



EUROPEAN ASSOCIATION OF  
COMMUNICATIONS AGENCIES

Secretariatul General al Guvernului  
Palatul Victoria,  
Piața Victoriei nr. 1,  
Sector 1, Municipiul București, 011791  
Romania

28 November 2012

Dear Sir,

Based on publicly available information on the official site of the Romanian Government, the Emergency Ordinance for the amendment of the Audiovisual Law ("GEO") was discussed and approved on 27 November 2012.

We are writing to express our disappointment at the decision of the Government to pass this Emergency Ordinance which seeks to amend an organic law that broadly reflects audiovisual laws in Western Europe and the United States.

Your Ordinance not only puts at risk an entire industry, many of which are Romanian-owned and managed companies, but also thousands of middle class Romanian workers who represent a newly-trained skilled labour force.

We urge you to suspend publication of the measure in the Monitorul Oficial immediately and to revisit the Ordinance only after it has met the constitutional and procedural path required by Romanian and European law.

One of the most important legislative amendments brought by the GEO relates to the regulation of the activities relating to the purchasing of television advertising space. In this sense, the GEO provides that advertising agencies cannot acquire TV advertising space unless they have been expressly mandated by their clients (the final beneficiaries) in this respect. Moreover, advertising agencies will have to confirm in advance with broadcasting companies the prices for the acquisition of TV advertising spaces, prior to submitting them to their clients. Any contract executed in breach thereof will be considered null and void.

Therefore, the proposed amendments place broadcasters in a more favorable position which will distort the normal competition environment on the advertising market which will be significantly affected. In addition to this, as further detailed below, the GEO does not comply with the transparency and procedural requirements provided by the law for the adoption of emergency ordinances.

#### **1. The transparency requirements have not been observed**

The GEO has not been subject to the transparency requirements applicable to legislative proposals. As the GEO has not been officially published by the Romanian Government on its website, the persons affected by the proposed amendments were not given the possibility to express their point of view thereof. Therefore, several principles set forth by the Law no. 52/2003 on transparency requirements in the decision-making process have been breached, such as the principle of prior information and consultation of citizens and professional associations, the principle of their active participation in the decision making process and in the process of elaborating drafts for regulatory deeds.

## **2. The GEO fails to comply with the "urgency" requirements**

Pursuant to the GEO's substantiation note, the urgency of the enactment of the GEO is justified based on budgetary reasons. Each year, during the months of November/ December of each year, customers allocate their advertising budgets for the next calendar year and thus, transactions targeting the acquisition of advertising space are mostly perfected within this timeframe.

However, as per the Romanian Constitution, the "emergency" requirement is inherently related to the need to adopt immediate solutions in order to avoid serious prejudices to the public interest, solely under extraordinary circumstances. Therefore, it cannot be held that the already "naturalized" practice of allotting advertising budgets by the beneficiaries of advertising services and of concluding contracts by the advertising agencies with the broadcasters could prejudice public interest in a manner that could justify the enactment of an emergency ordinance. On the contrary such argumentation seems to favor the broadcasters to the detriment of the advertising agencies representing the interest of the beneficiaries of the services.

## **3. The Romanian Competition Council has not been consulted in respect of the GEO**

Pursuant to Romanian Competition Law no. 21/1996, central and local public administration authorities and institutions are compelled to request the opinion of the Romanian Competition Council regarding the regulatory deeds that could have an anticompetitive impact

As further detailed at point 4 below and based on the purposes declared in the GEO's substantiation note and its preamble regarding the need to eliminate corruption and unclear practices, as well as to remedy some competitive deficiencies, it may be construed that the GEO has an anticompetitive impact. Therefore, in compliance with the requirements of Competition law, the Romanian Government, as the authority issuing the regulatory deed, must request the prior consultative opinion of the Competition Council.

## **4. The GEO has a major anticompetitive impact by favoring broadcasters**

### **4.1. The GEO limits the negotiation power of the agents in their relationship with the broadcasters**

As the GEO sets forth strict "mandate" rules for the acquisition of TV advertising space, advertising agencies will no longer have the possibility to reserve advertising space in advance from media companies, but will have to postpone its acquisition until the final beneficiary formulates a request. Thus, the new provisions significantly influence the negotiation capacity of the advertising agencies in front of the broadcasters. More specifically this would translate in restricting the advertising agencies from negotiating in advance the acquisition of advertising space and respectively from obtaining more advantageous tariffs for their customers based on higher estimated volumes.

### **4.2. The GEO favours broadcasters' monopoly over their own advertising space by eliminating the counterweight of their negotiation power from the agencies**

Advertising agencies negotiate contracts with broadcasters according to determinable criteria, well-known on the market, by reference to the audience shares that the broadcaster achieves during a certain period of time and on a certain market segment, and respectively the frequency rate of broadcasting the concerned advertisement. That is why, without any value added services made available by the advertising agencies, the final beneficiary with a lower level of specialized know-how will remain unprotected in front of the broadcaster, which will use in its relation with the uninformed beneficiary non-transparent list prices.

In their relationship with the broadcasters, the customers of the advertising agencies, as beneficiaries of such services, are the parties that must be protected. By eliminating the agents' possibility to negotiate the acquisition of an advertising space based on their own experience and not only based on a strict mandate granted by the final customer, the GEO gives the broadcasters the liberty to control the customers, according to the level of the budgets spent. Thus, the providers of advertising space will also have the possibility to offer preferential tariffs to certain customers, not necessarily based on the size of the advertising space that was acquired.

Given the lack of clear criteria for establishing the mechanism to be used by the broadcasters in order to capitalize the advertising space, it is difficult to imagine that they are going to determine prices in compliance with the competitive requirements, because the advertising space is relatively limited, and the competitive pressure of the other broadcasters is difficult to quantify.

#### **4.3. The Draft favours the broadcasters' monopoly over their advertising space by making the terms of the mandate concluded by the final beneficiary with the agent known to the broadcaster**

There is no argument to justify this need for a full transparency of the business relationships between the agent and the final beneficiary towards the broadcaster. On the contrary, such interference of the broadcasters in the business relationships of the advertising agencies with their clients contradicts the principle of market economy based on competition as provided by the Romanian Constitution.

Should the advertising agency breach its obligations or commit an abuse, may be held liable towards its clients or the broadcaster by way of contractual means and not by full transparency obligations as required by the GEO. In addition to this, please note that the French Loi Sapin (which served as inspiration for the GEO) does not provide such contractual transparency requirements either.

#### **5. The GEO does not define the notion of "intermediary" and fails to consider the complex role of advertising agencies**

Advertising agencies do not act as simple intermediaries for the purpose of acquiring advertising space, but rather provide value-added services for which the advertising space merely represents a support. In fact, customers elaborate their advertising strategy, to include the media channels which will broadcast the advertising spots, based on competitive offers from several advertising agencies, clearly detailing the associated costs.

Moreover, even Loi Sapin makes a clear distinction between the situation where the agency acts a simple intermediary and where it has a more complex role, in which case it must be granted the possibility to conduct its business without the broadcasters' scrutiny. The GEO did not take into account such a distinction and thus it does not allow advertising agencies to perform value-added services.

#### **6. The GEO has a negative economic impact for all entities involved**

The GEO adversely impacts not only advertising agencies, but the final beneficiaries of the advertising services as well. Following the enacted provisions, customers would have to dedicate time in order to understand this market sector, to negotiate the contracts as such and respectively, to directly monitor how the advertising services that were acquired by the latter are provided. However, all these services fall under the scope of the business activities regularly performed by the advertising agencies (intermediaries) as per the well-established market practices.

Such changes would be reflected in costs that the beneficiaries would assume by deducting from the budgets they allocate today for promoting the products and services they trade.

Therefore, although it seems that the GEO may place broadcasters in a more favorable position, in reality all parties involved may lose: Firstly, while customers are forced to spend the same budgets, they obtain services that do not benefit from the same quantity or quality. This would also impact the incomes of broadcasters as well as of advertising agencies, which depending on the business streams they develop and on their financial strength, would ultimately force them to close their doors.

Broadcasters' inability to negotiate large volume advertising space in advance, also brings an additional uncertainty with regard to the revenues they would obtain. This may particularly affect broadcasters with reduced financial capabilities.

Your Ordinance not only puts at risk an entire industry, much of which consists of Romanian-owned and -managed companies, but also thousands of middle class Romanian workers who represent a newly-trained skilled labour force.

We urge you to put an immediate freeze on this Ordinance and request that your government engages with domestic governmental agencies, business interests and European officials for a proper legislative process.

Yours faithfully,

Dominic Lyle  
Director General

Cc           Ministerul Economiei, Comerțului și Mediului de Afaceri  
  
              Autoritatea Națională pentru Administrare și Reglementare în Comunicații  
  
              Ministerul Justiției  
  
              Consiliul National al Audiovizualului - CNA  
  
              Consiliul Concurenței  
  
              Mrs. Viviane Reding,  
              Vice-President of the European Commission  
              Commissioner for Justice, Fundamental Rights & Citizenship  
  
              Mr. Joaquín Almunia  
              Vice-President of the European Commission  
              Commissioner for Competition