

COMPETITION & ANTITRUST

The presentation hereby has in view the legal provisions in force on the 31st of March 2004

Applicable legislation in this field

- Law no. 21/1996 – Competition Law, published in the Official Gazette 88/30th of April 1996, amended by:
 - *Emergency Government Ordinance no. 121/2003 for the amendment and completion of the Competition Law no. 21/1996 published in the Official Gazette 875/10th of December 2003*
- Regulation no. 2/1997 on establishing and levying of tariffs for the procedures and services provided by the Competition Law no. 21/1996 and by the regulations issued for its enforcement, published in the Official Gazette no. 116 bis/9th of June 1997
- Order of the President of the Competition Council no. 63/2004 on enforcement of the regulations and instructions of the Competition Council drawn up based on the Competition Law no. 21/1996, as further amended and completed, published in the Official Gazette no. 280/31st of March 2004
- Order of the President of the Competition Council no. 216/2002 for the amendment of the thresholds stipulated at Art. 8 and 15 from the Competition Law no. 21/1996, published in the Official Gazette 922/17th of December 2002
- Order of the President of the Competition Council no. 61/2004 on enforcement of the regulations and instructions of the Competition Council drawn up based on the Competition Law no. 21/1996, as further amended and completed, published in the Official Gazette no. 288/1st of April 2004

I. Acts and deeds falling under the scope of the provisions of the Competition Law and of the regulations issued for its enforcement

Legal provisions on competition apply to acts and deeds that have or may have as an effect the restriction, prevention or distortion of competition, and were committed by undertakings or groups of undertakings, natural or

legal persons - Romanian or foreign, irrespective of nationality or citizenship or by the central or local public administration authorities, to the extent that they intervene in market operations, directly or indirectly influencing competition.

Competition Law applies to acts and deeds committed within Romanian territory and outside the Romanian territory, when they have effects within the Romanian territory. Competition Law shall not apply to:

- the labor market and labor relations;
- the monetary market and the securities market, to the extent that free competition in these markets is subject to special regulations.

II. Competent authorities on the enforcement of the Competition Law and of the regulations issued for its enforcement

The administration and enforcement of the Law no. 21/1996, as further amended and completed are entrusted to the Competition Council.

III. Anticompetitive practices

A. Agreements between undertakings or associations of undertakings and any partnership decisions or concerted practices prohibited by the Competition Law.

General prohibition stipulated by the Competition Law (Art.5 paragraph 1 from the Law no.21/1996, as further amended and completed)

Any express or tacit agreements between undertakings or associations of undertakings and any partnership decisions or concerted practices which have as their object or may have as their effect the restriction, prevention or distortion of competition on the Romanian market or on a part of it, shall be prohibited, especially those aimed at:

- a) concerted fixing, directly or indirectly, of the selling or purchase prices, tariffs, rebates, markups, as well as any other inequitable terms of trading;
- b) limiting or controlling production, distribution, technological development or investments;
- c) allocating distribution markets or supply sources according to territorial criteria, sales-and-purchase volume or other criteria;
- d) imposing unequal terms for equivalent services to trading partners, thus causing a competitive disadvantage to some of them;
- e) conditioning the conclusion of contracts by imposing upon partners the acceptance of certain clauses stipulating additional services which, either by

their nature or by commercial usage, do not relate to the object of such contracts;

f) participating, in a concerted manner, with rigged bids in auctions or any other forms of competitive tendering;

g) eliminating competitors from the market, limiting or preventing access to the market and the free exercise of competition between other undertakings, as well as agreements not to buy from or to sell to certain parties without reasonable justification.

Scope of the prohibition

The prohibition is not applicable to undertakings or groups of undertakings if their turnover for the fiscal year prior to the alleged anticompetitive behavior does not exceed the threshold annually set by the Competition Council (the present threshold is of ROL 20 billion, set by the Order of the President of the Competition Council no. 216/2002) and:

- the total market share of the undertakings involved in the agreement, decision of the association of undertakings or concerted practice does not exceed 5% on any of the relevant markets affected, in case of agreements, decisions taken by the associations of undertakings or concerted practices between the competitor undertakings; or

- the market share of each undertaking involved in the agreement, decision of the association of undertakings or concerted practice does not exceed 10% on any of the relevant markets affected, in case of agreements, decisions taken by the associations of undertakings or concerted practices between undertakings that are not competitors.

These limitations are not applicable to anticompetitive practices prohibited when they refer to prices, tariffs, market division agreements or auctions.

The prohibition does not apply to vertical agreements, of specialization, agreed between the undertakings from the same group, as defined in the “Instructions on the turnover calculation in case of anticompetitive behavior, stipulated in Art 5 and 6 from the Competition Law no. 21/1996 and in the cases of economic concentration”, published in the Romanian Official Gazette, Part I, no. 57 bis from the 4th of April 1997.

Cases in which the agreements, partnership decisions, concerted practices of undertakings or associations of undertakings, even though they fall within the scope of the general prohibition set by the Competition Law may be excepted, are stipulated in Art. 5, paragraph 2 from the Law no. 21/1996, as further amended and completed.

B. Abuse of a dominant position

General prohibition of the abuse of a dominant position (Art. 6 from the Law no. 21/1996, as further amended and completed)

Any abuse of a dominant position held by one or more undertakings on the Romanian market or on a substantial part of it by resorting to anticompetitive deeds which have as an object or may have as an effect the distortion of commerce or the prejudice of consumers is prohibited. Such abusive practices are primarily those:

- a. imposing, directly or indirectly, the sale or purchase prices, the tariffs or other inequitable contractual clauses, as well as refusing to deal with certain suppliers or customers;
- b. limiting production, distribution or technological development, to the users' or consumers' disadvantage;
- c. applying unequal terms for equivalent services to trade partners, thereby placing some of them at a competitive disadvantage;
- d. making the conclusion of contracts subject to the acceptance by the other partners of supplementary obligations which, by their nature or according to commercial usage have no connection with the subject of these contracts;
- e. importing such products and services that determine the overall price and tariff level in the economy, without the usual bids and technical-commercial negotiations;
- f. charging excessive prices or charging predatory prices, below costs, with the aim of driving competitors out of the market or of selling on the export below production costs, recovering differences by imposing increased prices to the domestic consumers;
- g. taking advantage of the state of economic dependence of a client or a supplier towards such an undertaking or undertakings and who does not have an alternative solution under equivalent conditions, as well as breaking contract relations for the sole reason that the partner is refusing to submit to certain unjustified commercial conditions.

Specific sanctions

If the measures and sanctions applied by the Competition Council, to an undertaking abusing its dominant position do not remedy the situation and prevent the abuse from repeating, the Competition Council, for the reason of serious damage to a major public interest, may request the Bucharest Court

of Appeals, to order adequate measures to remove its dominant position on the market; depending on the case, the court may issue an order:

- a. invalidating contracts or contractual clauses through which an undertaking exploits, abusively, its dominant position;
- b. invalidating the act or acts through which an economic concentration creates a dominant position, even if the legal act or acts at issue would have created a new legal person;
- c. restraining or prohibiting access to the market;
- d. selling assets;
- e. restructuring through division of the undertaking.

The court may order one or many of the measures stipulated only subject to condition for any prices increase because of this reason to be avoided or the affecting of the execution by the undertaking of the obligations undertaken to third parties.

IV. Economic concentrations

Economic concentration refers to the measure in which a small number of undertakings hold a high share of the economic activity – expressed by the total of assets sales or of the labor used etc. – on a certain market (*Art. 11, paragraph 1 from the Law no. 21/1996, as further amended and completed*).

An economic concentration takes place when:

- two or more previously independent undertakings merge;
- one or more persons, already holding control over at least one undertaking, or one or more undertakings directly or indirectly acquire control over one or more undertakings or parts of them, either through acquiring share capital or through acquiring assets, by contract or other means (*Art. 11, paragraph 2 from the Law no. 21/1996, as further amended and completed*).

Control results from rights, contracts or other means that grants individually or taken together and considering de facto and de jure circumstances, the possibility to exercise decisive influence over an undertaking, especially through:

- rights of ownership or of possession over the whole or part of an undertaking's assets;
- rights or contracts that grant a decisive influence over the setting up, the deliberations or decision-making of an undertaking's management or board of directors.

Control is acquired by the person or persons or the undertakings who are holding the rights or are beneficiaries of the contracts mentioned, or who, without such rights or contracts, have the power to exert a decisive influence granting such rights and contracts (*Art. 11, paragraphs 4 and 5 from the Law no. 21/1996, as further amended and completed*).

Economic concentrations are illegal which, having the effect of creating or consolidating a dominant position, lead to or are likely to lead to a significant restriction, prevention or distortion of competition on the Romanian market or on a part of it.

Cases in which economic concentrations may be allowed are stipulated by Art. 14 paragraph 2 from the Law no. 21/1996, as further amended and completed.

Situations in which economic concentrations do not arise are stipulated by Art. 12 from the Law no. 21/1996, as further amended and completed.

Scope of the prohibition

The legal provisions on economic concentrations do not apply to economic concentrations where the aggregate turnover of the undertakings involved is less than the equivalent in lei of the amount of EURO 10,000,000 and there are not at least two undertakings involved in the operation to make on the Romanian territory, each, a turnover exceeding the equivalent in ROL of EURO 4,000,000. The equivalent in lei is calculated at the exchange rate of the National Bank of Romania from the last day of the financial year from the year prior to the operation.

Economic concentrations notifications

Economic concentrations exceeding the threshold of EURO 10,000,000 have to be notified by the Competition Council.

V. Investigation procedure of the Competition Law violations

Identification and investigation of the violations of the provisions of the present law are incumbent to the Competition Council which acts through its competition investigators.

The competition investigators have, according to law, the following powers of investigation:

a) to search the premises, grounds or professional means of transportation belonging to the undertakings or associations of undertakings;

- b) to investigate any documents, ledgers, book-keeping and commercial documents or other records connected to the activity of the undertakings or associations of undertakings, regardless of the place of storage;
- c) to obtain statements of the representatives and employees of the undertakings or associations of undertakings on the acts or deeds considered as being conclusive;
- d) to take over or obtain in any form copies or excerpts from any documents, ledgers, book-keeping and commercial documents or other records connected to the activity of the undertakings or associations of undertakings;
- e) to seal any place destined for the activities of the undertaking or association of undertakings and any documents, ledgers, book-keeping and commercial documents or other records connected to the activity of the undertakings or associations of undertakings, during and to the extent necessary for the investigation.

VI. Sanctions stipulated for the violation of the provisions of the Competition Law. Procedure of establishing and enforcing the sanctions

Any agreements, conventions or contractual clauses, either expressed or tacit, public or secret, referring to an anti-competitive practice are null and void.

Violation of the legal provisions in the competition field is sanctioned according to the provisions of the Law no. 21/1996, as further amended and completed.

For example:

The following deeds are contraventions and punishable with a fine of up to 1% from the total turnover from the financial year previous to the sanctioning:

- omission of notifying an economic concentration;
- supplying of incomplete or inaccurate information or incomplete documents or failure to supply the documents and information requested by the competition investigators;

The following deeds are contraventions and punishable with a fine of up to 10% from the total turnover from the financial year previous to the sanctioning:

- a) violation of the provisions on concerted practices, abuse of a dominant position, economic concentrations;

- b) applying an operation of economic concentration with the violation of the legal provisions;
- c) beginning an action of economic concentration declared as being incompatible with the provisions of the present law by a decision of the Competition Council;
- d) failing to comply of an obligation or of a condition imposed by a decision taken according to the provisions of the present law.

Contraventions stipulated in the Law no. 21/1996, as further amended and completed are established and sanctioned by the Competition Council in plenum, commissions or through the competition investigators.