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Just in Case

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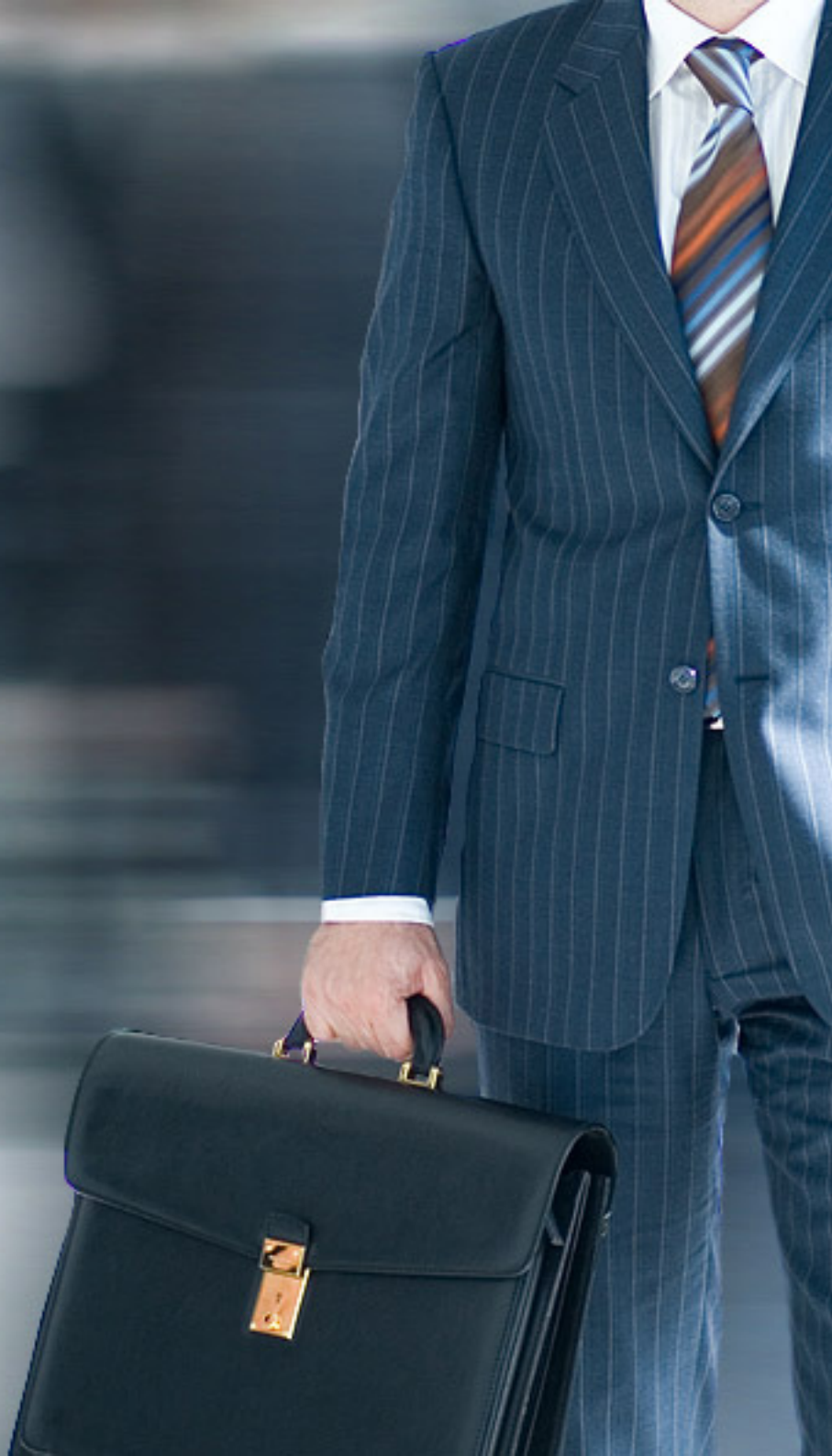

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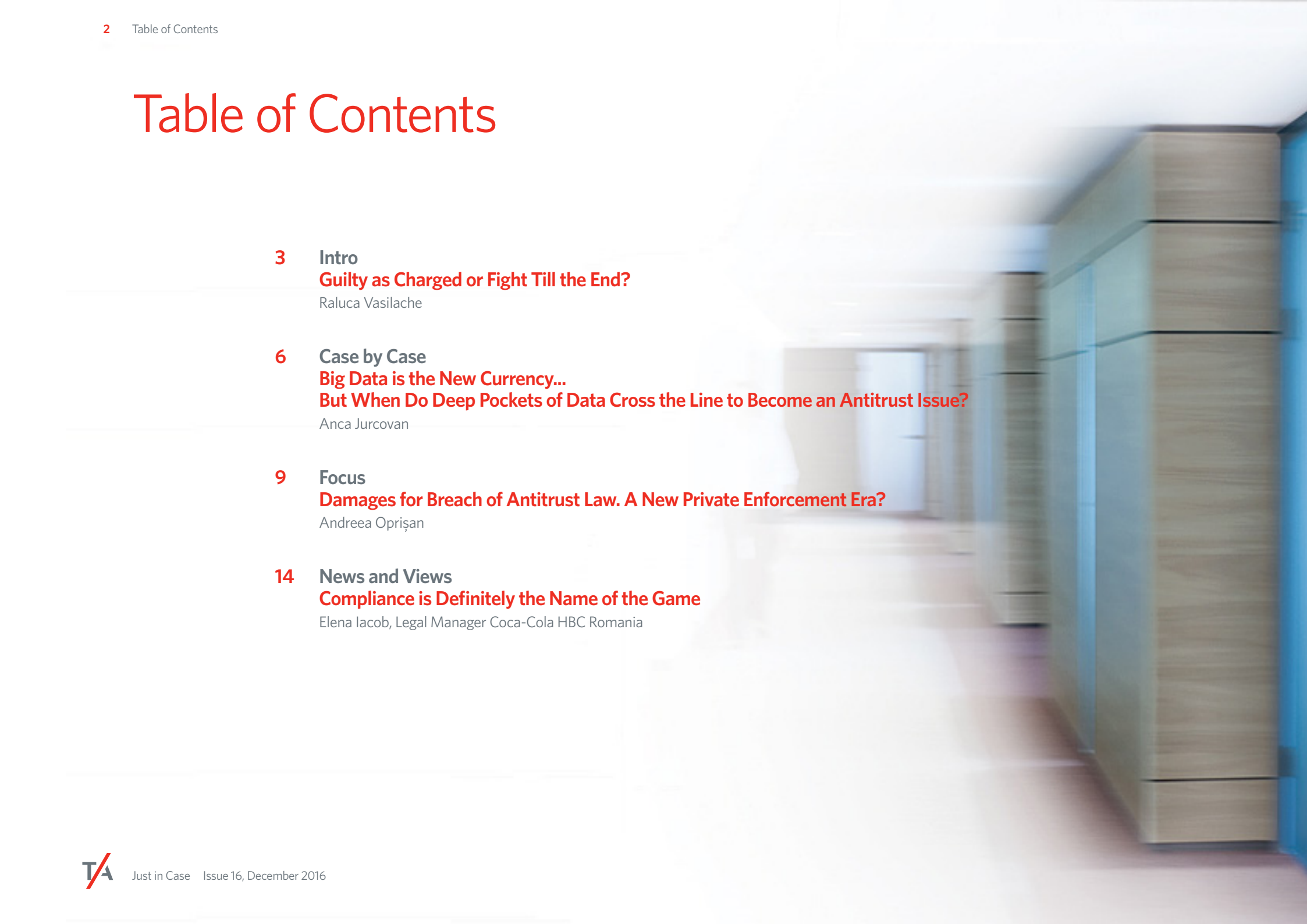
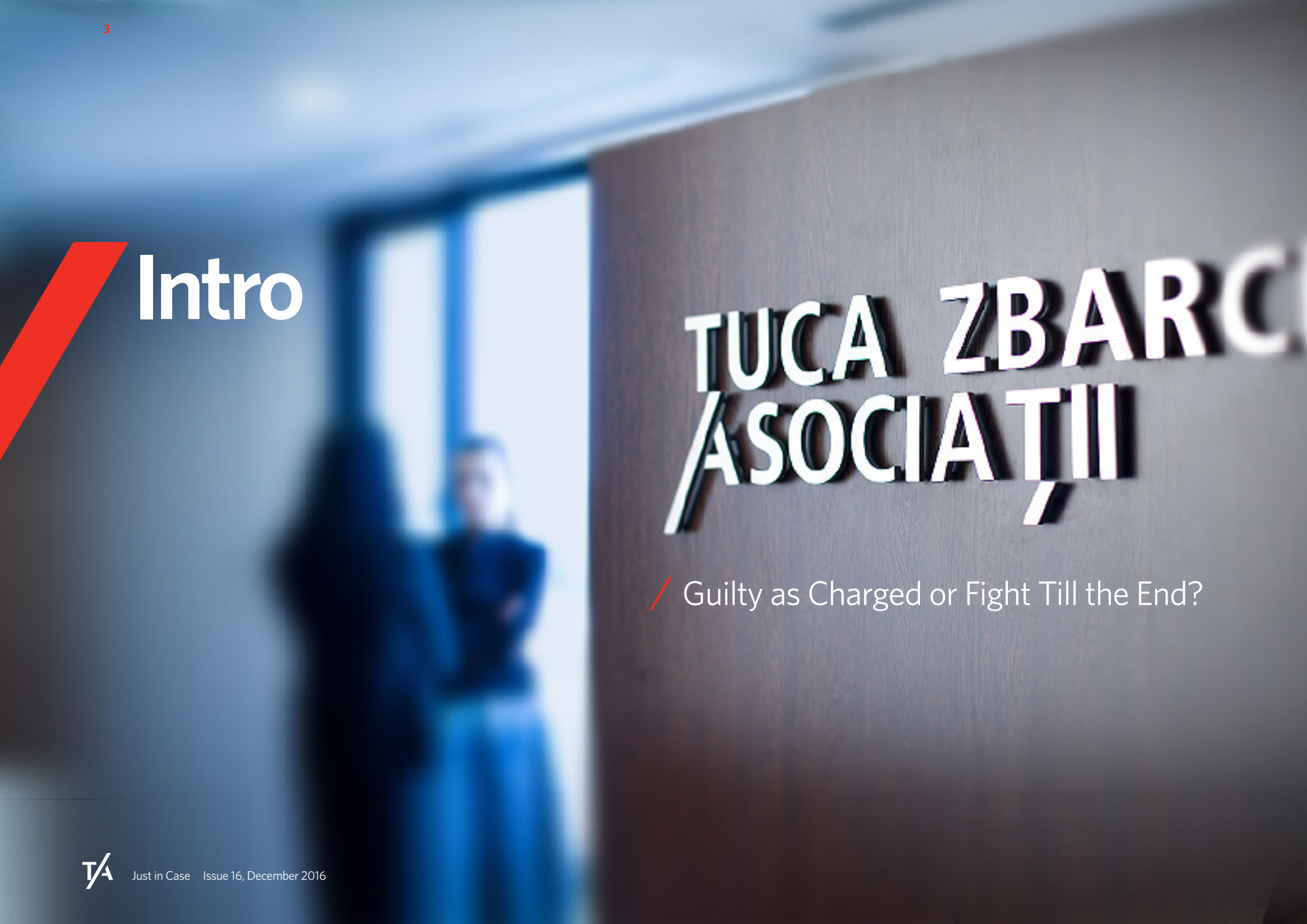


Intro



Guilty as Charged or Fight Till the End?

Guilty as Charged or Fight Till the End?

Ten years ago, acknowledging participation in a cartel or vertical agreement that infringed competition rules was considered a discreditable and unacceptable approach for the management of local companies. The Romanian Competition Council ("RCC"), as it has become more prominent in the market by increasing the number of investigations (both sector enquiries and infringement cases), applied severe fines and managed to have its decisions upheld in court, has made companies think twice before maintaining their innocence till the end.

For over a decade the RCC has continuously strengthened its position as a fearsome authority. The financial exposure in fines that could reach up to 10% of turnover has made companies more heedful of antitrust rules. Both local and multinational companies have been fined by the Romanian watchdog for various practices judged to be against the law. Discovering and sanctioning cartels (horizontal agreements) is the declared focus of the RCC and the legal framework has been drawn up in order to prompt participants to bring such harmful agreements to light. However, the leniency procedure, which is quite successful at the European Commission level, has proved unsuccessful in Romania. Just a few cases, and none among those with the biggest fines or in key economic sectors, have been completed based on leniency applications.

While the RCC continues to encourage full confession, companies in Romania are still reluctant to take this path, even though the level of education in the competition field has visibly improved over recent years and the fines applied by the authority are increasing both in number and size.

Although leniency seems unappealing to companies, the acknowledgement of guilt and the recently improved version of settlement are gaining interest among potential defendants. A reduction of up to 30% of the base fine that would be applied, plus further reductions for mitigating circumstances, thereby a commitment to a fixed proportion of the fine in exchange for acknowledging the infringement, is the latest *best offer* from the RCC.

What has raised interest in this approach? Why would companies rather admit breaking the law at a later stage of the investigation (in most cases, when the RCC has concluded it) rather than applying for leniency before the investigation was initiated or immediately after, or fighting the RCC in court and trying to have the fine overturned?

Despite taking lessons on recommended behaviour, companies still seem to be tributary to their commercial aims. The RCC still levies fines for practices that are not easily recognisable as hardcore restrictions under the competition law. Such practices are different for each industry, but similar in their>

effects which the authority deems as distorting competition on the market. By the time a proper assessment of the practice is performed, the potential exposure is understood and the management is willing to acknowledge the contravention, the window for leniency has closed. Even if it is possible time wise, companies hope that an approximately three-year investigation by RCC might lead to the case being closed with no fines.

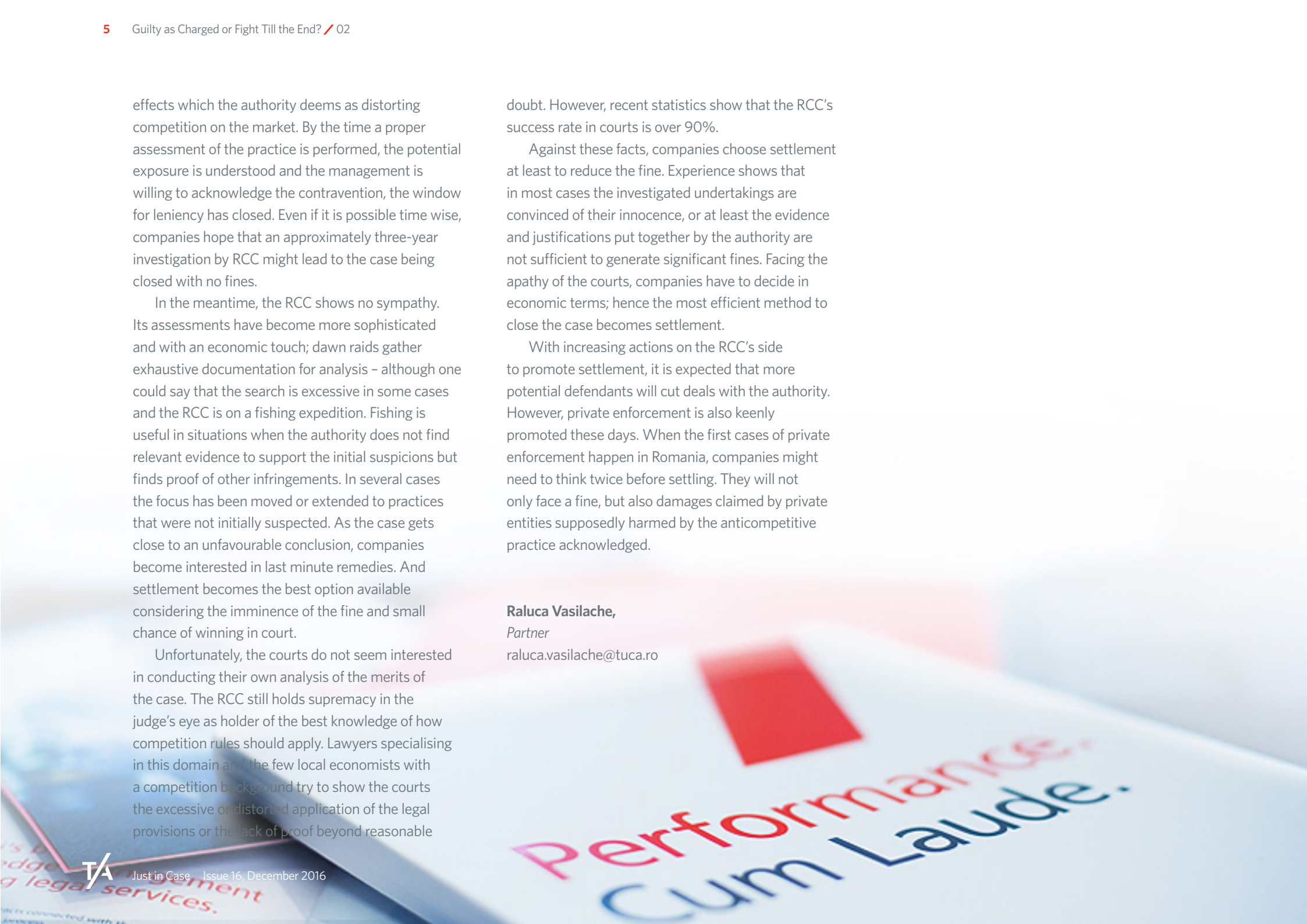
In the meantime, the RCC shows no sympathy. Its assessments have become more sophisticated and with an economic touch; dawn raids gather exhaustive documentation for analysis – although one could say that the search is excessive in some cases and the RCC is on a fishing expedition. Fishing is useful in situations when the authority does not find relevant evidence to support the initial suspicions but finds proof of other infringements. In several cases the focus has been moved or extended to practices that were not initially suspected. As the case gets close to an unfavourable conclusion, companies become interested in last minute remedies. And settlement becomes the best option available considering the imminence of the fine and small chance of winning in court.

Unfortunately, the courts do not seem interested in conducting their own analysis of the merits of the case. The RCC still holds supremacy in the judge's eye as holder of the best knowledge of how competition rules should apply. Lawyers specialising in this domain and the few local economists with a competition background try to show the courts the excessive or distorted application of the legal provisions or the lack of proof beyond reasonable doubt. However, recent statistics show that the RCC's success rate in courts is over 90%.

Against these facts, companies choose settlement at least to reduce the fine. Experience shows that in most cases the investigated undertakings are convinced of their innocence, or at least the evidence and justifications put together by the authority are not sufficient to generate significant fines. Facing the apathy of the courts, companies have to decide in economic terms; hence the most efficient method to close the case becomes settlement.

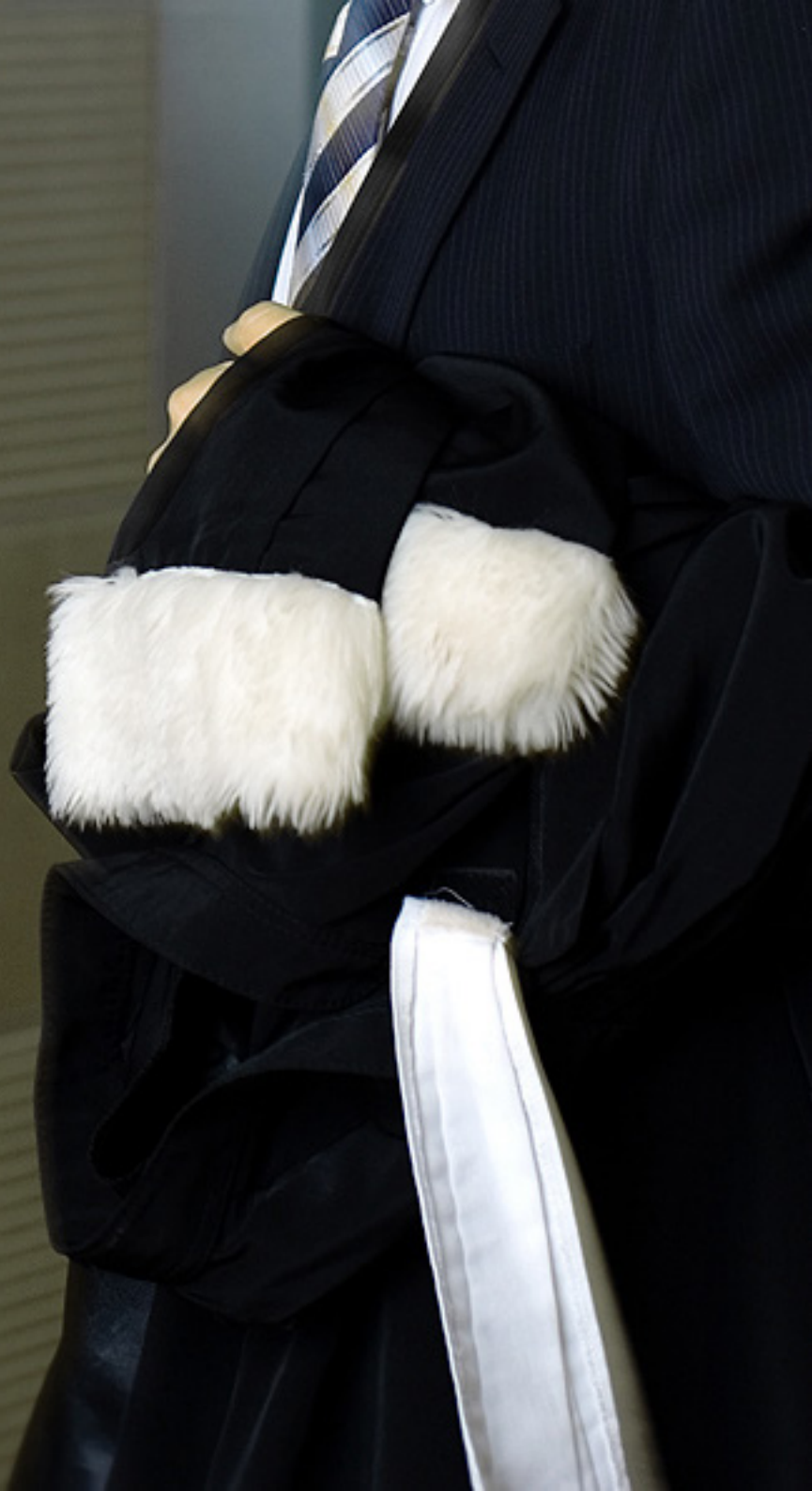
With increasing actions on the RCC's side to promote settlement, it is expected that more potential defendants will cut deals with the authority. However, private enforcement is also keenly promoted these days. When the first cases of private enforcement happen in Romania, companies might need to think twice before settling. They will not only face a fine, but also damages claimed by private entities supposedly harmed by the anticompetitive practice acknowledged.

Raluca Vasilache,
Partner
raluca.vasilache@tuca.ro



Case by Case

Big Data is the New Currency... But When Do Deep Pockets of Data Cross the Line to Become an Antitrust Issue?

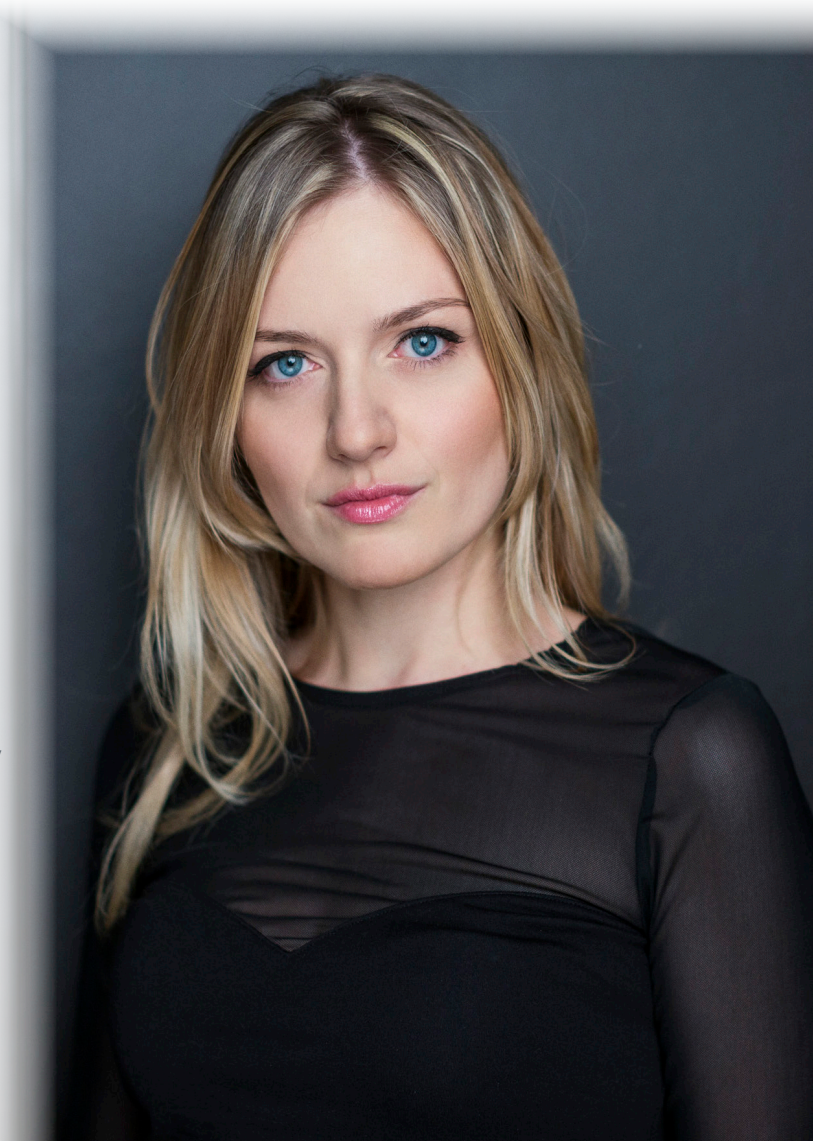


Big Data is the New Currency... But When Do Deep Pockets of Data Cross the Line to Become an Antitrust Issue?

In the age of the digital economy, while consumers have access to "free" online services, they eventually pay with personal data, which is packaged, processed and monetised by the service providers selling big data to business owners eager to model and anticipate the perfect consumer's behaviour.

The term 'big data' encompasses the large data sets accumulated by companies through various web-based sources, such as social networks and intelligent devices. What sets it apart is its great volume, which requires more powerful processors and algorithms in order to be analysed. Never before have companies had such detailed access to the lives and habits of their customers. A recent study shows that a dozen Android Phone Apps track the phone's location once every three minutes.[1] The power of big data lies in companies' ability to use this vast information in order to improve their service level and quality, by tailoring their products and advertisements to the specific needs of the customer.

It is easy to identify the procompetitive benefits of big data. Its use allows customers to access free or low-priced services tailored to their specific needs. At the same time, it also improves the quality of these services and supports efficient dynamic pricing, leading to lower overall prices. All these benefits are not only the result of the volumes of big data, but also of the variety of the collected information and the speeds at which it is analysed, thus making big data nowadays an indispensable tool in virtually every sector, not only the digital economy.>



1. Elizabeth Dwoskin, "Apps Track Users – Once Every 3 Minutes," WALL STREET J. (March 23, 2015), http://www.wsj.com/articles/apps-track-usersonce-every-3-minutes-1427166955.
2. OECD, Data-Driven Innovation: Big Data for growth and well-being (OECD Publishing 2015) 94 http://dx.doi.org/10.1787/9789264229358-en.
3. Competition in a big data world, 17 January 2016, https://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-big-data-world_en

The appeal of big data can be traced in recent mergers and acquisitions trends, which have seen data-related deals rise from 55 in 2008 to almost 164 in 2012.[2] This surge in the market has not gone unnoticed by competition authorities, which have started to develop a particular interest in the possible competition issues raised by big data exploitation. This was signalised in January 2016 by the EU Commissioner Margarethe Vestager, who expressed the Commission's intentions to keep an eye out for possible big data market power transgressions.[3] What caught the authorities' attention were the novel issues these data sets raise in relation to market power and barriers to entry. Issues can arise in merger cases, as well as in circumstances of market dominance.

Facebook seems to be a favourite contender to come under scrutiny in both scenarios. Facebook's acquisition of WhatsApp in 2014 was reviewed by the European Commission, as it raised concerns that combining the two companies' databases would strengthen Facebook's market position, by allowing it to use the new data for advertising activities or introducing advertising to the WhatsApp service.[4]

The Commission, however, concluded that there were no competition risks, as WhatsApp does not collect or store data on its users and there is still plenty of internet user data not in Facebook's exclusive control, available for advertising purposes.

Although there were no competition issues identified, the Facebook/WhatsApp case signalised the need for a change in the approach to digital companies' mergers. Since WhatsApp did not meet the turnover threshold set out under EU competition rules, the case would not have come before the European Commission, had it not been referred by the national authorities. This situation indicates a possible future policy change regarding big data companies, as their turnover might not accurately indicate their real market power, thereby allowing them to avoid the EC's scrutiny.

A further question raised by the Facebook/WhatsApp merger was that of the role privacy issues play in competition-related investigations. The Commission emphasised that these issues are not part of its merger control jurisdiction, unlike in the US, where the transaction was only approved after privacy-related remedies were agreed upon. This EU stance regarding the interplay between privacy and competition issues was also emphasised by the EU Commissioner in her speech on big data. However, this status quo seems to be shifting too, at least at a national level. At the same time as the French Competition Authority released an extensive study on the impact of big data on competition law and its potential harm theories[5], the German Federal Cartel Office also opened an investigation into Facebook regarding an alleged abuse of dominance relating to data protection rules. "There was an initial suspicion that Facebook's conditions of use were in violation of data protection provisions. Not every legal infringement on the part of a dominant company is also relevant under competition law. However, in the case in question, Facebook's use of unlawful terms and conditions could represent an abusive imposition of unfair conditions on users. The Bundeskartellamt will examine, among other issues, to what extent a connection exists between the possibly dominant position of the company and the use of such clauses."[6]

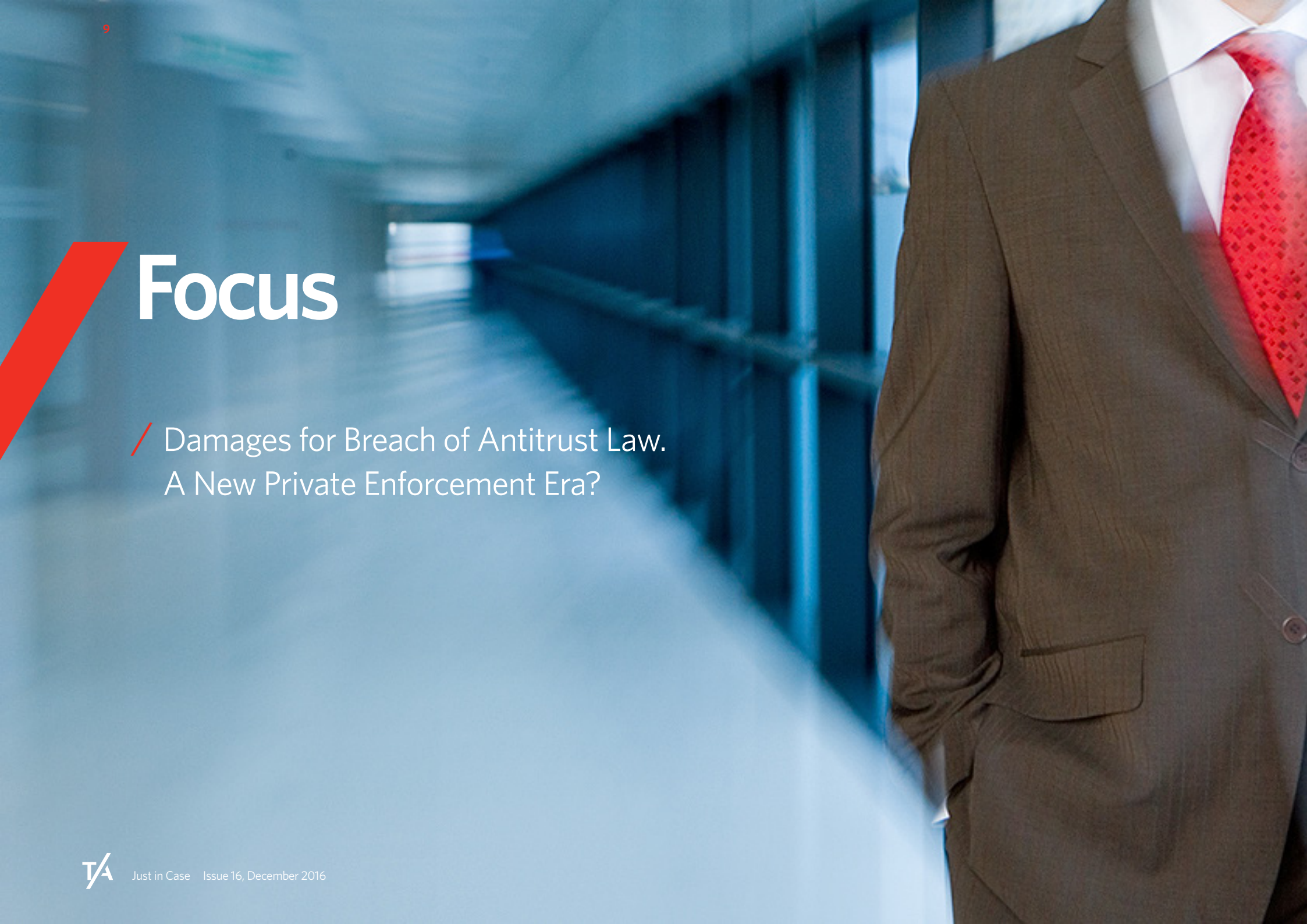
These changing EU and national attitudes regarding the role big data plays in a company's market power point towards future assessments affecting a broad range of industries in both merger and market conduct cases, with questions focusing on the scale and scope of the data collection, whether the owned data is scarce or easily replicable, and even whether data on one market can develop or increase power on another one.

Anca Jurcovan,
Managing Associate
anca.jurcovan@tuca.ro

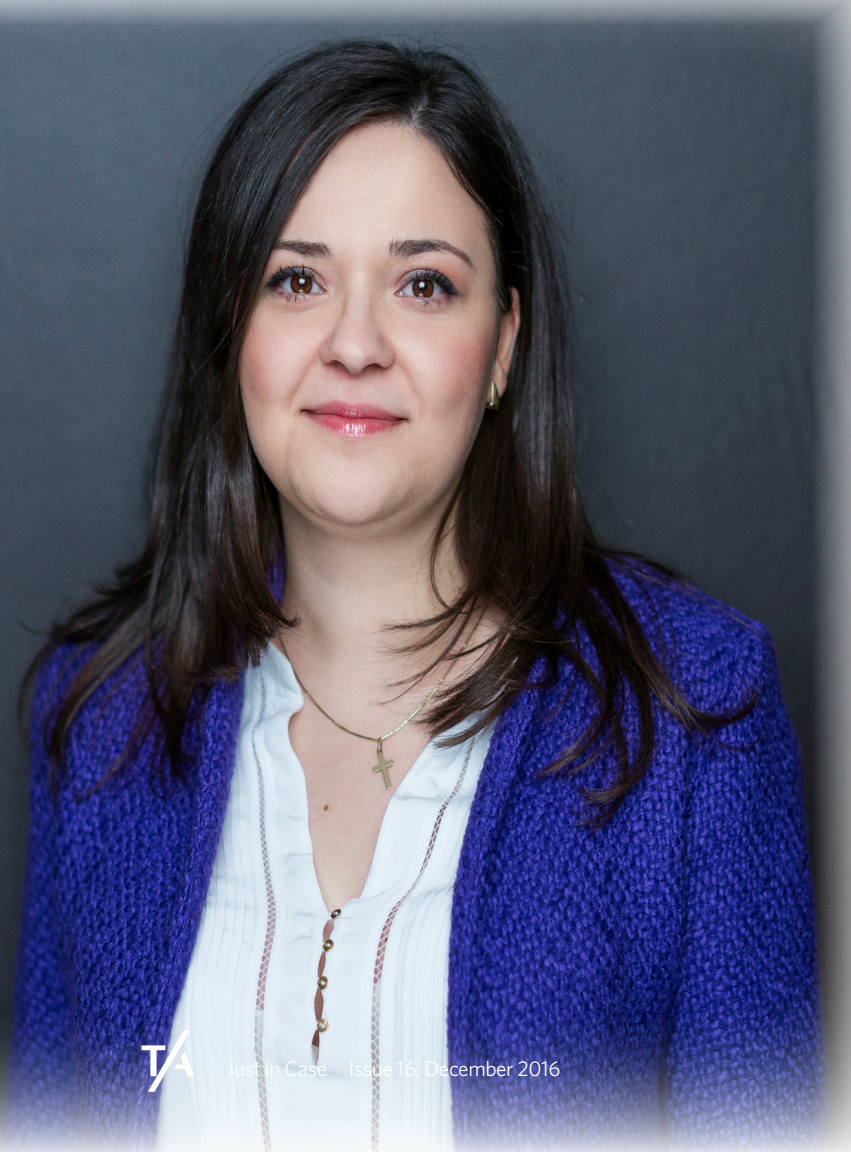
4. Facebook/WhatsApp (Case No COMP/M.7217) Commission Decision 03/10/2014 [2014] OJ C(2014) 7239 finalFacebook/WhatsApp (Case No COMP/M.7217) Commission Decision 03/10/2014 [2014] OJ C(2014) 7239 final
5. Competition Law and Data, 10 May 2016, http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf
6. Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html

Focus

Damages for Breach of Antitrust Law. A New Private Enforcement Era?



Damages for Breach of Antitrust Law. A New Private Enforcement Era?



Competition rules at European Union (EU) level, as well as in Romania, provide investigative powers for the competition authorities.

Such powers are granted in connection with anticompetitive practices on the market (e.g. cartels, anticompetitive vertical arrangements, abuse of dominant position), as well as the power to apply administrative sanctions for breach of such regulation (i.e. public enforcement), sanctions being computed as percentage (up to a maximum threshold of 10%) out of the turnover of the infringing party in the year preceding the issuance of the sanctioning decision. However, competition authorities have limited resources and, in certain cases, their own case priority policy. On the other hand, the damages generated on the market by the anticompetitive behaviour are not solved by the administrative fines, while entities injured by the anticompetitive practice may need to seek redress.

After careful consideration for some time now,[1] at the end of 2014, at the proposal of the European Commission, the European Parliament and the Council adopted Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the "Damages Directive").[2]

The Directive has two manifest objectives:[3]

- Ensure that victims of anticompetitive behaviour can effectively claim damages before national courts, but also outside the court through settlement procedures (i.e. private actions). The Damages Directive applies to all damages actions, whether individual or collective, as such are available in the Member States;>

1. Following case-law of the Court of Justice of the European Union (i.e. Case C-453/99 - Courage and Crehan, and Joined Cases C-295–298/04 – Manfredi), a Green Paper and a White Paper prepared by the Commission. The Damages Directive is part of a more complex policy package covering also disclosure of evidence, collective redress mechanisms and quantification of harm caused by infringements of the EU antitrust rules. Such issues are covered based on interrelated Commission's enactments or guidelines.
2. Published in the Official Journal Series L No. 349 of 05.12.2014.
3. Detailed information on the Damages Directive may be found on the webpage of the European Commission - http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html.

- Enhance an efficient relation between the public and private enforcement. To this end, the Damages Directive takes certain measures of nature to maintain certain key policy principles of public enforcement (such as protecting the private statute of the leniency corporate statements, settlement submissions or limiting the use of certain documents created specifically for the purpose of a competition authority's investigation until after the investigation is closed) while introducing other elements aimed to support a more facile access to private actions. Thus, the Damages Directive aims to hit two birds with one stone, notably public and private enforcement working together in order to achieve both a deterrent and sanctioning effect. In addition, in line with the Single Market principles, it is estimated that the new framework will allow damages to be claimed throughout the European Union.

The deadline for the Member States to implement the Damages Directive is 27 December 2016. To date, it appears that only Latvia partially implemented the Damages Directive.[4]

The Romanian Competition Council prepared a draft law for private damages actions in case of breach of competition legislation (the "Draft Damages Law"). The Draft Damages Law was subject to the public consultation procedure on the authority's website until 15 September 2016.[5]

Is the Draft Damages Law implementing the Damages Directive a spring flower for competition law enforcement?

The Draft Law elaborates along the lines of the Damages Directive, taking damages claims for anticompetitive practices to a new level. Nevertheless, damages claims were an instrument of private enforcement available to individuals or entities harmed by anticompetitive practices in Romania based on provisions of Competition Law No. 21/1996 ("Competition Law").[6]

Even now, prior to the entry into force of the Draft Damages Law, Article 66 of Competition Law provides that irrespective of the administrative sanctions applied under Competition Law by the Competition Authority, the right of individuals and/or legal entities to claim damages for the repair of the prejudice generated by an anticompetitive practice banned under Competition Law or Article 101 and/or 102 of the Treaty on the Functioning of the European Union is reserved. Such provision dates as early as the initial implementation steps of Competition Law in Romania and was further enhanced in time with principles now extensively elaborated in the Damages Directive, such as:

- **Protection of leniency applications**. A leniency applicant may not be held jointly liable for the damages with other members of a cartel. Such measure aims not to discourage leniency applicants from blowing the whistle on other participants to the anticompetitive arrangement, theoretically a source for competition authorities for identifying cartels, but with somewhat limited application in practice (or, perhaps competition nowadays is that strong that cartels do not exist?);

" Is the Draft Damages Law implementing the Damages Directive a spring flower for competition law enforcement?

- **Access to proof.** The possibility for a court facing a claim on an action for damages for anticompetitive practices to request access to documents in the investigation file, while preserving confidentiality for business secrets. The principle was stated, however how this is achievable from a procedural or practical perspective is still under debate;
- **Collective claims**. Clear provisions that collective claims may be filed by consumer protection or professional associations;
- **Statute of limitation**. A deadline for filing a damages claim of 2 years as of the date the decision of the Competition Council finding an>

4. Source: http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html (public data on the website of the European Commission as at 29 September 2016).
5. Source: http://www.consiliulconcurentei.ro/ro/docs/177/11239/consultare-publica-privind-proiectul-de-act-normativ-privind-actiunile-in-despagubire-in-cazurile-de-incalcare-a-dispozi-iilor-legisla-iei-in-materie-de-concuren-a.html.
6. Republished in the Official Gazette, part I, No. 153 of 29.02.2016.

infringement becomes final and binding after the exhaustion of all jurisdictional contest steps.>

- **An amicus curiae** role of the Competition Council.

However, even in the presence of such provisions there is no to little case-law of such private actions for damages, at least in Romania. There are other jurisdictions (such as the United Kingdom, Germany or France) where private enforcement claims are more widespread, but still it appears that there is not a large scale application of such principles throughout the EU.

Will the Draft Law put things in motion in order to be able to see more private enforcement cases in the future?

The Draft Damages Law attempts to achieve just that by a series of additional measures. However, it is still debatable to what extent those measures would actually boost damages claims in practice towards a Nord American model. Main improvements cover:

- **One stop shop norm**. An extensive separate framework benefiting of clearer terminology, set jurisdiction provisions (i.e. the Bucharest Tribunal – the Civil law court is competent to handle damages claims in case of breach of competition law), specific rules encouraging settlement on damages between the author of the infringement and the damaged party.
- **All doors opened**. No apparent need for a prior sanctioning decision from the Competition Council as the Draft Damages law states that the right to file a damages claim applies irrespective of sanctions applied by the authority. Also, the claims are exempted from the obligation of stamp duty (normally charged as a percentage out of the total value of the prejudice claimed), thus making the access to justice less burdensome in terms of costs.
- **All cards on the table**. As opposed to the current provisions of Article 66 under Competition Law, the Draft Damages Law elaborates on the concept of access to evidence, evidence that may be used in court, as well as certain limits in using proof obtained further to access to the files of the competition authority.
  - Thus, if a claimant objectively needs documents that are in the hands of the defendant or of other parties in order to prove its claim, it may request in court the disclosure of such documents. The court will have to ensure that disclosure is proportionate and that confidential information is duly protected.
  - Under same principles of proportionality and confidentiality on business secrets, access to the file of the competition authority may be obtained in court in case necessary evidence may not be obtained from another source. However, leniency statements and settlement documents are always protected being outside the scope of such procedure.
  - Sanctions (ranging from RON 1,000 to RON 40,000) are set for failure to provide requested evidence, destruction of evidence or failure to observe requirements for the protection of confidential information.
- **The golden card**. A final decision of the Competition Council, of the European Commission or of the court finding the existence of an infringement of competition norms will constitute full proof before the civil court in a damages claim, while a final decision in another Member States will constitute at least prima facie evidence of an infringement.
- **Amicus curiae**. The court has full competence to determine the value of the prejudice. Also, upon the courts request, the Competition Council may provide assistance for the court. In any case, the European Commission also issues some rather complex and detailed guidelines on quantification of harm caused by infringements of antitrust rules.
- **Enough time to identify and act**. Victims will have at least 5 years to bring damages claims before courts. The term does not start to apply before the infringement ends and the claimant had the possibility to discover the anticompetitive behaviour, that it suffered harm from the infringement and the author(s) of the infringement. Furthermore, the period will be suspended or interrupted if the competition authority starts investigation procedures, so that victims can decide to wait until the public proceedings are over. Once a competition authority's infringement decision becomes final (if not contested or finally maintained in court), victims will have at least 1 year to bring damages actions. Additional measures of protection apply>

during the period of court settlement procedures. By doing the math on this system, the entities breaching competition norms are exposed for damages claims for an extensive period of time after the actual infringement ends.

- **One for all and all for one**. The rule on joint and severable liability of the parties to an infringement is maintained[7], while leniency applicants benefit of an exception from this rule unless damages may not be obtained from the other members to the infringement. Another exception from the joint and several liability is provided for SMEs in case they have a small market share (below 5%) and they would go bankrupt as a consequence of such rule.
- **The domino effect**. The new principles will not benefit easy profit seekers, but those who actually suffered a prejudice. Direct customers of an infringer sometimes compensate such increased price they paid by raising the prices charged downstream to indirect customers. In this case, the direct customer may not claim the prejudice represented by this overcharge. However, the prejudice may still be claimed and recovered by the indirect customers.

It all sounds revolutionary, but will it work? What may be expected next?

Although the Draft Damages Law implements the Damages Directive and thus introduces additional clarifications and measures aimed at facilitating damages claims, it is not clear if such would actually boost private enforcement.

On one hand, damages claims for infringements of competition rules are exempted from tax duties, thus facilitating access to courts. However, on the other hand, competition law cases are rather complex, entailing also an important economic element. Also, quantifying the actual damage incurred from the anticompetitive practice is significantly burdensome. Therefore, in order to file a damages claim, the interested party would actually need to team-up with a specialised team of legal and economic competition practitioners. Such exercise could prove to be expensive for the average consumer. Commentators find fault in the Damages Directive the absence of specific norms establishing support funding for consumers' associations.

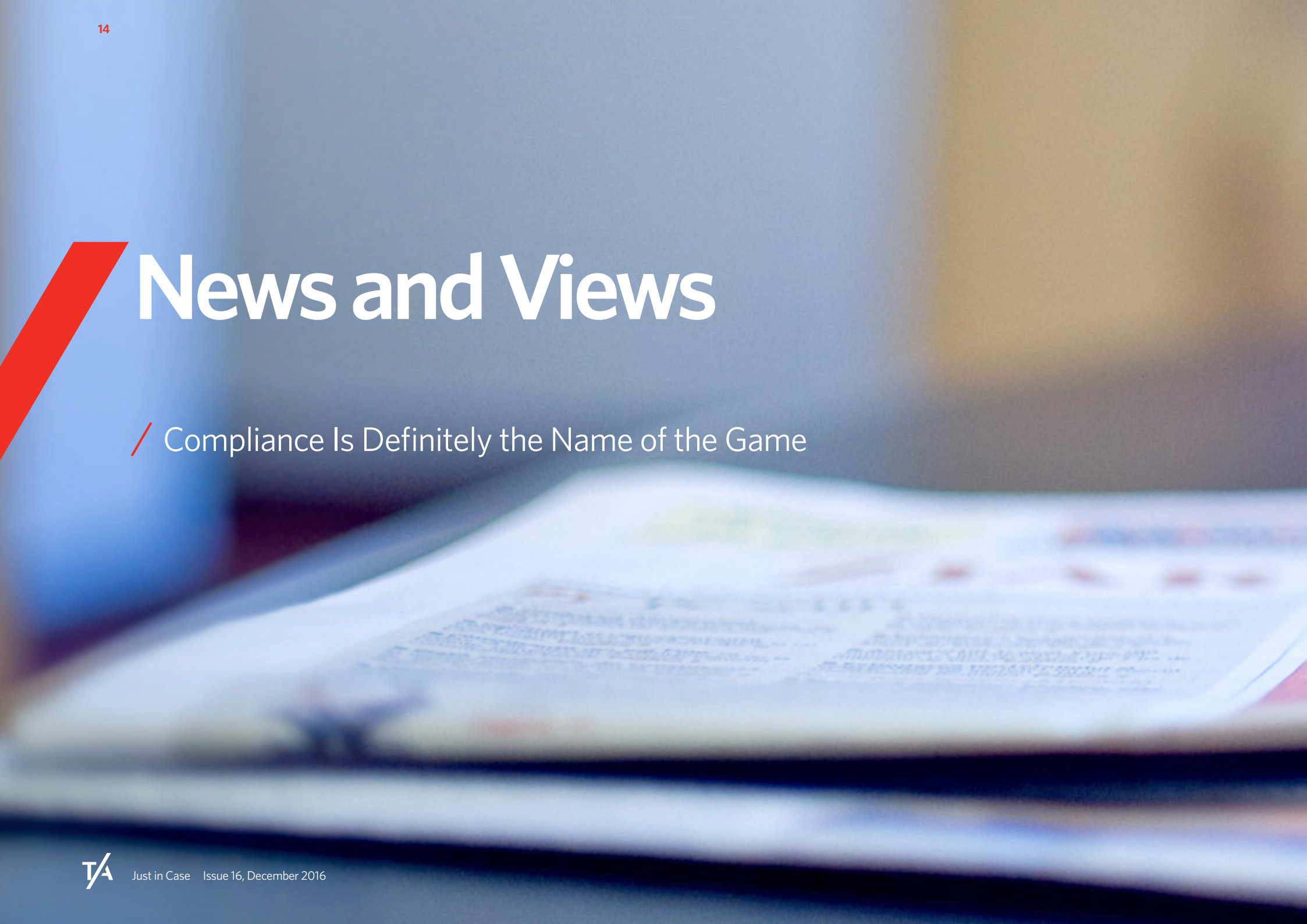
Also, even though the burden of proof would now be less onerous for the claimant, it remains to be seen how the courts would actually handle ensuring confidentiality of business secrets. Most probably, additional procedural norms should be issued in this regard. Also, courts should obtain funding for obtaining the necessary software and other necessary equipment in order to achieve the pioneering access to evidence envisaged by the Damages Directive. Training sessions would most certainly be useful.

Andreea Oprișan,
Managing Associate
andreea.oprisan@tuca.ro

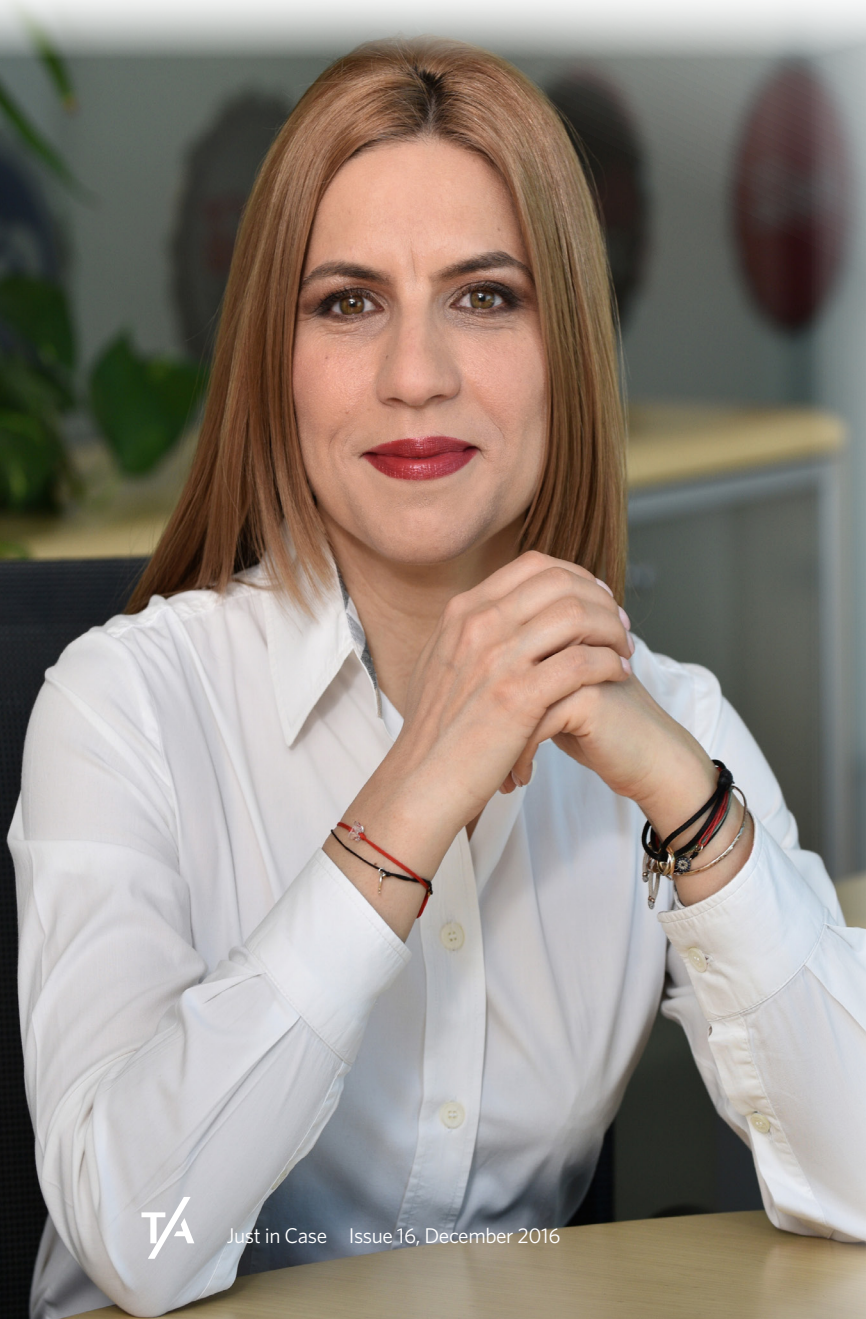
7. With the possibility of obtaining a contribution from other infringers for their share of responsibility.

News and Views

Compliance Is Definitely the Name of the Game



Compliance Is Definitely the Name of the Game



Every day we strive for performance, achieve efficiencies and sustainable growth for our companies, and target improvement, while building a culture of ethics and compliance.

Apart from overall commercial strategic planning (depending on the field of activity, such may refer to research & development, review of market indicators, search for new business lines, increase internal cost efficiencies or securing the human capital etc.), **is there anything one can do to ensure that long term profits are secured and overall company stability maintained? Are commercial ethics and compliance programs just nice words in the corporate world or are they really a "must have" in today's business life?**

Companies with a culture of ethics and compliance have a competitive advantage, they are more prosperous and profitable, valued by their consumers and respected by their competitors and their employees share a genuine sense of pride in what they are achieving in their jobs.

The risk of non-compliance is unfortunately high and it encompasses multiple elements:

- More and more, the law provides for sanctions based on the principle of percentage out of the turnover or high levels of fines in absolute amount. Competition law is the main example of severe sanctions amounting up to 10% of the turnover achieved in the year preceding the issuance of the sanctioning decision. However, there are also multiple other areas gaining focus such as data protection, criminal offences of companies (anti-bribery and anti-money laundering are some of the main topics), stock exchange regulation.
- Apart from the administrative or criminal sanctions of financial nature, the company might be sentenced to pay damages to the persons (individuals or other legal entities) suffering losses as a result of the non-compliant behaviour (i.e. private damages enforcement). The competition authorities, especially the European Commission, encourage such private damages enforcement actions complementary to the administrative enforcement in the antitrust field (i.e. public enforcement).
- In today's world when the information is easily available to anyone, the issue of bad reputation

triggers various detrimental consequences, such as (i) loss of consumers'/ clients' trust; (ii) loss of investors' interest and trust; (iii) potential negative stock exchange impact in the case of listed companies.

- Company managers may also face direct liability from criminal and civil perspective.

So, a compliance program helps the business? Definitely YES!

A compliance program tailored to the company's needs and specific activities is *a must have* to avoid harmful non-compliance consequences.

In addition to the prevention role, in some jurisdictions (such as Romania), the implementation of a compliance program may bring the benefit of a reduction in the level of the fines that potentially may be applied in the worst case scenario of a non-compliance case (at least at present, implementation of a compliance program represents a mitigating circumstance in case of an investigation run by the Romanian Competition Council).

Compliance programs may vary from one company to another or from jurisdiction to jurisdiction to address specific needs and structures. Nevertheless, such programs would normally cover at least the following essential points:

- A regular training program with the majority of the employees, not only with the members of the senior management, followed by regular e-learning exercises/ programs;
- A comprehensive compliance manual drafted in simple straightforward way based on examples from the case-law of the European Commission and other local competition authorities or practical examples that may be revisited by the commercial teams when necessary;
- Regular internal updates on new case-law and trends, as well as on new pieces of legislation or amendments;
- Periodic audits not necessarily consisting in the review of documents, but actually having interviews with the teams and assessing the awareness across the board. This would also help one's understanding the teams' need for further training in certain areas;
- One-to-one explanations and discussions for clarifying any specific situations or questions (the so-called on the job training).

Are all such compliance actions sufficient?

The mere implementation of a compliance program does not completely exclude a potential risk of non-compliance, for instance from a "rogue employee". However, introducing compliance as part of the organizational culture would really increases the chances of a successful compliance mechanism.

It is not only important that compliance starts from the top and spreads in the organisation, but also that compliance is actually embraced by the team members and its spirit is truly understood. A consistent and efficient compliance program is not only about showing that transgressions are sanctioned, but also about understanding that an ethical and compliant business approach is more likely to bring larger profits on the long term, as well as increase the employee bonding and team work (in an ethical and compliant environment). Commentators tend to indicate that senior managers in highly competitive markets are more likely to overlook or not punish as harshly transgressions which bring profits. However, a company's reputation and image are now closer linked to its profit than previously thought. Accordingly, building a healthy organizational culture represents an imperative for today's economic well-being of a company and a target of a dedicated legal/compliance department, also hand in hand with other organizational functions, for instance, the human resources department (developing a consistent induction plan for the new employees where addressing compliance trainings; the public affairs and communication department (staying aware on the new legal enactments drafts).

Therefore, "Compliance Is Definitely the Name of the Game."

Elena Iacob
Legal Manager Coca-Cola HBC Romania

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Victoriei Square
4–8 Nicolae Titulescu Ave.
America House, West Wing, 8th Floor
Sector 1, 011 141, Bucharest

Ⓣ +40 (21) 204 8890
Ⓕ +40 (21) 204 8899
Ⓔ office@tuca.ro
Ⓦ www.tuca.ro