

MAJOR AMENDMENTS TO COMPETITION LAW AS A RESULT OF THE PRIVATE DAMAGES DIRECTIVE

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Pursuant to Government Emergency Ordinance no. 39/2017, the private damages regime defined under Directive 2014/104/EU was formally transposed into the Romanian legal framework. The enactment of the act is a result of the European Commission actions of January 2017 when the European institution informed the Romanian authorities that it had started an infringement procedure for their failure to observe the implementation calendar of the private damages Directive.

1. Key elements related to private damages regime

a) *Scope of the law and competent court*

The Ordinance regulates the rights of any person to obtain the full recovery of the damage resulting from a breach of the competition rules. The full recovery of the damage includes the actual damage, the lost profit and the related interest. However, this should not result in an unfair profit for the victim of the breach.

The private damages claim are to be settled by the Bucharest Tribunal with an appeal at the Bucharest Court of Appeals and higher appeal at the Highest Court of Cassation and Justice.

b) *Admission of evidence*

The competent court may allow the administration of evidence and oblige the defendant to provide specific evidence. The interest of an undertaking to avoid private damages claims may not be used to ensure protection of the information.

In respect to the information and data existing in the competition authority's file, the court may request disclosure of the evidence in the file if such information could not be obtained otherwise. In case of a preexisting sanctioning decision, the court may request the documents on which the competition authority's decision was based on.

The court may not request: (i) leniency claims and (ii) settlement proposals.

c) *Sanctioning regime*

The court may impose fines up to EUR 1,100 for natural persons and ranging between 0.1 and 1 % of the total turnover for legal persons for (i) not providing the documents requested by the court, (ii) destroying such evidence or (iii) not observing the conditions imposed by the court in respect to the confidential elements in the documents existing in the file.

There is an irrefutable presumption in respect to a breach of competition rules in case of a final decision of the Competition Council, European Commission or of the competent courts.

A final decision issued in another EU Member State attests, until proven otherwise, that there was a breach of competition rules and could be evaluated along with other proves submitted by the claimant.

d) Statute of limitations and joint liability

The claim for damages may be filled in 5 years. The terms starts from the moment when the breach of competition rules finished and the claimant knew or should have known that: (i) the behavior represents a breach of competition rules, (ii) the breach caused a damage to the claimant and (iii) the identity of the person responsible for the breach.

The term does not start or it is suspended for the period when the competition authority performs its investigation. The suspension ends one year after the issuance of the final and binding decision of the authority or after the proceedings were stopped. Also, the term does not start or it is suspended for the period when the parties try alternative settlement procedures for the case.

There is a joint liability for the parties breaching the competition rules towards the victims of the breach. However, in case of SMEs, such entities are responsible (i) only for direct and indirect buyers (customers) in case the SMEs have a market share lower than 5 % during the breach and the applicability of joint liability would significantly affect the viability of its economic position and loosing of its major assets; and (ii) for other parties only to the extent that full recovery could not be obtained from other parties.

The above limitations do not apply in case the SME had a leading role for the competition breach or it has been previously involved in a competition breach.

The leniency applicants are responsible (i) only for direct and indirect buyers (customers); and (ii) for other parties only to the extent that full recovery could not be obtained from other parties.

e) Estimation of damages

The courts are competent to estimate the damage resulting from a competition breach ensuring that this would not result in an impossible or an extremely difficult burden for the company that would have to pay damages. There is a simple presumption that cartels generate damages. The Competition Council may, at the request of the court, provide assistance in computing the damage.

The Competition Council may take into account the payment of damages as a mitigating factor in setting the fine.

2. Other amendments to the Competition Law

Along with transposing of the private damages Directive, the Ordinance includes also other changes in the Competition Law, the most interesting ones being:

(A) Food retail sector

The entities active in food retail sector (supermarkets, hypermarkets, cash & carry and discounters) are obliged to submit, at the Competition Council's request, their resale prices, in order to enable the Competition Council to conduct various studies and market analysis.

This was done as a result of the Competition Council performing specific market analysis in the food retail sector and not having the appropriate tools to request data and information from market players outside a formal investigation framework. Thus, the authority may enhance its price comparison studies covering all relevant players in the market (which would now not be able to oppose submission of resale prices).

(B) Procedural elements – dawn raids powers

During its dawn raids the data stored electronically could be copied in full and taken by the authority under seal. The documents would be analyzed at the head office of the Competition Council in the presence of the undertakings or its representatives.

The measures described above could be done only based on the Order of the President of the Competition Council and with the approval of the court.

The above is part of a larger process undertaken by the authority trying to include in the Competition Law clearly expressed rights to perform forensic searches at its head office. While this is similar to the rights of the European Commission, it is expected that this would become the rule in dawn raid cases, leading to the majority of searches being done in a forensic environment and at the level of the authority.