POPOVICI & ASOCIAŢII
Attorneys at Law

Str. Alexandru Constantinescu nr. 47
Bucuresti, Sector 1, Cod 713261
Romania

Tel.: (0040) 21 224 79 19
Fax: (0040) 21 224 60 59 / 224 75 05
office@popovici-partners.ro
www.popovici-partners.ro

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BANKING LAW

After a 2 year period during which several projects for the amendment of the existing Banking Law have been analysed by banking specialists, the Romanian Parliament has passed Law no. 485/2003 for the amendment of the Banking Law no. 58/1998, published in the Official Gazette no. 876/10.12.2003. This normative act came into effect according to the new Constitution within 3 days from its publication, except for certain chapters that are set to enter into force as from the date Romania becomes a member of the European Union.

The amendments brought by the new law are significant, from specific banking terms and areas of activity allowed to be carried out by banks to the rules regarding authorisation of significant shareholders, bank's administration, risk funds, but also the bank prudential supervision, special administration and liquidation rules.

New rules on banking activities performed by Romanian entities in European Union member states or by entities from this zone in Romania have been also issued, intending to create a banking law for a market on which the freedom of capital movement is guaranteed.

Diversifying the specific banking terms

Establishing the principle that banking activities shall be carried out in Romania through authorised credit institutions, the new law defines the concept of a *credit institution*, as opposed to *financial institution*. The banking terminology has expanded also with terms such as: *electronic money issuer institution, ancillary services company; financial holding, holding company, parent company*.

Moreover, the new law has amended the definitions for essential terminology such as: *significant shareholder* (that is, a shareholder holding a participation or voting rights over 10%, harmonizing the definition with that used for the capital markets field) and *initial capital* (representing that part of the bank's own funds, comprising the share capital or endowment capital and other accounting elements, calculated according to the regulations issued by the National Bank of Romania).

Extending banking activities

The banking activities have been broaden, including with the possibility of performing, subject to their authorisation, capital markets activities without being requested to create a distinct company. However, financial leasing operations shall be performed directly by banks only starting with the date Romania shall become a member of the European Union, until then such activities being carried out, as until the present, through distinctive companies.

Banks have become entitled to perform activities related to movable or immovable assets, including lease of movable or immovable assets towards third parties, subject to the condition that the value of the leased goods does not exceed 5% of the bank's own funds and for the aggregate incomes obtained from such operations not

to exceed 5% of the bank's total incomes diminished with the value of the incomes pertaining to such operations. Furthermore, with respect to the assets obtained through enforcement of bank debts, these assets shall have to be sold by the bank within 1 year from the date of their acquiring, the N.B.R. having the possibility to extend this term.

Bank management

The bank management shall have to consist of employees of the bank, who shall also be entitled to become members of the board of directors (case in which, the number of board of directors members shall be set in such a manner that the directors who are not also part of the bank management to hold a majority number).

Confidentiality

The meaning and the limits of confidentiality in the banking field have been better defined within the amendments to the banking law, leading to an expansion of the regulations provided by the relevant chapter.

Share capital

We draw your attention to the fact that the article providing that all changes in the share capital of a bank should be approved by the N.B.R. has been repealed. Nevertheless, we mention that according to the transitory provisions of the new law, the regulations issued until the present by the N.B.R. and in force shall be further applied, among these regulations being the Norm on changes in the status of banks that provides for the prior approval by the National Bank of banks' share capital level.

Reserve Fund

The reference for calculating the bank's reserve fund has been amended, establishing that banks shall allocate from their accounting income as determined before deducting income tax, the amounts for creating the general banking risks fund, within the limit of 1% of the balance pertaining to the assets with specific banking risks, as set by the N.B.R. regulations, and should the respective amounts be part of the net income.

Investments allowed for banks

According to the new regulations, the level and type of investments allowed to be made by banks has been changed, that is, any financial participation held directly or/and indirectly by a bank consisting in shares or other such titles in entities *other than credit institutions, financial institutions, insurance companies or ancillary companies* shall not exceed: (a) 15% of its own funds; (b) 20% of the respective entity's share capital, or, if the case, of the total value of titles issued by the respective entity. Moreover, it has been provided that the total value of such participations must not exceed 60% of the bank's own funds.

For prudential supervisory activities purposes, the terms and conditions subject to which the N.B.R. shall issue its approval of the bank's participations in other entities has been detailed, including that for those participations that are not subject to a prior

approval, a notification towards the National Bank shall still be required within 5 days from their acquiring.

Significant shareholders

The conditions in which the participations of significant shareholders are supervised by the National Bank have been extensively amended.

Thus, any individual or legal person or group of persons that intends to become a significant shareholder of a bank shall have to notify this to the N.B.R., subject to the conditions provided by the law, the National Bank being entitled to oppose to such participation within maximum 3 months from receipt of notification.

The N.B.R. shall have to be notified upon any intention of a significant shareholder of increasing its participation or quota of voting rights by reaching or exceeding *20%*, *33%* or *50%* of the share capital or total number of voting rights or by which the bank would become its subsidiary, the National Bank being entitled to oppose to such acquisition within maximum 3 months from receipt of notification. Furthermore, the National Bank must be notified with respect to any intention of a significant shareholder of decreasing its participation or quota of voting rights under *10%*, *20%*, *33%* or *50%*, as well as if the bank would become its subsidiary.

Additionally, banks shall be compelled to immediately inform the National Bank with respect to any acquisition or transfer of their shares that shall exceed or fall under the levels described above.

Banking prudential supervisory activities

The level and conditions of the banking prudential supervisory activities for the purpose of protecting the bank's clients interest and insuring the strength and viability of the entire banking system have been detailed by the new law, including with respect to financial holdings, credit institutions, financial institutions, insurance companies or other entities related to the bank.

Sanctions applicable to banks

With respect to the sanctions applicable to banks, an important change has been brought with respect to the effects generated by participations held by significant shareholders that were not authorised by N.B.R. Until the amendments made through the new law, such significant shareholders were sanctioned as follows: suspension of the voting rights pertaining to the unauthorised participations, the obligation to sell within 3 months the unauthorised shares followed by the obligation of the bank, in case the unauthorised shares were not transferred within this term, to annul the respective shares, issue new shares for the purpose of putting them up for sale. At the present, according to the new law, if such new issued shares are still not sold, the bank is complied to immediately proceed to a share capital decrease with the value representing the balance between the registered share capital and the capital held by the shareholders holding a voting right.

COMPETITION

The adjustment process of the legal framework in the competition field, started in 2002, has been carried on by entering into force the Government Emergency Ordinance No. 121/2003 (published in the Official Gazette No. 875/2003 – "**GEO 121/2003**") regarding the amendment and completion of the Competition Law No. 21/1996 ("**Law 21/1996**").

More specific regulation of the notions relating to individual exemptions and to the exemptions for categories of agreements, decisions of undertakings' partnerships or concerted practices

Thus, the individual exemptions will be granted upon decision of the Competition Council, subject to renewal and of which issuance, as a new feature, shall no longer be subject to a tax payment.

Differently from the previous legal provisions, the agreements, the decisions of the undertakings partnerships or the concerted practices falling in one of the categories exempted from the interdictions provided by anticompetitive legal provisions should not be notified to the Competition Council, being considered as legal.

In this respect, it is to be noted that, although the secondary legislation (regulations and instructions) dealing with the exemptions by categories of agreements, decisions of the undertakings partnerships or concerted practices is to be revised, the current exemption categories shall probably remain into force, namely: the vertical agreements (purchase and exclusive distribution agreements, selective distribution agreements, exclusive sale agreements, franchise agreements, conditional sale agreements etc.), research and development agreements, training/specialising agreements.

The abuse of dominant position – a forbidden practice, regardless the turnover of the concerned undertakings

According to the new enactment, the abuse of dominant position is deemed a forbidden practice, irrespective of the turnover of the undertakings. It is an expected amendment, as the normal competition environment is distorted by the abusive behaviour of the undertakings/groups of undertakings holding a dominant position on the market regardless of their turnover.

In this respect, GEO 12/2003 has amended the previous provisions of Law 21/1996, according to which the interdictions provided for at art. 5 of Law 21/1996 (applicable to monopolistic agreements), as well as those provided for at art. 6 (relating to the abuse of a dominant position) were conditional upon the fulfilment of the conditions concerning the turnover set forth by the Competition Council.

At the same time, GEO 121/2003 has amended the conditions the implementation of the provisions regulating the monopolistic agreements is subject to. Thus, in order not to fall under the provisions of

art. 5 of Law 21/1996, the competing concerned undertakings should not exceed the 5% market share on each of the affected relevant markets, while for the non-competing undertakings a 10% quota has been set forth.

Restructuring and reorganisation operations within the same group

According to the provisions of GEO 121/2003, the restructuring and reorganisation operations within the same group, to which only the undertakings of the said group participate, do not represent economic concentration.

Amendment of the turnover threshold applicable to economic concentrations

By reference to the previous regulation, the turnover threshold for the concerned undertakings, based on which the provisions concerning the economic concentrations are applied, has raised from 100 thousand million ROL to the ROL equivalent of 10 million Euros, calculated at the exchange rate communicated by the National Bank of Romania, applicable for the last day of the financial year prior to the operation. It is to be noted that this quantum is aggregately calculated for the concerned undertakings.

In order not to fall under the provisions regulating the economic concentrations, apart from the compliance with the turnover threshold condition above mentioned, a cumulative condition has been introduced: at least two concerned undertakings should not obtain on the Romanian territory, each of them, a turnover exceeding the ROL equivalent of 4 million Euros.

The economic concentration operation may not be applied until the issuance of a decision in this respect by the Competition Council

It is to be noted that, according to Law 21/1996, the concerned undertakings had the possibility to take actions relating to the concentration, not having an irreversible character or not definitively distorting the market structure. Thus, the undertakings were allowed to assess whether or not their actions were complying with the legal framework.

However, the Competition Council may grant exemption from the general interdiction required. The request for exemption should be well grounded. When issuing its decision, the Competition Council shall take into account the effects of the suspension of economic concentration over the concerned undertakings or third parties or over the competition environment.

The tax for the authorisation of the economic concentration should be paid only in case of a non-objection decision issued by the Competition Council, in case of an authorisation decision or a conditional decision

Upon this regulation, it is amended the previous provision stipulating the payment of the authorisation tax without any distinction among the different types of decisions issued by the Competition Council

in respect of an economic concentration notification.

Nevertheless, among such decisions it was also regulated the admission decision (non-intervention decision according to the provisions of GEO 121/2003), which was issued in the situation where the economic concentration was not infringing the law. However, in such a case the payment of the authorisation tax is not justified, as the said operation does not fall within the provisions of Law 21/1996.

Significant amendments resulted from the restructuring and reorganisation of the relevant institutions in the competition field

Pursuant to these amendments, the responsibilities of the Competition Office shall be taken over by the Public Finance Ministry and the Competition Council.

Although, on one hand, the Competition Council remains the sole authority involved in maintaining and supervising a normal competition environment, it is to be noted the extension of the executive's influence over this institution, whereas the members of the Competition Council shall be appointed by the president of Romania, *upon the proposal of the Government*.

As to the Public Finance Ministry, its responsibilities shall mainly cover the implementation of the laws relating to State aids, the implementation of the legal provisions in the prices, unfair competition and advertising fields.