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# Legal Bulletin



## Competition Law

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1. Amendments to Competition Law No. 21/1996

### Government Emergency Ordinance modifying and supplementing Competition Law No. 21/1996

*In the Official Journal of Romania, Part I, No. 474/30 June 2015 was published Government Emergency Ordinance No. 31/2015 modifying and supplementing Competition Law No. 21/1996 („Competition Law” or the „Law”) and supplementing Article 1 of Government Emergency Ordinance No. 83/2014 on the remuneration of personnel remunerated from public funds during 2015, as well as other measures in the field of public expenditure („GEO no. 31/2015”).*

The main amendments brought to Competition Law are as follows:

1. **The provisions of Competition Law on anticompetitive agreements and abuse of dominant position are now harmonised with the corresponding rules of the Treaty on the Functioning of the European Union**

The texts of Competition Law on anticompetitive agreements (i.e. Article 5 of the Law) and unilateral abusive practices (i.e. Article 6 of the Law) now perfectly match to the corresponding provisions of Article 101 and Article 102 of the Treaty on the Functioning of the European Union (the „Treaty”). Consequently, Article 5(1) of Competition Law no longer identifies separately certain anticompetitive practices<sup>1</sup>. Also, the text of Article 6(1) of Competition Law is now simplified<sup>2</sup>. The amendment does not imply that the respective provisions are not outside the scope of Competition

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<sup>1</sup> Respectively, (i) bid-rigging [former Article 5 (1) letter f)] and (ii) eliminating competitors from the market, the limitation or prohibition of market access or competitive freedom, as well as the agreements not to buy from or not to sell to certain undertakings without reasonable justification [former Article 5(1) letter g)].

<sup>2</sup> Article 6(1) of Competition Law no longer provides separately as abusive practices (i) excessive pricing or dumping pricing with a view to eliminating competitors [former Article 6 (1) letter e)] and (ii) exploitative practices and refusal to supply [former Article 6(1) letter f)].

Law. In fact, the Competition Council continues to hold the applicable tools to sanction such type of behaviour although no longer expressly included in the legal text. According to Article II of GEO No. 31/2015, as of the entry into force of the emergency ordinance, the investigations opened based on the eliminated provisions, are now considered to be opened based on the general provisions of Article 5(1) and Article 6(1) of the Law, respectively.

## **2. Additional conditions for granting the mitigating circumstance of settlement (i.e. a fine reduction in case a company admits its breach of competition rules)**

In case a company settles a case with the Competition Council, such triggers the application of a special mitigating circumstance consisting in the reduction of the fine level by a percentage ranging from 10 to 30%. GEO No. 31/2015 introduces additional procedural rules for the award of such mitigating circumstance with the purpose of obtaining express recognition on the breach of law and decrease the number of court cases challenging the sanctioning decisions issued by the authority. Accordingly, in order to obtain a reduction of the fine under the settlement procedure:

- An express, clear and unequivocal application must be filed by the company requesting access to the settlement procedure;
- The company must provide a statement indicating that it accepts the maximum level of the fine;
- The company benefiting from a reduction of reduction based on the settlement loses such benefit in case of subsequent court challenge of the sanctioning decision issued by the competition authority. The latter may use in court the recognition formulated during the administrative phase.

In addition, under the Law as modified by GEO No. 31/2015 it is clearly stated that the settlement and leniency procedures may be cumulated in order to obtain a reduction in the fine level. However, the cumulated value of such fine reduction cannot exceed 60% of the fine amount as determined in accordance with the guidelines of the Competition Council on the setting of sanctions.

## **3. A higher degree of flexibility is implemented with regard to dawn raids**

As per the amended form of Competition Law, the authority has the possibility to perform a dawn raid at the registered address of the company, but also in areas where such company performs its activities de facto. The amendment appears to aim at covering the situations in which, although a company is legally registered as operating at a certain location (i.e. its headquarters), in fact, the activity is performed at another location. Nevertheless, at least upon a prima facie assessment, taking into account that a dawn raid needs to be authorized in advance by the court and the location of the dawn raid needs is identified by the inspection order, it may be reasonably estimated that, in practice, the amendment will not be interpreted as automatically allowing the extension of the scope of a dawn raid to other locations for which there is no express mandate. Also, according to the amendments implemented by GEO No. 31/2015, in case of a dawn raid, the inspection order

can be communicated in hard copy, but also by telefax, e-mail or other means designed to ensure the transmission or acknowledgment of delivery. The competition inspectors may display the dawn raid order, the judicial authorization and the order for instantiating the investigation at site.

**4. The term provided by Law for the companies to challenge the court decision authorising a dawn raid is extended from 48 hours to 72 hours**

**5. Increased flexibility in terms of adjustment of the turnover thresholds triggering the mandatory notification of economic concentrations to the Competition Council**

Competition Law provides two turnover thresholds (cumulative conditions)<sup>3</sup> which trigger the obligation of prior notification of economic concentrations (i.e. transactions generating a long-lasting change in control over companies or assets) to the Competition Council. In case such turnover thresholds are exceeded, the respective transaction cannot be implemented until it is cleared by the competition authority. The turnover thresholds triggering the notification obligation are considered as very low at present. However, by the new amendments to the Law, the competition authority acquires flexibility in adjusting the value of such thresholds based on the actual socio-economic context. To this end, the Competition Council now has the power to modify the notification thresholds. Adjustment can be performed after obtaining approval by the Ministry of Economy, Trade and Tourism.

**6. The obligation of central and local public administrative authorities and institutions to obtain prior endorsement of the Competition Council for draft bills and draft public policy documents.**

GEO No. 31/2015 introduces the obligation of the central and local authorities and government institutions to seek the prior endorsement of the Competition Council when initiating draft laws or draft policy documents that may have an anti-competitive impact. The new legal provisions are intended to ensure compatibility with the principles of effective competition.

**7. Special rights of intervention by the Competition Council are established in case market failure is identified**

In order to ensure an effective competitive environment, pursuant to GEO No. 31/2015 the Competition Council has the right of to take measures such as:

- Issue recommendations towards the business environment, public authorities or consumers, in order to facilitate market development and competition;

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<sup>3</sup> At this date, the turnover thresholds are as follows: (i) an aggregate worldwide turnover of all the parties to the concentration over 10 million EUR (in lei equivalent); and (ii) a Romanian turnover of more than 4 million EUR (in lei equivalent) achieved by at least two parties to the concentration. The concept of party is a complex one which does not include only the parties to the transaction, but is determined on a case-by-case basis depending on the scope and structure of the transaction.

- Promote specific regulations in case it is discovered that market failures were generated by laws in force;
  - Following public consultations impose, by decision, appropriate and proportionate measures to remedy market failure.
8. It is clarified that access to the confidential information to an investigation file is permitted once, unless of intervention of new elements
9. Under the new provisions, the statute of limitation for applying sanctions is deemed as suspended over the period in which the Competition Council's decision is pending before the courts

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## Editors

The lawyers specialized in **Competition Law** at Tuca Zbârcea & Asociații provide legal assistance and consultancy in the field of competition regulations, including issues related to antitrust, domestic and cross-border transactions (mergers, acquisitions, joint ventures etc.), as well as State aid. The firm's Lawyers are constantly representing the interests of clients before national competition authorities and in litigation procedures before the courts in connection with a wide range of specific issues (unfair competition inclusively). Moreover, Tuca Zbârcea & Asociații has developed a competition law compliance department (covering, for instance, prior assessment of potential exposure, training programs) to help clients avoid sanctions resulting from the breach of competition laws. Work in this area is popular with international specialized directories as among the best in the market, the company was ranked first in the specialty charts Chambers Europe or other similar publications.



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