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Enhanced powers for the Romanian Competition Council to protect markets, consumers and ultimately competition

In order to ensure the compliance with the requirements of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+ Directive), the Government has adopted an Emergency Ordinance No 108/2023 amending and supplementing the Competition Act No 21/1996 and other legislation (GEO 108/2023) by which the Romanian Competition Council enjoys a substantial increase in its investigative and intervention tools onto the economy.

The recently amended rules mark a milestone for the Romanian Competition Council, an authority with a well-established reputation for its active role across many industries. By the same token, other regulations in the field of state aid, the powers of the national competition authority in dealing with contestable and fair markets in the digital sector, as well as provisions on the control of foreign direct investment are further amended and expanded.

More efficient tools for the Romanian Competition Council's investigations

In order to ensure that the national competition authority has all the necessary resources and powers to fulfill its attributions stemming from the ECN+ Directive, the recent amendments come with more guarantees of independence, resources and appropriate intervention tools for the Romanian Competition Council, within a novel economic paradigm defined by the energy crisis, the emerging digital economy and the expansion of Artificial Intelligence. Notably, in some areas of heightened interest, the amendments go beyond the requirements of the ECN+ Directive in order to facilitate the authority's arsenal of investigative ammunition.

What powers does the Competition Council acquire by way of GEO 108/2023?

Increased sanctions: Firstly, the new amendments harmonize the European approach regarding the liability of the parent company for the anticompetitive practices of its subsidiaries. Thus, the single economic unit doctrine is transposed into national law in terms of antitrust fines – i.e., in the event of an undertaking, comprising several legal entities that have been engaged in an anticompetitive practice and therefore could be found liable of such, all of said legal entities may be held responsible individually for the conduct (for instance, a parent-company and its subsidiary, or all other of its subsidiaries).

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Moreover, this change exponentially affects the amount of the fines – as the upper limit of administrative fines go up to 10% of the turnover of the respective economic unit achieved in in the financial year preceding the sanction.

Additionally, it is expressly stated that the competition authority will apply the principles of economic and legal continuity, in line with the European jurisprudence (e.g., where one of the undertakings under investigation has transferred its assets to another company pending the antitrust investigation).

Note: Until now, in case of groups of undertakings, the sanction for anti-competitive conduct has strictly concerned the entity directly involved in the infringement. Under the newly introduced concept of joint and several liability, it becomes imminent that the other legal entities within the group (which will also have the status of participants in the proceedings) will be sanctioned through the imposition of worldwide turnover fines. The purpose of these rules is to improve enforcement of effective and preventive competition law, although the compatibility of the provisions with the constitutional principle of personal liability remains to be clarified.

Inspections and market failure analysis at the request of the Government. When evidence of market distortions is apparent, the Government may request the Competition Council to carry out case-by-case analyses. This tool complements the Competition Authority's current market investigation powers along three pillars, namely:

- (i) the Competition Council will be able to conduct dawn raid based on prior judicial authorisation;
- (ii) these market analyses are expedited procedures with a maximum duration of 6 months, with the possibility of an extension, upon justified grounds, of up to 3 months;
- (iii) the market analyses may be finalized by (a) a recommendation to remedy the detected deficiencies, (b) a proposal for new measures, or (c) the initiation of a formal investigation if evidence of anti-competitive practices is found.

Note: It remains to be tested how this instrument will be applied in practice by the competition authority, as the authority can already intervene by imposing "market failure remedies" after conducting sector inquiries.

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Mandatory interviews with representatives of undertakings, associations of undertakings and individuals who may have relevant information. According to the new regulations, the Romanian Competition Council will be able to summon representatives of companies, associations of undertakings and individuals for interviews, subject to a prior notice of appointment and having the possibility of audio-visual recording of these interviews.

In the event of non-attendance or of providing inaccurate or incomplete information, the Romanian Competition Council may fine both the natural person involved and the company whose representative has violated this prohibition. For a company, this fine may range between 0.1% of the total revenue achieved in Romania and 1% of the total worldwide turnover achieved in the financial year preceding the sanction.

Note: The mandatory interviews provided for by the GEO 108/2023 strengthen the investigative powers of the Competition Council. At the same time, they increase the financial risks for companies that may be liable for the failure of their representatives to attend the interviews, or for the provision of inaccurate information by their representatives.

The amendments further clarify the investigative powers of the Competition Council, allowing it access to any document regardless of its type or format. In particular, any electronic data storage and any storage means of the documents are now clarified, with documents archived on external servers and cloud servers being available for inspection, regardless of their location (e.g., they can be stored outside the national territory). The new provisions also specify that personal devices belonging to representatives and employees of the company under inspection will also be made available for review if these are used for business purposes.

Note: These new clarifications practically ratify the Competition Council's previous practice of carrying out unannounced inspections and bring more predictability for the companies under investigation.

Restricting the scope of privileged attorney-client communications. The new rules include the possibility of restricting the scope of privileged attorney-client communications during on-site unannounced inspections. Thus, the content of lawyer-client correspondence can be directly accessed by competition inspectors if the company does not adequately substantiate the validity of such privilege.

Note: While it remains to be seen how these legal provisions will operate in practice, the restriction of companies' and lawyers' rights may raise concerns, as it poses the question concerning the constitutionality of the new provisions.

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Expediting and streamlining administrative proceedings. The new provisions facilitate the smooth functioning of the current investigative and pre-investigative procedures of the competition authority, including the evidence gathering and handling instruments:

- the Romanian Competition Council will be able to dismiss a claim for reasons of case prioritization, being able to allocate its resources more efficiently and focus on the practices of significant economic impact;
- competition inspectors will also be able to send out requests for information to individuals who hold/may hold relevant data and information;
- the competition authority will be able to carry out announced inspections, with the prior consent of the companies under inspection, without a prior judicial review;
- involvement of law enforcement and police forces, in case of anticipated obstruction to the unannounced inspections;
- the leniency programme becomes formally incorporated into the Competition Law ensuring more legal clarity.

Note: These provisions essentially provide clarification to the Romanian Competition Council's previous approaches and provide more streamlined administrative procedures to ensure the efficiency of the Competition Council's vital work. It remains to be observed how the application of the principle of prioritization will work in practice, since it allows for more leeway in rejecting companies' claims so as to ensure that the right of petition is not unduly restricted.

Conclusions: The new rules follow the general European trend in to equip competition authorities with more powers beyond traditional competition law enforcement tools. In particular, it remains to be tested the application of the competition rules to companies which are members of a single economic unity, in terms of the amount of fines imposed.

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