

23 March 2020

COVID-19 Legal Insights



In t his issue:

1. Relief in the performance of ongoing agreements

Government Emergency Ordinance No. 29/2020. Relief in the performance of ongoing agreements

This document contains a summary of the main provisions of Article X of Government Emergency Ordinance No. 29/2020 (“GEO No. 29/2020”) setting forth certain support measures in the performance of certain commercial agreements. GEO No. 29/2020 was published on 21 March 2020 and became effective on the same date.

1. Who are the beneficiaries?

The beneficiaries of the measures ordered under GEO No. 29/2020 are small and medium-sized enterprises (“SMEs”) (which enjoy the application of all support measures provided under Article X), members of the liberal professions, national sporting associations and sporting clubs (which enjoy only the deferment of utilities and rent payment).

The liberal professions envisaged by Article X are public notaries, lawyers, court bailiffs (which categories also have the obligation to ensure their activities continue), medical general practitioners’ clinics and dental practices in which no more than 20 persons conduct their activity in any fashion.

For the SMEs, the definition provided under Law No. 346/2004 applies, *i.e.* the enterprises which:

- a) Have an annual average number of employees lower than 250;
- b) Make a net annual turnover of up to EUR 50 million, in RON equivalent, or hold total assets not exceeding the RON equivalent of EUR 43 million, according to the latest approved financial statement. Total assets shall mean fixed assets plus current assets plus accrued expenses.

2. Deferment of payment for utilities and rent

Conditions for deferring payment are as follows:

- a) Beneficiaries should have fully or partly interrupted their activity based on decisions issued by public authorities;
- b) Deferment is granted throughout the state of emergency;
- c) Beneficiaries should hold a state of emergency certificate.

Utilities for which deferment of payment is granted are electricity, natural gas, water, telephone and Internet services. Deferment of rent payment is granted for the main office and for the secondary offices.

The term for which deferment of payment is granted is unclear. The current legislative solution creates the risk for the beneficiaries of the support measure to have to pay large amounts of money in the period immediately following the cessation of the state of emergency, which could be difficult from an economic standpoint.

3. The parties have the obligation to negotiate

The provisions of Article XI(2) of GEO No. 29/2020 require the parties to a contract where one of the parties is a SME to negotiate the adjustment of contractual clauses in consideration of the exceptional conditions generated by the state of emergency. The provision refers to agreements “other” than those concerning utilities and rent.

Negotiation must be real, and not just a formal process. Provisions included in the preamble of GEO No. 29/2020 indicate which might be the coordinates and objectives of such negotiation, i.e.:

- a) Contractual fairness;
- b) Willingness to adjust business relationships to the challenges and difficulties encountered by the entire nation;
- c) Production and consumption continuity;
- d) Exceptional measures must seek not to abandon contractual relationships, but to renegotiate and adjust to the harsh conditions.

Renegotiation may occur in any fashion, including by sending documents via electronic means.

4. Where renegotiation fails, force majeure may be claimed

According to Article X(2), force majeure against SMEs may only be claimed after having conducted negotiation. In order to be presumed force majeure, the circumstance must meet the following conditions:

- a) It is unforeseeable, absolutely insuperable and unavoidable, according to Article 1351(2) of the Civil Code;
- b) Arises out of an action of the authorities in enforcing the measures required to prevent and fight the Covid-19 pandemic;

- c) It has affected the activity of the ordinance's beneficiary;
- d) The fact that the activity has been affected is attested by a state of emergency certificate.

The presumption is relative and may be overturned by the party concerned by any means of evidence.

The unforeseeable nature is assessed by reference to the moment when the affected legal relationship has begun. The measures taken by the authorities in accordance with the legislative act which instituted the state of emergency shall not be deemed unforeseeable.

5. Is Article X a more restrictive regulation compared to the Civil Code in matters of force majeure?

The above-summarized regulation poses several problems which could complicate the legal situation of SMEs interested in claiming force majeure, amongst which:

- a) Article X refers only to force majeure, and not to also to unforeseeable circumstances (“**caz fortuit**” in Romanian), which may also represent a cause for exemption from liability, suspension or termination of the agreement;
- b) The regulation is meant to improve the legal situation of the beneficiaries. Consequently, it could be argued that, where the Civil Code or the parties' agreement contains provisions more favourable to SMEs, then these provisions would apply, in principle;
- c) The distinction between the event of force majeure and the consequences thereof (which may extend in time for a long time subsequent to the cessation of the force majeure case) is not clear;
- d) The adoption of certain measures by the Romanian authorities may only represent one particular case of force majeure or unforeseeable circumstances among others. In certain cases, force majeure may arise from the very occurrence of the Covid-19 epidemic or pandemic, from the blocking of the commercial supply chain or administrative measures adopted by other states.

6. Exemption from payment of penalties

Penalties for delay in performance arising out of the agreements concluded by SMEs with public authorities shall not be due throughout the existence of the state of emergency.

cornel.popa@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/>



Cornel Popa
Partner
+4 021 204 88 94
cornel.popa@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

This material is for reference only. It does not seek to provide legal advice, which may be requested according to each specific legal issue and may not be relied upon for any purposes whatsoever. For details and clarifications on any of the topics dealt in this Legal Bulletin, please do not hesitate to contact the attorneys indicated hereinabove.