Competition law: Using a superior bargaining position could soon become subject to sanctions

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The Law No. 11/ 1991 concerning unfair competition represents, together with Law 21/1996 on competition, the most important instruments of the Romanian Competition Council (*Consiliul Concurenței*) for monitoring and regulating competition on the Romanian market. At the beginning of June, the draft of an Emergency Ordinance ("**EO**") modifying and complementing the abovementioned laws was published for consultation.

We will present below an overview of the proposed changes.

The superior bargaining position

The notion "superior bargaining position" should be adopted, whereas the use of such should be sanctioned.

Until now, in Romania, only the abuse of a dominant position (*abuz de pozitie dominanta*) could be sanctioned. This required, however, a market quote of more than 40%, so that the companies not reaching this threshold would not necessarily be affected in terms of their commercial and bargaining practices.

According to its legal definition, a "superior bargaining position" means a situation of a non - market-dominating company which relies on the characteristics of the specific market and favors the emergence of imbalances. By way of example, the following cases are mentioned:

(i) The specific structure of the production and distribution chain;

(ii) Vulnerability towards external influences;

(iii) The perishability and seasonality of products;

(iv) The specific relation to companies existing on different markets.

The abovementioned relation must be analyzed on the basis of the following cumulative criteria:

1. The existence of a power imbalance, for example, as a result of the company's size or market position;
2. The importance of the relationship for the course of business of the other company, for instance in case of a significant share of purchases or sales of its activity, the relevance of the products or services for its activity or in case of previous significant investments with regard to the legal transaction;
3. The difficulty or even the impossibility to find alternative solutions for the other company.

The use of such position

According to the draft, the use of a superior bargaining position is considered to be unfair competition if it can cause significant damages to the business partner or affect fair competition. By way of example, the following actions or omissions are described:

(i) Unjustified refusal to supply or purchase products or services,

(ii) Non-observance of contractual clauses regarding payment, supply or purchase,

(iii) Imposing unjustified burdensome or discriminating conditions with regard to the subject-matter of the contract,

(iv) Unjustified change or conditions of the business relationships.

The Competition Council is free to also consider other cases as a use of a superior bargaining position.

Imposing sanctions is however possible only if the measure affects a public interest. Such cases will be identified on an individual basis, according to criteria such as “social threat“, the importance or dimension of the market, the number of companies involved, the duration of the etc.. Upon identifying an infringement of the public interest, a detailed investigation will take place at the request of the president; which is notified to the parties concerned.

Sanctions

The abovementioned measures will be fined as follows:

- between 0,01% and 1% of the turnover achieved in the year prior to the respective use, however not less than 5.500,- RON (around 1.100,- EUR) and not more than 100.000,- RON (around 20.000,- EUR) for legal entities;
- between 5.500,- RON and 11.000,- RON (around 2.200,- EUR) for natural persons.

In case the offender admits the offence, the sanction can be reduced by 10-20%. The reduction will cease to apply, however, if it is challenged in court.

Conclusion

The draft on changing and complementing the competition legislation supplies companies with munition against abusive contracting partners that have no market-dominating position, but are, however, very important for their activity. On the other hand, because of the abstract legal wording (which is necessary), different interpretations and, thus, also an improper use are possible. At the moment it is also rather unclear when and how to determine the presence of a public interest; only practice can cast light upon this issue. In case the change comes into effect, the competition authority will have to come up with guidelines for determining the conditions.

Important companies must keep an eye on the new regulations. A violation in this regard will not only lead to sanctions but possibly also to damages of one’s public image and would be critical from a Compliance point of view.

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