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Legal Bulletin



Competition Law

1. **GEO 170/2020 on actions for damages for infringements of the competition law provisions, as well as amending and supplementing Competition Law No. 21/1996**

Novelties regarding Competition Law

The Emergency Ordinance regulating the mechanism and procedures whereby the natural or legal persons that suffered harm as a result of anticompetitive acts may claim compensation before the courts of law (“GEO 170/2020”) was published in the Official Journal of Romania No. 952 as of 16 October 2020.

GEO 170/2020 also includes amendments and supplementations to Competition Law No. 21/1996 (“Competition Law”).

1. Context / Background

In the context of the adoption of 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 Union (the “Directive”), the Romanian Government adopted Government Emergency Ordinance No. 39/2017 (“GEO 39/2017”) on actions for damages for infringement of the competition law provisions, and for amending and supplementing Competition Law No. 21/1996. Further to the submission of notices of unconstitutionality, the Constitutional Court of Romania found, under Decision No. 239/2020, that GEO 39/2017 and the Law for the approval thereof were unconstitutional, in their entirety, for failure to apply for the opinion of the Economic and Social Council.

Thus, the adoption of GEO 170/2020 removed the risk of the European Commission initiating new infringement proceedings against Romania.

The provisions previously included in GEO 39/2017 were either retrieved as such in GEO 170/2020 or amended, as detailed below.

2. The main provisions in GEO 170/2020 regarding actions for damages

- The persons that may exercise their right to bring action and the damages to which they are entitled;
- Courts' jurisdiction in actions for damages;
- Disclosure of evidence in actions for damages, as regards both evidence from judicial proceedings, as well as evidence included in files of a competition authority, where the proportionality of disclosure is to be assessed and ordered by the court;
- Limitation period for bringing actions for damages:
 - The limitation period for bringing actions for damages is 5 years;
 - Such limitation period does not begin to run before the competition infringement ceases and before the claimant knows, or can reasonably be expected to know: (a) the behaviour and the fact that such behaviour constitutes an infringement of competition law; (b) the fact that the infringement caused the claimant harm; and (c) the identity of the infringer;
- Joint and several liability of the undertakings which are liable for the harm:
 - Each of the undertakings is bound to compensate for the harm in full;
 - The injured party has the right to require full compensation from any of the undertakings which is liable for the harm;
 - An immunity recipient is jointly and severally liable as follows: (a) to its direct or indirect purchasers or providers; and (b) to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement;
 - An undertaking concerned has a right of recourse to recover the contribution that was paid on account of another undertaking;
 - If the infringer is a SME, distinct provisions are applicable.
- The passing-on of overcharges and the right to full compensation;
- As regards the quantification of harm, two presumptions are established, which the infringer has the right to rebut, as follows:
 - Cartel infringements cause harm **consisting in a 20% price increase for the products or services envisaged by the cartel;**

- **Infringements constituting abuses of dominant position cause harm.**¹
- The effects of alternative dispute resolution, the possibility for the Competition Council to consider compensation paid as a result of an alternative dispute resolution to be a mitigating factor in individualising the penalty.

3. Main amendments and supplementations to Competition Law

- Provisions in GEO 39/2017 which were not amended:
 - The undertakings' failure to comply with the obligation to submit, at the Competition Council's request, the sale prices for the products sold via online platforms for analyses, market surveys or price comparisons, constitutes a contravention and may be sanctioned by fine ranging from RON 20,000 to RON 50,000;
 - The possibility that, during dawn raids, the information stored or archived electronically would be copied and seized on an electronic medium, with the application of a seal; the information necessary for the investigation shall be retrieved at the Competition Council's headquarters, in the presence of the representative of the undertaking/association of undertakings;
 - The method for determining the turnover for the calculation of the fine for non-residents' omission to notify an economic concentration, consisting in the following cumulated revenues:
 - a) turnover earned by each of the undertakings registered in Romania and controlled by the infringer;
 - b) revenues earned in Romania by each of the non-resident undertakings controlled by the infringer;
 - c) own revenues earned in Romania by the infringer and registered in the individual financial statements of the infringer.
- New provisions:
 - It is stipulated that microenterprises may pay the administrative fines, applied under the administrative acts for the application of penalties issued by the deliberative bodies or by competition inspectors, in accordance with Article 22(2) of Law No. 203/2018 on measures for

¹ The two presumptions did not exist in GEO 39/2017, they are included as novelty in this regulation.

rendering efficient the payment of administrative fines (half of the minimum fine within 15 days);

- The fine for the acts provided at Article 55(1) of Competition Law cannot exceed 10% of the aggregate worldwide turnover earned by the undertaking or association of undertakings in the financial year preceding the penalty. Also, the minimum fine for contraventions provided in same paragraph cannot fall below 0.5% of the aggregate revenues earned in Romania by the undertaking or association of undertakings in the financial year preceding the penalty;
- Certain elements are provided, by reference to which the Competition Council shall individualise the penalties; the novelty consists in: the interim financial benchmarks by reference to which the final amount of the fine will be established up to the maximum cap provided by the law, as well as the aggregate revenues earned in Romania or other types of revenues;
- A provision is inserted concerning the concepts of intent and negligence, which are to be construed in accordance with the Court of Justice of the European Union case-law in relation to the application of Articles 101 and 102 of TFEU.

andreea.oprisan@tuca.ro

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.



Raluca Vasilache
Partner
+4 021 204 76 33
raluca.vasilache@tuca.ro



Andreea Oprișan
Managing Associate
+4 021 204 88 90
andreea.oprisan@tuca.ro

TUCA ZBARCEA ASOCIATII

Șos. Nicolae Titulescu nr. 4-8
America House, Aripa de Vest, et. 8
Sector 1, 011141, București, România
T + 4 021 204 88 90
F + 4 021 204 88 99
E office@tuca.ro
www.tuca.ro

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