

Schoenherr | The Unfair Competition Law is changing: new focus on companies with superior bargaining position

A draft Emergency Government Ordinance recently published on the Romanian Competition Council's (RCC) website sets the stage for several significant changes to Law 11/1991 (the Unfair Competition Law).

Superior bargaining position, the "new kid on the block"

Similar to other jurisdictions, this draft legislation aims to introduce a new concept ultimately creating more room for enforcement, even in the absence of a dominant position on the market.

"Superior bargaining position" is defined against a background of significant imbalances generated by factors such as the specific structure of the production or distribution chain, vulnerability to external factors, perishability or seasonality. This background is deemed to allow a non-dominant undertaking to influence partners active on a different market, based on the following cumulative criteria:

- the existence of unbalanced forces due to the non-dominant company's considerable size or its market position;
- the importance of the business relationship for the partner's business (i.e. a significant share of its sales or purchases, the critical role of its products or services, significant investments); and
- difficulties in identifying an alternative solution or lack of options for the partner.

Under such circumstances, an undertaking exploiting its superior bargaining position (and thereby causing significant damages to the other party or affecting normal competition on the market) would be found in breach of the unfair competition rules.

This can occur, inter alia, in case of a refusal to supply or purchase, breach of contractual clauses (for payment, supply or purchase), unjustified and discriminatory terms, contractual termination or unjustified amendment of contractual clauses.

Enforcement and proposed fines

Another interesting development is the newly included distinction between "public" and "private" interest. The RCC is set to enforce only the "public" interest cases, while any party claiming a "private" interest can address its claim to the competent courts of law.

In case of public enforcement, the proposed fines for companies range from 0.01 % to 1 % of the company's turnover, in any case capped at a minimum of RON 5,500 (approx. EUR 1,250) and a maximum of RON 100,000 (approx. EUR 22,500). Several tools applicable to antitrust investigations have been translated into this draft legislation, thus bringing the Unfair Competition Law closer to the general antitrust framework.

Comments

The RCC Chairman stated that these new changes are focused on dealings of companies that have a 20 – 30 % market share, which are clearly stronger and have significant negotiating strength towards smaller firms, but still do not meet the criteria in order to be considered dominant (i.e. are below the 40 % market share threshold).

It can be anticipated that the enhanced Unfair Competition Law will become a more notable tool that will enable

the RCC to initiate a series of new investigations and require players with a higher market share to rethink and reshape their agreements and competition compliance programmes to account for these legal developments.

The draft is currently up for public debate on the [RCC's website](#). Stakeholders and other interested parties can provide their comments until 3 July 2020.