

## IMPORTANT CHANGES INTO ROMANIAN COMPETITION LAW - AN OVERVIEW

On 8 June 2017, Emergency Government Ordinance 39/2017 ("**EGO 39**") entered into force and brought a number of important changes to the Romanian Competition law. The EGO transposes the EU Damages Directive (2014/104/EU) into Romanian law and introduces a number of other changes into Romanian competition law, including inter alia: (i) a specific obligation incumbent upon modern retailers to provide, (upon request), information to the Competition Council regarding their resale prices; (ii) additional powers of the Romanian Competition Council ("**RCC**") during dawn raids.

The following provides an overview of the most important changes:

### PRIVATE ENFORCEMENT OF ANTITRUST DAMAGES MADE EASIER

Following years of consultations, the European Commission published the Damages Directive in 2014, which aims at facilitating the private enforcement of claims before national courts for damages after competition law infringements. Below is a brief overview of the main provisions of the transposition of the Damages Directive into Romanian law.

#### **One competent Court**

All claims for damages, irrespective of value, are to be filed with the Bucharest Tribunal, thereby increasing the chances of a relatively unitary and predictive court practice.

#### **Shift of the burden of proof in favor of the injured party**

In case of a cartel between competitors, a rebuttable legal presumption is introduced that the cartel caused harm. The defendant can rebut the presumption, but bears the burden of proof.

#### **Limitation period of claims for damages**

Damage claims for competition law infringements will only become time-barred after five years (as opposed to three years for regular claims for damages); the new limitation period will only begin when the claimant knows or can be expected to know of the identity of the infringer, the relevant conduct, of the harm being caused by that conduct and of the fact that the conduct constitutes an infringement of competition law.

The limitation periods are suspended when a competition authority takes investigative measures with regard to the respective infringement. The suspension ends one year after the investigation or valid decision by the authorities.

### Access to evidence (disclosure)

Civil courts are entitled to order, upon request of the claimant (or the defendant), the disclosure of evidence from anyone who has such evidence. In contrast to other member states, a request for disclosure can only be filed with or after filing the claim. "Pre-trial discovery" is not allowed in Romania.

Disclosure orders can also concern evidence in files of courts or authorities; leniency applications and settlement submissions are however excluded. In case disclosure obligations are disregarded, courts can impose fines of up to 1% of the offending party's turnover in the prior year.

As such disclosure concepts are relatively novel to the Romanian legal system, there is curiosity as to how civil law judges will apply their new powers in connection to, among others, privileged attorney-client communication.

### SPECIFIC OBLIGATIONS IMPOSED ON THE MODERN RETAIL

Importantly, the EGO 39 provides for a specific obligation imposed on supermarkets, hypermarkets, discounters and cash & carry stores, requesting them to provide, upon request of the RCC, information about the resale prices of both food and non-food products, for the purposes of analysis, market studies or price comparisons. In case this obligation is not met, the RCC can impose fines of up to 12,000 EUR.

Introducing such a specific provision into the Romanian Competition Law reflect that the RCC continues to be extremely preoccupied with the level of prices charged by modern retailers and extends its focus to non-food products as well. It may also be expected that the Prices Monitor (ro: Monitorul preturilor, [www.monitorulpreturilor.info](http://www.monitorulpreturilor.info)), an RCC-backed project which provides online price comparison for 200 food products in a number of participating retail chains, will be extended to cover new chains and non food products, with the participation being mandatory and not voluntary (as it has been to date).

### DAWN RAIDS AND ELECTRONIC DATA

EGO 39 expressly grants RCC inspectors carrying out a dawn raid the power to make copies of any electronic storage medium such as a hard drive (if such a measure is provided for in the Order of the Chairman of the RCC and the judicial authorization approving the dawn raid), to put the copy of the hard drive in a sealed envelope to take with them and later access at the RCC headquarters, in the presence of the dawn raided company's representative.

While bringing welcome clarification to an already common practice of the RCC, introducing such an express provision in the Romanian Competition Law underscores that the use of this practice will likely become the norm.

## FINES FOR FAILURE TO NOTIFY A MERGER

As a general rule, failure to notify a merger or implementing a merger prior to clearance being received risks a fine between 0.5% and 10% of the overall turnover in the year prior to the sanctioning decision being issued, with the actual amount of the fine depending on, among other things, the competition concerns raised by the merger.

EGO 39 introduces specific provisions regarding the fines applicable to a non-resident entity in the scenario above. As such, the turnover on the basis of which the fines are assessed is replaced with the sum of the following:

- turnover achieved by each of the companies registered in Romania and controlled by the infringing party; and
- the turnover derived in Romania by each of the non-resident companies controlled by the infringing party; and
- any turnover obtained in Romania by the infringing party and accounted for in its financial statements,

This change effectively removes the turnover of companies not belonging to the infringer's group (the activity of which bears no connection to Romania) from the calculated turnover in relation to which the fine is assessed and thereby significantly reduces the potential liability exposure in Romania of a non-resident company which fails to submit a merger notification.

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