

## Novelties in Competition Regulation in Romania. Impact on Competitors

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**Abstract.** *Upon the coming into force of the Law No. 149/2011, the recent changes in the Competition Law bring a significant decrease of the fines level, while encouraging competitors to support the maintenance of a healthy and transparent competition. However, some provisions require application guidelines, while others are tougher than the European law principles.*

**Keywords:** economic operator; lower fines; presumption of dominant position; serious competition constraints; lawyer-client privilege.

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**REL Codes:** 14K, 17F.

As for the impact on competitors, the main novelty aspects Law No. 149/2011 has introduced are: reduction of the bail the companies have to pay so that the court can decide to suspend the execution of a Competition Council's decision to impose fines; reduction of authorization tax for economic concentrations; increase of maximum fine reduction for law violation confession, but introduces additional obligations; until otherwise proven, companies with over 40% market share are supposed as holding a dominant position.

We will analyse below each main novelties introduced by the new regulation, also attempting to get a glimpse of the effects this new approach has on the market, competitors and competition itself.

*The notion of "economic operator" is introduced, long before used by European jurisprudence*

The enterprise is defines by the regulator as any economic operator carrying on an activity in goods and services sphere, without any constraints related to its legal condition or to its financing (Art. 2 paragraph 2 - EGO No.75/2010 approved by Law No. 149/2011).

*Authorization tax for economic concentrations is reduced*

According to the previous regulation, the authorization tax for economic clustering was set up at 0.04% of total turnovers achieved on Romania's territory by the companies involved in authorized economic clustering, calculated based on the turnover for the financial year preceding the authorization decision. In the future, the economic operators will pay an authorization tax worth between EUR 10.000 and EUR 25.000 (Art. 32 paragraph 2 – EGO No. 75/2010 approved by Law No. 149/2011).

The authorization tax cut down should encourage acquisitions and simplify authorization procedure, all the more as we consider that the turnovers of the involved economic operators are no longer a reference element.

The new authorization taxes will be applied based on some guidelines the Competition Council is expected to issue in the next future.

*The bail the companies have to pay so that the court can decide to suspend the execution of a Competition Council's decision to impose fines is cut down*

According to the previous regulation, the court could order, upon request, the suspension of the attacked decision execution, on condition of a bail payment amounting to 30% of the fine set up by the attacked decision.

In the light of the new provisions, the economic operations will be submitted to the provisions of the Code of Fiscal Procedure, the court being

able to set up the bail up to 20% of the fine (Art. 47<sup>1</sup> paragraph 2 - EGO No.75/2010 approved by Law No. 149/2011).

It is expected that this cut down of the bail maximum value, matched with the court possibility to adjust this threshold depending on the typology and specific features of each case, should lead to a higher accessibility to court of the sanctioned economic operators. Until now, some economic operators did not afford financially to address the Competition Council in contesting the fine and in asking for the decision suspension as they did not have enough financial resources to pay the 30% bail.

However, the new regulation refers to the Fiscal Code, while the bail is regulated by the Code of Fiscal Procedure, which makes us believe that the near future will bring new changes of this new regulation.

*Increase of maximum fine reduction for law violation confession, but introduces additional obligations*

If after the receipt of investigation report and exertion of its file access file the economic operator admits its anti-competition deed during the observations or hearing phases, this will be regarded as a special mitigating circumstance under the form of collaboration during the administrative procedure and will lead to the reduction of the fine amount by a percentage ranging between 10% and 30% of the basic level (Art. 52 paragraph 2 of Competition Law, amended and completed).

At the same time though, to benefit of a fine reduction in the above mentioned conditions, the economic operator's obligation is introduced to propose remedies leading to the removal of the violation causes, where the case. This fine reduction provision is different from the voluntary evidence presentation which makes the object of "clemency policy".

The Competition Council is also expected to draw up the required set of Guidelines for the application of these provisions, so as to avoid their discretionary application on the fine threshold cut down, especially in the lack of clear and precise criteria for the distinction of the remedies which can be proposed by the economic operators to remove the violation causes.

*Until otherwise proven, companies with over 40% market share are supposed as holding a dominant position*

According to the previous regulation, until otherwise proven, it was supposed that one or more enterprises are not in a dominant position if their market share or cumulated market shares on the relevant market reached during the analysis period did not exceed 40%.

The new law stipulates that, until otherwise proven, it is supposed that one or more enterprises are in a dominant position if their market share or cumulated market shares on the relevant market reached during the analysis period exceed 40% (Art. 6 of Competition Law, amended and completed).

This new provision is contrary to European practices, according to which a high market share is only a clue and does not have the value of an assumption. European Commission can reach such a conclusion only after analyzing all the factors leading to competition limitations for the respective economic operator.

*Especially highlighted are the cases representing serious constraints of competition (Art. I pct. 3-5 - L No. 149/2011)*

The new regulation specifically provides for the serious competition constraints induced by any understandings between companies, decisions of company's associates and concerted practices, by taking them over from the relevant regulations and instructions

The "serious constraints" refer to those which, directly or indirectly, have as object:

- setting up products selling prices to third parties;
- limitation of production or sales;
- markets or clients sharing;
- narrowing the buyer's capability to set up his selling price without hindering the supplier's possibility to impose a maximum selling price or to recommend a selling price, on condition the latter are not equivalent to a fix or minimum selling price set up due to the pressures exerted by one of the parties, or due to the stimulation measures practiced by them;
- territorial limitations or related to the clients to whom the buyer can sell the goods or services making the contract object;
- shrinking the active or passive sales to the final users made by the members of a selective distribution system acting on the market as retailers, without hindering the possibility to forbid a member of the system to carry on his activities from an unauthorized secondary premise;
- narrowing cross deliveries between distributors within a selective distribution system, including between distributors acting at various trade levels;
- restriction agreed between a components supplier and a buyer which assembles these components, limiting the supplier's chance to sell these components as separate parts to final users, to menders or to other services performers which were not appointed by the buyer to repair or maintain his goods.

The law defines such and those restrictions which are not regarded as serious:

(i) shrinking the active sales to an exclusive territory or to exclusive clients reserved to the supplier, or assigned by the supplier to another buyer, without limiting the sales performed by the buyer's clients;

(ii) narrowing the sales to final users made by a buyer acting on the market as a retailer;

(iii) restriction of sales to unauthorized distributors made by the members of a selective distribution system;

(iv) restriction of the buyer's capacity to sell components meant to be assembled by clients who could use them to manufacture similar products to those of the supplier.

*Lawyer-client communication privilege (Art. I pct. 21 - L No. 149/2011)*

The provisions of the former regulation are preserved in the sense that "the preparatory documents made by the investigated company or association of companies to the exclusive purpose of exerting the right to defence cannot be taken or used as evidence".

The content of these provisions still includes a final stipulation which made impossible the taking over or use as evidence of those documents which were not sent to the lawyer or which were not created to the purpose of physically being sent to a lawyer.

The new regulation eliminates this last stipulation, it seems with the intention to limit the category of documents which cannot be taken or used as evidence to those actually dedicated to lawyers.

*Reduction of fines applicable to authorities, public administration institutions and start-ups (Art. 50<sup>1</sup> Competition Law, amended and completed)*

Until this new regulation, the Competition Council could apply fines only to economic operators, ranging between RON 5.000 and RON 40.000. With the new regulations, the maximum fine is cut down by 50%, and the minimum one, by 20%, which makes that the failure of central and local public authorities to supply the requested information and documents, or the supply of inaccurate or incomplete information be sanctioned with a fine between RON 1.000 and RON 20.000.

At the same time, the fines for start-ups which had no turnover in the year before the sanctioning and for which no percentage from the turnover can be set up as fine, are also cut down by half (in this way, the maximum fine is now of RON 2.5 million).

To conclude, by cutting down fines and taxes, the new regulation could stimulate the competitors to contribute to the clarification of certain cases with anti-competition risk.

However, there are still a series of aspects requiring a rapid treatment, such as those regarding: the drafting of guidelines regarding the calculation of authorization taxes for economic concentrations; the correction of some legislative references such as that to the Fiscal Code; 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; the review of dominant position assumption in the light of European legislation and jurisprudence.

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