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COVID-19 Legal Insights



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Legal implications of the export restrictions brought by the Military Ordinance No. 8/2020

By the Military Ordinance No. 8/2020, a series of restrictive measures were taken in the context of the coronavirus outbreak, among which most is the ban/suspension of exports from Romania of the types of agri-food products provided in Annex 2 (the “Agri-Food Products”).

The wording of Articles 7 and 8 of the Military Ordinance No. 8/2020 is relevant in this context:

- Throughout the duration of the state of emergency, the export of Agri-Food Products is banned/suspended;
- Ongoing export procedures of Agri-Food Products are suspended for the duration of the state of emergency;
- Intra-community acquisitions of Agri-Food Products may take place solely if the member state proves that the acquired products are destined for national consumption or the community consumption and not for export.

These restrictions became effective on the date the Military Ordinance No. 8/2020 was published in the Official Journal of Romania (*i.e.*, 10 April 2020).

We present below the reasonable legal interpretation following from the new regulation’s wording as regards: (i) what does “*export*” mean, and (ii) what does “*ban/suspension*” mean.

The General Directorate of Customs in Romania is in the process of issuing a methodology (in Romanian, „*circulară*”) applicable to all customs offices in Romania in the context of the Military Ordinance No. 8/2020.

Romanian traders affected by the new restrictions on exports of Agri-Food Products may already have orders they can no longer satisfy. These contracts are at risk and legal remedies should be analysed carefully, on a case-by-case basis.

Moreover, in the current context and taking into account the measures of ban/suspension of exports according to the Military Ordinance No. 8/2020, it is not excluded that, in the future, the authorities may take requisition measures in respect of Agri-Food Products.

Temporary ban/suspension of the export from Romania of Agri-Food Products, in the context of the Military Ordinance No. 8 of 9 April 2020

1. What does “export” mean?

1.1. Only community goods that are taken outside the customs territory of the Union are banned from export

The wording of the Military Ordinance No. 8/2020 may be read to mean that any crossing of the Romanian borders would constitute an “export” and, thus, be banned/suspended.

However, “exports” refer only to community goods that are taken outside the customs territory of the Union¹.

¹ The customs territory of the Community (European Union) comprises also of the territory of: Belgium, Bulgaria, the Czech Republic, Croatia, Denmark, except the Faroe Islands and Greenland, Germany, except the Island of Heligoland and the territory of Büsingen, Estonia, Ireland, Greece, Spain, except Ceuta and Melilla, France, except New Caledonia, Mayotte, Saint-Pierre and Miquelon, Wallis and Futuna Islands, French Polynesia and French Southern and Antarctic Territories, Italy, except the municipalities of Livigno and Campione d'Italia and the national waters of Lake Lugano which are between the bank and the political frontier of the area between Ponte Tresa and Porto Ceresio, Cyprus (pending a settlement to the Cyprus problem, the application of the Community 'acquis' is suspended in those areas in which the Government of the Republic of Cyprus does not exercise effective control), Latvia, Lithuania, Luxembourg, Hungary, Malta, the Netherlands in Europe, Austria, Poland, Portugal, Romania, Slovenia, the Slovak Republic, Finland, Sweden. The customs territory of the Community includes the territorial waters, the inland maritime waters and the airspace of the Member States, except for the territorial waters, the inland maritime waters and the airspace of those territories which are not part of the customs territory of the Community as listed above. The following territories, including their territorial waters, inland maritime waters and airspace, situated outside the territory of the Member States, shall also be considered to be part of the customs territory of the Community: the territory of the principality of Monaco; the territory of the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia, in Cyprus - https://ec.europa.eu/taxation_customs/glossary_en.

The Ministry of Agriculture and Rural Development of Romania issued clarifications in this respect, stating that:

- Intra-community trade shall be carried out in compliance with the current community regulations for the free movement of goods, together with an affidavit (statement on one's own responsibility) from the trading partner in the Member State (the model form of the declaration is included in the annex published on the site of the Ministry of Agriculture and Rural Development²), and
- Goods that are only transiting the Romanian territory are excluded from the provisions of the Military Ordinance No. 8/2020.

According to the Military Ordinance No. 8/2020, the intra-community acquisition of Agri-Food Products may only take place where the receiving Member State proves that the acquired products are designated for national or the community consumption only, and not for export. Therefore, in order not to limit the free movement of products within the Union, intra-community acquisitions continue to be permitted, but they are subject to restriction as regards the final use of the products.

Romania seems to be the first state in the European Union taking this type of measures. Russia, Ukraine, Kazakhstan, Vietnam, Serbia - none of which is a EU member - are reported to have introduced similar restrictions. Restrictions in other countries refer to medicines and medical equipment; recently, Germany lifted even such restrictions.

1.2. What does “export procedures” mean?

The Military Ordinance No. 8/2020 does not explain the meaning of “*ongoing export procedures*”, so that one can determine from which point of the procedure going further the export is “*suspended*”. In other words, one needs to establish the moment where an export procedure is deemed to begin:

- Upon the execution of a contract having as object goods subject to export?
- Upon obtaining the export documentation?
- Upon commencement of the export procedure with the relevant custom?

In a reasonable interpretation, an export procedure commences with the first act of the trading partner towards the competent customs office (such as lodging the customs declaration of export, presenting the goods for export or presenting the export licence). Up to that point in time, one can only discuss of the trading partner's intention to export.

2. What does “ban/suspension” of exports mean?

The wording of the Military Ordinance No. 8/2020 is unclear in determining the situation where an export is deemed banned, or where an export is deemed suspended. The Military Ordinance No. 8/2020 operates with these two terms as being different, hence the

² <https://www.madr.ro/comunicare/5947-precizari-privind-aplicarea-prevederilor-ordonantei-militare-nr-8-din-10-aprilie-2020.html>.

interpreter cannot take them to be synonymous. Both ban and suspension of exports are instituted only for the duration of the state of emergency; upon termination of the state of emergency, these restrictive measures will also cease, if no other restrictive measures are taken by the competent authorities at that time.

2.1 But when is an export “banned”?

No new export procedures will be initiated throughout the state of emergency.

Theoretically, contracts bearing on Agri-Food Products may still be concluded in this period, however we recommend specialized advice to ensure their legal and economic efficiency.

As for contracts concluded prior to the coming into force of Military Ordinance No. 8/2020, please refer to the following section herein.

2.2 And when is an export “suspended”?

In a reasonable interpretation, this second term used by the Military Ordinance No. 8/2020 refers to export procedures that have been initiated before the Military Ordinance No. 8/2020 (for example, where the loaded ships that deliver the goods are already within the premises of the customs under approval for export). In fact, this suspension is imposed to the relevant custom authorities that have competences in the field of export of Agri-Food Products: they are bound to suspend the export procedures and not to allow the traders to pass the customs office.

The suspension of such an export procedure should mean that, after the state of emergency ceases, the export procedure shall be continued from the stage it was previously left, if the trader persists in its export request. Paragraph (3) of Article 7 of the Military Ordinance No. 8/2020, providing that “*The procedures for the issuance of phytosanitary certificates for the export of agri-food products provided in annex 2 of this military ordinance are suspended throughout the duration of the state of emergency*”, also grounds this interpretation, as in the same way (albeit with a clearer wording) this provision is suspending the activity of a Romanian authority with competences in Agri-Food Products export.

2.3 In practice, what happens to export requests brought to the customs offices throughout the state of emergency?

Although the Military Ordinance No. 8/2020 was adopted and all customs offices are aware of the ban/suspension of exports, there are no clear procedures on how the authorities are supposed to proceed. As mentioned, the General Directorate of Customs in Romania is in the process of issuing a methodology (in Romanian, „*circulară*”) applicable to all customs offices in Romania in the context of the Military Ordinance No. 8/2020, and this methodology is expected shortly.

Even though at the date of this Legal Alert such methodology was not yet issued, one may argue:

- *As regards the export ban.* In case Agri-Food Products are transported towards customs offices starting with 10 April 2020, this will constitute a violation of the

provisions of the Military Ordinance No. 8/2020 and might result in fines, the carrier's obligation to return, ban of entry into customs facilities;

- *As regards the export suspension.* In case of procedures of export already initiated prior to the Military Ordinance No. 8/2020 (and which were not finalised yet), the customs offices shall inform the traders/transporters regarding the suspension of the export and ask them to leave the customs facilities with the goods that were intended for export.

What is the fate of contracts executed before the Military Ordinance No. 8 of 9 April 2020, in the context where the obligations can no longer be performed due to the ban/suspension of exports?

After determining the meaning and field of application of the ban, respectively suspension of exports from Romania of Agri-Food Products, a reasonable question arises: what happens to contracts that were executed *before* the Military Ordinance No. 8/2020?

Traders from Romania that are affected by the new restrictions on exports of Agri-Food Products may already have certain orders that can no longer be satisfied. The effects of the restriction depend on the law applicable to the contract affected by the export ban/suspension, which is determined on a case-by-case basis. In order to identify the law applicable to contract, the following are checked, in this order: (i) the convention of the parties (the contract), (ii) the European Union regulations (such as the Rome I Regulation³), (iii) the applicable international conventions (for those outside the European Union), (iv) the Romanian Civil code.

Under the Romanian Civil Code, the ban/suspension of exports through the Military Ordinance No. 8/2020 could constitute a force majeure event, a fortuitous case event, a hardship event, and might trigger the rules regarding contractual risks. Under Romanian law, the provisions of the Civil Code regarding the law applicable to contracts are applicable in matters that are not covered by European Union regulations, unless otherwise provided by international conventions or by special provisions.

3. Contracts executed *before* the Military Ordinance No. 8/2020 could be affected by force majeure?

The ban/suspension of exports has the potential to become serious enough for it to be considered, on a case-by-case basis, a force majeure event (*i.e.*, an external, *absolutely*

³ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

unpredictable, unpreventable and impossible to overcome type of event, which affects existing contracts).

A force majeure event can only be invoked for ongoing contracts. As such, if the parties conclude the contract at a time when the force majeure event was already known to the parties, or the existence of such an event had become imminent, it can be deemed that the unforeseeability condition is not met, which means that the event in question cannot be invoked as a force majeure with regards to that contract.

Moreover, given the specificities of the contractual obligation in the case at hand, namely that it concerns generic goods (such as foods, cereal, etc.), one can argue that the debtor cannot invoke the fortuitous impossibility to perform. That is because generic goods can be replaced by other, similar ones. However, this principle is not always incident in the case of mutually binding contracts (in Romanian, „*contracte sinalagmatice*”).

Therefore, we recommend a thorough analysis of contractual clauses in order to assess whether a certain measure taken by a public authority (such as ban/suspension of exports) is excluded or not from the applicability of rules concerning force majeure; this is because certain contracts (especially those subject to English law) define in detail what represents force majeure and which events are not subject to it (such as the so-called “*acts of the government*”).

4. Contracts executed before the Military Ordinance No. 8/2020 could be affected by fortuitous case (in Romanian, „caz fortuit”)?

The fortuitous case is an event that cannot be foreseen nor prevented by the one who would have been called to answer if the event had not occurred. Thus, the fortuitous case is characterised by *relative* unpredictability, invincibility and inevitability.

5. Contracts executed before the Military Ordinance No. 8/2020 could be affected by hardship (in Romanian, „impreviziune”)?

As a rule, if the performance of the contract becomes excessively burdensome due to an exceptional change in circumstances which would render grossly unfair the debtor’s obligation to perform, the contract may be altered (renegotiated) or even terminated. This applies even more so in the case of contracts that have as object generic, fungible goods or money payments. The debtor must try, within a reasonable timeframe and in good faith, to negotiate a reasonable and fair alteration of the contract.

Hardship consists of an event which makes contractual performance by a party unusually burdensome or futile, while force majeure is an event which prevents contractual performance, temporarily or permanently.

6. The rules regarding contractual risks could become applicable

As a general rule, in the absence of a stipulation to the contrary, as long as the good is not delivered, the risk of the contract remains with the debtor of the obligation, even if the property has been transferred to the acquirer. In the event of the fortuitous loss of the

good, the debtor of the obligation loses the right to consideration, and if he has received it, he is obliged to return it. However, the late creditor (in Romanian, „creditorul pus în întârziere”) takes the risk of the fortuitous loss of the good. He cannot be released even if he proves that the good would have been lost even if the delivery obligation had been performed in time.

7. Contracts executed under Incoterms 2010

In delivering goods in international trade, two critical points must be identified, respectively: (i) the point where the transfer of the risks from the seller/exporter to the buyer/importer takes place (“*at whose risk the goods are circulating?*”), and (ii) the point where the transfer of costs takes place from the seller/exporter to the buyer/importer (“*how does the distribution of costs occur?*”).

In addition, the classification of the delivery conditions for delimiting responsibilities and risks will be taken into account, as follows: (i) for any mode of transport: EXW, FCA, CPT, CIP, DAT, DAP, DDP, (ii) for maritime transport: FAS, FOB, CFR, CIF.

Future possible measures of requisition

In the current context and taking into account the measures of ban/suspension of exports according to the Military Ordinance No. 8/2020, one cannot exclude the possibility that the authorities might in the future resort to requisition in respect of Agri-Food Products.

Requisitions are generally governed by Law 132/1997 and by the Methodological Norms approved by Government Decision 219/2005. The presidential Decree issued on 16 March, which declared a national state of emergency, gives the authorities the power to order the requisition of certain assets.

Requisition is an exceptional measure consisting of a temporary transfer of use over certain assets, as ordered by the authorities. Requisition is dictated solely by the needs of the authority to obtain resources which are in its judgment necessary or appropriate in order to satisfy the public purpose defined in the law. Requisition should be distinguished from the confiscation of assets, which is generally a sanction for illegal conduct, and which is a final measure whereby the ownership is transferred to the state.

Consumable or perishable goods may be submitted to final requisitioning, subject to the payment of compensation.

dan.borbely@tuca.ro

raluca.chelaru@tuca.ro

Editors

COVID-19 Legal Insights is our response to the COVID-19 outbreak. We shall keep you informed on the various legal challenges posed by the coronavirus, thanks to a dedicated practice group comprising lawyers with different backgrounds, such as compliance/regulatory, corporate and commercial, insurance, labour and employment, litigation and arbitration, insolvency, public procurement, data privacy, tax and customs. In addition, our taskforce offers strategic advice on crisis-specific matters: corporate restructuring, review and (re)negotiation of agreements (including collective bargaining agreements and individual employment contracts), performance of the contracts which are affected by force majeure and hardship, unblocking pre-litigation relationships, etc. To keep abreast of developments, please feel free to regularly check our dedicated online resource: <http://www.tuca.ro/covid-19/>



Dan Borbely
Partner
+4 021 204 88 98
dan.borbely@tuca.ro



Raluca Chelaru
Senior Associate
+4 021 204 88 90
raluca.chelaru@tuca.ro

TUCA ZBARCEA ASOCIATII

Șos. Nicolae Titulescu nr. 4-8
America House, Aripa de Vest, et. 8
Sector 1, 011141, București, România
T + 4 021 204 88 90
F + 4 021 204 88 99
E office@tuca.ro
www.tuca.ro

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