

January 2016

Amendments to the Competition Law No. 21/1996



Calculation of Fines following Settlement Procedures and Leniency Applications

When an involved undertaking expressly and unequivocally admits committing a breach of competition rules, with the observance of Competition Council's procedure, a reduction of fine may be applied, ranging between 10% and 30% of the base level, including in cases when such base level is established at the minimum level set forth by the law. The novelty is however that the level of fines may not be less than 0.2% of the turnover achieved during the previous fiscal year.

To keep in mind: The implicit assumption in case of settlement procedures is that the undertaking admitting the guilt should not further challenge in court the Competition Council's streamlined decision. However, this right is not limited by law. The undertaking involved may appeal the deci-

sion, however the reduction of fine shall be withdrawn by the Competition Council. Until now, the Competition Council had the right to further use the formal admission of guilt against the relevant undertaking, whereas the new amendments clearly state that such acknowledgement shall not be used as evidence against the company.

In case a company applied for leniency, not benefiting though from total immunity, but only from a reduction of fine, the reduction based on the leniency application shall be cumulated with the reduction based on the settlement procedure, but only up to 60% of the level of the fine determined by the Competition Council.

Interview Procedure

A new procedure is expressly set forth as regards competition inspectors' powers of investigation, namely the interview procedure, based on which any individual of legal entity that consents to such discussion may be sum-

Dear Reader,

The Romanian Competition Law No. 21/1996 ("Competition Law") has undergone a series of significant changes and updates over the past 5 years, aiming to create a new, more efficient and modern legal framework. The latest, and hopefully last, amendments were brought by Law No. 347/2015 for the approval of the Government Emergency Ordinance No. 31/2015 on amending and supplementing the Competition Law and also other pieces of legislation in the field of public expenses.

This is expected to be the final review of the competition legal framework, ultimately harmonizing the domestic legislation with EU regulations.

This article summarizes the most important amendments and key issues to be considered by our readers.

Yours,



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moned for an interview. The summoning must be made in writing, mentioning the legal ground, scope, date and place where the interview is contemplated to be held as well as the legal sanctions applied under the law.

To keep in mind: The applicable fine in case of providing misleading or incorrect information during the interview (*i.e.* 0.1% up to 1%) is associated with the turnover of the involved company, irrespective of the quality of the interviewed person (either a mere employee or the legal representative of the company).

Documents Covered by the Legal Professional Privilege

The rule of thumb is that communications between the investigated company and its independent lawyer (*Nb.* not in-house counsel), *as well as the preparatory documents* drafted during and for the exclusive purpose of exercising the companies' right of defence, provided that these communications or documents are connected to the subject-matter of the procedure carried out by the Competition Council, cannot be taken away or used as evidence.

Moreover, in line with the EU case law, the substantive scope of the protection of legal professional privilege covers also, further to written communications with an independent lawyer made for the purposes of the exercise of the client's rights of defence, (i) internal notes circulated within an undertaking which are confined to reporting the text or the content of communications with independent lawyers containing legal advice and (ii) *preparatory documents* prepared by the client, even if not exchanged with a lawyer or not created for the purpose of being sent physically to a lawyer, provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of the defence.

Surprisingly, this particular provision was amended by excluding *preparatory documents* from the scope of legal professional privilege, which contradicts both EU regulations and related case law.

Investigation Prerogatives and Sources of Documents

The Competition Council straightens its collaboration with other public authorities and investigation institutions (such as the criminal prosecutor office, tax authority) and may use information and documents collected by the latter during their control activities.

To keep in mind: An alleged breach of competition rules and respectively the opening of an investigation by the Competition Council against a company may be triggered even by documents not directly submitted to or seized by the Competition Council. The competition authority concluded a series of protocols with various authorities (*e.g.* the National Anticorruption Directorate, National Authority for Management and Regulation in Communications, Consumers Protection Authority etc.), based on which, within the limits of the law, it may have access to a wide range of potential incriminating documents.

Whistleblowers

Individuals that willingly provide information to the Competition Council concerning potential breaches of competition regulations are now expressly defined as *competition whistleblowers* (in RO. *avertizori de concurență*). The Competition Council undertakes to protect their identity, whereas such disclosure of information shall not be deemed in breach of the employee's confidentiality obligations, either as set forth by the labor code or the employment agreement.

Merger Control Authorization Fees

The authorization fees in case of merger control proceedings have been differentiated, depending whether a decision has been taken during the first or the second phase of the analysis. For Phase I cases, the authorization fee remains unchanged (*i.e.* between EUR 10,000 and EUR 25,000, depending on relevant turnover thresholds), whereas for Phase II cases, the authorization fee has been increased to a range of EUR 25,001 up to EUR 50,000.

To keep in mind: Starting with 01.01.2016, merger control authorization fees shall be paid to and retained by the Competition Council in its budget, and not like previously, when this tax was paid to the State Budget.

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