its own investigation or inspection actions.

Although this new approach gives the Competition Council more freedom in the investigations and inspections area, it is worth mentioning that European legislation provides for the information use only for the purpose it

was obtained. That is why we can expect contestations on procedural aspects in the future from the affected economic operators.

Competition Council decides upon the cases in which hearings can be organized during the investigations on possible law violations (Art.43 paragraph 1 of Competition Law, amended and completed)

During the investigations, the Competition Council gives the economic operators participating in the understanding, decision made by companies association, concerted practice, abuse of dominant position or economic clustering making the object of investigation, the chance to express in writing their observations regarding the investigation report. In this context, the addressees of the investigation report can request that Competition Council organizes hearings.

The Competition Council can also organize hearings even if the investigated companies do not request that, when it thinks useful for finding out the truth in the investigated case.

According to the former regulation, any investigation procedure involves the hearing of the participating company in the understanding, decision made by companies association, concerted practice, and abuse of dominant position or economic clustering making the object of investigation.

The new regulation leaves at the latitude of Competition Council the decision regarding the admission or rejection of such requests, but does not provide the conditions in which the competition authority can make such a decision, or what is happening when not all the investigated companies request hearings organization during an investigation. The economic operators whose hearing requests are rejected could accuse a restriction of their right to defence.

Competition Council's Plenum delegates to its commissions significant aspects related to competition related sanctions application (Art. 20 paragraph 4¹ of Competition Law, amended and completed)

According to the new regulation, the Competition Council Plenum will be able to delegate the assignments for investigations and economic clusters to a commission made up of three Plenum members.

At the same time, the sanctions for (i) the breaching of the provisions of Art. 5 and 6 of Competition Law and of the provisions of Art. 101 and 102 of the Treaty regarding European Union functioning, for (ii) the failure to notify

an economic cluster before its putting into practice, as well as for (iii) the achievement of an economic cluster with the breaching of legal provisions, shall be applied by the Competition Council's Plenum or by the commission.

Competition Council becomes competent to sanction unfair competition deeds (Art. 26 paragraph 1 of Competition Law, amended and completed)

When the Competition Office was closed in 2003, The Ministry of Public Finances opened the General Division for State Aid, Unfair Practices and Regulated Prices which applied the legal provisions regarding prices, unfair competition and publicity. By Law No. 149/2011, the Competition Council gains the competence to sanction unfair competition deeds in this field.

Application instructions are expected to detail the way and mechanisms through which the Competition Council will act to meet this new responsibility. Within the same framework, the competition authority has to start, as soon as possible the amendment process of Law No. 11/2001 regarding the fight against unfair competition, especially in the sense of adjusting its provisions to the economic and social realities, and of extending the sphere of unfair competition deeds.

Competition Council is no longer endorsing the draft regulatory documents (Art. 26 paragraph 1 of Competition Law, amended and completed)

According to the former regulation, the Competition Council issued a complying endorsement for the draft regulatory documents which might have an anti-competition impact and proposed the amendment of those regulatory documents having such an effect. According to the current regulation, the authorities and institutions of central and local public administration are still bound to request the Competition Council's endorsement for the draft regulatory documents which might have an anti-competition impact. As for the endorsements, they are now simple and not compliant, which makes that the competition authority has only the possibility to recommend their amendment.

If the authorities and institutions of central and local public administration do not comply within the set up period, with the measures decided by the Competition Council in order to re-establish a competition environment, the Council can introduce an action in administrative litigation at

Bucharest Court of Appeal requesting the court, as the case may be, the total or partial cancellation of the document which lead to the restriction, hindering or distortion of competition, the obligation of the respective authority or institution to issue an administrative document or to perform an administrative operation.

Establishment of Consultative College (Art. 24 paragraph 2-5 of Competition Law, amended and completed)

One novelty of the current regulation is the Consultative College made up of university representatives, businessmen, representatives of consumers' protection associations or of other prestigious persons in legal, economic or competition fields.

This consultative body can issue opinions on the main aspects of competition policy, but without a binding character. Starting July 2012, the Consultative College will be able to make proposals for the member's appointment of the Competition Council Plenum.

To conclude, the new regulation introduces additional elements to strengthen the legal framework which allows the Competition Council to perform on the national territory the inspections requested by European Union or by other partner national competition authorities.

However, there are still a series of aspects requiring a rapid treatment, such as those regarding:

- adjustment and updating of the provisions of Law No. 11/2001 regarding the fight against unfair competition deeds;
- the drafting of guidelines for the application of Law No. 11/2001 regarding the fight against unfair competition deeds;
- the drafting of guidelines for the fines application in case of anti-competition deeds, so that to avoid the provisions discretionary application related to the fine threshold reduction.

References

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