

25 March 2020

COVID-19 Legal Insights



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1. **Litigation and court activity in the current economic and social context generated by COVID-19**

How are litigation and court activities affected by the current state of emergency?

The state of emergency generated by the outbreak of COVID -19, established in Romania by Decree No. 195/16 March 2020 of the President of Romania (the “Decree”), required for certain restrictive measures to be taken, including in relation to the activity of the courts.

In this context, the Superior Council of Magistracy - Judges Division (*Consiliul Superior al Magistraturii* - “CSM”) ordered, since before the entry into force of the Decree, a limitation of the courts’ activity and of trials, except for urgent cases.

By Decision No. 192/12 March 2020 of CSM - Judges Division, the courts were ordered to take urgent measures with a view to limiting the movement of all parties to judicial activities, and to that effect the following were considered:

- a) Trials between 13 March 2020 and 4 May 2020 shall be strictly limited to settlement of exceptional cases, namely cases where a postponement would prejudice the fundamental rights and freedoms or seriously jeopardize public order or citizen safety;
- b) Until 13 March 2020, each court reviewed internally the categories of cases (which are deemed urgent) to be tried during the above-mentioned period;
- c) In order to limit the movement of other categories of persons to the courthouses, the list of cases considered urgent was made public by display on the courts’ portal (www.portal.just.ro), on the websites of each court, and were notified to the bars and prosecutors’ offices;
- d) The recommendations set forth by Decision No. 191/10.03.2020 of the CSM - Judges Division seeking to avoid crowding within the premises and in the area where the courts are located, as well as to avoid movement of persons involved in judicial activities shall apply accordingly until 4 May 2020.

As a result of the coming into force of the Decree, the courts' activity has been suspended *de jure* while the state of emergency is active, except for urgent cases, in accordance with Article 42(6) and Article 43(2) of the Decree.

This shall lead, after the judicial activity *per se* is resumed, to the courts having to deal with a significant number of disputes, namely the already existing and postponed ones plus disputes that may be triggered by the existing circumstances.

In our opinion, such disputes may arise gradually (i) as soon as the state of emergency comes to an end, (ii) after an average period (up to one year after the state of emergency ceases) and (iii) after a longer period (more than one year after the state of emergency ceases).

Nevertheless, we cannot exclude the possibility for disputes to arise during the state of emergency as well.

1. Relevant laws adopted further to the state of emergency being declared

After the Decree was published in the Official Gazette No. 212/16.03.2020, multiple regulatory acts were passed, seeking to protect the environments affected by the evolution of the international epidemiological situation caused by the outbreak of SARS-CoV-2.

These acts include:

- a) Military Ordinance No. 1/17 March 2020 on certain high-emergency measures concerning gatherings of people and cross-border traffic of goods ("**Ordinance No. 1/2020**");
- b) Military Ordinance No. 2/21 March 2020 concerning measures to prevent the spread of COVID-19, published in the Official Gazette No. 232 of 21 March 2020 ("**Ordinance No. 2/2020**");
- c) Emergency Ordinance No. 30/18 March 2020 amending and supplementing certain regulatory acts, as well as imposing social welfare measures considering the epidemiologic situation determined by the outbreak of coronavirus SARS-CoV-2, published in the Official Gazette No. 231 of 21 March 2020 ("**GEO No. 30/2020**");
- d) Emergency Ordinance No. 29/2020 on fiscal measures, published in the Official Gazette No. 230 of 21 March 2020 ("**GEO No. 29/2020**").

Depending on the evolution of the situation that has led to the state of emergency, other regulatory acts could be adopted as well.

All these regulatory acts that have a special nature are supplemented by the other legal provisions in force, provided that the latter are not contrary to the special regulations.

2. Measures with immediate impact on the justice system

The measures with relevant and immediate impact on the justice system, and, implicitly, on litigation, include the following:

- a) While the state of emergency established under the Decree is in effect, prescription and forfeiture terms of any type shall not start, and if they have already started, they are suspended; the provisions of Article 2532(9) 2nd sentence of the Civil Code and any other legal provisions to the contrary are not applicable;
- b) While the state of emergency established under the Decree is in effect, the terms for appeal in the suspended cases (that were pending when the state of emergency was declared) are discontinued and new terms, of the same length, shall run as of the cessation of the state of emergency;
- c) After the cessation of the state of emergency, the suspended trials (that were pending when the state of emergency was declared) shall be resumed ex officio. Within 10 days from the cessation of the state of emergency, the courts of law shall take action to schedule the hearings and summon the parties.

Although these regulations are clear, it is possible for potential disputes to arise as regards the manner of calculation of the prescription or forfeiture terms, or as regards lodging appeals within the legal time-limit.

3. Possible areas that could be impacted

In the current factual and legal context and, inasmuch as no alternative methods are implemented for the amicable settlement of disputes, it is to be expected that new disputes will appear, for instance in the following areas:

- **Corporate/commercial contracts**

A hot topic of the day is, no doubt, *force majeure*. Țuca Zbârcea & Asociații's Legal Alert as of 19 March 2020 (link <http://www.tuca.ro/covid-19?lookin=CCM>) contained a description of the *force majeure* concept, as well as hypotheses where the COVID-19 epidemic could constitute a *force majeure* event, in the context of the restrictive measures imposed during this time.

Restrictive measures imposed as a result of the further spread of the epidemic, such as quarantine, closing national borders, suspending the activity of schools, restaurants, suspending retail activities in shopping malls, cultural and religious activities, traffic restrictions (such as, recently, those imposed by Ordinance No. 2/2020), etc., may meet the constitutive elements of *force majeure*.

A brief presentation of potential sources of diverging interpretations in terms of the evidence to be submitted in court, either in case of a pre-court situation, or in case of court proceedings, is relevant for the purposes of this analysis.

Thus, in those cases where the parties will fail to reach amicable settlement of the dispute arising between them due to a case of *force majeure*, practical issues may appear in proving the existence of the *force majeure* event, and whether that event identifies with the state of emergency, or, on contrary, that the event does not identify with the state of emergency; depending on the existing contractual terms, litigation may arise between the parties, be them individuals or legal entities.

- **Employment and social welfare**

GEO No. 30/2020 sets forth a set of social welfare measures in the context of the epidemiologic situation caused by COVID-19, among which: (i) the temporary layoff allowance in the context of the state of emergency generated by COVID-19, (ii) the conditions under which employers may be granted State support for paying the temporary layoff allowance, (iii) the fiscal regime of the temporary layoff allowance, (iv) the procedure to be followed by the employers.

Nonobservance of these legal provisions or implementation in breach of the regulations could bring about an abundance of disputes in the area of employment and social welfare.

Furthermore, nonobservance of the social welfare measures, of the obligation to implement the work from home / teleworking regimes, of the suspension of inspections conducted by local employment inspectorates, as provided by the Decree, may potentially result in future disputes in this field.

After the end of the state of emergency, when things get back to normal, there will likely be disputes generated by the current context, related to reorganizations, termination of positions, stages preceding insolvency or bankruptcy, with all the resulting consequences.

- **Administrative and tax disputes**

GEO No. 29/2020 provides for a set of fiscal measures meant to support individuals and professionals in overcoming the current situation. To this effect, the following legislative acts have been thereby amended so far: the Fiscal Code, the Fiscal Procedure Code and Emergency Ordinance No. 6/2019 on establishing certain fiscal facilities (“GEO No. 6/2019”).

Among these measures: (i) the prorogation of the due date for local taxes, (ii) incentives for taxpayers that apply the profit tax prepayment system, (iii) no late-payment interests or penalties to be calculated or owed for due and outstanding tax liabilities starting from the entry into force of GEO No. 29/2020, until the 30-day term from the end of the state of emergency has lapsed, (iv) legal enforcement measures are suspended or not started, except for legal enforcements applied for the recovery of debts to the State budget decided by court judgments ruled in criminal cases, (v) extending to 30 October 2020 the term for submission of the request for tax liabilities restructuring, and (vi) extending by 31 July 2020 the period for notifying the tax authority on the debtor’s intention to restructure tax liabilities.

The Decree sets forth the possibility to make direct purchases of materials, equipment and medicines. Basically, by derogation from the public procurement law, central public authorities and legal entities in which the State is a majority shareholder can directly purchase the materials and equipment required for fighting the COVID-19 epidemic.

The actual implementation and, subsequently, the case-by-case interpretation of such regulations and measures, any potential inconsistencies in the legislation and/or failures to observe the legal provisions in practice could result in administrative and tax disputes being filed in court, with direct impact in the field.

- **Competition**

During this period, one of the most sensitive sectors is competition, which is why competition regulations are not suspended during the fight against COVID-19.

The existence of cartels or the violation of other competition rules cannot be justified by any state of emergency or crisis. Under these circumstances, it is to be expected that, during the state of emergency as well, the Competition Council of Romania will be extremely vigilant and apply sanctions for violations of the law.

During the state of emergency, companies may take measures to survive the crisis generated by COVID-19 (for instance, work from home, limiting work with the public, limiting deliveries, online marketplaces that can apply certain limitations in case suppliers unreasonably increase prices, etc.), but their actions cannot restrict competition. This opinion has been publicly expressed by the regulator.

During this period, any of these activities, among others, should be avoided: (i) any discussions or agreements with competitors (directly or through joint ventures), (ii) coordinating prices through price algorithms, (iii) companies that have a dominant position on a certain market (*i.e.* those having a market share of over 40%) should avoid charging excessive prices, (iv) unfair practices (*e.g.* by denigrating a competitor).

For more details on these issues see Țuca Zbârcea & Asociații's Legal Alert of 18 March 2020 (link <http://www.tuca.ro/covid-19?lookin=CMP>).

Consequently, the current context may give rise to potential disputes in this area, whether as a result of the interpretations given to certain actions by the Competition Council, on the one hand, or, on the other hand, the business entities' interpretations of the law and their actions.

- **Other areas**

The areas that could similarly lead to disputes under the current circumstances, if the parties fail to reach an amicable settlement (where possible), include the following:

- a) **Disputes related to medical regulations** - considering the insufficient number of qualified health professionals, as well as the possibility to employ medical contractual professionals, auxiliary staff, pharmacists, laboratory staff and other categories of required contractual staff, without an exam, for a determined 6-month period;
- b) **Family law disputes** - as restrictions are imposed on private and family life during this period;
- c) **Disputes involving misdemeanours** - by the regulatory acts adopted in this period, measures were imposed the inobservance of which gives rise, *inter alia*, to liability for misdemeanours. To the extent that the implementation and applicability of these measures deviates from the letter and spirit of the regulation, disputes may arise or complaints may be submitted against the imposed penalties, as appropriate;

- d) **Criminal law** - the regulatory acts adopted in this period implemented measures the inobservance of which may give rise, *inter alia*, to criminal liability.

Last but not least, Romania requested activation of Article 15 of the European Convention on Human Rights (“ECHR”) which allows derogations from the applicability of the convention, considering the state of emergency generated by the COVID-19 epidemic. Therefore, the infringement of the ECHR in disputes referring to acts occurring while the state of emergency is in effect shall be interpreted in a restrictive fashion by the courts of law.

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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 be up to date with the news in these matters, you may access the resources available at the following link: <http://www.tuca.ro/covid-19/>



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