Romanian government adopts law sanctioning speculative actions during times of crisis and regulating the abuse of superior bargaining position



In the context of a looming post-COVID-19 financial crisis, exacerbated by the Russian intervention in Ukraine, soaring energy and fuel prices, and rapidly rising inflation, the Romanian government has recently adopted Government Emergency Ordinance 84/2022 on combating speculative actions and amending and supplementing certain normative acts (the "GEO"). The GEO was published in the Official Gazette on 20 June 2022 and will enter into force fully in 30 days from publication.

The GEO amends Law no. 11/1991 on unfair competition (the "**Unfair Competition Law**") and introduces major changes to the legal framework of unfair competition rules in Romania. The GEO provides for, *inter alia*, sanctions for speculative actions taken in times of crisis and also introduces the concept of a superior bargaining position ("**SBP**"), the abuse of which constitutes an unfair competition practice.

Speculative actions falling under the GEO

In times of mobilisation of the armed forces, a state of war, siege, emergency or alert, and other times of crisis as specifically designated by the authorities, the government may issue a decision designating certain products or services as being under speculative risk and potentially affecting the proper functioning of the economy and well-being of consumers. Such government decisions are issued for a period of six months and may be extended for an additional three-month period, as long as the relevant circumstances persist.

With respect to such products or services, according to the GEO, the following constitute speculative actions:

The GEO further provides for a number of criteria to be considered when evaluating speculative actions, such as:

seasonal products or services, for similar periods during the last three years, without an objective justification for the price differences;

The competent authorities for evaluating and sanctioning speculative actions are the National Authority for Consumer Protection in cases where individuals are directly affected, and the Romanian Competition Council (" **RCC**") when speculative actions are directed against other undertakings. According to the GEO, both authorities are entitled to request any relevant information available to the tax authorities, with respect to undertakings active on Romanian territory.

Introducing the abuse of SBP

In addition to the general framework against speculative actions during times of crisis, the GEO amends local rules on unfair competition and in particular introduces the notion of SBP and regulates its abuse.

As we <u>wrote previously</u>, in the context of the public consultations with respect to the GEO, perhaps the most significant amendment to the Unfair Competition Law is the definition of an SBP and the regulation of its abuse. Before the GEO, it was only the abuse of a dominant position that was enforceable in Romania, with a dominant position presumed only above a 40% market share.

According to the GEO, for a company to be sanctioned it must (i) first, hold an SBP, (ii) abuse it, and (iii) the case itself must be of public interest, affecting the proper functioning of the market, in order for the RCC to investigate it.

Pursuant to the GEO, SBP *refers to the position of an undertaking that is not dominant according to Romanian Competition law, a position that is determined by market features, favouring the appearance of significant imbalances* that are generated by factors such as (i) the specific structure of the production or distribution chains, (ii) vulnerability towards external factors, (iii) perishability or seasonality, and the specific relation between this *undertaking and other undertakings active on different markets.* This relation is to be analysed based on the following cumulative criteria:

 goods and services for the activity of the other undertaking, or (iii) the existence of significant investments of the latter undertaking, made in view of honouring the agreed commercial relation; and

According to the GEO, the abuse of SBP qualifies as a prohibited act of unfair competition if it meets the following cumulative conditions:

The case must also be of "public interest" for the RCC to review it

Moreover, the GEO provides that the RCC will only analyse and sanction unfair competition practices, including an abuse of SBP, when **the case is of public interest** <u>affecting the proper functioning of the market</u>.

The RCC will evaluate to what extent a potential unfair competition practice affects public interest by considering the following criteria: (i) the high degree of social danger, (ii) the importance or dimension of the economic sector concerned, (iii) the number of undertakings involved in the practice, (iv) the number of affected undertakings and (v) the duration of the unfair competition practice. If it considers that none of the above criteria have been met, the RCC will communicate to the author of the complaint its decision not to intervene because of a lack of public interest, within 45 calendar days from receiving a complaint that is deemed complete.

•€€€€€€€€ Fines under the GEO

Pursuant to the GEO, any acts of unfair competition affecting the public interest, including the abuse of SBP, are sanctioned as follows:

§ this can be seen as a significant reduction in the level of fines compared to the approach in the GEO's draft, which provided for a fine up to 1% of the infringer's total turnover in the financial year before the sanctioning decision;

§ the fine thresholds above also apply to undertakings committing speculative actions during times of crisis, with respect to products or services specifically designated by government decision, as further detailed above.



Should an infringing party expressly acknowledge the breach within 30 calendar days (or seven calendar days with respect to speculative actions committed during times of crisis) of being presented with the RCC's conclusions on the case (following the authority's review of the matter), the competition authority may apply a 10%–20% reduction of the fine. The statute of limitation for applying the above fines is three years from the moment the breach is committed. In case of continued or repeated breaches, the statute of limitations will run from the last act of unfair competition.

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The GEO follows the practice of other countries around the globe and within the European Union regarding the regulation and sanctioning of the unlawful behaviour of companies with superior market power, which nonetheless falls below the standard of dominance under competition law. As such, sanctioning the abuse of SBP could be perceived as somewhere between the enforcement of competition law and the rules against unfair commercial practices. In our case, however, the GEO clearly distinguishes the abuse of SBP as unfair competition behaviour, but its scrutiny is entrusted to the RCC, which will likely use its experience in sanctioning abuse of dominance in the process.

With the forthcoming entry into force of the GEO before the end of July 2022, large companies (more likely to be seen as holding a SBP) should further integrate the particular rules on SBP in their internal compliance policies and culture. This is particularly relevant as in addition to relatively high fines from the RCC for abusing an SBP, being sanctioned could also trigger reputational damage and risks of follow-on damages litigation (with the GEO expressly providing that a final RCC sanctioning decision represents proof before the courts dealing with damages cases that unfair competition law practices were carried out).

Moreover, the GEO introduces a welcome legal framework for the fight against speculators during times of crisis, such as the current soaring energy prices, partially fuelled by Russia's intervention in Ukraine. This will require, however, the adoption of further rules by the government, and its practical consequences and extent of enforcement remain difficult to anticipate at this stage.

For more information contact **Iustinian Captariu**, Partner, at <u>iustinian.captariu@kinstellar.com</u>, **Catalin Graure**, Managing Associate, at <u>catalin.graure@kinstellar.com</u>, or **Cosmin Mitrica**, Junior Associate, at <u>cosmin.mitrica@kinstellar.com</u>.