LEGAL UPDATE

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LEGAL UPDATE

COMPETITION LAW

The competition law field underwent significant regulatory activity over the last month, materialized with the entry into force of an important set of normative acts that, on one hand, superseded certain Regulations adopted throughout 2002 and, on the other hand, regulated more restrictively the market of certain products and services.

The Regulation on the applying of art. 5 par. (2) of Competition Law No. 21/1996, in case of vertical agreements

Although said enactment largely overtakes the provisions of the previous regulation on the matter, one could note several formal amendments, in the attempt to regulate more clearly certain situations and terms.

Nevertheless, the Regulation above comprises an important material amendment: when outlining the vertical agreements that do not fall under the incidence of forbidden anticompetitive practices listed at art. 5 of Competition Law No. 21/1996, the new Regulation increases from 5% to 10% the market share that should not be overpassed on any of the relevant affected markets by each of the undertakings involved.

The new Regulation on authorisation of economic concentrations ("The Regulation") modifies the previous provisions that regulated the notification in short form

It should be reminded that the prior Regulation was relating parties' possibility to request the Competition Council for the presentation of a notification in short form to a sole criterion: the market quota resulted after the economic concentration should not overpass 20%.

Among the modifications brought to the new Regulation it should be mentioned: (i) changing of the wording "notification in short form" with "simplified procedure of analysis", corroborated with the fact that there is no longer included any provision with respect to the form of such a notification, (ii) circumstantiation of conditions subject to which the simplified procedure of analysis may be requested, by way of eliminating the general criterion not to overpass 20% of the market share and regulation of distinct requirements depending on the type of economic concentration.

Actions with irreversible effect

It should be reminded that the involved undertakings may take until authorisation of the operation, only those measures related to concentration that are not irreversible and do not definitively modify the market structure.

According to the Regulation, are to be considered irreversible measures, among others: (i) entry of the acquired undertaking on a new/other market; (ii) modification of the acquired undertaking's object of activity; (iii) exercise of acquired voting rights in order to appoint members within the management bodies of the undertaking, to

approve the income and expenditure budget, the business and investments plans of the acquired undertaking; (iv) change of name, restructuring, closing, splitting up, sale of assets owned by the acquired undertaking, dismissal of its employees; (v) conclusion or cessation of long–term contracts or other important agreements entered into with third parties etc.

Instructions concerning the acceptable commitments in case of conditional authorisation of economic concentrations

The above mentioned instructions, approved by Order no. 63/2004 and published in the Official Gazette No. 280/March 31st, 2004 set forth the general framework wherein the involved undertakings may try to modify the implementation conditions of the economic concentration.

It should be reminded that such a possibility is provided by Competition Law No. 21/1996 in case the economic concentration raises competition issues entailing the creation or consolidation of a dominant position.

Types of commitments

Assignment – represents the most efficient way upon which the involved undertakings may prevent the normal competitive environment from being affected and aims at ensuring the necessary conditions for the setting up of a new competitor or consolidation of existing competitors.

The conditions for an assignment to trigger the issuance by the Competition Council of an economic concentration authorisation mainly refer to:

- The assigned elements should constitute a viable activity, whose exploitation may allow an appropriate purchaser to effectively and sustainable compete with the newly established entity through the economic concentration.
  An important criterion in determining the activity that should be assigned is its characteristic of being exploited autonomously, that is independently of the undertakings as far as suppliance with raw materials or other forms of cooperation are concerned. In case of an horizontal integration (among undertakings cooperating at the same level on the market), it is considered that it should be assigned the activity with the highest influence in generating the incompatibility.

- The viable activity should be assigned to an appropriate purchaser, who usually is an existing or prospective competitor, independent of the undertakings, who holds financial resources necessary to maintain and develop the assigned activity in competition with the undertakings.

- Elimination of structural relationships with the important competitors, considering that assignment commitments should not be restricted to eliminating the situations of incompatibility with a normal

competitive environment, created by horizontal integrations.

Cessation of various agreements – refers mainly to exclusive agreements of long term suppliance and distribution, when they restrict the market potential available for competitors.

Commitment to allow competitors access to certain necessary infrastructures or essential technologies – refers to situations where the respective infrastructures or essential technologies may trigger significant entry barriers or obstacles on the relevant market. Specifically, such elements consist of certain networks, patents, know-how or other intellectual property rights.

In case of an essential technology, it is considered that its assignment would be the best commitment. Nevertheless, should the respective assignment impede on continuation of efficient undergoing researches, it is possible to conclude only a license agreement (preferably exclusive licenses).

Sets of commitments – imply combination of the various aforesaid commitments.

The administrator-custodian in charge with supervision of the separation of activities

Representing an element of novelty, such an administrator-custodian may be approved by the Competition Council in view of supervising the temporary preservation measures necessary to ensure for the tangible and intangible assets of the ensemble to be assigned in accordance with the requirements of diligent commercial and normal business conducts.

The administrator-custodian will be in charge with ensuring separation of the activity to be assigned and will act in the interest of the respective activity.

The administrator-custodian in charge with the assignment

Having, generally, the role to supervise and impose, as the case may be, compliance with commitments undertaken by the parties in order to implement the assignment, this administrator-custodian, on a case by case basis, may be or not the same person in charge with separation of the activities object of the assignment.

As a general rule, administrator-custodian may be an investment bank, a management, consulting or accounting company or any other similar institution, its mandate being irrevocable.

The new set of normative acts includes as well: (i) Regulation on applying art. 5 par. (2) of Competition Law No. 21/1996 in case of vertical agreements within the field of auto vehicles (a distinct Regulation in this respect is due to particularities and specificity of auto vehicles market, which have made necessary more restrictive rules than those applicable to the general framework of vertical agreements); (ii) Instructions on the manner to apply competition rules to access agreements within the electronic communication field – general framework, relevant markets and

principles, which repealed the previous Instructions in the field (entered into force by Order of the President of the Competition Council no. 225/2002, published in the Official Gazette of Romania, Part I, no. 920/December 17th, 2002).

LABOUR LAW

Amendment of the labour permits regime

The series of modifications brought to Law No. 203/1999 concerning labour permits has been completed with the amendments recently passed by Law No. 130/2004 (Official Gazette no. 364/2004).

Thus, the initial validity duration of the work permit was extended from 6 to 12 months. At the same time, further extensions of the permit may be granted for 12-month periods.

Another modification concerns automatic issuance by the Labour Ministry, with the approval of the Ministry of Public Administration and Internal Affaires, of the permit for persons that shall perform activities with major influence over the economical development of the country. As a principle, it has been reaffirmed the general possibility to have labour permits issued until January 1st, 2007, under different conditions and circumstances than those provided by the last version of Law No. 203/1999, namely by the means of separate international agreements or conventions, or by other special laws.

Foreign citizens may be employed on the basis of the labour permits issued by the competent authority, only by labour agreement concluded for a determined period. Nevertheless, the labour permit for foreigners may be renewed by parties' assent, without being subject to the limitations provided by the Labour Code in respect of the labour agreement concluded for determined periods (namely, limitations regarding the total duration and the number of possible extensions).

It has also been attenuated the regulation according to which the foreign employees may be hired in Romania only if the vacant jobs can not be undertaken by Romanian workforce and if the foreigner meets the training and professional experience conditions required by the Romanian legislation in force. Thus, a large category of foreigners (citizens of the states member of EU, of the Agreement on Economic European Area etc.) may be employed in Romania by ignoring these prerequisites.

PRIVATISATION

Establishment of the State Assets Resolution Authority

Anticipated since the most recent regulation on central public administration reorganisation, the formation of the State Assets Resolution Authority has occurred through the entering into force of the Government Emergency Ordinance no. 23/2004, that provides the reorganisation of the Banking Assets Resolution Authority (AVAB) by merging by absorption with the

State Authority for Privatisation and Management of State Ownership (APAPS), institution that shall be dissolved, as of May 1, 2004.

AVAS Powers

The new State Assets Resolution Authority (hereinafter referred as, "**AVAS**") is conceived as a specialized central public administration body, having its own legal personality and subordinated to the Romanian Government, that shall bring together the assets, budget and personnel of the two high establishments AVAB and APAPS, with the purpose of carrying out their former powers, mainly regarding:

(i) Taking over the non-performing receivables and associated commercial debts from banks having the Romanian State as a shareholder and their specific recovery and trading, as well as assignment and resolution of fiscal debts, subject to certain conditions;
(ii) Exercising the rights and fulfilling the obligations pertaining to its capacity as shareholder on behalf of the Romanian State for the proper management of state participations;
(iii) Selling the shares held by the Romanian State, as well as the assets of the companies and *regies autonomes* where the Romanian State still holds its capacity of shareholder, at market value, according to the privatisation methods provided by the specific regulations;
(iv) Monitoring the manner in which the privatisation contract clauses are implemented, by exerting post privatisation control powers.

AVAS Management

Concentrating by now the entire state assets administering powers and having the aim of finalising the privatisation of banks and other companies having the State as shareholder, AVAS shall supervise and coordinate its activity through a "Supervision and Direction Council" comprising 9 members. The Council's President shall be appointed by the Ministry of Public Finance, while the other eight members shall represent: the National Bank of Romania, Ministry of Economy and Commerce, Ministry of Administration and Internal Affairs, Ministry of European Integration, Ministry of Justice, National Control Authority, Prime Minister Chancery and the National Agency for Small and Medium Enterprises

The management of new public body shall be achieved by a President assisted by 4 vice-presidents, appointed through the Prime Minister's decision. Among the powers granted to the AVAS President is that of having the possibility to grant exemptions or deferrals for the payment of budgetary debts transferred to AVAS.

Amendment of the normative acts concerning the privatisation and banking assets resolution activities

The same Government Ordinance has finally clarified the legal nature of the investor's obligations arising out of privatisation agreements, in the sense that these shall be deemed as commercial obligations, thus, any former interpretations that considered such obligations towards

APAPS as having a budgetary debt nature have been eliminated, with the legal effects thereof.

Moreover, the legal provisions regarding the powers of the former AVAB and the terminology regarding "*non-performing receivable*", "*associated commercial debt*", "*nominal*" "*net*", "achievable" and "*transaction*" value have been amended and restated in such a manner as to ensure AVAS, by taking over such authority the optimum legal mechanisms for their proper execution.

The impact brought by the establishment of the new State Assets Resolution Authority shall be a significant one on the Romanian market, considering its powers but also its difficult mission to finalise the privatisation procedures and to coordinate the governmental strategy in the field, especially during this electoral year.

New amendments to the privatization procedures (the accelerated privatization)

A new legislative initiative, that aims to the cessation in an accelerated rhythm of the privatisation process as well as to the consolidation of some privatisations already effected, has come into force by the Emergency Ordinance no. 26/2004 (".E.G.O. no. 26/2004", published in the Official Gazette no. 385).

Shares sale by call auction

EGO no. 26/2004 regulates the shares sale procedure by call auction as a special procedure for decreasing the state participations in the companies in which it holds shares (defined as "accelerated privatisation").

The sale offer shall be preceded by a prior announcement to be published 10 days in advance, both documents having to be issued in compliance with the specific conditions provided by the law. We mention that the offer price shall be calculated by APAPS on the basis of a simplified assessment report. In case the price resulted has a negative value, the offer price shall be of 20% of the face value of the shares.

For the auction procedure validity, two accepted offerors should be present, but even in case of presence by only one offeror, the shares sale procedure may turn into negotiations, in case that start-up price published in the sale offer is being accepted.

The sale is performed by open call auction, meaning that the participants to auction have the right to announce, either by call or by raise of the auction coupon, of an equal price, bigger or smaller than the price announced by the president of the auction commission. The auction shall take place in accordance with the rules of the competitive or Dutch auction, respectively by price rising or decreasing, as determined by the concrete evolution of the demand and of the offer.

The payment of the sale price must be carried out within 15 days as of the signing of the shares sale-purchase agreement, under sanction of the automatic cessation in case that the payment is not performed within such period plus additional 15 days

for which the purchaser must pay delay-interests. In case of cessation of the agreement on these grounds, APAPS shall be entitled to conclude the shares sale-purchase contract with the next offeror, as indicated by the results of the auction procedure.

Transfer of the rights regained by APAPS following the termination of previous shares sale agreements

Special provisions regard the transfer by APAPS of the rights regained by termination of the previous shares sale-and-purchase agreements, in case that such termination has not been followed by the new registration of APAPS as a shareholder.

Transfers of such rights shall be done pursuant to an assignment agreement, which shall be concluded after the publication of the appropriate announcement and of the assignment offer, with the observance of the incident legal procedure.

As a general rule, the price of the shares package subject of the assignment shall be equal to the difference between the initial sale price mentioned by the sale-and-purchase agreement already terminated and the price/rest of price left unpaid. The payment of the price must be effected completely or in instalments for a period of maximum 3 years, with a 30%-advance (plus the applicable interest rate calculated until the complete payment of the instalments).

Incentives for the privatisation of companies with budgetary debts

E.G.O. no. 26/2004 regulates additional possibilities for APAPS and the budgetary institutions to grant certain incentives to state-owned companies subject of privatization procedures.

With the observance of the conditions and exceptions detailed by E.G.O. no. 26/2004, we note that such incentives may refer to total or partial exemption from payment of the remaining obligations as of December 31st, 2003 representing taxes, charges, contributions and other budgetary revenues as well as credits and guarantees granted by the budgetary creditors, or other obligations representing own receivables and budgetary credits administered by APAPS. Moreover, certain receivables administered by the local administration authorities may also be totally or partially exempted on the basis of the appropriate decisions made by such bodies.

Approval of the incentives as regards the payment of the overdue budgetary obligations of the company shall be done by the means of a common order issued by APAPS together with each budgetary creditor involved, as well as by the means of certain addendums to such orders.

As a general rule, the incentives which are subject of the common order above-mentioned shall be granted under the condition that the beneficiary company should pay all its current budgetary obligations for each fiscal year, which shall become due as of the date of issuing the common order. The amounts exempted are those set out by the certificates of budgetary obligations issued at APAPS's request, in

accordance with the provisions of EGO no. 28/2004, pursuant to the control performed by the competent authorities as well as those established by the notifications issued by APAPS.

Consolidation of certain privatisations already performed by APAPS

Several special provisions introduced by EGO no. 26/2004 refer to certain actions aimed at the consolidation of some shares sale-and-purchase agreements already concluded by APAPS.

Thus, inter alia, the companies for which common orders have been issued may benefit of certain exemptions. Such exemptions regard the obligations overdue as of the date of coming into force of EGO no. 26/2004 and they may consist of total or partial exemption from payment of own receivables and of those resulted from budgetary credits administered by APAPS, starting with the date of signature of the shares sale-and-purchase agreement until the date of issuing the common order. As well, such companies may benefit of the total exemption from payment of penalties and delay interests related to the obligations previously mentioned, as included in the notifications issued by APAPS.

Furthermore, during the period starting with the transfer of the ownership right over the shares until the fulfilment of provisions contained by the common order or until the last payment effected in accordance with the payment schedule approved by the common order, it shall be suspended the application of any action of enforcement procedure which might be initiated by any budgetary creditors or APAPS in respect of the respective company. Following such suspension, throughout its entire duration, no new actions may be taken in respect of any other enforcement procedure.

Swap of certain receivables into shares issued by companies already privatized

In case of companies already privatised, the amounts representing funds for restructuring and redressing granted in accordance with the provisions of the Law no. 58/1991 (concerning the privatisation of commercial companies) and/or credits granted pursuant to the Government Ordinance no. 13/1995, owed and unpaid until the date of EGO no. 26/2004 shall be transformed into shares which are allotted automatically (by law) to the state.

To this aim, the company's directors are obliged to call the general meeting of shareholders within 15 days in order to approve the share capital increase by the above-mentioned amounts.

The shares resulted out of the conversion of such debts shall be sold by APAPS with the observance of the preference right of the purchaser of the state participation to the share capital.

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