

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

- an artificial increase in production costs, including labour, to hide an unjustifiable increase in the price of the final product or service;
- distributing products through a chain of more intermediaries than usual, without actually altering the product, in order to increase the price;
- limiting production or sales unjustifiably, which has the effect of stopping or significantly diminishing supplies to the internal market, in the absence of economic or other types of factors justifying such limitation;
- increasing stocks, during a certain period, compared to average stock levels in the last 12 months or, for 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 [wrote previously](#), 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:

- the existence of an imbalance of power due to elements such as market share or brand awareness;
- the importance of the commercial relationship for the proper functioning of the activities carried out by the other undertaking as a result of elements such as (i) the significant sales or acquisition rate of the undertaking holding a SBP in the activity of the other undertaking, (ii) the critical role of its

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

• the absence of an alternative equivalent solution for the other undertaking.

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

• the undertaking holding the SBP abuses its position towards another undertaking with which the infringer had or has commercial relations;

• such abuse is prone to cause the latter undertaking significant damage or to affect normal market competition; and

• the abusive behaviour consists in actions or inactions such as: (i) the unjustified refusal to supply or acquire goods or services, (ii) failure to comply with contractual clauses regarding payment, supply or acquisition, (iii) imposing unduly burdensome or discriminatory conditions considering the scope of the contract, or (iv) amending or terminating in an unjustified manner the commercial relation with the partner undertaking.

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** *affecting the proper functioning of the market*.

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:

• with a fine between RON 50,000 (approx. EUR 10,000) and RON 500,000 (approx. EUR 100,000) for acts committed by undertakings;

§ 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.

• with a fine between RON 5,500 (approx. EUR 1,100) and RON 11,000 (approx. EUR 2,200) for breaches by individuals.

