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Transforming NACP in an institution similar to the Competition Council

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In April 2016, the Parliament has initiated a draft law amending the statute of the National Authority for Consumer Protection ("NAPC"). The draft law was adopted by the Chamber of Deputies and is currently under the review of the permanent commissions of the Senate (the "Draft Law").

The Draft Law envisages NAPC no longer to be controlled by the Government and to become a self-governed administrative and independent authority, managed by a Parliament appointed Board and which could not suffer any restrictions from any other authority.

Of particular importance is the envisaged competence of NAPC to impose fines on companies up to 10% of their turnover of the financial year prior to the sanctioned offense.

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I. Substantial fines

The Draft Law provides the possibility of **sanctioning the behaviors that constitute administrative infringements with fines ranging between 0.5% and 10% of the total turnover** for the financial year prior to the sanctioned offense.

It can be duly noted that, contrary to the current regulations, which provide certain minimum and maximum thresholds that the inspectors of NAPC must comply with, the Draft Law repeals these thresholds, the amount of the fine being determined exclusively by reference to the total turnover achieved in the previous financial year.

Moreover, even if in the financial year prior to the sanctioning, the company has not registered any turnover or if the turnover cannot be determined, the fine shall be calculated based on the turnover corresponding to the previous financial year. If the undertakings or the associations of undertakings have not achieved turnover in the corresponding financial year, the last recorded turnover shall be the one considered.

There are also considered to fall within the scope Draft Law the newly established undertakings or associations of undertakings that have not registered any turnover in the year prior to the sanctioning, with the mention that the fine will have special fixed limits, respectively between lei 5,000 and lei 2,500,000.

II. Guilt admittance procedure

The Draft Law for the first time in this field regulates the guilt admittance procedure as a cause for mitigation of liability.

Thus, **if the company explicitly admits,** before the hearings, that it committed the misdemeanor and, where appropriate, proposes remedies that can lead to the removal of the infringement causes, **NACP can apply, at the specific request submitted by the company, a reduction of the fine with a percentage between 10% and 30%** of the determined basis in accordance with secondary legislation to be adopted for the purpose of enabling this provision. The reduction of the fine is also to be applied when the fine is determined at the minimum amount prescribed by law, without the percentage of the imposed fine to be less than 0.2% of the company's turnover in the previous financial year before the sanction.

III. Determination of the turnover

The Draft Law also contains provisions governing the manner of determining the turnover to which the fine is imposed, by taking into account in this respect **the income from sales of products and / or services** performed by the company in its last financial year, **minus the amounts due as tax obligations and the value of the exports** performed directly or through appointed representative, including the intra-community deliveries.

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If any of the undertakings that are to be sanctioned is part of a group of undertakings, in order to determine its turnover in the scope of applying the fine by the NACP, **the cumulative turnover of that group** will be the one taken into account when applying the fine, according to the consolidated financial statements.

IV. A fining policy similar to the competition law sanctions

At first sight, the fining framework proposed by the Draft Law transposes the level and the quantification principles of sanctions that safeguard other social values and goals. We refer to the fines provided by the antitrust legislation, which aim to maintain the free and competitive market as an efficient tool of social welfare and fair allocation of economic resources in society.

Apart the obvious differences between the two legislations' goals, the **Draft Law partially takes over the competition fining policy, exceeding the maximum margin of fines imposed by the Competition Council, without adopting the fundamental safeguards which ensure the companies' right of defense under competition law.**

In fact, the antitrust fines have been increased heavily in the last decade, this evolution reflecting the forecasted adverse impact, especially of cartels, on the economy. Therefore, the antitrust penalty system consistently has aimed to ensure the proportionality of antitrust fines with the gravity of infringements. Moreover, it should not be ignored the constant endeavor of the authority to ensure the right of defense of the companies accused of infringing the competition regulations, that goes from the right against self-incrimination to the designing of complex investigative proceedings during which the investigated companies acknowledge the supporting evidence and the infringement allegations, further on the concerned companies having the right to present written defense statements and to propose evidence in their defense.

However, **these principles and institutions have not been transposed in the Draft Law** which does not offer an adequate framework for the exercising of the right of defense of sanctioned companies. Moreover, we believe that a regulatory impact analysis could be of great value for the adoption of such severe fining policy, assimilated to the criminal sanctions by the European Court of Human Rights case-law.

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