

Schoenherr: Certain Romanian Competition Law provisions on hold (for now)



Several provisions of Competition Law no. 21/1996 (the "Competition Law") are currently suspended and may lose their legal effect from the beginning of September, following a recent decision issued by the Constitutional Court of Romania (the "CCR").

Through Decision no. 239/2020, published in the Official Gazette, Part I no. 649 of 23 July 2020, the CCR found that both the Law approving Emergency Government Ordinance no. 39/2017 on damages claims applicable to competition law infringements and on amending and supplementing Competition Law no. 21/1996 ("Law approving EGO 39/2017"), as well as EGO 39/2017 are unconstitutional in their entirety.

Brief background

The main purpose of EGO 39/2017 was to transpose the provisions of Directive 2014/104/EU (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")), into national law. This ordinance also came with a series of additional amendments and completions to the Competition Law, which mainly concerned the mechanisms of applying competition rules.

The Romanian Government, a group of 47 senators and the President of Romania raised unconstitutionality objections both for the Law approving EGO 39/2017 and for the ordinance itself. These took into account several criticisms, generated mainly by the newly introduced provisions in the Law approving EGO 39/2017, regarding the status and the mandates of the members of the Plenum or of the Chairman of the Competition Council.

However, the CCR found in particular that the omission to request the opinion of the Economic and Social Council (ESC) upon the approval of EGO 39/2017 triggers the extrinsic unconstitutionality of this enactment. It was thus found that the scope of EGO 39/2017 falls within ESC's areas of expertise, concerning the protection of fair competition and consumer rights and therefore requires the approval of this authority as well.

Which provisions of the Competition Law are targeted ?

Almost three years ago, EGO 39/2017 introduced several amendments and completions to the Competition Law, which included:

Retailers' reporting obligation

Supermarkets, hypermarkets, discounters and cash & carry stores had the obligation to provide the Competition Council, upon its request, with the sale prices of their products, in order to perform assessments, market studies or price comparisons. Failure to comply with this obligation constituted a contravention and was sanctioned with a fine from 20,000 lei to 50,000 lei.

Obligations during forensic inspections

During dawn-raids, information which is electronically stored or archived may be copied in its entirety, seized on electronic devices and sealed. According to this obligation, the collection of information necessary for the investigation was to be carried out in the presence of the representative of the undertaking/association of undertakings, at the headquarters of the Competition Council, based on the order issued by the Competition Council Chairman and the judicial warrant.

Provisions on turnover calculation for fines applied in the case of economic concentrations

Infringements by a non-resident in the case of economic concentrations led to the turnover being replaced by the sum of the following revenues: (a) the turnover achieved by each of the undertakings registered in Romania, controlled by the offender; (b) the revenues obtained in Romania by each of the non-resident undertakings controlled by the offender; (c) own revenues, obtained in Romania by the offender and recorded in its individual financial statements.

The possibility for the Competition Council to issue recommendations for the amendment of legislation

Within the scope of its duties to follow implementation in the field of laws and other regulations related to the Competition Law, the Competition Council had the possibility to provide recommendations to the competent authorities concerning the amendment of legislation that has or can have an anticompetitive impact.

What will happen to these provisions now?

The provisions of EGO 39/2017, including the concerned provisions in the Competition Law, are currently suspended de jure, as of 23 July 2020, the publication date of the CCR decision.

The legal effects of these provisions may cease within 45 days as of the decision being published (6 September 2020) if the Parliament or the Government, as the case may be, do not correlate the unconstitutional provisions with the provisions of the Constitution in this timeframe.

Otherwise, pending the definition of a new regulatory framework for damage claims in competition infringement cases, we could expect a possible scenario in which these Competition Law provisions will eventually be reintroduced via another enactment. However, such amendment would lead to a legislative void that may affect the unfolding of forensic inspections, in the absence of the investigated party's representative or the specific obligation of companies to cooperate with the competition authority, by providing sales price information - lack of a correlative sanction may lead to the general sanctioning framework and fines of up to 1 % of the total turnover for the previous financial year.