

31 May 2022

# Legal Bulletin



## Consumer Protection

1. Emergency Ordinance No. 58/2022 amending and supplementing consumer protection acts
2. Decision No. 686/2022 amending and supplementing Government Decision No. 947/2000 on the method of indicating the prices of products offered for sale to consumers

## Transposition of the legislative package “New Deal for Consumers” into national law

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Emergency Ordinance No. 58/2022 amending and supplementing consumer protection acts (“GEO No. 58/2022”) was published in the Official Gazette, Part I, No. 456 of 6 May 2022. The act entered into force on 28 May 2022.

Decision No. 686/2022 amending and supplementing Government Decision No. 947/2000 on the method of indicating the prices of products offered for sale to consumers (“GD No. 686/2022”) was published in the Official Gazette, Part I, No. 520 of 26 May 2022. The act entered into force on 28 May 2022, except for a small number of provisions that will enter into force on 5 June 2022, as mentioned below.

### 1. Transposition of the Omnibus Directive into national law

- GEO No. 58/2022 and GD No. 686/2022 transpose the provisions of Directive (EU) 2019/2161 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU as regards the better enforcement and modernisation of Union consumer protection rules (the “Omnibus Directive”), the European normative act that aims to improve and modernize the European legal framework for consumer protection in relation to professionals, also known as the legislative package of the European Union “New Deal for Consumers”.
- GEO No. 58/2022 amends and supplements the following legislative acts:

- Law No. 193/2000 on unfair terms in contracts between professionals and consumers (“**Law No. 193/2000**”);
- Law No. 363/2007 on combating unfair practices by traders in dealings with consumers and harmonising regulations with European consumer protection legislation (“**Law No. 363/2007**”);
- Emergency Ordinance No. 34/2014 on consumer rights in contracts with professionals (“**GEO No. 34/2014**”).
- GD No. 686/2022 amends and supplements Decision No. 947/2000 on the manner of indicating the prices of products offered for sale to consumers (“**HG No. 947/2000**”).

## 2. **Main provisions of GEO No. 58/2022**

### A. The changes introduced by GEO No. 58/2022 are significant, including:

- New commercial behaviours qualified as unfair;
- Much tougher penalties for traders (including percentage penalties of up to 4% of turnover) and long limitation periods or even no statute of limitations for taking legal action to establish the existence of unfair terms;
- Double standard - deceptive action;
- New rules for marketing products and services online and for digital content;
- Additional information requirements for distance contracts and contracts concluded in online marketplaces (which concern the compliance of digital content/digital service);
- Unfair terms in consumer contracts;
- Introduction of commercial records:
  - The commercial record is the record sheet in which the Romanian National Authority for Consumer Protection (ANPC) records the facts and penalties applied to economic operators through control documents;
  - Thus, for repeated violations of consumer rights, economic operators penalised for consumer protection misconducts will be entered in the commercial register for a period of 3 years from the date of the control document.
  - The annulment of the control document by the court leads to the deregistration of the penalty from the commercial record.

- Establishment of a commission at ANPC level with the purpose of analysing the control documents and establishing the penalties provided by Law No. 193/2000, Law No. 363/2007 and GEO No. 34/2014.

**B. Increased consumer protection against abusive clauses in contracts concluded with professionals**

Main amendments and supplementations to Law 193/2000:

- If the supervisory authorities find that unfair terms are used in the adhesion contracts, they will ask the court to order the termination of the unfair terms (in addition to the amendment of the contracts as provided in the previous legislation);
- If the court finds unfair terms in a contract, the court may, in addition to ordering the professional to amend all ongoing adhesion contracts and to remove unfair terms from pre-formulated contracts, also oblige the professional to publish on its website the final court judgments.
- The ANPC will publish the final court judgments on the official website within 45 days;
- Consumer associations may publish on the official website, in compliance with the provisions on the protection of personal data, the final court judgments, in cases where they have had standing, or the case is within the area for which the consumer association was established;
- Procedural changes:
  - The bringing of an action to establish the existence of unfair terms is **not subject to limitation** (by way of derogation from the provisions of the Civil Code).
  - By way of derogation from the provisions of the Code of Civil Procedure (Article 713(2)), the enforcement court has the possibility to examine in the challenge to enforcement, at the request of the consumer or *ex officio*, whether the terms of a contract concluded between a professional and a consumer which constitutes a writ of enforcement are unfair; such challenge to enforcement is **not subject to the statute of limitations**;
  - By way of derogation from the provisions of the Code of Civil Procedure (Art. 719(2) and (3)), when applying for a stay of enforcement, consumers are exempted from the payment of a court bond when they prove that their monthly income does not exceed the cumulative amount of two minimum wages per economy;

- The court is obliged to examine *ex officio* the unfairness of a contractual term as soon as it has the legal and factual elements to do so. Where the court finds that such a term is unfair, it does not enforce it unless the consumer objects.
- Increasing the fines applicable for the use of unfair terms:
  - **The fine limits** for the use of unfair terms now range from **RON 20,000 to RON 100,000** (as opposed to the previous legislation where the limits were from RON 200 to RON 1,000);
- New penalties for using unfair terms:
  - **Penalties calculated as a percentage of the turnover** - fine from 0.1% up to and including 4% of the professional's annual turnover achieved in the financial year preceding the penalty, imposed for widespread infringements and widespread infringements with a Union dimension as defined by Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, i.e.:
    - “widespread infringement” - (a) any act or omission contrary to Union laws that protect consumers' interests that has done, does or is likely to do harm to the collective interests of consumers residing in at least two Member States other than the Member State in which: (i) the act or omission originated or took place; (ii) the trader responsible for the act or omission is established; or (iii) evidence or assets of the trader pertaining to the act or omission are to be found; or (b) any acts or omissions contrary to Union laws that protect consumers interests that have done, do or are likely to do harm to the collective interests of consumers and that have common features, including the same unlawful practice, the same interest being infringed and that are occurring concurrently, committed by the same trader, in at least three Member States;
    - “widespread infringement with a Union dimension” - a widespread infringement that has done, does or is likely to do harm to the collective interests of consumers in at least two-thirds of the Member States, accounting, together, for at least two-thirds of the population of the Union;

- Where fines such as those mentioned above are to be imposed, but information on the professional's annual turnover in the financial year preceding the penalty is not available, the fine will range from EUR 200,000 to EUR 2 million;
- **Fine from EUR 5,000 to EUR 200,000** for failure to comply with measures made final by court judgments;
- Establishment of illustrative and indicative criteria to be taken into account for the application of penalties:
  - the nature, gravity, scale and duration of the infringement;
  - actions taken by professionals to mitigate or remedy the damage suffered by the consumer;
  - previous infringements by the professionals, which must be included in the commercial record of the ANPC;
  - financial benefits gained or losses avoided by professionals due to the infringement, if relevant data are available;
  - penalties imposed on professionals for the same infringement in other EU Member States;
  - any other aggravating or mitigating factor applicable to the circumstances of the case.
- The statute of limitations for the application of misdemeanour penalties is **3 years** from the date of the misdemeanour.

C. *Protection and additional remedies against incorrect and misleading practices*

Main amendments and additions to Law No. 363/2007

- **Terminology changes:**
  - the notion of “product” expressly includes digital services and digital content.
  - “ranking” - defined as relative prominence given to products, as presented, organised or communicated by the trader, irrespective of the technological means used for such presentation, organisation or communication;
  - “online marketplace” - defined as a service using software, including a website, part of a website or an application, operated by or on behalf of a professional which allows consumers to conclude distance contracts with other professionals or consumers.

- **Dual quality of products:**
  - It regulates a new commercial practice considered unfair (misleading action), i.e. the marketing of dual-quality products, more precisely any activity of marketing a good as being identical to a good marketed in other Member States of the European Union, although the good in question has a significantly different composition or characteristics, unless this is justified by legitimate and objective factors proven by conclusive documents;
  - Examples of such legitimate and objective factors:
    - national legal requirements,
    - availability or seasonality of raw materials,
    - voluntary strategies to improve access to healthy and nutritious food,
    - trader's right to offer goods of the same brand in packaging of a different weight or volume in different geographical markets.
  - In situations such as those mentioned above, traders must provide consumers with information on these situations in a way that allows them to access it, on the differentiation of goods as a result of legitimate and objective factors, so that this differentiation can be identified by consumers.
- **New provisions on online marketplaces:**
  - New categories of information considered essential for products offered on online marketplaces, which information is to be made available before the execution of the contract:
    - information on whether or not the third party offering the products is a trader, based on that third party's declaration to the online marketplace supplier;
    - all product reviews, indicating whether and how it guarantees that the published reviews originate from consumers who have actually used or purchased the product;
    - where consumers are offered the possibility to search for products offered by different traders or consumers on the basis of a search in the form of keywords, phrases or other input data, irrespective of where the transactions are ultimately completed, general information made available in a specific section of the online interface which is directly and

easily accessible from the page where the search results are presented is considered essential, on the main parameters determining the ranking of the products presented to the consumer as a result of the search and on the relative importance of these parameters in relation to other parameters, representing general criteria or processes or any specific signals incorporated in algorithms or in any other adjustment or downgrading mechanisms used in connection with the ranking of results; these provisions do not apply to online search engine suppliers.

- New remedies are introduced to eliminate all the effects of unfair practices at no cost as follows:
  - replacement, price reduction or termination of the contract and refund of the consideration for the product or service, as appropriate;
  - compensation for the damage suffered by the consumer (this remedy can be sought by the injured consumer directly from the court in whose territorial jurisdiction the consumer is domiciled or resident);
  - if deficiencies are found within 30 days of purchase, the product or service is replaced directly.
- Examples of circumstances that are taken into account for the determination of the above-mentioned remedies:
  - the gravity and nature of the unfair commercial practice;
  - the damage suffered by the consumer.
- The remedies set out above do not preclude the application of other remedies available to consumers, such as Government Emergency Ordinance No. 140/2021 on certain aspects of contracts for the sale of goods and Government Emergency Ordinance No. 141/2021 on certain aspects of contracts for the supply of digital content and digital services.
- Much tougher penalties for traders using unfair commercial practices:
  - The fine limits have been increased, and they now range from **RON 10,000 to RON 100,000**, without the number of employees being a criterion (under the previous legislation, the minimum limit was RON 2,000);

- If traders use unfair commercial practices affecting more than 100 consumers, the aforementioned minimum and maximum limits are doubled;
- Failure to comply with the measures provided in the order issued by the head of the ANPC or by decision issued by the heads of the units with legal personality subordinated to the ANPC is punishable by a fine of RON 50,000 to RON 100,000;
- Once the misdemeanour fine has been imposed, the official may propose an additional penalty:
  - suspension of the provision of services, supply of goods or activity until the unfair commercial practice has ceased.
  - one of the remedies consisting of (i) replacement, price reduction or termination of the contract and refund of the value of the product or service or (ii) direct replacement of the product/service, if deficiencies are found within the first 30 days of purchase of the product or service, as appropriate.
- Failure to comply with the remedial measure provided for as an additional penalty is punishable by a fine from RON 50,000 to RON 100,000;
- Failure to comply with the legal provisions prohibiting the use of unfair commercial practices by traders and constituting a misdemeanour, if the act is repeated in two separate actions, is punishable by a fine of RON 5,000 to RON 200,000;
- **Penalties as a percentage of turnover** - a fine ranging from 0.1% up to and including 4% of the professional's annual turnover in the financial year preceding the penalty, imposed for widespread infringements and widespread infringements with a Union dimension (as defined by Regulation (EU) 2017/2394); where such a fine is appropriate but information on the professional's annual turnover in the financial year preceding the penalty is not available, the fine will range from EUR 200,000 to EUR 2 million;
- By way of derogation from the provisions of Government Ordinance No. 2/2001, for the misdemeanours referred to in the previous paragraph, the limitation period for the application of the misdemeanour penalty is **3 years** from the date of the misdemeanour.



- Establishment of illustrative and indicative criteria to be taken into account for the application of penalties for the use of unfair commercial practices:
  - the nature, gravity, scale and duration of the infringement;
  - any action taken by the professional to mitigate or remedy the damage suffered by the consumers;
  - any previous infringement by the trader, which must be included in the commercial record of the ANPC;
  - financial benefits gained or losses avoided by the professional due to the infringement, if relevant data are available;
  - penalties imposed on the professional for the same infringement in other Member States of the European Union, in cross-border cases where information on such penalties is available through the mechanism established by Regulation (EU) 2017/2394;
  - any other aggravating or mitigating factor applicable to the circumstances of the case.
- **New categories of misleading commercial practices:**
  - Providing results in response to an online search performed by a consumer, without clearly mentioning the existence of any paid advertising or any specific payment to ensure a higher ranking of products within the search results;
  - The resale of tickets to consumers where the trader has purchased them using automated means to circumvent any imposed limitation on the number of tickets a person may purchase or any other rule applicable to the purchase of tickets;
  - Claiming that reviews of a product originate from consumers who have actually used or purchased the product, without taking reasonable and proportionate steps to verify that these reviews originate from those consumers;
  - Presenting or commissioning another legal or natural person to present false reviews or recommendations as coming from consumers or misrepresenting consumer reviews or recommendations on social media platforms to promote certain products.

*D. New rules regarding contracts concluded between professionals and consumers*

Main changes and supplementations to GEO No. 34/2014:

- **Terminology changes:**
  - “goods” - any movable tangible object; water, gas and electricity when offered for sale in limited volume or fixed quantity; goods with digital elements;
  - “sales contract” means any contract under which the professional transfers or undertakes to transfer ownership of goods to the consumer, including any contract having as its object both goods and services (no condition is specified that the consumer pays or undertakes to pay the price);
  - “service contract” - any contract other than a sales contract under which the professional supplies or undertakes to supply a service, including a digital service, to the consumer (no condition is specified that the consumer pays or undertakes to pay the price);
  - “digital service” - a service having one of the following characteristics:
    - a) allows the consumer to create, process, store or access data in digital format;
    - b) allows the exchange of data in digital format uploaded or created by the consumer or other users of the service concerned or any other interaction with such data;
  - “online marketplace” - a service using software, including a website, part of a website or an application, operated by or on behalf of a professional which allows consumers to conclude distance contracts with other traders or consumers;
  - “online marketplace supplier” - any professional that provides consumers with an online marketplace;
  - “compatibility” - the ability of digital content or digital service to work with hardware or software components that are normally used for digital content or digital services of the same type, without the need to convert digital content or digital service;
  - “functionality” - the ability of digital content or digital service to fulfil its functions, given its purpose;
  - “interoperability” - the ability of digital content or digital service to work with hardware or software components different from those normally used for digital content or digital services of the same type.

- The **scope** is broadened:
  - GEO 34/2014 shall also apply where the professional provides or undertakes to provide to the consumer digital content which is not delivered on a tangible medium or a digital service and the consumer provides or undertakes to provide to the professional personal data, except for the following cases:
    - where the personal data provided by the consumer are processed exclusively by the professional for the provision of digital content which is not delivered on a tangible medium or of the digital service;
    - when the personal data are provided by the consumer to enable the professional to comply with the legal requirements to which it is subject, and the professional does not process such data for any other purpose.
- **Additional information requirements** for distance contracts:
  - where the professional provides other means of online communication ensuring that any written correspondence with the professional, including the date and time of such correspondence, is kept available to the consumer on a durable medium, the information shall include details of those other means;
  - where applicable, that the price has been customised based on an automated decision-making process;
  - mentions on the existence of compliance requirements for goods, digital content and digital services;
  - where applicable, the functionality of digital goods, digital content and digital services, including applicable technical protection measures;
  - where applicable, any relevant compatibility and interoperability of digital goods, digital content and digital services of which the professional is aware or may reasonably be expected to be aware.
- **Additional information requirements for contracts concluded on online marketplaces.** Thus, before a distance contract or any similar offer on an online marketplace can be binding on the consumer, the online marketplace supplier must provide the consumer with the following information in a clear, easy-to-understand manner appropriate to the means of distance communication:

- general information, made available in a specific section of the online interface, which is directly and easily accessible from the page where the offers are presented, on the main parameters for establishing the ranking of the offers presented to the consumer as a result of the search carried out, and the relative importance of these parameters in relation to other parameters;
- whether or not the third party providing the goods, services or digital content is a professional, based on that third party's declaration to the online marketplace supplier;
- if the third party providing the goods, services or digital content is not a professional, that the consumer rights arising from existing consumer protection laws do not apply to the contract concluded;
- where applicable, how obligations under the contract are shared between the third party providing the goods, services or digital content and the online marketplace supplier, without prejudice to the responsibility of the online marketplace supplier or the third party professional in relation to the contract under applicable law.
- The withdrawal period of 14 days shall be extended to 30 days for contracts concluded in the context of unsolicited visits by a professional to a consumer's home or of trips organised by a professional with the purpose or effect of promoting or selling goods to consumers in order to protect the legitimate interests of consumers in respect of aggressive or misleading commercial or selling practices.
- Amendments/supplementations concerning the obligations of the professional in case of withdrawal:
  - With regard to the consumer's personal data, the professional must comply with the applicable obligations laid down in Regulation (EU) 2016/679;
  - The professional is prohibited from using any content, other than personal data, which has been provided or created by the consumer when using the digital content or digital service supplied by the professional, except where such content:
    - has no utility outside the context of the digital content or digital service supplied by the professional;
    - only relates to the consumer's activity when using the digital content or digital service supplied by the professional;

- has been aggregated with other data by the professional and cannot be disaggregated or can only be disaggregated with disproportionate effort;
  - has been generated jointly by the consumer and others, and other consumers are able to continue to make use of the content.
- Except in the cases referred to in the first three paragraphs above, the professional shall make available to the consumer, on request, any content, other than personal data, which has been provided or created by the consumer when using the digital content or digital service supplied by the professional;
  - The consumer has the right to retrieve that digital content free of charge, within a reasonable time and in a commonly used and machine-readable format, without hindrance from the professional;
  - In the event of withdrawal from the contract, the professional may prevent any further use of the digital content or the digital service by the consumer, in particular by making the digital content or digital service inaccessible to the consumer or disabling the user account of the consumer;
  - The following are also exempted from the right of withdrawal:
    - contracts for the supply of digital content which is not delivered on a tangible medium, if performance has begun and, if the contract places the consumer under an obligation to pay, where:
      - the consumer has provided prior express consent to begin the performance during the right of withdrawal period;
      - the consumer has provided acknowledgement that he thereby loses his right of withdrawal;
      - the professional has provided confirmation of the execution of the contract.
  - Much tougher penalties:
    - Fine limits have been increased and now range from **RON 3,000 to RON 50,000** (in the previous legislation the limits ranged from RON 1,000 to RON 3,000); e.g.: failure to comply with the provisions relating to the additional requirements for contracts concluded on online marketplaces (mentioned above), which the online marketplace supplier is obliged to provide to the consumer, is punishable by a fine of RON 10,000 to RON 50,000;

- **Penalties as a percentage of turnover** - a fine ranging from 0.1% up to and including 4% of the professional's annual turnover in the financial year preceding the penalty, imposed for widespread infringements and widespread infringements with a Union dimension (as defined by Regulation EU 2017/2394); where such a fine is appropriate but information on the professional annual turnover in the financial year preceding the penalty is not available, the fine will range from EUR 200,000 to EUR 2 million;
- By way of derogation from the provisions of Government Ordinance No. 2/2001 on the status of misdemeanours, for the misdemeanours referred to in the previous paragraph, the limitation period for the application of the misdemeanour penalty is **3 years** from the date of the misdemeanour.
- Failure to comply with the legal provisions which, according to GEO No. 34/2014 constitutes a misdemeanour, if the act has been committed repeatedly in two separate actions, is punishable by a fine from RON 5,000 to RON 200,000.
- Establishment of illustrative and indicative criteria to be taken into account for the application of penalties, similar to those mentioned in the amendments to Law No. 193/2000 and Law No. 363/2007.

#### *E. Transitional provisions*

Within 6 months from the date of publication of GEO No. 58/2022, the above-mentioned normative acts (i.e. Law No. 193/2000, Law No. 363/2007 and GEO No. 34/2014) will be republished in the Official Gazette of Romania, Part I, and the provisions will be renumbered.

The data contained in the commercial record will be established by order of the ANPC President, to be published in the Official Gazette of Romania, Part I, within 3 months from the date of entry into force of GEO No. 58/2022.

The implementation and instructions on the commercial record shall be carried out by the ANPC within no more than 6 months from the date of entry into force of GEO No. 58/2022.

### **3. Main provisions of GD No. 686/2022**

- It introduced the concept of **outlet sales** - sales made in sales establishments where products bearing the manufacturer's brand are sold and which meet one of the following conditions:
  - products that are part of collections from previous seasons;

- products that are surplus production or end-of-line products or second quality products;
  - products that are part of experimental product lines;
  - returned products and/or cancelled surplus stock;
  - used and resealed products sold at a reduced price;
  - products with minor defects, expressly indicated to this effect in the trader's offer, with written information to the consumer.
- **Rules applicable to price reductions:**
    - Any price reduction notice must indicate the previous price charged by the seller in the same sales area for a specified period before the price reduction is applied. Proof of the previous price shall be provided by means of documents submitted by the trader to this effect at the request of the authorised staff of the ANPC;
    - The previous price is the lowest price charged by the seller in the same sales area during the last 30 days before the date of the price reduction;
    - The provisions of the above two paragraphs shall also apply to outlet sales establishments;
    - In the case of products likely to deteriorate or perish rapidly, the previous price shall be the lowest price charged by the seller in the same sales area during the last 10 days before the date of application of the price reduction;
    - In the case of products which have been on the market for less than 30 days, the previous price shall be the lowest price charged by the seller during that period before the date of application of the price reduction. The seller must indicate in a clear, legible and easily identifiable manner the period during which the previous price was applied;
    - If the price reduction is gradually increased during the same reduction campaign, the previous price is considered the price without reduction before the first application of the price reduction;
    - Where outlet sale establishments compare sales prices with the manufacturer's factory shop price or catalogue price or other equivalent reference price, they must provide clear, legible and easily identifiable written information on the reference price used for comparison;

- If the product has not been displayed for sale within the last 30 days in the outlet sale establishments, the previous price is the manufacturer's factory shop price or the catalogue price, as evidenced by documentation from the manufacturer/seller showing the lower price;
- Tougher penalties:
  - The limits of the fines for non-compliance with the provisions on the indication of the sale price and the unit price (including the obligation to express the sale price and the unit price in RON) range from RON 1,000 to RON 5,000.
  - Failure to comply with the provisions concerning the indication of the previous price applied by the seller following an announcement of a price reduction constitutes a misdemeanour and is punishable by a fine of RON 5,000 to RON 30,000.
- Establishment of illustrative and indicative criteria to be taken into account for the application of penalties, similar to those mentioned in the amendments to Law No. 363/2007;
- **Rules on price reductions are also regulated by Government Ordinance No. 99/2000 on the marketing of products and services**, which regulates a separate sanctioning regime. In the absence of rules intended to correlate the two normative acts, the risk of contradictory interpretations or difficulties of application in practice cannot be ruled out.
- **Transitional provisions:** the provisions concerning the penalty regime and the illustrative and indicative criteria to be taken into account for the application of penalties shall enter into force from 5 June 2022.

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## Editors

Țuca Zbârcea & Asociații provides complex services in relation to all relevant legal matters on **Consumer Protection** law. Țuca Zbârcea & Asociații provides advice in all relevant areas of the legal relationship between professionals and consumers, including the review of standard contract terms, compliance assistance in relation to the execution and performance of contracts between professionals and consumers, including distance contracts, compliance assistance in relation to the observance of consumer rights under the relevant laws, etc. Our lawyers also have extensive experience in consumer protection litigation, gained in particular by representing banking institutions in over 2,500 cases involving the absolute nullity of allegedly unfair terms inserted in credit agreements with individuals (including class-action litigation), the amendment of entire portfolios of ongoing contracts by eliminating unfair terms, and the challenge of misdemeanour penalty minutes issued by the national authority for consumer protection.



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