

28 June 2017

Legal Bulletin



Competition Law

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Government Emergency Ordinance No. 39 of 31 May 2017 on actions for damages for infringements of the competition law provisions, as well as on amendment and completion of Competition Law No. 21/1996

Government Emergency Ordinance No. 39 of 31 May 2017 (“**GEO 39/2017**”) on actions for damages for infringements of the competition law provisions, as well as on amendment and completion of Competition Law No. 21/1996 was published in Official Gazette No. 422 of 8 June 2017.

GEO 39/2017 implements Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 Union¹ (“**Directive 2014/104/EU**” or the “**Directive**”). Also, GEO 39/2017 brings some important amendments to Competition Law No. 21/1996 (“**Competition Law**”).

Prior to the entry into force of GEO 39/2017, the Competition Law already included some measures to support actions for damages for infringements of the competition law. Hence, the topic is not new, but the detailed procedure on access to damages is. The new legal enactment elaborates and clarifies the procedure.

The most relevant amendments brought by GEO 39/2017 are the following:

¹ Published in the Official Journal L 349, 5.12.2014, p. 1-19.

1. Breach of competition rules does not only mean severe administrative fines, but also civil-law damages

Full indemnification principle

In case of breach of Competition Law or the Treaty on the Functioning of the European Union, either through a hardcore cartel, a vertical restriction of competition or an abuse of dominant position, any person suffering a prejudice thereof has a right to request and obtain the full recovery of the prejudice suffered (including (i) the actual loss; (ii) the profit that it would have otherwise obtained in absence of the restriction; as well as (iii) interest) irrespective if that person had a direct or indirect commercial relation with the parties to the infringement. Nevertheless, the full indemnification principle applies to the extent it does not lead to an unjust enrichment. Also, in case the super-price burden (i.e. the difference between the price paid and the price that would have prevailed in absence of the infringement) is transferred downstream, the person suffering the prejudice should not be able to request a prejudice resulting from the transferred super-price. The burden of proof on the transferred super-price rests with the parties to the infringement.

Also, the entity that was held to cover the full value of the prejudice may further revert against other parties to the infringement to recover the portion of the prejudice covered for such parties. However, the portion attributable to a leniency applicant is limited to the prejudice generated to its direct and indirect suppliers and clients.

Joint liability principle

In case of multiple parties to the competition law infringement, each may be held liable for the entire value of the prejudice.

As an exception:

- a. Small and Medium Size enterprises (SMEs)² are only liable towards:
 - The (i) direct and indirect buyers if its market share on the relevant market is less than 5% at any given moment during the breach of competition norms; and (ii) applying the joint liability regime would irremediably threaten its economic viability and would trigger the total loss of its assets;
 - Other injured parties, only if full indemnification cannot be obtained from the other undertakings part to the same breach of competition norms.

The exception no longer applies if the SME (i) was the initiator of the anticompetitive practice or coerced other undertakings to be part to the breach; or (ii) was previously ascertained to have violated competition norms.

² As defined in the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, published in the Official Journal series No. 124 of 20.05.2003.

b. Leniency beneficiaries are jointly liable towards:

- Its direct or indirect suppliers and clients; and
- Other injured parties, only if full indemnification cannot be obtained from the other undertakings part to the same breach of competition norms.

2. Court competence

GEO 39/2017 grants the Bucharest Tribunal the competence to settle civil law claims resulting from breach of competition rules. Its decision can be appealed against before the Bucharest Court of Appel, with the High Court of Cassation and Justice having jurisdiction in the higher appeal stage. The court has competence to finally decide on the level of the compensation due for the prejudice generated as a result of the competition law infringement. The Romanian Competition Council may, however, upon the court's request, provide assistance in determining the value of the damages.

Damages claims may also be settled outside the court. In this case, the courts may stay proceedings for a period of maximum 2 (two) years. In case of settlement, the claim is reduced by the portion of the prejudice part of the settlement, while the other parties to the competition infringement remain liable for the reminder of the prejudice. This also means that the joint liability principle would no longer be applicable by reference to the party settling the damages claim.

Settlement (or a compensation mechanism implemented by the parties to the infringement) might also be acknowledged as a mitigating circumstance by the Romanian Competition Council in a subsequent administrative procedure.

3. Access to evidence

One of main novelties introduced by GEO 39/2017 is represented by extensive rules on access to evidence for those suffering a prejudice resulting from the infringement of competition norms.

Disclose of evidence

In a competition damages claim the court may even impose on a third party the obligation to disclose evidence, not only to the parties to the court claim. However, such obligation should be applied based on the principle of proportionality taking into consideration (i) the actual need for such evidence; (ii) the costs of disclosure; and (iii) the imperative of protecting confidential information.

The court may, nevertheless, order certain measure aimed at protecting confidential information/business secrets such as (i) deleting certain sections of the documents; (ii) holding non-public hearings; (iii) limiting the number of persons having access to the information; and (iv) reports prepared in a manner that exclude confidential information (for instance, aggregated data reports could be an option).

The information that may be subject to disclosure could even relate to proof from the case-file of the competition authority, but only if such data may not be obtained from the parties or a third party. However, the access should not normally extend to the internal documents of the competition authority as such documents (such are not accessible even in the administrative procedure).

However, the court cannot, under any circumstances, request a party or a third party to disclose the following categories of evidence: (i) leniency statements; or (ii) settlement proposals.

Sanctions for restricting access to evidence

The court can impose sanctions of RON 500 to RON 5,000 for natural persons and of 0,1 to 1% of the turnover obtained in the previous year for legal entities, for the following:

- Failure to disclose evidence or the refusal to provide the said evidence at the hearing set to this end by the court;
- Destroying evidence;
- Failure or refusal to comply with the measures imposed by the court aimed at protecting confidential information; and
- Violating the limits imposed by GEO 39/2017 on the use of and access to evidence.

Role of the administrative procedure

A final and definitive decision of the Romanian Competition Council or the European Commission or of a court of law on the breach of competition norms represents a non-disputable proof for the court of law invested in a damages claim file.

However, a court decision from another EU Member State concluding on the existence of a breach of competition law represents a rebuttable presumption on the existence of a breach.

4. Statute of limitation

Actions for damages for competition law infringements shall be subject to a statute of limitation of 5 (five) years. This period does not start to run prior to (i) the party to the infringement ceasing the violation of competition norms; and (ii) the moment claimant knew or ought to have known:

- The existence of the practice and that it represents a violation of the competition norms;
- The fact that the violation generated a damage for the claimant; and
- The identity of the party to the infringement.

5. Application of GEO 39/2017

The substantial provisions of GEO 39/2017 shall not have retroactive effect. However, the procedural provisions of GEO 39/2017 will apply to damages claims for infringement of the competition norms filed after 26 December 2014 (inclusively).

6. Amendments to Competition Law

GEO 39/2017 introduces 3 (three) important amendments to Competition Law. Such amendments are based on the practice of the competition authority so far.

Reporting obligation for the modern trade retail sector

Undertakings part to the modern trade retail sector (supermarkets, hypermarkets, discounters and cash & carry stores) have the obligation to provide the Romanian Competition Council, upon its request, the sale prices for the products they commercialize so as to contribute to analysis, market researches or price comparison exercises performed by the authority. Failure to comply with this obligation will be sanctioned with a fine ranging from RON 20,000 to RON 50,000. These sanctioning provisions shall come into force 30 (thirty) days as of the date GEO 39/2017 was published in the Official Gazette (i.e. 8 June 2017).

Down raid computer clones

Another amendment concerns the down raid procedure. Thus, during a down raid, the data electronically stocked or archived can be fully copied and taken on an electronic data storage device which will be sealed correspondingly.

Additional sanctioning rules in case of breach of the standstill principle in cases of economic concentrations

If a non-resident undertaking fails to notify a merger transaction, implements an economic concentration absent a mandatory clearance decision issued by the Romanian Competition Council, implements an economic concentration declared by the authority as incompatible with effective competition principles, fails to observe an obligation, to meet a condition or to execute a measure set forth by a decision of the authority, the turnover taken into consideration for applying the administrative fine provided by Competition Law is replaced with the sum of the following:

- The turnover obtained by each Romanian entity that is under the control of the infringing undertaking;
- The revenues obtained in Romania by each undertaking not registered in Romania, but controlled by the infringing undertaking;
- The revenues obtained in Romania by the infringing undertaking and accounted for in its individual financial statements.

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Editors

The attorneys of Țuca Zbârcea & Asociații specialized in **Competition** provide legal assistance and consultancy services on the applicable regulations in the competition field, including in relation to aspects such as antitrust, domestic and cross-border transactions (mergers, acquisitions, joint ventures, etc.), and state aid. Our attorneys represent the interests of our clients before the national authorities in the competition field, and in disputes before the courts of law in relation to a wide range of specific matters, including unlawful competition. Moreover, Țuca Zbârcea & Asociații developed a department for compliance with the regulations in the competition field (i.e. preliminary assessment of potential exposure, training programs) to help clients avoid the sanctions applicable as a result of breaching the competition laws. The activity in this field is appreciated by international legal directories as one of the best on the market, and the firm ranks first in the tables of Chambers Europe or other legal publications.



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