

8 April 2019

**To: Mrs. Viorica Dăncilă,  
Prime Minister of Romania**

**Mr. Nicolae Bădălău  
Minister of the Economy**

**Mr. Ștefan Oprea  
Minister for the Business Environment, Trade and Entrepreneurship**

**Mr. Marius Pîrvu  
President of the National Consumer Protection Authority**

**Mr. Bogdan Chirițoiu  
President, Competition Council**

**Mrs. Elżbieta Bienkowska  
Commissioner for the Internal Market, Industry, Entrepreneurship and SMEs  
European Commission**

**Mr. Johannes Laitenberger  
Director-General of Directorate-General Competition European Commission**

**Subject: Administrative practice and other actions of the National Consumer Protection Authority (ANPC) in connection with product labelling in Romania**

Dear Prime Minister,

Dear Sirs,

Considering that Romania is currently faced with a lack of a clear legislative framework, and in particular with a lack of consistent practice aligned to the European labeling laws that would support the same understanding by all market players of the regulations concerning adequate information of consumers about the products they acquire, we hereby submit this letter to the Romanian authorities listed above, asking them to tackle this problem through coordinated actions, as set out in our submissions below.

We are also submitting this letter to representatives of the European Commission, to inform them about the current situation in Romania, as well as the legislative measures that, in our opinion, must be taken to rectify it.

We have reviewed the administrative practice and the recent actions of the National Consumer Protection Authority (“ANPC”) on the Romanian market as regards labeling of products sold in Romania, and we have found that the interpretations made by ANPC over the last few years on this issue may be characterized in most cases as inconsistent, both from one period to another, as well as from one region to

another. Local ANPC inspectors have taken different stances in terms of application of both the authority's inspection procedure, as well as the relevant provisions of the law. We believe that such inconsistent oversight and inspection actions taken by ANPC through its local bodies is due, most of the time, to contradictory interpretations of the applicable legislation being given by different ANPC offices which vary from other region to another, and which manifestly results in application of equally contradictory and legally inconsistent penalties and measures. This situation is generated, *inter alia*, on the one hand, by the obsolete and inconsistent legislative framework, and, on the other hand, by the rigid and conservative approach adopted by ANPC in the application of consumer protection legislation, as we will set out below.

As a result, we hereby bring to your attention the urgent need to make amendments to the currently applicable consumer protection legislative framework, in particular to the requirements concerning labeling of products offered to consumers, in order to introduce specific, consistent and clear regulations on this issue, which are also in line with the regulations applicable across the European Union. We also believe it is important to put in place a legal and administrative framework that would enable *a priori*, but particularly *a posteriori* control over the actions taken by the representatives and inspectors of ANPC who disregard the applicable legal provisions, and/or abuse their powers.

In consideration of the above, we respectfully ask you to take action as soon as possible, and coordinate the work of the appropriate authorities with a view to ensuring:

1. ***Amendment of the applicable consumer protection legislative provisions so that a consistent, clear and predictable legal framework can be put in place, which also takes into consideration the items of legislation applicable at European level and which are also binding on Romania as a Member State of the European Union.*** It is important that these rules should be consistently construed and applied both by business undertakings, in the pursuit of their business on the Romanian market, as well as by the inspection bodies of the appropriate authority at central and regional level.

Bearing in mind the deficiencies of the legislative framework on consumer protection, at the initiative of industry operators, in 2017, a task force was established within the Ministry of Business Environment to update and modernize retail legislation. This initiative also involved, participation by the relevant authorities, such as *the Ministry of the Economy, the Competition Council, the National Fiscal Administration Agency, ANPC*, etc.

In addition to the request made above to take the necessary steps to have consumer protection legal provisions applicable in Romania amended, we ***respectfully ask you to commence any procedure you might find appropriate so that the work of this task force established within the Ministry of the Business Environment, Trade and Entrepreneurship can be resumed***, and thus continued cooperation can be ensured between relevant industries, on one hand, and the authorities involved in application of the relevant

legislative framework, on the other. The ultimate goal should be to put place a legislative framework which is clear, coherent, fair, consistently applied and aligned with EU laws.

2. ***Institution of a legal and administrative legal framework that would enable effective a priori, but particularly a posteriori control over actions taken by representatives and inspectors of ANPC in the field***, so that these actions will be taken in full compliance with the applicable legal provisions, as well as in a consistent and comprehensive manner both during the time when these provisions are in effect, and across the whole country.

**2.1.** Consequently, we suggest that ***consideration should be given to adoption under an Order of the President of ANPC/Order of the Minister of Economy (or any other legal instrument considered appropriate) of formal rules/instructions for interpretation of the applicable consumer protection legal provisions.*** Of course, such rules / instructions should be **legally substantiated, clear, time-bound, transparent and consistently applied by all ANPC inspectors** to all business undertakings which are in the same given situation. Furthermore, these should be adopted in observance of the legal requirements on transparency and consultation of the operators of the relevant industries on the subject-matter of the relevant instrument.

**2.2.** Similarly, consideration should also be given to **revision** and **monitoring** of the inspection and penalty procedures, as well as to the way in which ANPC commissioners **order** complementary measures.

We suggest that the measures to achieve this could include: the issuing, in all instances when penalties are applied and complementary measures are ordered which affect the interests of both retailers and producers, as well as of Romanian consumers (because currently, measures are often unreasonably ordered and in disregard of the principle of proportionality between the severity of the infringement, the (potential) loss caused to consumers, and the effects caused by the measures applied), of written reports and/or other documents under which the ANPC inspectors should be required to describe in detail the infringement found, as well as to base the penalties applied and the measure ordered on each individual case, in consideration of all relevant elements *de facto* and *de jure*. Furthermore, the ANPC inspectors should be strictly prohibited from ordering coercive measures exclusively based on verbal indications, and the applicable procedural provisions should be observed. The Report finding the infringement and applying penalties should consequently expressly indicate the legal provisions infringed (meaning the grounds under the law). Furthermore, any oversight and inspection action, including in terms of the issuing of the Report finding the infringement and the application of penalties, should be carried out with due consideration given to the principle of the primacy of European Union law over domestic law, as well as existing European and domestic caselaw in connection with the objectives of inspection actions, including in terms of the means of product labeling. With the aim of ensuring a legal and administrative framework that is able to support attainment of the

purposes listed above, express legal provisions should be issued to ensure the financial and disciplinary liability of commissioners that take measures that are later invalidated through court proceedings, proportional with and by reference to the offense.

***2.3. In addition to the above, we believe that there is a need for a legal framework to support monitoring of requests filed to ANPC by business undertakings so that businesses can be provided with specialized advice on consumer protection issues, in particular on the replies of ANPC, with a view to improving dialogue between the authority and business undertakings.***

We believe that, despite the repeated requests being made by a number of business undertakings, ANPC often implicitly avoids providing such advice and guidance to business undertakings, when these ask ANPC for clarifications, by writing ambiguous replies, issuing circulars (sending a reply which is itself unclear to a request for clarification) or sending negative replies without providing any explanations or reliable legal substantiations.

As we have already underlined above, the current legislative framework is strewn with ambiguities and contradictions, as the business environment has repeatedly reported, and the relevant courts have confirmed. The absence of a clear legislative base, that is understood as such by all market players, is liable to have an adverse impact on the Romanian retail sector, and cause major negative consequences on the operation of the food and non-food retail sectors, producers, retailers, as well as consumers, and eventually the state – with a significant drop in sales as another potential consequence.

Moreover, recently the additional requirements and restrictions imposed under the penalty proposals issued by the regional inspectors of ANPC, which are usually confirmed by the central body of ANPC without any additional reviews or without any requests for additional information and/or documents from the business undertakings concerned, combined with an unclear and even distorted legislative framework, have deepened the confusion and uncertainty as to a correct and consistent interpretation of the product labeling legislation. This uncertainty also manifests itself with respect to those categories of products which enjoy special regulations at European level (*for instance, food products, cosmetics, and detergents*). A number of producers have been forced to make repeated changes of labels (even during the same year), in the absence of any relevant amendments of the applicable legislative framework in this respect, but instead in response to the dynamics and the emergence of new approaches adopted by the ANPC inspectors, claiming that these are necessary to align with the practice of ANPC, even though the interpretations given by the ANPC inspectors at regional and central level depart from the applicable legal provisions, and often result into application of measures and penalties in disregard of the provisions of European laws which are binding on Romania as a Member State of the European Union. Furthermore, not only producers, but also retailers have been forced to take ad-hoc, temporary measures, such as covering the labels found to be non-compliant by representatives of ANPC precisely so as not to deprive consumers of the possibility to acquire products of their choice from stores. Of course, such actions have affected and continue to materially affect the retail sector and, in turn, Romanian consumers. In this

respect, due to the measures ANPC has recently taken, whereby a number of food and non-food products were withdrawn from shelves, consumers could no longer buy products which used to be part of their daily shopping basket. This also causes losses to producers, especially since the products concerned are food products with a short validity term or are perishable goods.

In the Appendix, we speak extensively about some of the additional requirements and restrictions, as well as about the proposals for harsher penalties which have been made by ANPC, and in particular ANPC's requirement that all claims on labels are translated into Romanian on the face label of the product, regardless of whether this is actually required under European legislation. This practice results from an incorrect interpretation and application of the general consumer protection provisions, and a lack of attention to these general provisions in connection with the special legal provisions adopted at European level for specific product categories. This requirement affects most products, and causes serious damage to producers, retailers, consumers, and eventually the Romanian State which may no longer tax the products removed from the market.

Considering the arguments listed above, we reiterate our requests in items 1. – 2. above made to the Romanian authorities indicated and we emphasise the need for urgent interventions and actions to coordinate the work of these authorities to ensure consistency and coherence with European Union law.

Yours sincerely,

Ramona Jurubiță

Coordinator

Coalition for the Development of Romania



## Appendix

### Additional requirements and restrictions set by ANPC

#### and the problems they cause

Here are some examples of the restrictions that ANPC has recently imposed:

- The prohibition to use the word “free” (“*gratis*” in Romanian) – ANPC asked producers to use wordings such as “1+1”. The word “free” was eventually accepted by ANPC, but nevertheless, certain inspectors across the country still continue to give their own personal interpretation on the use of this word, which goes beyond the applicable legislative framework.
- “Mega Pack”, “Family Pack”, “Giga Pack”, “XL” – all of these designations (used to suggest to consumers that the package contains more items/units) were successively found misleading for consumers, as they are not translated into the Romanian language, so that, for the time being, the text agreed by ANPC to inform consumers of a larger quantities of good(s) in a package remains unknown.
- Claims such as “number 1 in ...”, “The best ...”, “Product of year...”, etc. are rejected *de facto*, and any use thereof is penalized by ANPC contrary to the European caselaw<sup>1</sup>, and even in the absence of any possibility given to producers to support the accuracy of such claims with objective elements (for instance market surveys, competitions won, etc.). In fact, in practice, there are instances where expert reports produced by established analysis and surveying companies are submitted, but ANPC rejects them arguing, without taking any other steps, that these are ordered and paid for by the producers and, consequently, biased.

The above clearly raises an important question mark as to the interpretation given to, and application of domestic consumer protection legislation, in the content of European regulations on unfair commercial practices.

Thus, while some domestic items of law (such as Government Ordinance no. 21/1992 or Government Ordinance no. 99/2000) neither implement, nor have any connection whatsoever with European consumer protection regulations or recommendations, these restrictions should be looked into in the context of these regulations. Specifically, Law no. 363/2007 on combating unfair practices by enterprises in relation to consumers, and harmonizing the regulations with European consumer protection legislation

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<sup>1</sup> In Case C-435/11 CHS Tour Service GmbH/Team4 Travel GmbH), the CJEU stated that “*the misleading nature of a commercial practice derives solely from the fact that it is untruthful inasmuch as it contains false information or that, generally, it is likely to deceive the average consumer in relation to, inter alia, the nature or main characteristics of a product or a service and that, therefore, it is likely to cause that consumer to take a transactional decision that he would not have taken if there had been no such practice. When those features are to be found, the practice is to “be regarded” as misleading and, therefore, unfair pursuant to Article 5(4) of that directive, and it must be prohibited in accordance with Article 5(1).*”

(which transposes the European Directive on unfair commercial practices) lists the cases when a commercial practice may be qualified as unfair, as well as the cases which will be qualified unfair practices *de plano*. Item 20 of Annex no. 1 to the relevant Law states: “*description of a product as “gratis”, “without charge” or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item*”. In fact, there is nothing preventing retailers to use the word “gratis” in the promotional campaigns they run insofar as the relevant message is accurate (it is clear for the consumer that, if they buy a product, they will receive one for free), and the price of the product acquired has not been increased by the price of the product offered for free.

Considering the above, the fact that ANPC qualifies these practices as infringements of consumer protection legislation goes against the provisions of the aforementioned directive.

**In addition, we have submitted for your attention a requirement from ANPC that all claims on labels are translated into Romanian on the face label of the product.**

This requirement affects most products, is over-burdensome, and contrary to the spirit of the applicable European legislation. Regulation (EU) no. 1169/2011 on the provision of food information to consumers (“Regulation no. 1169/2011”) sets out the mandatory food information to be written on labels, as well as the language labeling requirements according to which the mandatory information needs to appear in a language easily understood by the consumers of the Member States where a food is marketed.

It clearly follows that the European Union-wide harmonized food framework instituted under Regulation no. 1169/2011 does not set such strict regulations on translation of all the information on product labels into Romanian, so that any interpretation to the contrary given by ANPC to the language requirements determined at European level is excessively strict and amounts to an infringement of the principle of primacy of European law over domestic law.

Thus, in consideration of the observance of the principle of the primacy of European law, and in order to ensure rationality and consistency in the application of European legislation, ANPC may only derogate at national level in the instances and subject to the conditions expressly regulated under European law.

We believe that interpretation and application by ANPC of European food labeling regulations are excessive, given the position expressed by ANPC, the penalties applicable for failure to translate all the information into Romanian, as well as the draft Emergency Ordinance which severely increases the penalties for violations of consumer protection legislation, including in terms of product labeling.

For instance, both Government Emergency Ordinance no. 97/2001 regulating production, movement and sale of food products, and Government Decision no. 106/2002 approving the Application Rules on labeling of food products, institute the requirement that food products should be labelled in the

Romanian language (although not exclusively)<sup>2</sup>. Nevertheless, the aforementioned requirement is set out only for food products, and, in any case, should be construed by ANPC in accordance with the European provisions applicable to the issue (which take precedence over the provisions of domestic law), without requiring withdrawal from shelves of products which also feature specific and non-mandatory descriptions in other languages.

We believe that this position that ANPC has repeatedly and publicly expressed, including in the debate held by ANPC on 5 February 2019 (concerning the aforementioned draft Emergency Ordinance) – contradicts Regulation no. 1169/2011. There is no express regulation that requires translation of all information from English into Romanian exclusively on the face label of the products, yet this requirement affects the entire retail sector. We detail below the issues that result from such an interpretation:

(i) **the lack of legal grounds for such a requirement:**

ANPC supports this interpretation, despite **the absence of any legal provisions requiring** the use of the Romanian language on the face of a package. Additionally, this requirement concerns only the labeling of food products, and not non-food ones. ANPC relies on art. 20 para. (5) of Ordinance no. 21/1992 on consumer protection, but this applies as a general rule a) only read in connection with art. 20 para. (1) that explains the mandatory information which must appear on product labels, and b) only in the absence of specific rules applicable to the categories of products subject to control. Additionally, from our information, **ANPC has confirmed in the past that only the mandatory information set out in art. 20 para (1) needed to be translated into Romanian, and not necessarily on the face of the package**, but wherever on the package the producer decided.

(ii) **the specific regulations existing in the European Union:**

Lots of products are regulated at EU level under specific regulations, including labeling rules that list the items that must appear on product labels (including food products, under Regulation no. 1169/2011 - see the section above). Any other claims included on the package are optional, and need not be translated into the languages of the countries where such products are sold. From our information, there are **written confirmations issued in this respect by ANPC** before mid 2018. As a result, we may state that **the imposition of additional rules is liable to restrict the free movement of goods within the EU.**

Consequently, we believe that regulation of products at EU level has been put in place precisely to allow products to move freely across the EU space, and not to impose a number of additional

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<sup>2</sup> Article 29 of the Government Emergency Ordinance no. 97/2001 states as follows: *“The information on food products’ labels must be written in the Romanian language, irrespective of the producing country, without exclusion of its presentation in other languages. It must be visible, legible and printed in a manner that makes it indelible”.*

obligations on producers, which, by default, mean additional efforts and costs generated in each Member State, and which may amount to genuine trade obstacles on the single European market.

Such guidance on the application of the Treaty on the Functioning of the European Union in terms of the free movement of goods is available at European level (Ref. Ares(2013)3759436 - 18/12/2013): thus, the obligation to use the national language on the labels of consumer goods should not affect the free movement of such goods, and should be limited to providing the mandatory information laid down under the law. (Consequently, not all information on packages should be translated into the national language). The guidance also sets out that the principle of proportionality should be observed, and also allows the possibility for the information to be provided to consumers in other ways (drawings, symbols, icons).

Furthermore, Ordinance no. 21/1992 on consumer protection does not implement any piece of European law, and contains general provisions, some of which have become obsolete in relation to current practices. Moreover, as we have already pointed out above, many products are regulated under specific legislation which sets particular consumer information requirements, including whether the information should be in the Romanian language (for instance, for radio equipment).

(iii) **the serious harm caused to competition:**

This approach by ANPC materially affects small and large importers which bring to the Romanian market products from within or outside the EU and which, given the additional retail costs incurred for such a change of label, or for application of provisional labels, etc. may be forced to decide to close their businesses in Romania. Furthermore, the producers of food, even perishable, products are particularly affected as they are forced to effectively dispose of their stocks of products with a shelf life not long enough to allow a potential label adaptation and replacement on shelves.

Additionally, the inclusion of the Romanian language on the face of the package is a disadvantage for goods intended for other countries, and the export of goods from Romania to other countries will be significantly reduced or even stopped completely; thus, the principle of the free movement of goods within the EU is infringed again.

(iv) **the serious harm caused to the interests of consumers:**

Given the ANPC practice on the topic of labeling in Romanian, a wide range of products has already been withdrawn from sale in Romanian. Consequently, consumers may no longer enjoy some of their products of choice.

Moreover, discussions are currently in progress at European level about the double standards applied to products in Eastern Europe compared to Western Europe. But, when producers are forced to translate all the elements on the face of packages into Romanian, irrespective of whether or not this is mandatory, a clear difference will occur between the labels of these products sold in Romania and those of the products in Western Europe. Hence Romanian consumers will be unable

to understand that this is the same good or make comparisons between the price and the quality of it anymore.

However, without application of the prevention law, in the absence of an express legal regulation, as well as before ANPC had made public these labeling requirements, the authorities started many actions focused on specific sectors and mass inspections, following which fines were applied and/or hundreds of products disappeared from shelves. ANPC has failed to assess the potential impact of such measures on either the retailers subject to sector based inspections, or the producers which are directly affected and harmed, or on the consumers whose choices of food or non-food products are limited without any justification or legal basis.

Whether such claims really mislead consumers is at least questionable, considering that the practice of ANPC has been inconsistent over time and some products had been checked by ANPC before and not found non-compliant. Moreover ANPC has confirmed in writing that the manner in which the products were labeled was lawful (*i.e.* without translation into Romanian of the optional texts).

Furthermore, ANPC inspectors, when they issue penalty reports, fail to indicate in them the specific articles of law infringed, but only make a general reference to an infringement of the legal provisions. This makes it virtually impossible to challenge these in court.

We welcome the initiative set out in the public debate organized by ANPC on 5 February 2019, when the President of ANPC expressed ANPC's availability to review the labels to be launched on the Romanian market, but this measure is insufficient to solve this major retail crisis because:

- Such an approach may cause problems in connection with violation of Romanian competition law. Competition is seriously harmed when each business undertaking is required to obtain an additional and separate approval for its own products, in the absence of clear and transparent legal rules in this respect that are applicable to all business undertakings. Thus, while some undertakings may obtain these approvals, others may be disadvantaged due to a subjective interpretation by ANPC. Likewise, some approvals may be issued very quickly, while others may take longer, which virtually amounts to a restriction on placement of a product on the Romanian market.
- ANPC is short of both staff and time, and simply cannot review all products placed on the market every year. Consequently some business undertakings will be given priority on the basis of subjective criteria, and the competition rules are again infringed.
- The measure proposed by the President of ANPC entails amendment of the current legislative framework by introducing a new stage in placement of new products on the market. As a result, due to time considerations, we believe that amendment and clarification of the legislative provisions in effect, as requested hereunder, should be top priorities.