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**Opinion regarding the conformity of draft of the amendments to the Rumanian Law no. 321/2009 regarding the sale of food products with the law of the European Union in selected aspects**

The opinion has been drawn based on Annex no. 1 (Accepted amendments) to the Law no. 321/2009 regarding the sale of food products (hereinafter referred to as “the Act”). The aforementioned draft of the amendments to the Act is hereinafter referred to as “the Draft”.

**The main aim of the opinion:** to analyze proposals contained in the Draft, in particular in its Chapter III1 and to point out which of these could be considered as inconsistent with the law of the European Union (hereinafter referred to as “EU”) and to provide a legal basis of conclusions arising out from the opinion.

**Limitations:** the opinion has been prepared within the scope of the above mentioned Draft in the light of selected aspects of the EU law, with no relation to other Romanian law and/or law of the EU not mentioned therein, in particular the opinion does not regard law addressed to supply chain of goods, competition law and unfair competition issues. Therefore the opinion should be interpreted exclusively within its scope and having in mind general character of conclusions as well as the aforementioned main aim of the opinion. Any particular legal action shall be preceded by a more detailed analysis.

**The scope of the analysis:** this opinion was mainly focused on proposals contained in Chapter III1 (Special obligations of traders) of the Draft in relation to selected aspects of EU law.

**General conclusions**

1. The analyzed proposals contained in the Draft could be considered as not being compliant with the principle of free movement of goods within EU single market (Article 26 and Article 34 of TFEU[[1]](#footnote-1)).
2. There is a significant risk that measures proposed in the Draft could lead to discrimination of a part of undertakings contrary to free establishment principle set forth in Article 49 of TFEU.
3. The economic advantage granted by the state to national food producers as well as to other undertakings delivering Romanian food products to traders to some extent may violate the principle laid down in Article 107 of TFEU being considered as prohibited state aid.
4. **Special obligations of traders according to the Draft**

The special obligations of traders set forth in Chapter III1 of the Draft are mainly addressed to Romanian products, in particular their sales and promotion. According to Article 101 of the Draft *traders have the obligation to establish* ***distinct areas for the sale of*** *“Romanian products”* defined in Article 2 paragraph 2 point 25 of the Draft. Romanian product is in turn understood to mean *product obtained on the national territory, out of raw material coming exclusively 100% from the Romanian farms*. With respect to that, Article 2 paragraph 4 of the Draft required from merchants[[2]](#footnote-2) *to offer display and selling spaces for Romanian products, according to the law*.

Consequently, according to the aforementioned proposals of the Draft all businesses carrying out sales of goods (traders, merchants) shall specify certain area or space in their stores exclusively for Romanian products. Such products should be displayed by traders in the space specified by the law.

As the Draft indicates further in Article 103, *the legal entity traders authorized to perform trading activities for food products have the obligation, for the categories: meat, eggs, vegetables, fruit, honey, dairy and bread products* ***to purchase those products in a proportion of at least 51% corresponding to each category of food products, originating from the short food chain****, as defined according to the legislation in effect*. Short supply chain according to Article 2 paragraph 2 point 16 of the Draft is understood to mean as *a supply chain which involves a limited number of economic operators involved in cooperation and local economic development, and close geographic and social relations between producers, processors and consumers*. The proposed regulation must result in the obligation of any entity acting in sales of food products toward consumers to purchase at least 51% of such products form local, small, allegedly national producers.

Moreover, as Article 106 sets forth that *the legal entity traders authorized to perform trading activities for food products* ***have the obligation to a organize events for the promotion and sale Romanian food products****, with the observance of the sanitary-veterinary legislation effect. The frequency of these events, as well as the opening hours will be established through decision of the local council*. The aforementioned obligation leads to the situation in which trader or merchant is obliged not only to purchase specified products from the sources mentioned in Article 103 of the Draft (Romanian products, short supply chain), but also to promote such products. The promotion shall be conducted through organizing special events. If the author of this opinion understood drafters’ intension correctly, such events aim not only at promotion but also direct sales of Romanian food products. Even more, the frequency of the required events and opening hours will arise from decision of local council with no limitation of such discretion of the local authority neither in the Act nor in the Draft.

Finally, the Draft contains sanctions in case of the infringement of its provisions. As a result, non-compliance of any trading entity with the above mentioned special obligations is sanctioned with administrative fines specified in Article 11 paragraph 1 letter a) and b) of the Draft. Additionally, in cases of repeated violation, a trader’s functioning authorization can be suspended up to 6 months.

1. **Alleged consequences of special obligations imposed on traders in Chapter III1 of the Draft for business and market**

The above mentioned proposals – if they become the law in force – must lead to significant consequences affecting Romanian trade, especially merchants and traders, not only in domestic but in cross-border dimension too. First of all, as understood by the author of this opinion, the proposed amendments are intended to provide an especially privileged position for products originating exclusively from Romanian territory. This must in turn result in a privileged position of such products in relation to other products (those that do not originate from Romanian territory). Romanian products shall be more displayed in stores, more visible, more promoted, more accessible for consumers, and as a result more will be sold in traders and merchants’ sales area. This will result not only from obligations imposed on trading entities to dedicate appropriate space and to display such products, but also will be a consequence of mandatory events specified in Article 106 of the Draft. The events will be focused on the promotion and sales of Romanian food products. The whole effect is underpinned by obligatory volumes of category of products to be sourced from short food chain.

Bearing in mind the aforementioned proposals and their consequences, if the new regulations come into force, these will inevitably result in significant competitive advantage of Romanian over non-Romanian products, and obviously increase sales comparing with the other, not Romanian goods. In reality, the effect of the proposals in question in relation to EU law is situated elsewhere. The really privileged entities under the new law are Romanian, national undertakings being a source of the products mentioned in the Draft and thus having a competitive advantage over producers or suppliers from other member states of the EU. Moreover, that latter will face obstacles and barriers in delivering products not originating from Romanian territory. It is worth mentioning that the competitive advantage of undertakings delivering Romanian food products has nothing to do with a real competition as it is understood in the EU law. This is only a result of regulatory measures being applied according to the Draft. The measures in fact disturb the balance of the market and in the end harm competition. Even more, the proposals in the Draft are – maybe except short supply chain - with no respect to the size of undertaking, whether it is a small-and-medium[[3]](#footnote-3) size enterprise or a part of big, international company having operation in Romania. Paradoxically, taking into account the market power and resources of the latter, those will be the one significantly more privileged than local, small food producers and farmers, including SMEs. This is because the only condition needed to obtain a privileged position in the market is the source of products delivering to merchants and other trading entities, namely Romanian territory. As a result, “national” does not necessarily mean small, local food producers and the aforementioned competition advantage can be granted to units which happen to be a part of international company. Such companies can obtain significant competitive advantage toward businesses located in other member states and delivering non-Romanian food products to Romanian traders in order to sale to consumers. The traders according to the Draft shall incur costs of mandatory events indicated in Article 106 of the Draft. The number of events and related costs seem to be unpredictable for such undertakings, since according to the above mentioned proposal their frequency fully depends on decision of the local council.

In the author’s view the aforementioned factors must provide at least two important consequences for the market in both domestic and European dimensions. In domestic, this must affect competition in the market giving unjustified advantage all undertakings delivering Romanian food products to traders. At the same time this brings about obstacles and even barriers for undertakings delivering non-Romanian products, weakening their market position. In some extreme cases, in particular concerning SMEs, it can even cause the winding down of undertaking or its removal from the market. Importantly, similar consequences solutions contained in the Draft can cause in cross-border trade (within European single market). The envisaged regulations set up barriers in cross-border EU trade in relation to food products not fully originating from Romania in the meaning of the Draft, their producers and suppliers. This means that food products as well as undertakings from other EU member states will face barriers and obstacles in access to the Romanian market. The consequences for such entities – weakening of market position or even removal from Romanian market – shall be almost similar as domestic one. As a consequence, the proposals contained in the Draft will affect not only domestic market, but single European market too.

1. **Proposal of the Draft and selected principles of the EU law**

The issue of measures undertaken by member states in order to promote local food products and protect internal food industry (i.a. farmers, food producers) should be analyzed in the view of the main EU principles. In the author’s view, these are in particular those addressed to the free movement of goods, free establishment and state aid. It is worth noting that the issue has come up before several times as a subject of examination proceeded by both European Commission (hereinafter referred to as “EC”) and European Court of Justice (hereinafter referred to as “ECJ”).[[4]](#footnote-4)

1. There were two important cases related to the issue of promotion and protection of “national” food by member states.
2. In the Irish case of 24 November 1982 (C-249/81) called “Buy Irish”, the EC applied to ECJ for a *declaration that, by taking measures to promote Irish goods within Ireland, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty*. The case concerned promotion of Irish food by means of Governmental three-year program for the promotion of Irish goods, including among others establishing exhibition facilities available solely for domestic products in the Ireland House Trade Centre, which was operated in Dublin by the Irish Goods Council and labeling of products with the "Guaranteed Irish" symbol. The program consisted of a set of initiatives that add up to an integrated program for promoting Irish goods, with specific proposals to involve the producer, distributor and consumer. In such circumstances, described in the reasoning of ECJ’s decision[[5]](#footnote-5), the Court declared that *by organizing a campaign to promote the sale and purchase of Irish products within its territory Ireland has failed to fulfil its obligations under the Treaty*. The main motives of ECJ were that Irish initiative restricted trade in European single market and was intended to check the flow of trade between member states by encouraging the purchase of domestic products. As a result, the Irish initiative discriminated against goods from other member states and in this respect was contrary to Article 30 of the Treaty (Article 36 of TFEU) in relation to restrictions in free movement of goods (Article 34 of TFEU).
3. In the German case of 5 November 2002 (C-325/00),[[6]](#footnote-6) ECJ followed EC application and declared, that *by awarding the quality label 'Markenqualität aus deutschen Landen' (quality label for produce made in Germany) to finished products of a certain quality made in Germany, the Federal Republic of Germany has failed to fulfil its obligations under Article 30 of the EC Treaty* (Article 36 of TFEU). Briefly speaking, the case related to the public legal body (the Fund) established by the German state with the object of promoting, at central level, the marketing and development of agricultural products and the German food industry by researching and developing markets inside and outside Germany. Moreover, the Fund was assisted by specialized company for the promotion of agriculture and the German food sector and its purpose was the promotion, at central level, of the marketing and exploitation of German agricultural and food products. The company was awarding the aforementioned labels of German food products undertakings which fulfilled specified conditions. Moreover, the company was financed by a compulsory contribution made by all the undertakings in the sectors concerned. In such a circumstances ECJ held that in setting up the aforementioned scheme the Federal Republic of Germany has failed to fulfil its obligations under Article 30 of the Treaty. As a result, the ECJ concluded having in mind Article 36 of the Treaty, that a *scheme such as that at issue in the present proceedings, defining the area of provenance as the extent of German territory and applying to all agricultural and food products fulfilling certain quality requirements, cannot in any case be considered as a geographic indication capable of justification under Article 36 of the Treaty* (Article 42 of TFEU).

In the author’s opinion, there are several important similarities, those mentioned above as well as the others included in reasoning of ECJ rulings, between both Irish and German cases and the scheme of promotion of Romanian food products contained in the Draft. Furthermore on the subject of labeling, German “Markenqualität aus deutschen Landen” (quality label for produce made in Germany) and Irish "Guaranteed Irish", based on intention, play the same role as “Romanian products” labeling. The same mandatory financing – in the German case it was contribution directly made by undertakings, in the Romanian case these are mandatory events organized and financed by traders in order to promote and sale Romanian products. The same is the goal of both initiatives, namely the promotion of products originating exclusively from given member states in order to strengthen and increase their sales to consumers. Additionally, it should be also taken into account that according to the Draft “Romanian products” must be displayed in merchants’ stores. All circumstances described above bring the author to the conclusion that it is highly likely that the Romanian legislative initiative aiming at promotion of Romanian food products and in this respect imposing special obligations on entities acting in trade could be considered by the EC and furthermore by TJEU as being contrary to the principle of free movement of goods having in mind Article 34 of TFEU and consequently not being justified in Article 36 of TFEU (ex article 30 of the Treaty mentioned in both rulings of ECJ).

1. Proposals contained in the Draft imposing special obligations on undertakings, in particular traders, in relation to space in stores, sourcing, labeling, promotion and sales of Romanian products have to be analyzed with a view to the principle of **freedom of establishment** set forth in Article 49 of TFEU. Based on case-law it is worth noticing that this is a very broad concept of “establishment” which allows EU nationals to participate, on a stable and continuous basis, in the economic life of a member state other than their state of origin and to profit therefrom (see to that effect, in particular Case 2/74 Reyners [1974] ECR 631, paragraph 21; Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 25; and Case C 451/05 ELISA [2007] ECR I-8251, paragraph 63).[[7]](#footnote-7) That concept of "establishment" within the meaning of TFEU allows to participate in the economic life of a member state other than state of origin (Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 25). ECJ in the aforementioned ruling also acknowledged that *national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it*.

The very broad extent of the concept of establishment and its freedom means that Article 49 of TFEU prohibits, as a restriction on such a freedom, any discrimination on grounds of nationality resulting from national legislation. With that said and bearing in mind the alleged consequences of the new legislation for businesses and markets described briefly in part II of this opinion - in particular the privileged position of Romanian “national” food producers, but also special obligations of traders in this respect - at least some of the measures included in the Draft appear to be discriminatory.

The Draft provides important economic advantage to some national undertakings resulting in the increase of sales and profitability, at the same time setting up barriers in trade for non-privileged undertakings from other member states. Mandatory space (sales area) which has to be exclusively used for Romanian food products, privileges in promotion and sales as well as 51% of minimum purchase of local products, bring about great competitive advantage for certain category of undertakings. This approach will inevitably have a detrimental effect on undertakings from other member states, especially in terms of limited access to Romanian market and profitability. As a result, in this author’s opinion, the granting of such privileges by the Romanian state in order to promote Romanian food and local producers involves discriminatory measures and consequences. That is because in the light of article 49 of TFEU, as well as very broad concept of freedom of establishment which has been developed in case-law, companies in the EU are free not only to set themselves up in other EU member states, but also to conduct their businesses in countries other than the one in which they are established under the same conditions as the one established in that member state. If the legislative initiative in question comes into force, the Romanian state can come under investigation conducted by the EC with reference to infringement of Article 49 of TFEU.

1. The Treaty (TFEU) **generally prohibits state aid unless it is justified** by reasons of general economic development. State aid is defined as an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities.[[8]](#footnote-8) As in the case of freedom of establishment, the concept of state aid is very broad. There are a lot of forms of state aid which can be granted to undertakings by member state. Article 107 clause 1 of TFEU stipulates that *save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*.

Bearing this in mind, proposals of the Draft concerning special obligations of traders in respect to Romanian food products and well as privileges granted “national” food producers and suppliers have to be analyzed with a view to the above mentioned principle. Although the Draft does not provide any form of direct financial aid to undertakings, in particular food producers, this does not mean that some of the measures cannot result in state aid being provided in altered forms, also prohibited by Article 107 of TFEU. As was mentioned in part II of this opinion, mandatory events aiming at promotion of Romanian food, which according to the Draft has to be financed by traders, to some extent could be recognized as indirect support for local food producers. Since that support is ordered by the state, this could in turn mean that the state is the indirect contributor. Obviously the real source of such financing is the trader. The support, the space dedicated exclusively to Romanian food products and at least 51% of products from short food chain can inevitably result in the increase of sales of the products. This can in turn bring about increase of profitability of Romanian food suppliers and producers not only small, local farmers and SMEs, but big international traders selling Romanian food products too. As a consequence, the state as a matter of fact grants indirect yet tangible aid to the aforementioned category of privileged undertakings.

1. **Summary**

There are three main threats concerning conformity of proposals contained in the Draft with the EU law and its main principles in relation to business, supply chain of food included. Firstly, the Romanian legislative initiative being the subject of this opinion can in the author’s view bring about incompliance with principle of free movements of goods within EU internal market. This is because the initiative in question favouring “national” food producers and suppliers the same time results in barriers and obstacles for those that are from other member states and conduct their business in Romanian food supply chain. Bearing in mind several similar cases which have appeared in case-law, in particular ECJ rulings, there is a significant probability that the Romanian case – if the legislative initiative becomes law in force – could be treated the same way by CJEU.

Another potential inconsistency of the Draft with EU law arises from the discriminatory character of measures contained therein. Based on the very broad meaning of concept of freedom of establishment any measure which favors selected category of undertakings, in particular national with detrimental effect on the others, should be recognized as discriminatory. This is the case of Article 49 of TFEU discussed above in part III.2 of this opinion.

Finally, it is worth mentioning that the EU is very sensitive about prohibited state aid granted by member states to undertakings. This issue has been the subject of numerous investigations conducted by the EC and its decisions. Bearing in mind that state aid can be granted in various forms, both direct and indirect, there is a significant threat that measures aiming at the promotion of Romanian food can result in support being given to “national” food producers. In conclusion, this form of support could also be considered as prohibited by TFEU, in particular by its Article 107 clause 1.

Prepared by Dr. Dominik Wolski (Chief Lawyer at JM Poland) with co-operation with Prof. Dr. Tadeusz Skoczny (CARS Director)

1. The Treaty on the Functioning of the European Union, OJEU C 326/47, 26 October 2012 (hereinafter referred to as “TFEU”). [↑](#footnote-ref-1)
2. According to Article 2 paragraph 2 point 6 of the Act merchant - is natural or legal person authorized to carry out selling activities towards the food products consumer. [↑](#footnote-ref-2)
3. Small and medium-sized enterprises (SMEs) are defined in the Commission Recommendation of 6 May 2003

concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422), (2003/361/EC)EU recommendation 2003/361, OJEU L 124/36, 20 May 2003. [↑](#footnote-ref-3)
4. Current Court of Justice of the European Union (hereinafter referred to as “CJEU”). [↑](#footnote-ref-4)
5. See: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61981CJ0249. [↑](#footnote-ref-5)
6. See: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62000CJ0325. [↑](#footnote-ref-6)
7. See: case C-384/08 Attanasio [2010] ECR I-2055 §36 and for more information: *Guide to the case law of the European Court of Justice on Articles 49 et seq. TFEU, Freedom of establishment, European Commission*. [↑](#footnote-ref-7)
8. See: http://ec.europa.eu/competition/state\_aid/overview/index\_en.html. [↑](#footnote-ref-8)