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**Draft law on actions for damages for infringements
of the competition law**



Draft law on actions for damages for infringements of the competition law

The Romanian Competition Council (the "RCC") released recently for public consultation a Draft law on actions for damages for infringements of the Competition Law (the "Draft law").

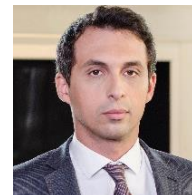
This initiative comes to complement the efficiency of deterrence framework against the anticompetitive practices and, at the same time, to ensure an effective instrument of full compensation for the affected parties by the anticompetitive deeds faster and at a lesser cost.

A major threat will come from RCC or Commission which have a broad range of discretion to determine the liability of the companies infringing the Competition law, which may be extended to the parent company and thus entitle a person who suffered a harm to claim damages from the parent company.

The Draft law acts as an additional enforcement tool that raises the financial stake of the undertakings active on the involved in anticompetitive practices and creates the necessary endorsement of private incentives for compensation.

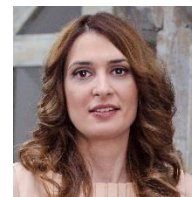
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Draft law on actions for damages for infringements of the competition law

Simplifying conditions to file an action for damages

As the infringement of the competition rules represents a tort ("faptă ilicită"), the claimant must consider the general civil requirements, by proving the illegal behaviour of the defendant, the harm, the guilt and the causal connection between the illegal behaviour of the defendant and the harm.

The Draft law will alleviate the plaintiff's burden of proof by:

- ◆ rendering binding the final decision of the competition agencies in connection with the infringement for the court where the claim was filed;
- ◆ the binding effect of the final decision of RCC and/or the European Commission will simplify the task of the plaintiff in follow-on private actions who will only have to focus on the estimation of harm;
- ◆ clarifying that an action for damages may be filed, irrespective of the existence of a sanctioning Decision by the RCC the European Commission;
- ◆ establishing a rebuttable presumption that victims suffered a damage caused by cartels, albeit claimant still have to produce evidence for the quantification of the actual harm;
- ◆ reducing the claim actions costs, the action for damages is stamp tax excepted.

Passing-on defence and legal standing for indirect purchasers

In accordance with the European principles, the defendant may invoke the

passing-on of the actual harm as a defence against a claim for damages; for example, a producer-defendant may successfully prove that the plaintiff-distributor passed on to the retailer a part of the increased price.

The passing-on provisions enables the standing of indirect victims of anticompetitive conducts who can obtain compensations for the actual harm passed on along the distribution channels, irrespective of their position in the distribution chain. Therefore, end consumers may claim compensation for the anti-competitive increased final price.

Single actions for damages

Any individual or company who suffered a damage from antitrust infringements may effectively exercise the right to claim full compensation for that harm from the respective undertaking or association, by filing a claim with the Bucharest Tribunal.

Collective actions for damages

The current competition legal framework provides for the collective redress, as action for damages may be introduced for the consumers by consumer protection associations, as well as by trade associations for their members affected by an anticompetitive practice.

Assessment of loss

According to the envisaged law, the claimant will receive full compensation



for the harm, including the actual loss, loss of profit, plus the payment of interest.

Economic experts and econometric reports should play an important role for the quantification of damages as usually the damages are determined by using a counterfactual scenario that envisages the market prices under normal competitive conditions. As the UK and German experience showed, the discussions can get a long way between economic experts, particularly on the choice of methodology, the robustness of the economic model and the validity of statistical datasets.

Liability under the competition law

Joint liability within private enforcement

The individual or company who suffered a harm from a Competition law infringement may recover the entire loss from every undertaking who took part in the infringement, who is jointly responsible for the harm caused.

However, a notable exemption regards the beneficiary of immunity who will be held jointly liable only for its direct and indirect customers and suppliers.

Parent company liability for its subsidiary

Albeit not yet applied under the national case law, the parental liability doctrine has a widespread application by the European Commission and by the European Competition Authorities in their endeavour to achieve a deterrent effect.

The principle of "parental liability" may have a significant impact for corporate groups since liability for any infringement of competition rules, by even the smallest member can extend right up to the overall parent company, making it liable to fines of up to 10% of worldwide consolidated group turnover and, possibly, private action damages.

Disclosure of evidences

The Draft law facilitates the access to the evidence and set up the legal framework that allows claimants to require the court to order other parties or even competition authorities to produce evidence. The courts will need to meet a proportionality criterion and to duly protect confidential information.

The access to the case file

The court may also order the disclosure of the evidences from a RCC investigation file only if the claimant was not able to obtain the evidences in a reasonable manner from other party or third party.

The envisaged disclosure policy will raise significant strategic issues during the investigation, as the involved parties will have to carefully balance the size of potential follow-up claims, while duly fulfilling the obligation to cooperate with the competition public body. Therefore, the documents retention policy should be cautiously designed and the safeguards of legal privilege should be extended, in order to mitigate the impact of potential claims.

The claim must be filed within 5 (five) years from the date when the infringement of Competition law has ceased and the claimant has known, or can reasonably be expected to have known the anticompetitive conduct and the infringer.

The limitation period is suspended during the investigation of the competition authority and the suspension shall end at the earliest one year after the final infringement decision.

When does the Draft law come into force?

If the current Draft law will be enacted with no major amendments, the dispositions thereof will come into force from December 27th, 2016. However, the dispositions that are not substantive or related to the burden of proof will be applicable to actions for damages filed with a court from December 26th, 2014.

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