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## ROMANIA

### The Torment of Transparency Rules in Relation to Television Advertising

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The freedom of contract is one of the main principles governing the Romanian civil law. According to art. 1169 of the Civil Code, the parties are free to enter into any contracts and to establish their content, within the limits imposed by law, public order and accepted principles of morality. The activity of the media agencies was governed by the freedom of contract principle, without particular legal restrictions, until April 2013 when the Romanian Government approved the Government Emergency Ordinance no. 25/2013 ("GEO 25/2013") amending the Audiovisual Law no. 504/2002 ("Audiovisual Law") and introducing new rules applicable to the purchasing of TV advertising.



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The preamble of GEO 25/2013 justified the legal intervention on the need to fight the corruption in the advertising market (kick-backs and other forms of bribery), as well as the non-transparent and anti-competitive systems in this field, which affect the activity of TV broadcasters and the "right of the public to correct and quality information". Furthermore, the Government indicated some of the media agencies involved in the financial circuits between TV broadcasters and advertisers are bad payers to the state budget.

GEO 25/2013 has added the following main restrictions:

- Any acquisition of TV advertising space can be made only by the advertisers directly; in case an intermediary is involved, the intermediary can only act as an agent, in the name and on behalf of the advertisers (i.e. the final beneficiary of the TV advertising);
- Any tariff offers presented by intermediaries to advertisers shall have to be priory confirmed in writing by the TV broadcasters and the intermediaries shall have to submit the written powers of attorney issued by the advertisers;
- The invoices shall be issued by the TV broadcasters directly to the advertisers and the payments shall be made directly from the advertisers to the TV broadcasters;
- Any rebate or tariff benefit, irrespective of its nature, granted by the TV broadcasters must be disclosed on the invoice issued to the advertiser;
- Intermediaries cannot receive any payment or consideration from the TV broadcasters; the intermediaries can receive payments or considerations only from the advertisers;
- Any legal act concluded in breach of the above-mentioned provisions is void.

The above changes affected in a major manner the TV advertising market and created heated public debates. Leaving aside the media agencies that may have caused the Government's reaction and the TV broadcasters which were happy with the change because of their past unfortunate dealings with insolvent or "P.O. boxes" media agencies, other players in the market, such as big multinational media agencies, complained about the interference with the freedom of contract and the burden of extracting the TV

advertising from their larger arrangements with their clients which covered print, online, radio and TV advertising together with various creative services.

Advertisers complained about the administration hassle of signing up advertising agreements with tens of TV broadcasters, enrolling them into accounts payable systems and processing invoices and payments, instead of signing one single contract with one media agency and processing invoices from only one source.

GEO 25/2013 also affected the activity of the media agencies who were acting as "sales houses" for smaller Romanian TV broadcasters and foreign TV broadcasters with coverage in Romania, which were no longer able to charge the TV broadcasters for their services, and in the same time they did not have contracts with the advertisers.

According to the Romanian Constitution, after their entering into force, Government emergency ordinances have to be subject to parliamentary debates for the approval, amendment or rejection through a law, the changes being applicable only after the entering into force of the law.

The public debate moved into the Parliament and became a real battle, which took 2 years. The first version of the law approved quite quickly in June 2013 was not considered satisfactory by the market players.

In fact, such first version was also criticized by the President of Romania who refused the promulgation of the law and requested a reexamination, this being an exceptional tool of intervention of the President into the procedures of the Parliament.

In short, the President of Romania criticized GEO 25/2013 as being contrary to the freedom of contract: "we consider that nothing justifies such legal provisions which are limiting the freedom of the TV broadcasters to sell as they want their own TV advertising space, according to their legitimate interests".

Furthermore, the President of Romania alerted on the anti-competitive effects that GEO 25/2013 may cause: medium and small advertisers may have difficulty to access the TV advertising market, which may lead to unjustified tariffs increases, while medium and small or international TV broadcasters may have difficulties in selling all their TV advertising space, which may lead to a monopoly of the big TV broadcasters who may become in a position to lead a non-transparent price policy.

The parliamentary debates have been resumed only in April 2014 and ended in June 2015, getting stuck in between the two Chambers of the Parliament for a period of 6 months.

The result of the dispute was the Law no. 181/30.06.2015, approving with amendments GEO 25/2013 ("Law 181/2015"). Law 181/2015 brought a compromise between the positions and interests of all the parties, still maintaining the initial scope of bringing transparency into the dealings of the media agencies:

- The purchase of TV advertising space by the advertisers can be made either directly from the broadcaster or through an intermediary;
- In case the purchase of TV advertising space is made through an intermediary, the agreements may be tripartite, at any of the parties' request;
- In both cases provided above, the TV broadcaster shall issue to the beneficiary of the TV advertising or, as applicable, to the intermediary the invoices related to the purchase of TV advertising space, which shall clearly indicate any discount or tariff benefit, irrespective of its nature, granted by the broadcaster, as per the agreement;
- In case of agreements performed through an intermediary, such intermediary shall issue invoices related to the intermediation services provided according to the agreement. The intermediaries cannot receive any payment or consideration other than the remuneration of the provided services, nor any material benefit, irrespective of its nature, from the TV broadcaster.

In short, Law 181/2015 allows intermediaries to purchase and resell TV advertising space, but in doing so the intermediaries should segregate clearly the amounts related to the purchase price of the TV advertising space (which should be charged to beneficiaries at cost and with no mark-up) and their own fees for intermediation services, which will be paid by the beneficiary advertiser (and no benefits should come from the broadcaster, as mentioned before).

Some of the provisions may still be unclear (for example in relation to the role of the "sales houses" acting not on behalf of the advertisers, but strictly to the benefit of the TV broadcasters), but the compromise brought by Law 181/2015 removed the major hurdles of GEO 25/2013 and still imposed transparency rules that can be handled by the market players.

Nevertheless, in March 2016, the topic has been placed again into the debate of the Parliament. At the initiative of two Parliament Members, a new draft law has been initiated in order to completely repeal the above-mentioned provisions. According to the initiators, although the intention of the legislator in 2013 and 2015 May have been good, in fact the goal was not achieved.

To the contrary, the turnovers of media agencies have decreased significantly and less taxes have been paid to the state, while TV broadcasters have continued to report losses although their turnovers have increased. On 13 April 2017, the Parliament approved the Law no. 66/2017 for the repealing of the transparency

provisions introduced by GEO 25/2013 and amended by Law 181/2015.

As a result, starting with the 22 April 2017, the date of the entering into force of the Law 66/2017, the principle of freedom to contract governs again the legal relationships between TV broadcasters, media agencies and advertisers.

### **Biography**

**Catalin Baiculescu** is a Partner at Țuca Zbârcea & Asociații. He is a skilled and resourceful lawyer in TMT matters. He has extensive experience in the entertainment and media sector, providing services to radio and television broadcasters and production companies on regulatory issues and commercial contracts relating to television shows, advertising and internet exploitation of audio-visual content. He has also advised on telecommunications service agreements, interconnection agreements, software development agreements and licenses, outsourcing agreements, as well as data privacy related issues. Other areas of practice include Corporate/M&A and Banking and Finance.