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Clients&FriendsMemo

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A NEW LENIENCY REGULATION

Dear Clients and Friends:

The Romanian Competition Council ("**Council**") has become a very active institution, as evidenced by the investigations initiated in major industries such as food retail, the banking industry, the mobile telephony industry, the automobile industry and the pharmaceutical industry. The Council has historically initiated investigations following either complaints from disgruntled competitors or distributors or media scrutiny regarding allegedly dysfunctional markets. Still, there have not yet been cases put together by the Council based on self-reporting by a company of its involvement in cartel-like activities, although it has been more than five years from the commencement of the Council's leniency policy.

However, with the appointment in April 2009 of a new Council Chairman, Bogdan Chirițoiu, the Council moved to encourage companies to voluntarily disclose their non-conforming conduct by participating in leniency programs. In addition, the Council has even proposed a "direct settlement policy" which could be applied in the future, with companies waiving their rights to challenge Council's fining decision in exchange for lower fines. Also, a new leniency notice ("**Council Notice**") was adopted in early fall of 2009, which implements the revised and improved 2006 European Commission Notice on Immunity from fines and reduction of fines in cartel cases ("**Commission Notice**"). The new Council Notice came in the context of the Council becoming increasingly more active in conducting dawn raids and having a more aggressive stance in terms of market scrutiny.

This means that any player on the Romanian market which may have carried out cartel-related activities should be aware of the current much greater costs associated with a cartel. Thus, this informational memorandum endeavors to provide an introduction to the rules governing the so-called whistleblowers and leniency programs.

What is Immunity from Fines under the Leniency Policy?

Pursuant to the leniency programs, cartel members are encouraged to disclose the existence of their illegal cartels in exchange for full immunity from fines. If a cartel member decides to access the program, it has to apply to the relevant competition authority and follow the applicable leniency procedures.

The whistleblower must provide sufficient evidence to the competition authority so as to enable the latter to open an investigation or fine a cartel in exchange for immunity from fines. Likewise, other cartel members may obtain significant reductions of their fines of up to 50%, if they provide evidence of significant added value with respect to the evidence already in the Council's possession and cooperate actively with the Council.

In fighting cartels, the European Commission adopted several notices (in 1996, 2002 and 2006), which introduced and then refined its leniency programs, pursuant to which cartel members were allowed to

voluntarily provide details regarding the cartel in exchange for amnesty or a reduction of fines. The leniency policy is based on the principle that the interests of consumers outweigh the interest to fine all of the undertakings participating in a cartel and self-reporting fosters an efficient competition enforcing policy.

In its turn, the Council adopted in April 2004 its own first leniency notice, fashioned after the European Commission's 2002 notice. However, the leniency policy was not particularly successful since no applications were received by the Council thereafter, partly due to the Council's rather weak enforcement track record, the discouraging ambiguities and shortcomings in the 2002 notice and the then applicable short statutory limitation periods.

Who May Apply for Full Immunity?

As a general rule, so-called ringleaders and coercers may not obtain full immunity from fines. The *ringleader* is usually the entity which initiated the cartel, with *coercers* being those cartel members who actively took steps to coerce/enforce the cartel's arrangements against other cartel members.

Nonetheless, coercers and ringleaders are still qualified for a reduction, like any other cartel members in case they actively cooperate with and provide to the Council additional evidence of significant added value.

What Types of Conduct May Qualify for Leniency Protection?

Violations of the competition law subject to the leniency protection rules are the most serious ones, the so-called "hard core" horizontal cartels formed by direct competitors agreeing for instance on price fixing, market or customer sharing or bid rigging.

The Council Notice also covers vertical agreements or concerted practices that restrain the ability of the reseller to determine its resale prices, or impose territorial or customer related constraints, or confer absolute territorial protection.

What Does It Take to Obtain Immunity? An Uncertain Threshold

Pursuant to the Council Notice, an applicant for immunity must produce information and evidence about the cartel which, in the Council's opinion, will enable the Council to start an investigation and conduct dawn raids (the so-called A-type immunity) or find an infringement (the B-type immunity). For that purpose, the applicant must submit a so-called corporate statement containing information about the cartel and the relevant market, the applicant and other cartel members and evidence relating to the cartel.

The "*in Council's opinion*" threshold is overly broad and subjective, leaving an unjustified amount of discretion to this authority when assessing the information received from an applicant. Consequently, it is important that any potential immunity applicant be represented by experienced legal counsel who would be able to best present the available information and negotiate with the Council in order to prevent a decision by this authority not to grant immunity.

What Does it Take to Preserve the Conditional Immunity? Full Cooperation

An immunity request starts with a conditional written immunity granted by the Council, and ends with a final confirmation of immunity from fines granted by the Council after the investigation is closed. As such, an immunity applicant must remain actively involved by cooperating until the end of the investigation.

What is very clear is that both the Commission Notice and the Council Notice impose high requirements of cooperation, which may make it rather difficult for applicants to preserve the immunity or any favorable treatment at all. For example, an immunity applicant must fully cooperate with the Council by providing all relevant information that comes into its possession or is available to it, or it must not destroy or conceal information or evidence relating to the alleged cartel (which could nevertheless happen due to a rogue employee or director). Further, the applicant must cease the cartel activities upon the Council's request, should the latter so decide. Thus, it is extremely important for the applicant to ensure that appropriate internal controls are implemented prior to, and most importantly, after an immunity request filing.

A Faster Access to Leniency: the Marker System

The introduction of the marker system is an important improvement of the 2009 Council Notice. It confirms that the applicant has submitted a leniency application and thus gives the applicant a priority ranking while allowing it additional time to gather evidence. The marker system also prevents other potential applicants from “jumping the line”. Consequently, it enhances the immunity applicant’s position vis-à-vis the Council and other potential applicants.

Nonetheless, a potential problem is that the time granted by the Council for gathering the needed evidence might be rather short and thus the applicant will need to be relatively well-prepared before submitting a request.

The time granted under a marker becomes even more relevant in situations where a company has been recently taken over and the new management discovers the cartel but has difficulties in obtaining information due to the geographic spread of the applicant’s subsidiaries, the historical character and duration of the cartel practices or the former managers not being available for interviews. Further, the interviews must be conducted in such a manner so as not to raise concerns and thus signal the other cartel members that the company is considering filing for immunity, which strategy also requires a considerable amount of time to finalize.

Hypothetical Application for Immunity

It is possible under the Council Notice for a company to submit a hypothetical application for immunity without disclosing the identity of the applicant or of the other cartel members. Nonetheless, this option is of limited or no practical use. Specifically, the current Commission and Council Notices (as compared to their previous 2002 and 2004 notices) make it more difficult and riskier to file such an application since they introduced the additional requirement to clearly identify the products and services concerned and the geographic scope of the cartel. Consequently, this particular requirement makes it practically impossible to submit a hypothetical application in certain concentrated industries where very few players operate.

Keeping the Immunity Application Secret

The fact that an immunity request has been filed or any of the content of an application may not be disclosed until the Council has released its statement of objections, which may take a considerable amount of time.

However, some applicants run the risk of non-compliance due to the disclosure requirements applicable in various jurisdictions, particularly with respect to securities filings. As such, applicants may need to negotiate with the Council the obtaining of an exemption in this respect.

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For any questions regarding this memorandum or related issues, please contact one of the following attorneys:

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