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Romania: New rules on damages claims for infringements of competition law

BACKGROUND

On 14 October 2020, the Romanian Government adopted the Emergency Ordinance no. 170/2020 on damages actions in cases of competition law infringement ("**GEO 170/2020**"), implementing the EU Damages Directive (2014/104/EU). The newly enforced provisions aim to enhance private enforcement in Romania and ensure that victims of anticompetitive practices can exercise their rights to full compensation for the harm suffered.

In addition, companies which are subject to competition law investigations are incentivised to voluntarily compensate the victims and settle the case with the Romanian Competition Council by proving the existence of an alternative dispute resolution mechanism. In such a case, the potential fine could be reduced as a result of the application of the mitigating circumstance of victim compensation.

MAIN PROVISIONS

The principle of full compensation

Anyone who has suffered harm following an infringement of competition law by a business or by an association of businesses can claim full compensation for the damage caused. The right to full compensation is expressly provided, as the victim can claim damages for the actual loss, loss of profit and interest rate.

The passing-on of overcharges

In order to ensure the full effectiveness of the right to full compensation, anyone who has suffered harm may claim compensation, whether he/she is a direct or indirect purchaser of the infringer. This principle is aimed at preventing over or under compensation in the case of actions for damages issued by claimants at different levels of the supply chain.

According to the new rules, a rebuttable presumption applies, according to which the indirect purchaser is considered to have proved that an overcharge (or a part) was passed on to him/her, when the defendant has breached competition rules, the violation has resulted in an overcharge and the indirect purchaser acquired the goods or services

concerned. Compensation for actual loss at any level of the supply chain will not exceed the damage in the form of overcharge caused at that respective level.

Notably, a rebuttable presumption applies that harm resulting from a cartel is quantified at 20% surcharge/ price raise. This is aimed to ease the burden of proof of the claimants, who might simply claim the damages by assuming the 20% surcharge. The burden of proof is thus shifted to the cartel participants, which could use court/ out-of-court economic expertise in an attempt to prove lower overcharges.

Also created by the new rules is a rebuttable presumption that abuses of dominance cause harm, with no minimum quantification of such harm.

Effect of definitive decisions

An infringement of competition law found by a final ruling of the Competition Council or of the European Commission or finally confirmed by the court is deemed to be irrefutably established for the purposes of an action for damages brought before the court. A decision issued in another EU Member State shall represent only rebuttable presumptions of competition law violations, which could be overturned by the defendants.

Joint liability of cartel participants

Cartel participants shall be jointly and severally liable for the damage caused, and any victims could claim full compensation from any of the participants, irrespective of whether they had a direct or indirect purchasing relationship with the respective party.

By exemption, SMEs and leniency applications shall only be held liable with respect to direct and indirect buyers and, in subsidiary, with respect to third parties if the damage cannot be recovered from the other cartel participants. SMEs can enjoy the limited liability subject to the following conditions that the SME:

- was not an initiator of the anticompetitive behaviour;
- has not previously been found to be in breach of competition law;
- had less than 5% market share on the relevant market; *and*
- applying the joint liability rules, would irreparably jeopardise its economic viability and would entail total loss of the value of its assets.

Jurisdiction

The Bucharest Tribunal has exclusive first court jurisdiction for settling damages claims. The first court's ruling may be appealed to the Bucharest Court of Appeal and further to the High Court of Cassation and Justice.

Disclosure of evidence

Under a reasoned justification, the court can order the defendant, the plaintiff or a third party to disclose specific documents as relevant evidence to the claim.

The court can order the disclosure of evidence containing confidential information where considered relevant, while taking appropriate measures to protect such information, such as the deletion of sensitive fragments of document text or the limitation of access to

hearings. However, the court will order the disclosure of evidence with respect to professional secrecy.

The court may request the disclosure of evidence in a file of a competition authority only when the evidence cannot be obtained from one of the parties or from a third party.

Where there is a decision of a competition authority sanctioning an anti-competitive practice, the court may request the documents from the file on which the decision was based. To this end, by receiving these documents, the court will ensure that the confidentiality of the information representing business secrets and other information classified as confidential is respected.

The right to make such disclosure is limited to what is proportionate. The Competition Council may, *ex officio*, submit observations to the national court before which a disclosure order is sought.

The court may order the disclosure of the following categories of evidence only after the Competition Council, by adopting its final decision, has completed the proceedings:

- information that has been prepared by a natural or legal person specifically in proceedings conducted by the Competition Council;
- information that the Competition Council has drawn up and sent to the parties during its proceedings;
- settlement submissions that have been withdrawn.

Nonetheless, by restricting access to evidence contained in the files of competition authorities, which was provided by the beneficiaries of immunity deals or by parties that have entered into a settlement agreement with the competition authority (the grey and the black list), GEO 170/2020 safeguards the purpose of public enforcement of competition law. If such self-incriminating evidence under a leniency statement or settlement procedure were to be disclosed, businesses would be discouraged from cooperating in the future with the competition authority.

Penalties

The court may sanction the parties, third parties and their legal representatives with a fine of between RON 500 (approx. EUR 110) and RON 5,000 (approx. EUR 1,100) for natural persons and between 0,1 and 1% of the turnover achieved for legal persons the previous year for the following acts committed in connection with the trial:

- the failure to produce evidence the court has ordered the disclosure of by the person possessing the evidence or the refusal to submit it, within a time limit fixed for that purpose;
- the destruction of relevant evidence;
- the failure to comply with the measures ordered by the court to protect confidential information;
- breach of the limitations on the use of evidence provided by GEO 170/2020.

The provisions regarding the imposition of the fines shall be without prejudice to the criminal liability of the offender.

Limitation periods

The limitation period for a damage claim is five years. The limitation period shall not start to run and, if it has begun to run, it shall be suspended for the period during which a competition authority is taking action for the purpose of investigation or proceedings in respect of a breach of competition law to which the damages claim relates. The suspension shall end one year after the decision establishing the infringement has become final or after the proceedings come to an end in another way. The limitation period shall not begin to run and, if it has begun to run, it shall be suspended during the alternative dispute resolution process.

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