

Banking Alert

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Increased sanctions for consumer protection breaches – draft of the National Authority for Consumer Protection. Impact on the financial services industry

Sanctions with fines calculated as percentages of turnover are provided by the draft of an emergency ordinance, recently published by the National Authority for Consumer Protection. Some of the proposed changes also have an impact in the financial services sector.



Increased sanctions for consumer protection breaches – draft of the National Authority for Consumer Protection. Impact on the financial services industry

Main amendments

The main proposed amendments with direct impact on the financial services' sector concern:

1. the significantly more severe sanctioning regime of certain misdemeanours in the consumer protection area, such as:

- (i) the inclusion of abusive clauses in an agreement concluded between a professional and a consumer shall be sanctioned with a fine of up to 5% from the professional's turnover. In the current regulation the fine varies between RON 200 and RON 1,000.

A possible interpretation is that the fine might be applicable per breach (i.e., for each agreement concluded with consumers which contains an abusive clause).

Furthermore, it will be expressly provided that, if a court of law determines that there are abusive clauses in an agreement concluded with a consumer, it shall oblige the professional to repay in full to the consumers the amounts collected by effect of such abusive clauses. At the time, based on the availability principle, a court of law may rule on the restitution of the amounts only within the limits of the consumer's claim who is a claimant.

- (ii) a fine of up to 3% from the trader's turnover shall be applied if a trader engages in:
 - unfair commercial practices;
 - commercial practices which are likely to materially distort the economic behaviour of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee;
 - aggressive commercial practices.

Also, a fine of up to 4% from the trader's turnover shall be applied if a trader engages in misleading commercial practice.

Under laws currently in force, engaging in actions as described under item (ii) is sanctioned with a fine between RON 2,000 and RON 100,000.

- (iii) a fine of up to 3% from the payment services provider's turnover shall be applied if certain obligations are not complied with, such as:
 - the pre-contractual information obligation in respect to the commissions pertaining to a payment account, as well as any other obligation information in relation thereof;
 - the payment services provider's obligation to pay back to the consumer any amounts collected from him/her following of a breach of the payment services provider's obligations under Law no. 258/2017.

Under laws currently in force, the applicable fine varies between RON 10,000 and RON 50,000.

(iv) a fine of up to 3% from the financial services provider's turnover shall be applied in case certain general undertakings or interdictions of general nature imposed under GO no. 21/1992 are not complied with, such as:

- the pre-contractual information obligations;
- the obligation to comply with certain mandatory deadlines provided by the law in respect to the relation with the consumer.

The sanction described under item (iv) shall apply to the extent there is no other sanction provided in a special piece of legislation regulating the financial services' area in the consumer protection field. Therefore, in respect to the credit agreements or the payment services pertaining to a payment account, the sanctions imposed by the special laws shall apply.

(v) a fine of up to 4% from the credit institution's turnover may be applied if, *inter alia*, the following obligations are not complied with:

- the obligation to not discriminate the EU residents, on nationality or residence grounds, when requesting or accessing a base payment account;
- the obligation to ensure that EU residents consumers, as well as the consumers without a stable address, asylum applicants and consumers who, based on legal or factual grounds, cannot be expelled, may open and use a payment account with base services;
- the obligation to grant certain facilities to vulnerable consumers.

Under laws currently in force, the applicable fine varies between RON 10,000 and RON 50,000.

2. Establishing a waiver unfavourable to the offender from the general applicable rules, respectively for any fines applied for committing any misdemeanours regulated under EGO no. 50/2010 and EGO no. 52/2016, the offenders will no longer have the option to pay half of the minimum amount of the fine provided by law, within a term of 15 days as of the moment when the sanctioning minutes was handed-over or communicated.

Laws envisaged to be amended

- the Law no. 193/2000 on abusive clauses in the agreements concluded between professionists and consumers;
- the GO no. 21/1992 on consumer protection;
- the Law no. 363/2007 on unfair business-to-consumer commercial practices and the harmonization of the legislation with the European consumer protection legislation;
- the Law no. 258/2017 on the comparability of the commissions pertaining to a payment account, the change of a payment account and the access to the payment accounts with base services;
- EGO no. 50/2010 on credit agreements concluded with consumers; and
- EGO no.52/2016 on credit agreements for consumers relating to immovable property and on the amendment of the EGO no. 50/2010 on credit agreements for consumers.

Legislative procedure. What's next?

The Draft Emergency Government Ordinance is under public debate until the date of 25 January 2019, and afterwards, it shall be transmitted to the General Secretariat of the Government to obtain, *inter alia*, the opportunity notice regarding the government emergency ordinance procedure, from the Parliament Relations' Department, notice which is valid for a term of 20 calendar days as of its issuance.

Upon obtaining all notices the Draft Emergency Government Ordinance shall be registered on the Government's meeting working agenda.

Entry into force and applicability in time

In accordance with the general provisions applicable in the misdemeanours' field, the new provisions sanctioning misdemeanours enter into force within 30 days from the publication in the Official Gazette or, in any case, within a term which cannot be shorter than 10 days from the publication in the Official Gazette, to the extent such a derogation would be expressly provided in the Draft Emergency Government Ordinance. No derogation is provided in the form currently available of the Draft Emergency Government Ordinance.

In consideration of the aspects regulated under the Draft Emergency Government Ordinance, the provisions of Article 15, paragraph (2) of the Romanian Constitution ("*The law produces effects only for the future, except for the criminal and misdemeanours' law that is more favourable*") and of Article 12, paragraph (2), final thesis, of Government Ordinance no. 2/2001 on the legal regime of misdemeanours ("*In case the new piece of legislation provides for a more severe sanction, the misdemeanour committed prior to the entry into force of such new piece of legislation shall be sanctioned in accordance with the legal provisions in force at the time when the misdemeanour was committed.*") become applicable, and, therefore, these sanctions shall apply in respect to the misdemeanours committed after the entry into force of the Draft Emergency Government Ordinance.

For further questions regarding the aspects mentioned in this alert, please do not hesitate to contact us



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