

COVID-19 SUPPORT MEASURES – ROMANIA

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Index

1. Main measures.....	2
1.1. General	2
1.1.1. Measures to support SMEs	2
1.1.2. Failure to pay ancillary tax obligations, suspension/non-enforcement of proceedings.....	3
1.1.3. Extension of certain payment terms and completion terms of formalities provided for in special laws	3
1.1.4. Facilities for the payment of loans granted by the Ministry of Public Finance ...	3
1.1.5. Rules for the payment of annual profit tax in case of quarterly advance payments	3
1.1.6. Granting a discount to the profit tax payment	5
1.1.7. Rules regarding budget amendment and allotment of funds.....	5
1.1.8. Special VAT rules.....	5
1.1.9. Labor relationship facilities	5
2. legal opinion – force majeure	9
2.1. What is force majeure and how can it be implemented in contracts?.....	9
2.1.1. Update regarding proof of force majeure and when it can be invoked by some business operators (small and medium-sized enterprises) in contractual relationships in the current context.....	11
2.2. How can the force majeure clause be enabled?.....	13
2.2.1. Legal conditions	13
2.2.2. Contractual conditions.....	14
2.2.3. Notification of the opposing party	14
2.2.4. Relevant interpretations	14
2.2.5. The opinion of the Chamber of Commerce and Industry of Romania / County Chambers	14
2.3. What should the notice documentation contain?	15
2.4. statement chamber of commerce and industry of romania	15
2.5. How can it also be applied to rent deferment or non-payment?	15
2.6. How can it be applied to the payment of utility bills?.....	16
2.7. Can it also apply in employment contracts?	16
2.8. other situations in which the force majeure clause may apply	17
3. facilities for bank loans	18
3.1. Type of loans to which the ordinance applies to	18
3.2. Its advantage and duration	18
3.3. Beneficiaries	18
3.4. Conditions in order to benefit from the established measures	18
3.5. Procedure	20
3.6. Interest on installments for which payment is deferred	21
3.7. Contract amendment.....	21

3.8. Guarantees	21
3.9. Reference sources	22

1. MAIN MEASURES

1.1. GENERAL

By Emergency Ordinances no. 29/2020 and GEO 30/2020, the Government has established a first set of measures, expected and requested by the business community, so as to limit the impact of the crisis on the economic system generated by the spread of COVID-19 virus.

By GEO 32/2020 and GEO 33/2020, a series of clarifications have been made, amendments to the previous legislative acts, as well as new regulations, all with the intent, at least declared, to protect businesses and to ensure the necessary liquidity during such times

The measures have been taken on several levels, as follows:

1.1.1. Measures to support SMEs

In the form of deferred payment of some services

Regarding SMEs that have stopped working, in whole or in part, based on decisions made by the authorities during the state of emergency, contingent upon the procurement and submission of an emergency situation certificate issued by the Ministry of Economy, Energy and the Business Environment, they shall benefit from the deferred payment of: (i) utilities (electricity, gas, water, telephone and internet access services), (ii) rent for the building destined as registered office and as secondary place of business.

Professions that carry out public services (notary public, lawyer, judicial officer), as well as primary medical care practices, national sport federations, sport clubs, that have had their activity directly affected by the measures taken by the authorities to prevent and counter the pandemic, benefit equally from these measures.

Exemption from interest payment

Penalties for delays in the performance of obligations arising from contracts concluded by SMEs with public authorities shall not be due during the state of emergency.

By granting tax reliefs in the sme invest program

Thus, government bonds are granted for investment credits, credits / lines of credit for working capital, in the amount of 80% of the financing value (for facilities offered to a single beneficiary amounting to no more than 10,000,000 lei), and 90% of the financing value for micro-enterprise or small enterprise, amounting to no more than 500,000 lei for micro-enterprise and 1,000,000 lei for small enterprise.

By granting a reduction to the income tax payment of micro-enterprises

Pursuant to GEO 33/2020, taxpayers who pay the micro-enterprise income tax corresponding to the first quarter of 2020 by April 25, 2020 receive a 10% discount applied on the tax due for that quarter.

1.1.2. Failure to pay ancillary tax obligations, suspension/non-enforcement of proceedings

It was thus established that, for all tax obligations outstanding at the date of entry into force of GEO 29/2020 (March 21, 2020) and unpaid upon the expiry of a period of 30 days after the state of emergency has ended, interest and late payment penalties are not due and are not calculated, as these are not considered to be outstanding tax obligations.

Furthermore, enforcement measures by attachment of budgetary claims shall also be suspended or not initiated, except for procedures meant for the recovery of budgetary claims established by judicial decisions in criminal matters.

GEO 32/2020 has also set out other situations for which the debt recovery and enforcement procedure is suspended or is not initiated - welfare rights, budgetary, tax and commercial claims that apply to the monthly entitlements paid through Local Pension Funds. The procedures shall be resumed within 60 days from the cessation date of the state of emergency.

1.1.3. Extension of certain payment terms and completion terms of formalities provided for in special laws

The deadline set for the payment of local taxes (on buildings, land and means of transport) is extended from March 31, 2020 to June 30, 2020, while retaining the discount right if the tax is paid in full by the new due date (June 30, 2020).

Moreover, the deadline by which the debtor that wishes to restructure its budgetary obligations, which he is required to notify to the competent tax authority (March 31, 2020) is extended, the new deadline being July 31, 2020, as well as the deadline for submitting the restructuring application - October 30, 2020.

During the state of emergency, the obligation to submit the declaration regarding the beneficial owner (for companies, as well as for associations and foundations), as provided for in the Law on prevention and combating money laundering and terrorism financing no. 129/2019. The deadline for submission is thus extended by 3 months from the date of cessation of the state of emergency.

1.1.4. Facilities for the payment of loans granted by the Ministry of Public Finance

Contingent on the absence of overdue payments upon the entry into force of GEO, the payment of rates and interest granted by the Ministry of Public Finance resulted from privatization of administrative divisions may be postponed, at the latter's request, for a period of 3 months, not having to owe interest and default interest for this period.

1.1.5. Rules for the payment of annual profit tax in case of quarterly advance payments

For taxpayers implementing the statement and payment system of annual profit tax with quarterly advance payments, a possibility has been regulated which states that, for the entire 2020 fiscal year, quarterly advance payments may be done in the amount resulted from the current quarterly profit tax calculation.

1.1.6. Granting a discount to the profit tax payment

Pursuant to GEO 33/2020, taxpayers that pay profit tax, regardless of the statement and payment system, who pay the tax due for the first quarter of 2020 and the advance payment for the same quarter, up to and including the deadline April 25, 2020, receive a discount calculated on the profit tax due, amounting to 5% for large taxpayers and 10% for medium taxpayers, as well as for those that do not fall into any of these categories.

1.1.7. Rules regarding budget amendment and allotment of funds

As an exceptional measure, the possibility of promoting budget amendments in the first half of the year has been regulated for the current year.

Additionally, main authorizing officers are also authorized to carry out transfers of unused budget loans and commitment appropriations to ensure the necessary funds for implementing measures to counter and prevent COVID-19.

1.1.8. Special VAT rules

Taxpayers importing medicines, protective equipment, medical devices and medicines, as well as sanitary materials used in the prevention, limitation, treatment and prevention of COVID-19, shall not pay to customs VAT for these imports during the state of emergency and for 30 days after its cessation.

1.1.9. Labor relationship facilities

Paid days off in case of closure of educational establishments

The recent law issued to grant free days for parents to supervise children up to 12 years of age in the event of temporary closure of educational establishments (Law no. 19/2020) has been supplemented in order to specify in detail the conditions under which it applies.

The following, however, do not benefit from the provisions of this law: (i) the person on parental leave, (ii) the personal assistant to one of the dependent children, (iii) the person on annual or unpaid leave, (iv) the person who has the employment contract suspended due to a temporary suspension of the employer's business, or the latter's spouse; (v) the other parent that does not earn income from any of the sources provided for in the Fiscal Code.

Pursuant to this law, parents benefit from paid days off, which are granted at one of the parents' request, and submitted to the employer of the person who is to supervise the child. For certain businesses operating in areas such as welfare, telecommunications, radio-TV, transport, etc., this facility is granted only with the employer's consent.

The benefit for each day off shall be paid from the chapter relating to personnel expenses of the employer's income and expenditure budget, and shall amount to 75% of the basic salary corresponding to a business day, but not more than the daily correspondent of 75% of the average gross salary used to substantiate the state social insurance budget.

By GEO 32/2020, an express statement has been introduced saying that the allowance is subject to taxation and payment of social security contributions, social health insurance, as well as payment of the insurance contribution for work, the latter being borne by the employer.

The suspension of activity in pre-school education units, similar to educational establishments, has also been stipulated, the parents of children in these units benefiting from the rights provided by Law no. 19/2020.

Rules on granting the insertion incentive

The insertion incentive shall continue to be granted for a period of 90 days for persons entitled to sick-leave, paid days off for child care, for those who have had their employment relationships suspended as a result of the temporary suspension of the employer's business, or for those that have had their employment relationship or contract terminated or suspended.

Subsequently, upon the expiry of the period, the insertion incentive is still granted, under the provisions of the law (until the child reaches the age of 3 or 4), if the person obtains income subject to taxation.

GEO 32/2020 has brought a series of clarifications and rules for implementing the provisions of GEO 30/2020, especially related to the set of supporting documents that are sent by electronic mail to the County Agency for Payments and Social Inspection, as well as to that of Bucharest.

Provisions regarding the persons on parental leave

By GEO 32/2020, it was expressly set out that persons receiving the parental allowance and those in payment when the state of emergency was established shall continue to receive the allowance throughout the state of emergency, even if the child has reached the age of 2, and 3 for the disabled child, or is to reach this age during this period.

Subsequently, the insertion incentive may be opted for, which shall be granted from the date of application submission.

Forwarding communications regarding the granting of welfare benefits

During the state of emergency established by the Presidential Decree no. 195/2020 concerning the establishment of a state of emergency in Romania, the transmission by electronic mail of applications and supporting documents for claiming the insurance rights becomes the main means of communication.

Thus, all applications, statements and supporting documents for claiming welfare benefits granted from the state budget through the budget of the Ministry of Labor and Social Protection can be submitted in paper format or by electronic mail.

Moreover, during the application period of the Decree regarding the establishment of a state of emergency in Romania, the decision to grant/reject/terminate/suspend the welfare right for any of the social benefits can be submitted to the beneficiary in paper format, or by electronic mail, by the issuing county agency.

Provisions related to short time working scheme

One of the most important amendments and supplements made to GEO 30/2020 by GEO 32/2020 is related to the conditions for granting the facility regarding the payment of short time working scheme compensation.

During the state of emergency and during the temporary suspension of the individual employment contract, on the employer's own initiative, according to art. 52 para. (1) lit. c) from the Labor Code, republished, as amended and supplemented, the compensations received by employees shall be set at 75% of the basic salary corresponding to the position occupied, and shall be borne from the unemployment insurance budget, but no more than 75% of the average gross salaries provided for by the 2020 State and Social Insurance Budget Law no. 6/2020 (5,429 lei x 75%).

Unlike the previous regulation, there is no longer a distinction between the 2 types of employers, being generically stated that the beneficiaries of the facility shall be the employees of employers who reduce or temporarily interrupt the work, totally or partially, as a result of the effects of the coronavirus epidemic SARS-CoV-2, during the decreed state of emergency, according to the employer's statutory declaration.

Also, the initial eligibility conditions (having an emergency certificate, motivating the lack of financial capacity to pay all salaries, recording a decrease in receipts by at least 25% compared to the average in January-February) have been eliminated.

The compensation is subject to taxation and payment of compulsory social contributions, and the calculation, retention and payment of the income tax, state social insurance contribution and health social insurance contribution are carried out by the employer from the allowances received from the unemployment insurance budget.

The insurance contribution for work is not due for the compensation given in case of short-time working scheme, but for the period in which the employees whose individual employment contracts are suspended, and the employers of such employees do not owe the insurance contribution for work, it is considered as a qualifying period without the payment of the contribution in the general health insurance scheme for sick leave and health social security benefits. To determine and calculate the health social security benefits, the minimum gross salary per country guaranteed in payment is used, in force during the reference period.

By GEO 32/2020, the situation of the employee that has been classified under several employment contracts, thus:

- (i) if an employee has several individual employment contracts concluded, of which at least one full-time contract is active during the decreed state of emergency, he shall not receive compensation;
- (ii) if an employee has several individual employment contracts concluded, and all of them are suspended as a result of the decreed state of emergency, he shall be entitled to the compensation corresponding to the individual employment contract with the most advantageous salary rights.

In addition, for the situation of employees with incomes above the average gross salary (over 5,420 lei gross), it was expressly provided that the compensation can be supplemented by the employer with amounts representing the difference of up to at least 75% of the base salary corresponding to the position occupied, if the employer's budget for the payment of personnel expenses allows it.

In order to provide the necessary amounts for compensation payment, the employers must submit by electronic mail to the County Employment Services Agencies where they have their registered office, as well as to that of Bucharest, an application signed and dated by the legal

representative, a statutory declaration and the list of persons that should benefit from this compensation.

The documents are submitted in the current month for the payment of the previous month's compensation, and the payment from the unemployment insurance budget of the compensations is made no later than 15 days after the submission of the documents. The employer is required to pay the compensations to the employees no later than 3 business days after the amounts from the budget have been received by the employer.

For other categories of freelancers, that do not have the status of employers (such as the liberal professions), but also for persons who have concluded individual labor agreements under Law no. 1/2005 on organization and functioning of cooperation, and have interrupted their activity due to the effects of coronavirus SARS-CoV-2, during the state of emergency, a monthly compensation of 75% of the average gross salary provided by the 2020 State and Social Insurance Budget Law no. 6/2020 (2,230 lei net) shall be received from the state budget. This shall be granted based on a statutory declaration.

Measures are also provided for sports facilities, during the temporary suspension of the sports activity contract, on the initiative of the latter, athletes, coaches and medical staff receiving a compensation of 75% of the money rights related to the sports activity consideration, but not more than 75% of the average gross salary provided for by the 2020 State and Social Insurance Budget Law no. 6/2020 (5,429 lei x 75%), this being borne from the state budget.

As a novelty brought by GEO 32/2020, in addition to the compensation, the sports facilities and the above-mentioned persons may mutually negotiate and agree the payment of other compensatory allowances granted by the sports facility, so as to compensate for the reduction of the financial consideration.

Also, the situation of private individuals who obtain exclusively copyright revenues was regulated: if they have interrupted their activity as a result of the effects of coronavirus SARS-CoV-2, during the state of emergency they shall receive from the state budget, through the county Agencies for Payments and Social Inspection, and through that of Bucharest, a monthly compensation of 75% of the average gross salaries provided by the 2020 State and Social Insurance Budget Law no. 6/2020, compensation subject to taxation and payment of social security contributions and social health insurance.

For these latter categories of taxpayers, in order to obtain the compensation, it is necessary to submit by electronic mail an application along with a copy of the identity document and a statutory declaration.

The template for the application and the statutory declaration shall be established by a joint order of the Minister of Labor and Social Protection and the relevant ministries, as appropriate.

The documents shall be submitted to the territorial agencies by the 10th of the current month for the compensation payment of the previous month, and the payment is made no later than 10 days after the submission of documents, during the state of emergency.

Although the measures adopted have been updated and supplemented, rapid responses from decision makers are still expected in order to be effectively implemented.

2. LEGAL OPINION – FORCE MAJEURE

2.1. WHAT IS FORCE MAJEURE AND HOW CAN IT BE IMPLEMENTED IN CONTRACTS?

Force majeure, as defined by the Civil Code, is that external event, unpredictable, absolutely invincible and inevitable, which entails the waiver of contractual liability, unless the law provides otherwise, or the parties agree otherwise. In other words, force majeure takes into account those situations in which the debtor of an obligation is objectively unable to perform the contractual obligations, due to an unforeseen event that is beyond his will and fault, and which he cannot control, prevent, restrict or remove.

When analyzing the effects of force majeure, a distinction is made between a temporary impossibility and a permanent impossibility of performing the obligations. In terms of temporary impossibility, the performance of the obligation shall be suspended for a reasonable period, assessed on a case-by-case basis, depending on the duration and consequences of the force majeure event.

However, when the impossibility of performance is total and definitive, and concerns essential contractual obligations, in consideration of which the parties have concluded the contract, the latter shall be rightfully annulled from the occurrence of the force majeure event, the debtor being exempted from liability.

The legal rules governing the effects of force majeure being optional (the legislator leaving it up to the parties to establish certain rules of conduct and, only in the absence of such rules, those established by law shall be applicable), the parties have the possibility to derogate from this, establishing their own way in which force majeure is to operate. If there is no contractual agreement regarding force majeure, the provisions of the Civil Code shall apply.

Precisely because it is a supplementary rule and the effects in case of occurrence affect the contractual relations, the clause relating to force majeure is a very common one and is found in most commercial and civil contracts, but not exclusively, the parties often agreeing on the operation procedure of force majeure in their contractual relations.

By means of the force majeure clause, the parties may, by way of example, determine what events might constitute force majeure, the manner and time limit for notifying the occurrence of force majeure, proof of force majeure, the limits and conditions under which force majeure shall operate.

By way of example, regarding the effects, the parties may agree to:

- Establish a limited time frame during which the suspension of performance of obligations is active, and, to the extent possible, the other party's corresponding obligations may also be suspended;
- Terminate the contract, if force majeure is not removed within a given deadline;
- Renegotiate and modify the contract so that it shall enable the affected party to continue to perform the contract, but on more favorable terms.

Given that the effects of force majeure lead to failure to comply with certain contractual obligations, in most cases the existence of the force majeure event is challenged by the other contracting party.

In all instances, the burden of proof as to the existence of force majeure and the objective inability to perform the contract, the duration and consequences of the force majeure event, shall be borne by the party invoking it.

The law does not lay down provisions regarding proof of force majeure. That is why, oftentimes, the parties also agree on how to prove force majeure, usually by presenting a certificate issued by the Chamber of Commerce and Industry of Romania or by subordinate county structures (as for traders¹). We believe that, even when the manner in which force majeure is proved is not contractually determined, it is advisable for the party invoking force majeure to prove it by presenting the aforementioned certificate, in order to avoid any subsequent disputes and objections from the opposing party which might have a chance of success.

As a novelty, given the effects produced by the spread of SARS-CoV-2 virus and the decreed state of emergency in Romania, by art. 12 of the Decree for the institution of the state of emergency dated 16.03.2020, it was established that the Ministry of Economy, Energy and the Business Environment shall issue, upon request, emergency situation certificates based on supporting documents to economic operators that have had their activity affected in light of COVID-19. The issuing procedure and the eligibility criteria have not been established so far.

In the Government Meeting of 18.03.2020, several normative acts were adopted regarding measures to be taken for implementing the aforementioned Decree.

One of these normative acts is the Emergency Ordinance regarding some economic and one-off fiscal measures published in the Official Gazette no. 230/21.03.2020.

According to art. X. of the Ordinance, during the state of emergency, SMEs, as defined by Law no. 346/2004 regarding the stimulation of the creation and the development of small and medium enterprises, which have stopped working wholly or partially based on the decisions made by the competent public authorities, pursuant to the law, during the decreed state of emergency, and those that have an emergency certificate issued by the Ministry of Economy, Energy and the Business Environment, shall benefit from the deferred payment of utility services - electricity, gas, water, telephone and internet access services, as well as from the deferred payment of the rent for the building destined as registered office and as secondary places of business.

Simultaneously, according to the same article of the Ordinance, by exemption from any other provisions in on-going contracts, others than those above-mentioned entered into by SMEs that have an emergency certificate issued by the Ministry of Economy, Energy and the Business Environment, force majeure may be invoked in spite of these only after the attempt, as evidenced by written documents communicated between the parties through any means,

¹ Pursuant to Law 335/2007 of Chambers of Commerce in Romania, businessmen are legal entities, private individuals and family partnerships that usually perform trading activities, legal entities, national companies and domestic companies, state-owned enterprises, economic interest groupings of commercial character and cooperative institutions, registered with the relevant county trade register office or with that of Bucharest, as applicable, as well as with any other special registers, according to the law.

including by electronic means, to renegotiate the contract so as to adjust the terms thereof, taking into account the special conditions arising from the state of emergency.

From the above mentioned Ordinance, it therefore follows that the protective measures taken are aimed at this time only to SMEs whose businesses have been profoundly affected by the context of the spread of SARS-CoV-2 virus, and to those that have stopped working wholly or partially due to decisions made by the competent public authorities, referring particularly to those operating in transportation, tourism, HoReCa, event-planning, advertising, private education, certain services, whose revenues have significantly diminished due to measures taken in the context of the pandemic.

It also follows that the submission of the emergency situation certificate is used only to postpone the payment obligations of SMEs arising from contracts with utility providers and the obligation to pay the rent resulted from leases for registered offices and secondary places of business.

We therefore consider that the emergency situation certificate is not equivalent to the certification of the existence of force majeure issued by the Chamber of Commerce and Industry of Romania.

Related to the contractual relationship, while the submission of the emergency situation certificate by the SMEs shall only postpone the payment of the bills arisen from contracts with utility service providers, as well as the payment of the rent for the properties defined as registered office or secondary places of business, the certificate attesting the existence of force majeure may also entail the suspension of the performance of other contractual obligations arising from other types of contracts, force majeure being claimed by any business operator, even a non-SME and even if its activity is not performed in those areas substantially affected, but its activity is still negatively influenced by the economic and social measures imposed, and has received the certificate attesting the existence of force majeure.

Therefore, within the scope of the contract, based on the emergency situation certificate, SMEs can only benefit from the deferment of payment of the bills arisen from utility service contracts, as well as the payment of the rent for registered offices or secondary places of business, and if the impossibility of performing other contractual obligations is invoked, it is advisable that SMEs should also obtain and present certificates attesting the existence of force majeure issued by the Chamber of Commerce and Industry of Romania.

Another issue that needs to be highlighted here is the fact that emergency situation certificates are to take effect only during the 30-day period for which the state of emergency has been established, whereby, if the state of emergency is not extended, any force majeure is to be proved subsequently by obtaining a force majeure certificate.

2.1.1. Update regarding proof of force majeure and when it can be invoked by some business operators (small and medium-sized enterprises) in contractual relationships in the current context

Following the adoption of Order no. 791/2020 concerning the granting of the emergency situation certificates to economic operators whose activities have been affected in the context of the SARS-CoV-2 pandemic, issued by the Ministry of Economy, Energy and the Business Environment, as well as the clarifications made by public authorities, certain explanations have to be made.

According to art. 1 para. (2) from the aforementioned Order, the applicant - business operator, pursuant to the Order, is the legally entitled person, as defined by Emergency Ordinance no. 30/2020 to amend and supplement some normative acts, as well as to establish social protection measures in the context of the epidemiological situation caused by the spread of SARS-CoV-2 coronavirus, and by Emergency Ordinance no. 29/2020 regarding some economical and budgetary-fiscal measures, or other normative acts regulating measures granted in the context of the state of emergency.

Therefore, in order to determine the economic operators that can request the issuance of emergency certificates, we must refer to the two above mentioned normative acts, the conclusion being that the applicants may primarily be small and medium-sized enterprises (i.e. companies specified by Law no. 31/1990, cooperative societies, authorized natural persons, owners of individual partnerships, and family-owned partnerships, authorized according to the legal provisions in force, which are engaged in economic activities, if: (i) they have an average annual number of employees less than 250; and (ii) they achieve an annual net turnover of 50 million euro, equivalent in lei, or own total assets which do not exceed the equivalent in lei of 43 million euro, according to the latest financial statements approved; total assets are defined as fixed assets plus current assets plus prepaid expenses)

This article aims to further analyze only the situation of small and medium-sized enterprises in contractual relationships.

Emergency situation certificates are of two types, as we will show below, and they can be obtained by small and medium-sized enterprises under certain conditions, in accordance with Order no. 791/2020:

- i. TYPE 1 (BLUE) - granted for applicants that request it based on the statutory declaration issued as set out in Order Annex no. 3, resulting in the total or partial disruption of the activity, following decisions issued by the competent public authorities, according to the law, during the decreed state of emergency;
- ii. TYPE 2 (YELLOW) - granted for applicants that request it based on the statutory declaration issued as set out in Order Annex no. 3, resulting in a decrease in revenues in March 2020 by at least 25% compared to the average revenues in January and February 2020.

The applicant can obtain only one type of emergency situation certificate and it can be used in contractual relationships, pursuant to the law.

In order to determine the cases in which force majeure can be invoked or certain benefits can be obtained based on an emergency situation certificate, we need to take a look at the provisions of Emergency Ordinance no. 29/2020 regarding some economical and budgetary-fiscal measures.

As we have pointed out, according to art. X pt. (1) of the Emergency Ordinance no. 29/2020 regarding some economical and budgetary-fiscal measures, SMEs which have stopped working wholly or partially based on the decisions made by the competent public authorities during the state of emergency, and those that have an emergency situation certificate issued by the Ministry of Economy, Energy and the Business Environment, shall benefit from the deferred payment of utility services - electricity, gas, water, telephone and internet access services, as well as from the deferred payment of the rent for the building destined as registered office and as secondary places of business.

Thus, based on the emergency situation certificate TYPE 1 (BLUE), small and medium-sized enterprises that have disrupted their activity entirely or partially for the duration of the state of emergency based on the decision issued by the competent public authorities, benefit from a postponement in the payment of utility services - electricity, gas, water, telephone and internet access services, as well as from the deferred payment of rent for the building destined as registered office and as secondary places of business.

At the same time, according to art. X para. (3) of the Emergency Ordinance no. 29/2020 regarding some economical and budgetary-fiscal measures, force majeure is defined as, pursuant to the emergency ordinance, the unpredictable, absolutely invincible and inevitable circumstance referred to in art. 1351 para. (2) of the Civil Code, resulting from an action of the authorities in enforcing the measures imposed to prevent and counter the pandemic caused by the infection with coronavirus COVID-19, which affected the activity of small and medium-sized enterprise, impairment attested by the emergency situation certificate. Nevertheless, the presumption may be overturned by any means of proof.

Therefore, regarding small and medium-sized businesses having the emergency situation certificate, a presumable case of force majeure shall be established with respect to the unforeseeable circumstance resulted from the action of the authorities in enforcing the measures imposed to prevent and counter the pandemic that has affected the activity of small and medium-sized enterprises, a force majeure which can be invoked in any contractual relationship, but one that may be rebutted by the creditor, by any means, should he appreciate that the small or medium-sized enterprise is able to perform its contractual obligations.

Emergency situation certificates are issued only during the existence of the state of emergency in Romania.

With respect to economic operators who are not eligible to obtain the emergency situation certificate and their having to prove force majeure, this shall continue to be done based on the certificate attesting the existence of force majeure issued by the Chamber of Commerce and Industry of Romania.

2.2. HOW CAN THE FORCE MAJEURE CLAUSE BE ENABLED?

2.2.1. Legal conditions

We have seen that, for force majeure to be effective, the event has to be of foreign nature (external to the parties' conduct), unpredictable and insurmountable, and, on the other hand, the party invoking it should have taken all measures in order to avoid it or limit its effects.

In addition to the exterior and unpredictable conditions, it is therefore necessary to satisfy a previous condition that, this time, relates to the conduct of the person seeking to invoke this case of removal of contractual liability, namely: to take all possible measures, preventive and regressive, in order to avoid force majeure and limit its effects. This conduct shall also be analyzed by the Chamber of Commerce and Industry of Romania, as described below, when approving force majeure for traders.

2.2.2. Contractual conditions

The relevance of the contract content in terms of force majeure has been stressed above, the parties being free to regulate even less restrictive conditions that a case must fulfil in order to constitute force majeure. The parties may also regulate the need for an opinion from the Chamber of Commerce and industry of Romania (for traders).

2.2.3. Notification of the opposing party

The party seeking to invoke force majeure shall notify the other party in this regard, the agreed contractual provisions concerning notifications and communications between the parties being relevant at this stage (mode of communication, deadline for notification, etc.).

2.2.4. Relevant interpretations

In practice and in specialized theories, an important point regarding the incidence of force majeure has also been taken into account. Specifically, in order to benefit from the effects of force majeure, it is essential that the event qualified to have occurred before the obligation arising from the contract concluded between the parties became due, whilst taking into account that the existence of force majeure shall not exclude the liability of the debtor, if the debtor was in default in performing his contractual obligations, and if the event occurred afterwards. However, the debtor shall be able to defend himself from liability when he proves that, even if he had performed the obligation, force majeure would have deprived the creditor of its benefits.

2.2.5. The opinion of the Chamber of Commerce and Industry of Romania / County Chambers

If the party that opposes force majeure challenges its incidence, or if the parties have contractually stipulated the need for a confirmatory document issued by legitimate organizations, the interested party shall have to submit an application before the Chamber of Commerce and Industry of Romania, or before the County Chambers, as the case may be. The purpose of the approach is to approve the alleged force majeure.

The Chamber of Commerce and Industry of Romania is an organization meant to assist and defend the general interests of the business community in Romania. It shall, on request, advise Romanian companies, based on documentation, of the existence of force majeure cases and their effects on the performance of international commercial obligations. The County Chambers approve the existence of force majeure cases and their influence on the performance of the obligations of traders derived from contracts having no extraneous elements.

The request addressed to the Chamber of Commerce of Romania / County Chamber shall include a factual and detailed presentation of the event, its consequences in relation to the contractual partner, and legal arguments proving that the event invoked represents force majeure.

The notice of the existence of force majeure shall be issued based on supporting documents submitted only by the applicant.

2.3. WHAT SHOULD THE NOTICE DOCUMENTATION CONTAIN?

The file must contain (at least):

- the request for opinion, signed by the legal representative (form);
- a copy of the affected contract from the force majeure event, including the force majeure clause;
- certificates from competent bodies, authorities and institutions, on a case-by-case basis (others than the Chamber of Commerce and Industry of Romania), regarding the existence and effects of the event invoked, its location, the time of commencement and termination of the event;
- notifications addressed to the contractual partner regarding the occurrence of the event invoked and its effects on the progress of contractual transactions.

The documents shall be submitted in original or certified copy by the applicant. The fee charged by the Chamber of Commerce and Industry of Romania is EUR 500 (in lei, at the NBR rate on the day of payment) + VAT.

2.4. STATEMENT CHAMBER OF COMMERCE AND INDUSTRY OF ROMANIA

The Chamber of Commerce and Industry of Romania issued their explanation in the current economic-social context determined by the spread of SARS-CoV-2 virus.

In view of the recent concern of the population regarding the application mechanism of force majeure, the Chamber of Commerce and Industry of Romania stated that neither it, nor the County Chambers, are empowered to declare or not, at national / international level, a particular situation as being a force majeure situation or case.

The only responsibility of these organizations is to analyse in particular, at the traders' request, and to approve or not, the existence of force majeure - considered exclusively from the perspective of its effects and influence on the performance of obligations arising from a commercial contract.

2.5. HOW CAN IT ALSO BE APPLIED TO RENT DEFERMENT OR NON-PAYMENT?

Force majeure may also be invoked to obtain certain facilities for rent payment during the force majeure event, exactly under the same conditions in which force majeure is invoked regarding the performance of any other contractual obligations.

In order to invoke force majeure, the contractual provisions must be analyzed, and the procedure agreed by the parties for such cases must be followed precisely (the messaging channel and the time-frame for the delivery of the notification). If there is no contractual clause regulating force majeure, it shall be notified to the other party forthwith, by means of a written notification in the manner agreed or used for the transmission of communications.

Generally, force majeure is invoked by sending a notification to the other contracting party, by which the event constituting force majeure is presented, how and to what extent it affects the performance of contractual obligations, showing the remedial actions required (either pursuant

to the law or pursuant to the contract, if there is a force majeure clause): suspension of the performance of obligations, exemption from performance, etc.

Furthermore, after the occurrence of force majeure, the parties may agree to any other payment methods, even outside the contract: extension of the payment maturity, payment in installments, postponement of payment and so on

The established facilities shall be applicable during the force majeure time frame, or during any other period agreed by the parties, and following the termination of force majeure, the contractual obligations shall be performed as originally agreed, unless the parties agree otherwise.

2.6. HOW CAN IT BE APPLIED TO THE PAYMENT OF UTILITY BILLS?

Force majeure may also be invoked in contracts concluded with utility providers. Surely, we have to refer to the relevance and importance of contractual provisions in this regard. For non-traders - to whom the procedure of the Chamber of Commerce and Industry of Romania / County Chambers does not apply - if force majeure is challenged by the supplier, the interested party has but to resort to legal proceedings.

2.7. CAN IT ALSO APPLY IN EMPLOYMENT CONTRACTS?

In the employment law area, force majeure may be invoked for the rightful suspension of the employment contract during force majeure, as well as when the employer decides, unilaterally and temporarily, without the consent of the employee, to modify the employment contract by changing the type and place of work, for the employee's protection, due to a force majeure event.

The employer may freely choose one of the two solutions, depending on the negative consequences on his activity as a result of the force majeure event.

In case of force majeure, if the employment relationship can no longer continue, the employment contract is to be rightfully suspended, resulting in the suspension of the work provided by the employee, and the payment of salary rights by the employer. After the termination of the force majeure event, the employment contract is to be resumed in the initial conditions.

The rightful suspension takes place pursuant to the law and not by the will of one of the contracting parties, which is why we consider that it is not necessary for the employer to issue a decision in this regard for establishing the rightful suspension.

In the employment law area, force majeure must also fulfil the same conditions to be invoked: it must represent an external event, unpredictable, absolutely invincible and inevitable.

The force majeure event can be a natural, social, economic event and must be the sole cause of the non-performance of the obligation. Natural disasters (earthquakes, droughts, floods, storms), severe raw materials crisis, economic crises that seriously affect the flow of supply,

difficulties in supply and transport, damage to production equipment, labor conflicts (strikes), adverse weather conditions, etc., can be considered as force majeure causes².

Following the occurrence of a force majeure, if the contract may still proceed, but a change in the manner or place of work is necessary and possible to ensure the protection, health and safety of the employee at the workplace, the employer, without prior notice given to the employee, may decide to issue a decision based on one of the two measures, but only temporary. Such a decision should be issued in written form, by presenting the factual situation which requires such a measure to be taken, pursuant to the law (art. 48 of the Labor Code) and the period in which it is applies.

Being taken unilaterally and without the consent of the employee in question, but only by informing him/her, this decision may subsequently be challenged.

2.8. OTHER SITUATIONS IN WHICH THE FORCE MAJEURE CLAUSE MAY APPLY

Being provided by law as an exonerating cause of liability (both contractual and tortious, but the latter form of liability is not relevant for the purpose of this article), force majeure may be invoked in any type of contract, but its impact shall be construed on a case-by-case basis, depending on the content of the contract and the fulfilment of the conditions stipulated by law and by the contract.

In specialized theories³ it has been pointed out that, depending on the specific status quo, even circumstances that are neither totally unpredictable nor totally invincible, but constitute real obstacles to the performance of obligations arising from contracts, can be considered as having exonerating effect from liability. Such a tolerant view is explained by the fact that, considering the new circumstances, it becomes impossible to perform the contract under normal, reasonable conditions. The current conditions in which trade activities are carried out, as well as other activities aimed at stimulating the civil circuit, precisely in order to provide stability and encourage such activities, require the use of some extensions, readjustments or decrements of severity in assessing force majeure. For these reasons, together with the natural and social phenomena which meet the typical and conventional features of force majeure, by means of the judicial practice, it has been acknowledged that other social phenomena may also have an exculpatory effect, such as the measures taken by responsible state authorities, which, based on their legal responsibilities, stop the transport programs (by no fault of the contracting parties), such as acts of piracy or sabotage, or even strikes, and also labor disputes, if they make it impossible to meet the obligations listed in the contract.

Considering this interpretation, it is reasonable to assume that the state of emergency decreed in our country, along with specific measures imposed in the economic, labor and social protection spheres, are capable of causing imbalances to a large enough degree to justify the incidence of force majeure.

² I.T. Ștefănescu, Ș. Beligrădeanu, *Înțelesul și sfera de aplicare a noțiunilor de forță majoră și cazul fortuit în dreptul muncii*, în „Dreptul” nr. 6/2008, p. 19.

³ D.-E. Sîngeorzan, *Răspunderea contractuală în materie civilă și contractuală*, p. 228-229.

3. FACILITIES FOR BANK LOANS

Considering the state of emergency established by Decree no. 195/2020 in Romania for a period of 30 days, as a result of the international epidemiological situation determined by the spread of coronavirus SARS-CoV-2, the state authorities vested with legislative power have intervened in different sectors of public and private life in order to prevent the spread of coronavirus, but also to prevent the negative effects caused by it, particularly the disruption of socio-economic activities.

In these exceptional circumstances, the Romanian Government adopted Emergency Ordinance no. 37/2020 which entered into force Monday, March 30, 2020, whereby certain categories of debtors can benefit, upon request, from the deferment of the payment obligations for installments and interest on loans granted by banking and non-banking institutions, and Decision no. 270/2020 for the implementation of this ordinance that came into force Monday, April 6, 2020.

3.1. TYPE OF LOANS TO WHICH THE ORDINANCE APPLIES TO

The ordinance applies to all types of loans, consumer loans, those granted by the employer to its employees, credit agreements concluded with investment firms, secured loans (including mortgage loans) or unsecured, even lease agreements or shopping cards, etc.

3.2. ITS ADVANTAGE AND DURATION

According to art. 2 para. (1) of GEO no. 37/2020, debtors who meet the criteria that shall be addressed below can request the deferment of the payment obligations of loan rates which are due, representing capital rates, interest and commissions, for a period of at least one month and no more than 9 months, depending on the debtor's option, until 31.12.2020 at the latest.

3.3. BENEFICIARIES

Debtors who benefit from the deferment of rates and interest payments are **private individuals, authorized natural persons, individual partnerships and family partnerships** that operate according to GEO no. 44/2008 on carrying out economic activities by authorized natural persons (freelancers), individual partnerships and family partnerships, **liberal professions and those exercised under special laws and legal entities** involved in credit and lease agreements, except for credit institutions defined according to GEO no. 99/2006.

3.4. CONDITIONS IN ORDER TO BENEFIT FROM THE ESTABLISHED MEASURES

- Credit agreements must have been concluded before the entry into force of GEO no. 37/2020 (30.03.2020);
- Credit agreements must not have reached maturity (i.e. the final maturity date of the obligations to repay installments, provided for in the credit agreements, occurs later than the date of entry into force of the provisions of GEO no. 37/2020, namely March 30, 2020 included) and the creditor must not have declared early maturity prior to the entry into force of the ordinance;

- The loans must have not been in default at the time of the **establishment of the state of emergency** in Romania, or the debtors must have paid these arrears **up to the date of request for the suspension of the payment obligation**;
- For debtors that are **private individuals**: their income has to be directly or indirectly influenced by the situation generated by the COVID-19 pandemic, they must submit a statutory declaration that their own income and/or incomes related to the debtor's family have been affected (as defined by GD no. 270/2020, the debtor's family members are the husband/wife, parents and children, that live in the same household as the debtor), directly or indirectly, in the grave circumstances created by the COVID-19 pandemic, **compared to the level recorded prior to the establishment of the state of emergency**, and are unable to honor the payment obligations arising from the loan. In GD no. 270/2020, for the enforcement of GEO no. 37/2020, the executive has drawn up a sample list, **not exhaustive**, of cases in which the debtor is presumed to be unable to meet the payment obligations arising from the loan. These are: a) the entry of the debtor or his family members into technical unemployment, as a result of the closure or restriction of the employer's activity; b) the reduction of the debtor's salary or of that of his family members; c) the placement of the debtor in institutionalized quarantine or isolation at home; d) illness caused by COVID-19 **and others alike**.
- For debtors **other than private individuals** (PFA, I.I., legal entities, etc.) the debtor, except for private individuals, shall make a statutory declaration that his/her income has been affected, either directly or indirectly, due to the grave circumstances created by the COVID-19 pandemic, compared to the level recorded prior to the establishment of the state of emergency, and is unable to honor the payment obligations associated with the loan, its business being affected by the following conditions:
 - for debtors that are **authorized natural persons, individual partnerships and family partnerships**, as well as for debtors exercising **liberal professions and professions that are exercised under special laws**, regardless of the type of profession, if the activity has been interrupted totally or partially as a result of decisions issued by the competent public authorities according to the law, during the decreed state of emergency, with the following consequences: limitation of the retail market; decrease in the number of employees; decrease in the number of suppliers, and others;
 - for other debtors, except for private individuals and those mentioned in pt. a), if they have an emergency situation certificate issued by the Ministry of Economy, Energy and the Business Environment in which a decrease of the income or revenue of at least 25% in the March, 2020 was concluded, by reference to the average in January and February 2020, or if their activity was cut short, in total or in part, as a result of decisions made by public authorities competent during the decreed state of emergency, with the following consequences: limitation of the retail market; decrease in the number of employees; decrease in the number of suppliers, and others;
 - they are not insolvent at the time of the request for suspension of the loan repayment, according to the information available on the website of the National Trade Register Office.

3.5. PROCEDURE

- In order to qualify for the deferment of reimbursement rates, interests and fees, the debtor shall submit a request to the creditor in this regard, on paper format, or by electronic means using the contact details set out in the credit agreement, or through another remote communication channel provided by the creditor, **no later than 45 days from the entry into force of this emergency ordinance**. If the debtor cannot submit the application through one of the listed channels, he may make it verbally, by telephone, at a dedicated telephone number **that shall be announced by each creditor on its website**, in which case the creditor is required to record the conversation. Along with this request, the debtor shall also send the statutory declaration to the creditor;
- The debtor has to choose the deferment duration of the rates, between one month and nine months, but no later than 31.12.2020, a choice that can be made by the request submitted to the creditor;
- The creditor shall analyze the request made by the debtor by checking if the debtor meets all the conditions listed above and, within **15 days** from the receipt date of the request, he shall notify the debtor of his decision: a) of approval, if the debtor meets all the conditions analyzed above, **in which case the creditor is required to approve the debtor's request**, or b) rejection of the debtor's request, if one or more of the above conditions are not fulfilled;
- If the debtor's request for deferment of payment obligations is approved, the creditor's decision must contain **the number of installments for which the deferment was approved**, and it shall be communicated to the debtor in paper format or by electronic mail, at the contact details specified in the credit agreement, or through another remote communication channel provided by the creditor, or by telephone, in compliance with the creditor's obligation to record the conversation, where necessary, **depending on the choice made by the debtor**;
- The performance terms of the obligations to pay the installments shall be extended by the equivalent period of deferment, starting from the date on which the request for deferment was communicated, subject to the creditor's approval. In other words, the contractual period shall be extended by the deferment period from the date of application;
***Important note:** This extension applies also to the loans provided in the framework of the program "First House" ("Prima casa"), the deferment of payment obligation of the installments resulting in an extension of the maximum duration of the 30 year-loan, the creditors having to comply with the internal regulations related to the age limit range of the debtors at the termination of the contract extension.*
- For secured loans, including those secured under government programs, within **15 days** of receiving the debtor's request, the creditor shall notify the guarantor as well regarding **the validity extension of the guarantee contract** and the modification of the guarantee commitment clauses, due to the deferment facilities granted to the debtor pursuant to GEO no. 37/2020, this extension taking effect **from the date when the guarantor gives his consent**.

3.6. INTEREST ON INSTALLMENTS FOR WHICH PAYMENT IS DEFERRED

The ordinance states that the interest owed by debtors corresponding to the outstanding amounts whose payment has been deferred shall be capitalized to the balance of the existing loan at the end of the deferment period, thus, upon expiry of the deferment period, the interest (ancillary claim) whose payment has been deferred shall be capitalized (principal claim) therefore, the interest on the installments that mature after the deferment period shall be calculated by reference to the new capital, augmented by the total interest corresponding to the rates whose payment was deferred. The capital thus increased is paid in installments over the remaining period until the new maturity of the loans, subsequent to the deferment period.

It should be noted that the debts of the debtors shall be more burdensome, they shall have to pay an additional interest if they use this deferment procedure, i.e. interest (the price of benefiting from the performance term extension for the payment obligations for installments) for the interest whose payment has been deferred.

By exception, for mortgage loans contracted by **private individuals**, the interest for the deferment period shall be calculated according to the provisions of the credit agreement, and represents a **separate and independent claim** with respect to other obligations arising from the credit agreement. The interest on this claim is 0% and the debtor shall pay this debt gradually, in 60 equal monthly installments (5 years), starting with the month immediately following the end of the deferment period, and the repayment schedule of these payments shall be communicated within **5 days** to the borrowers and to the F.N.G.C.I.M.M. by the creditor. It can be noticed that private individuals who have taken out mortgage loans shall not pay interest for the interest corresponding to the rates owed during the deferment period.

3.7. CONTRACT AMENDMENT

The modification of the contracts for the purpose of the above-mentioned shall occur by operation of law, without concluding addenda. Within **30 days** since the request has been received, the creditor shall notify the debtor of the amended contractual terms for the implementation of this ordinance, including the new loan repayment schedule and the repayment schedule of interest instalments. Notification of the debtor is made in paper format, or by electronic mail to the contact details specified in the credit agreement, or through another remote communication channel provided by the creditor, according to the option expressed by the debtor. In the repayment schedule of the loan revised after granting the deferment facility of the payment obligation, **the interest rate is maintained at the level provided for in the initial credit agreement concluded between the debtor and the creditor.**

3.8. GUARANTEES

It should be noted that the Romanian state, through the Ministry of Public Finance, guarantees 100% the payment of deferred interest on **mortgage loans contracted by individual debtors**. The Ministry of Public Finance is authorized to mandate the F.N.G.C.I.M.M. in order to issue indemnity bonds in the name and on behalf of the state. The grant and performance of sovereign loan guarantees is carried out based on a guarantee agreement concluded between the F.N.G.C.I.M.M. and the creditors.

In order to guarantee the obligations of repayment of interest accrued during the deferment of payment, the creditor that has approved the deferment requests made by its debtors urges the F.N.G.C.I.M.M. to issue an indemnity bond in the name and on behalf of the state, and the F.N.G.C.I.M.M. issues the indemnity bond based on the guarantee agreement concluded with the creditor.

Upon expiry of the 45 days made available to the debtors to request the payment deferment of installment obligations, within 30 days, the creditor shall forward to the F.N.G.C.I.M.M. the request to issue the indemnity bond, along with a statutory centralizing situation prepared by the creditor, in which the total amount of the guarantee agreement arises from cumulation of payment amounts according to the payment schedules which represent interest owed by the debtors.

Within **5 days** from the entry into force of GD no. 270/2020 (06.04.2020), the creditors involved in accessing the guarantee facility provided by GEO no. 37/2020 shall notify the F.N.G.C.I.M.M. in order to conclude the guarantee agreement.

Claims arising from the payment of sovereign loan guarantees, namely the amounts paid to creditors on the basis of indemnity bonds, are budgetary claims and are recovered from debtors by the competent tax bodies of the A.N.A.F., according to the provisions of the Fiscal Procedure Code.

The payment term of the obligation arising from the performance of the indemnity bond is 15 days from when debtor has been notified of the budgetary debt instrument, upon expiry of this term, **the budgetary debt instrument becomes an enforceable instrument.**

For default on maturity (15 days from the notification of the budgetary debt instrument) of the obligations arising from the performance of the indemnity bond, the debtor shall owe ancillary tax obligations (interest) that are determined and notified by the A.N.A.F.

3.9. REFERENCE SOURCES

Civil Code

Law no. 335/2007 of Chambers of Commerce in Romania

<https://ccir.ro>

<https://www.mfinante.gov.ro/acasa.html?method=detalii&id=999646013>

D.-E. Sîngeorzan, Răspunderea contractuală în materie civilă și contractuală

I.T. Ștefănescu, Ș. Beligrădeanu, Întelesul și sfera de aplicare a noțiunilor de forță majoră și cazul fortuit în dreptul muncii, în „Dreptul” nr. 6/2008