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# Cartels

Second Edition

Romania: Law & Practice  
MPR Partners | Maravela, Popescu & Roman

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2019

## Law and Practice

Contributed by MPR Partners | Maravela, Popescu & Roman

### Contents

<b>1. Basic Legal Framework</b>	<b>p.4</b>	3.2 Obtaining Documentary Information from Target Company	p.10
1.1 Statutory Bases for Challenging Cartel Behaviour/Effects	p.4	3.3 Obtaining Information from Entities Located Outside this Jurisdiction	p.10
1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards	p.5	3.4 Inter-Agency Co-operation/Co-ordination	p.10
1.3 Private Challenges of Cartel Behaviour/Effects	p.5	3.5 Co-operation with Foreign Enforcement Agencies	p.11
1.4 Definition of 'Cartel Conduct'	p.5	3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases	p.11
1.5 Limitation Periods	p.6	3.7 Procedure for Issuing Complaints/Indictments in Civil Cases	p.11
1.6 Extent of Jurisdiction	p.6	3.8 Enforcement Against Multiple Parties	p.12
1.7 Principles of Comity	p.6	3.9 Burden of Proof	p.12
<b>2. Procedural Framework for Cartel Enforcement – Initial Steps</b>	<b>p.6</b>	3.10 Finders of Fact	p.12
2.1 Initial Investigatory Steps	p.6	3.11 Use of Evidence Obtained from One Proceeding in Other Proceedings	p.12
2.2 Dawn Raids	p.7	3.12 Rules of Evidence	p.12
2.3 Restrictions on Dawn Raids	p.7	3.13 Role of Experts	p.12
2.4 Spoliation of Information	p.8	3.14 Recognition of Privileges	p.12
2.5 Procedure of Dawn Raids	p.8	3.15 Possibility for Multiple Proceedings Involving the Same Facts	p.13
2.6 Role of Counsel	p.8	<b>4. Sanctions and Remedies in Government Cartel Enforcement</b>	<b>p.13</b>
2.7 Requirement to Obtain Separate Counsel	p.8	4.1 Imposition of Sanctions	p.13
2.8 Initial Steps Taken by Defence Counsel	p.8	4.2 Procedure for Plea Bargaining or Settlement	p.13
2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony	p.8	4.3 Collateral Effects of Establishing Liability/Responsibility	p.13
2.10 Procedure for Obtaining Other Types of Information	p.8	4.4 Sanctions and Penalties Available in Criminal Proceedings	p.14
2.11 Obligation to Produce Documents/Evidence Located in Other Jurisdictions	p.8	4.5 Sanctions and Penalties Available in Civil Proceedings	p.14
2.12 Attorney-client Privilege	p.9	4.6 Relevance of 'Effective Compliance Programmes'	p.14
2.13 Other Relevant Privileges	p.9	4.7 Mandatory Consumer Redress	p.14
2.14 Non-co-operation with Enforcement Agencies	p.9	4.8 Available Forms of Judicial Review or Appeal	p.14
2.15 Protection of Confidential/Proprietary Information	p.9	<b>5. Private Civil Litigation Involving Alleged Cartels</b>	<b>p.14</b>
2.16 Procedure for Defence Counsel to Raise Arguments Against Enforcement	p.9	5.1 Private Right of Action	p.14
2.17 Leniency, Immunity and/or Amnesty Regime	p.10	5.2 Collective Action	p.15
<b>3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds</b>	<b>p.10</b>	5.3 Indirect Purchasers and 'Passing-on' Defences	p.15
3.1 Obtaining Information Directly from Employees	p.10		

5.4	Admissibility of Evidence Obtained from Governmental Investigations/Proceedings	p.15
5.5	Frequency of Completion of Litigation	p.15
5.6	Compensation of Legal Representatives	p.15
5.7	Obligation of Unsuccessful Claimants to Pay Costs/Fees	p.15
5.8	Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation	p.15
<b>6.</b>	<b>Supplementary Information</b>	<b>p.15</b>
6.1	Other Pertinent Information	p.15
6.2	Guides Published by Governmental Authorities	p.15

**MPR Partners | Maravela, Popescu & Roman** offers full services in legal, tax advisory and insolvency matters for clients including large multinational corporations, Romanian private companies, private equity investors, public authorities and State companies. The firm's competition team has hands-on expertise in the whole range of matters spanning

antitrust (merger clearance, anti-competitive behaviour, dominance abuse) and State aid. It advises on competition compliance audits, policies and training, merger clearance assessments and procedures, and assessments regarding abuse of dominance, amongst other matters.

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## 1. Basic Legal Framework

### 1.1 Statutory Bases for Challenging Cartel Behaviour/Effects

In Romania, cartels can be investigated and punished based on Article 101 of the Treaty on the Functioning of the European Union ("TFEU") and related EU competition legislation, and/or Romanian Law No 21/1996 on competition (the "Competition Act") and various secondary legislation issued by the Romanian Competition Council ("RCC"), such as:

- the Regulation concerning the finding of administrative offences and the enforcement of sanctions by the Competition Council, approved by Order 407/2019 of the President of the Competition Council;
- the Regulation on Competition Council procedures, approved by Order no. 377/2017 of the President of the Competition Council;
- instructions on the individualisation of sanctions for administrative offences provided in Article 55 of the Competition Law No 21/1996, approved by Order No 694/2016 of the President of the Competition Council;
- the Regulation on the assessment and settlement of complaints concerning infringements of Articles 5, 6 and 9 of the Competition Law No 21/1996 and of Articles 101

and 102 of the Treaty on the Functioning of the European Union, approved by Order No 499/2010 of the President of the Competition Council;

- instructions on the definition of the relevant market, approved by Order no. 388/2010 of the President of the Competition Council; and
- instructions on the conditions and criteria for the application of a leniency policy, approved by Order No 300/2009 of the President of the Competition Council (the "Leniency Act"), etc.

In addition, the RCC issues various guides, guidelines and recommendations on various aspects of relevance for law enforcement pertaining to cartels, eg:

- a guide concerning the observance of competition rules if an association takes part in a public procurement procedure;
- a guide concerning the identification and deterrence of anti-competitive practices within public procurement procedures;
- good practice recommendations for the petitioning activity carried out jointly by competing undertakings or associations of undertakings; and
- a guide entitled "You have the right to complain".

## 1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards

In Romania, cartels are investigated and sanctioned by the RCC (*Consiliul Concurenței*, in Romanian), which has jurisdiction over all agreements between undertakings, decisions of associations of undertakings and concerted practices that have as an object or effect the prevention, restriction or distortion of competition on the Romanian market or a part thereof.

An undertaking's involvement in a cartel may be punished by the RCC with administrative fines of up to 10% of the undertaking's total net worldwide turnover. At present, the Competition Act itself does not provide for the criminal liability of the undertakings involved.

According to the Competition Act, it is the undertakings' directors, statutory representatives or other managers who intentionally conceived and organised cartels that may become criminally liable, in which case they would be punished by imprisonment of up to five years or by criminal fines and a restriction of certain civil rights. Criminal cases are instrumented by criminal prosecution bodies and brought to court.

Where expressly provided by laws other than the Competition Act, cartels may equally amount to criminal offences (for instance, in public bid rigging cases) on behalf of the undertakings themselves. Likewise, such cases are instrumented by criminal prosecution bodies and brought to court.

In addition to the RCC and criminal prosecution bodies, the EU and Romanian legislation against cartels is enforced by the Romanian courts of law, in various situations, such as:

- where RCC decisions are challenged;
- where civil claims for compensation are filed by parties that have incurred prejudices due to cartel behaviour;
- where criminal offences pertaining to breaches of competition legislation are tried; and
- incidentally, in cases where the validity of clauses or agreements amounting to cartel behaviour is assessed.

## 1.3 Private Challenges of Cartel Behaviour/Effects

Cartels may be formally challenged via complaints filed with the RCC or before the relevant courts of law, on various occasions, as described in **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**.

Formal complaints need to contain certain information and must be filed with the RCC using a specific form. However, only (natural or legal) persons that can demonstrate a (direct or indirect) legitimate interest may file complaints.

As opposed to anonymous whistle-blowers, individuals and undertakings who submit formal complaints have certain rights throughout the investigation procedure, such as the right to be informed of certain stages, the right to be heard, the right to access the file in certain conditions, the right to express their views if the RCC deems the complaint unfounded, etc.

In order to be successful in actions for (civil) damages incurred as a result of cartels, claimants must first demonstrate that the respondent has infringed competition legislation. However, this is not required where there is a final decision of the Romanian competition authority, the European Commission or a Romanian court of law finding an infringement.

If the court or national competition authority that rendered an infringement decision belongs to another EU Member State, the infringement will be presumed, unless there is proof to the contrary. Secondly, claimants must prove not only that they have sustained a prejudice as a result of the competition legislation infringement, but also the amount thereof.

Actions for damages are heard by the Bucharest Tribunal in first instance. Judgments can be appealed one time before the Bucharest Court of Appeals and a second time before the Romanian Supreme Court (High Court of Cassation and Justice).

## 1.4 Definition of 'Cartel Conduct'

As far as the Romanian law is concerned, cartel conduct is defined by statute, ie the Competition Act. In addition, the following precedents bind the RCC and the Romanian courts (when judging cartel-related cases):

- when the cartel equally breaches Article 101 of the TFEU, the decisions of the European Commission and the judgments of the courts of the European Union;
- the regulatory judgments of the Romanian Supreme Court (ie, judgments issued with the aim of unifying court practice on certain matters).

The Competition Act forbids all agreements between undertakings, decisions of associations of undertakings and concerted practices that have as an object or effect the prevention, restriction or distortion of competition on the Romanian market or a part thereof, in particular (but not exclusively) those which:

- fix prices and other commercial terms;
- limit production, markets, innovation or investments;
- share markets or sources of supply;
- provide unequal conditions in equivalent deals with commercial partners (thus inflicting competitive disadvantages on some of them); or

- condition conclusion of contracts on uncustomary additional obligations.

Moreover, cartels are specifically defined in the Leniency Act as agreements with competitors aimed at setting prices or commercial terms or the allocation of production or sales quotas, markets or clients, including fake tenders, restricting imports or exports, and at other anti-competitive acts directed against competitors.

If the agreement, decision or practice does not remove competition on a substantial part of the relevant market and has positive effects that outweigh its negative effects on competition (ie, it improves production or distribution, or promotes technological or economic progress), it will not be deemed as an infringement of the Competition Act. However, to this effect, consumers must be afforded a proper share of the benefits of that agreement, decision or practice, considering the benefits derived by the parties thereto. Also, the restrictions must not go beyond those that are imperatively necessary in view of obtaining the relevant positive effects.

In order to demonstrate that these conditions are fulfilled, a very complex test requiring intricate economic assessments would normally have to be passed. It is usually considered virtually impossible for hardcore infringements, and rather difficult (but not impossible) for other restrictions of competition by object to fit these criteria.

Other agreements, decisions or practices between competitors that fall outside the scope of the Competition Act provisions on cartels include:

- those that fall under the market shares-based “safe harbours” set forth by the Competition Act and those established by the European Commission (eg, the agreements deemed of “minimum importance” and those that do not affect trade between EU member States); and
- under certain conditions, the agreements required for the implementation of economic concentrations that are cleared by the RCC.

Agreements between competitors that can be deemed an economic concentration within the meaning of the Competition Act will be mainly assessed as per the merger control provisions of the Competition Act and related proceedings.

Cartel conduct related to public procurement procedures may, under certain circumstances, also amount to a criminal offence. Moreover, undertakings that have infringed competition legislation may be excluded from such procedures.

To date, there are no economic sectors that are exempt from scrutiny based on cartel-related legislation.

### 1.5 Limitation Periods

The RCC’s right to prosecute cartel behaviour becomes time-barred after five years as of the date when the infringement ceases.

The five-year term is interrupted towards all undertakings involved, by any action taken by the RCC in view of a preliminary examination or investigation of the cartel with respect to any of the undertakings involved.

Actions interrupting the statute of limitations mainly include written requests for information, the order of the RCC president whereby the investigation commences, dawn raids, circulation of the statement of objections, etc.

In the case of interruption, a new five-year term starts to run. Notwithstanding, the limitation period will lapse at the very latest within ten years of the date when it started to run.

The limitation period is suspended during the time the decision of the RCC is being tried by a court of law.

### 1.6 Extent of Jurisdiction

If the cartel affects or may affect the Romanian market or a part thereof, there are no limits on the RCC’s exercise of personal jurisdiction over the cartel participants.

Thus, the RCC’s jurisdiction equally encompasses cases where all parties to the cartel are foreign and where the cartel is implemented entirely outside Romania if the Romanian market may be affected as a result.

### 1.7 Principles of Comity

There are no express provisions in the Romanian legislation concerning principles of comity with respect to competition matters. However, comity obligations may arise from competition-related international treaties and conventions to which Romania is a party, as well as those concluded by the European Union.

## 2. Procedural Framework for Cartel Enforcement – Initial Steps

### 2.1 Initial Investigatory Steps

Cartel investigations are initiated by the RCC at its own motion (for instance, following sector investigations, or following leniency statements of one or more undertakings involved in the cartel or information provided by whistleblowers), or following complaints filed by aggrieved parties.

The formal commencement of the investigation is preceded by a preliminary examination phase conducted by the relevant directorate.

The investigation commences by formal decision of the Competition Council. Where dawn raids are conducted, a court decision authorising the raid is equally required. Formal requests for information addressed to the undertakings involved will also normally be sent by the RCC.

At any point in the investigation, the RCC may prompt the parties to consider a settlement (or alternatively the parties may informally address the RCC in view of finding out if they would be willing to initiate the settlement process). To date, settlements have been rather frequent in Romania but, as per the latest statements of RCC officials, it follows that a decrease of instances where fine discounts would be granted as part of settlements may follow.

After the RCC gathers all the requisite information and forms an opinion of the case (and/or after settlement proposals are submitted by one or more of the undertakings concerned), a statement of objections (ie, the “investigation report”) will be circulated by the RCC so that the undertakings concerned may provide their comments on it. Hearings may equally take place, following which the RCC will either maintain the report and issue a decision or amend the report.

## 2.2 Dawn Raids

Dawn raids are both possible and rather common in RCC’s practice. Dawn raids are conducted both in Romania and abroad, in other EU Member States, with the assistance of the local competition authorities, although cases where dawn raids are conducted abroad are much less numerous in practice.

During a dawn raid, undertakings are mainly required:

- to allow RCC to access their premises, means of transport, computers and any other devices containing the requisite information; personal homes, lands and means of transport of the relevant staff of the undertaking concerned may also be investigated;
- to provide full access to documents and information required, irrespective of how and where they are stored;
- to appoint a member of staff that can help the RCC to access communication and IT equipment and information stored in the cloud;
- to block user or e-mail accounts and changed passwords if so requested by the RCC;
- to allow the RCC to run software and forensic tools in view of identifying the relevant information; and
- not to remove any seals affixed by the RCC.

Outside counsel may be present during the dawn raid to make sure that the RCC observes the applicable legal provisions governing dawn raids. However, the RCC is not bound to wait for the external counsels to arrive, and may start the raid in their absence. In practice, the competition inspectors wait for the external counsel to arrive for a limited time only.

Delaying a dawn raid may result in delay penalties of up to 5% of the undertaking’s daily average turnover from the preceding financial year for each day of delay. The refusal to allow a dawn raid completely is subject to an administrative fine of up to 1% of an undertaking’s worldwide turnover for the preceding financial year.

## 2.3 Restrictions on Dawn Raids

The dawn raid may be carried out only by the RCC staff with the requisite position and degree of seniority, and only if the dawn raid is authorised by the relevant court of law. Thus, dawn-raid searches may be conducted only with respect to the subject matter and within the limits set out within the court decision authorising the raid.

The dawn raid may be carried out only during normal working hours, in the presence of the undertaking’s statutory representative or a person appointed thereby. An 8 am to 6 pm interval cannot be exceeded, unless the undertaking expressly agrees.

Also, during a dawn raid, the RCC should not seize documents that are subject to legal privilege (the privilege is to be proven by the undertaking concerned). However, in certain cases, documents may be copied in bulk, so privileged documents could be taken away by the RCC and only subsequently removed from those to be used as evidence. Also, where the undertaking cannot prove on the spot that certain information is privileged, the information will be sealed and removed, and the undertaking will be entitled to bring evidence subsequently.

If information is collected in bulk to be examined at RCC’s venue, the selection of the information to be used as evidence will be made in the presence of the relevant undertaking(s) involved.

An undertaking subject to investigation should, in principle, also have the right not to provide documents and information that would directly incriminate that undertaking. Nonetheless, in practical terms it is very difficult to make a clear distinction between information that can be deemed as such and information which must be provided, so companies normally allow full access to their records, subject to the limits mentioned above.

During the dawn raid (as well as during the investigation in general), the RCC’s interviewing powers are rather limited, as the undertaking’s staff may not be questioned or requested to issue statements by the RCC (with respect to other aspects than the location of relevant information and documents) unless they consent to it. However, where the individual does agree to be interviewed, the RCC may record his or her answers.

## 2.4 Spoliation of Information

The RCC may seal rooms and devices, and may request that user and e-mail accounts are blocked and passwords changed.

The failure to provide the RCC with information that is accurate, complete and not misleading triggers additional administrative fines of up to 1% of an undertaking's worldwide turnover for the preceding financial year.

The RCC may also impose delay penalties of up to 5% of the undertaking's daily average turnover from the preceding financial year for each day of delay in providing correct and complete information in response to the RCC's requests.

## 2.5 Procedure of Dawn Raids

After presenting the court decision authorising the dawn raids and the relevant inspectors' badges, the RCC will usually wait a limited amount of time for the external counsel for and will then proceed to the raid. Where deemed necessary, the RCC may affix seals on certain rooms and devices.

The RCC may seize and copy documents as well as devices, and at the end of the raid will draw up the dawn raid minutes listing the information seized and describing the undertaking's degree of co-operation. Copies of documents seized during the dawn raid will be provided to the undertaking concerned.

The undertaking's officers and employees may be requested to answer questions during dawn raids but are not obliged to do so (unless the question concerns the location and access details of the relevant information).

## 2.6 Role of Counsel

Officers and employees who are subject to criminal investigations are entitled to have a counsel. The counsel's rights during such investigations are governed by the criminal procedure rules.

During interviews conducted by the Competition Council, officers or employees will be entitled to have a counsel by virtue of the fundamental right of defence. As there are no express provisions concerning counsel's intervention during an interview, counsel's pleadings and advice will be subject to a reasonable defence behaviour, in line with the rules governing the attorney's profession and the interviewee's fundamental right of defence.

## 2.7 Requirement to Obtain Separate Counsel

The Competition Act does not provide for such a requirement. However, due to conflicts of interest between the company and the individuals involved (eg, the latter may have an interest to co-operate with the RCC in view of escaping potential liability), counsels representing the company

would not normally be allowed by the attorney profession legislation also to advise the relevant individuals.

## 2.8 Initial Steps Taken by Defence Counsel

As soon as it is informed of an investigation, the defence counsel should remind the undertaking concerned about their rights and obligations during a dawn raid and in general throughout the investigation.

When a dawn raid takes place, there is a possibility to challenge the court decision and the RCC order that authorised the raid. Where there are appropriate grounds, these actions should be considered and implemented quickly.

At the same time, defence counsel should quickly assess the existing evidence and prospects of the case, as they may be discerned at that stage. Based on such assessment, the defence counsel should consider advising the undertaking concerned with respect to the possibility of applying for leniency, where circumstances of the case and evidence held allow it.

## 2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony

Evidence is obtained from the following sources:

- requests for information addressed to the undertakings concerned;
- during dawn raids;
- from other market players as well as other public authorities;
- following leniency applications filed by undertakings seeking to escape or diminish their liability;
- wilful co-operation of individuals involved;
- independent research of publicly available sources;
- whistle-blowers; and
- other competition authorities.

The RCC does not have powers to obtain testimonies, unless they are wilfully presented by undertakings or the individuals concerned.

## 2.10 Procedure for Obtaining Other Types of Information

Non-documentary information (eg, recordings) may be obtained by the same means as documentary evidence. Please see **2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony**, above.

## 2.11 Obligation to Produce Documents/Evidence Located in Other Jurisdictions

A company has the same obligations to produce documents, irrespective of where they are located. Moreover, in the case of dawn raids, undertakings have the express obligation to allow access to documents that can be reached from their premises (eg, documents stored in the cloud).

Under practical terms, the enforcement of such obligations (eg, by means of dawn raids aimed at identifying the relevant documents at the place where they are located) may be substantially more difficult with respect to jurisdictions located outside the European Union, especially in those cases where there are no applicable international treaties or conventions regulating mutual support during investigations.

Although the law enables the RCC to access documents located in European Union Member States via dawn raids with the co-operation of the local competition authorities, in practical terms this will require additional resources. Therefore, dawn raids conducted at the RCC's request in other countries will not be as frequent as those carried out in Romania.

If the RCC proves that a request for information has not been duly complied with, it has the power to inflict the relevant sanctions, irrespective of where the information is located. Thus, in practical terms, undertakings wishing to avoid additional sanctions and delay penalties, as well as the aggravating circumstance of the failure to co-operate (which may increase the base amount of the fine by 5-10%), will normally provide the relevant information.

### **2.12 Attorney-client Privilege**

Legal privilege is limited to attorneys at law ("*avocat*" in the Romanian language) – ie, members of the lawfully constituted bar associations – and covers only the documents exchanged in view of defending the subject-matter of the relevant investigation. Communications with in-house counsels are not recognised as privileged.

### **2.13 Other Relevant Privileges**

In theory, the privilege against self-incrimination should exist under the same conditions as recognised in EU competition law.

Nonetheless, in practical terms it is extremely difficult to make a distinction between information that can be subject to such privilege and information that must be provided. Due to this reason, and considering the consequences of the failure to co-operate and provide information to the RCC, this privilege is rarely relied on in practice.

However, the self-incrimination privilege may potentially be useful in leniency applications, where it may be argued that self-incriminating information provided in response to the RCC's requests may be deemed an additional contribution to the case (further to the lack of an obligation to provide it in response to such requests).

### **2.14 Non-co-operation with Enforcement Agencies**

RCC requests for information are not commonly resisted. However, this may happen in certain cases, in particular with

undertakings located outside Romania and/or that have a low degree of awareness concerning competition matters.

Refusal or failure to provide accurate, complete and not misleading information in response to the RCC's requests triggers additional fines of up to 1% of an undertaking's total worldwide turnover for the preceding financial year.

The RCC may also impose delay penalties of up to 5% of an undertaking's average daily turnover during the preceding financial year for each day of delay in providing the requested information.

Additionally, the failure to co-operate with the RCC is an aggravating circumstance that increases the potential fine imposed for the alleged infringement by 5-10% of the base amount of the fine.

If leniency applications are filed, the failure to co-operate will trigger the loss of conditional fine immunity or the conditional fine reduction granted in response to the leniency application, as the case may be.

### **2.15 Protection of Confidential/Proprietary Information**

Targets of enforcement actions may protect confidential or proprietary information throughout the investigation, based on the legal provisions governing the access to the file, and before the decision of the RCC is published. Protecting the confidentiality of information that other undertakings involved in the investigations are entitled to access (as part of their right of defence) is subject to restrictive conditions.

In each case, parties must submit reasoned requests explaining the confidential nature of each piece of information, and providing non-confidential versions of the relevant documents.

Third parties may potentially request protection based on legislation governing private data, the general right to access information held by public authorities, and the protection of know-how and business secrets.

### **2.16 Procedure for Defence Counsel to Raise Arguments Against Enforcement**

The first formal opportunity to raise arguments is in the appeal against the court decision authorising the dawn raid and the motion to challenge the RCC order initiating the inspection, which are to be made rather shortly after receipt of the relevant documents.

Thereafter, strictly based on procedural provisions, defence counsels may raise legal, economic and factual arguments once the statement of objections (termed investigation report in Romanian legislation) is circulated by the RCC.

However, as a matter of practice, parties often submit legal and factual arguments as well as expert reports and opinions well before the statement of objections is circulated by the RCC – eg, within responses to the RCC’s requests for information that precede the statement of objections.

### **2.17 Leniency, Immunity and/or Amnesty Regime**

Undertakings participating in cartels may be granted leniency, which may take the form of immunity from the administrative fine imposed by the RCC at the end of the investigation or a considerable reduction of such fine.

Immunity is granted to undertakings that provide information that enables the RCC to initiate an investigation (Type A leniency) or to find an infringement (Type B leniency), provided that additional conditions are equally fulfilled (eg, the applicant fully and continuously co-operated with the council, the applicant has not coerced other parties to take part in the infringement, etc).

Fine reduction is granted to applicants that do not meet the conditions to be granted immunity but who have nonetheless provided information with substantial added value to the RCC’s case. The additional conditions are to be fulfilled for fine reductions as well.

Immunity works on a first-come, first-served basis. Fine reductions also decrease by chronological order of the leniency applications (the first to apply is granted a higher discount than those following).

Undertakings may apply for markers in order to secure priority before the RCC issues a conditional decision on leniency. Leniency may thereafter be withdrawn at the end of the investigation if the relevant additional conditions are no longer fulfilled.

To date, leniency has been requested and awarded in a very limited number of cases in Romania.

## **3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds**

### **3.1 Obtaining Information Directly from Employees**

The RCC does not have any means to obtain forcefully information directly from employees. However, the undertakings concerned may occasionally offer witness testimonies, or employees may agree to give statements or answer RCC’s questions. For instance, certain employees may wilfully co-operate in the hope of escaping criminal liability or helping the undertakings concerned by clarifying certain aspects.

The RCC may take employees’ statements, but the employees must first be informed of the fact that the statement is to be recorded, as well as of the purpose and legal ground thereof. A copy of the recorded statements will be provided to the relevant person, who will be entitled to correct the statement if needs be.

The RCC may also interview employees who agree to be questioned, based on written requests sent thereto providing the legal ground, purpose, date and place of the interview. The interview may be made by any means, and will be recorded. Details regarding the manner in which the interview was carried out are to be registered in minutes to be signed by all persons taking part in the interview. A copy of the record and the transcript made based on the recording will be provided to the persons interviewed so that they may check the accuracy thereof.

### **3.2 Obtaining Documentary Information from Target Company**

The RCC may directly seek documentary information via requests for information addressed to any person as well as through dawn raids conducted at the premises and means of transport of the undertakings concerned, and, where needed, at the relevant directors’ and employees’ homes, lands and means of transport.

Failure to observe one’s obligations regarding such requests and dawn raids triggers substantial fines, delay penalties and aggravating circumstances increasing the fine imposed at the end of the investigation.

Conversely, co-operating with the authority beyond one’s obligation to do so (ie, beyond responses to the RCC’s requests for information and co-operation during dawn raids) amounts to a mitigating circumstance decreasing the amount of such fine. Moreover, under certain conditions, immunity from fine or fine reductions are granted to undertakings that wilfully provide documents outside the RCC’s requests.

Together, these serve as rather powerful incentives for undertakings to provide documentary evidence.

### **3.3 Obtaining Information from Entities Located Outside this Jurisdiction**

The RCC may directly seek information from companies located outside Romania, either via requests for information or during dawn raids conducted in other EU Member States, with the co-operation of the relevant national competition authorities.

### **3.4 Inter-Agency Co-operation/Co-ordination**

The RCC actively co-operates with various Romanian authorities concerning various aspects, including:

- the investigation of certain conducts that are deemed criminal offences, in which case the RCC co-operates with the relevant criminal prosecution bodies;
- the support that may be granted to the RCC by the police in certain cases in view of carrying out dawn raids;
- information held by various authorities that may be helpful for the RCC's investigation; and
- guidance and support provided by the RCC to various authorities with the aim of helping them to deter the perpetration of cartels in the economic sectors under their respective jurisdictions, etc.

In any case, information obtained by the RCC from other authorities must be used only for the purpose of enforcing competition legislation, and is subject to confidentiality requirements.

### 3.5 Co-operation with Foreign Enforcement Agencies

As Romania is a member of the EU, the RCC is part of the European Competition Network (ECN) and has close co-operation relationships with the European Commission and the other national competition authorities within the EU. There have been cases where the ECN co-operation framework has helped the RCC in conducting cartel investigations, and vice versa. Moreover, the RCC is required to inform the EC of any investigations encompassing infringements of Article 101 of the TFEU.

Co-operation with national competition authorities from countries outside the EU may take place within the International Competition Network (ICN) framework or based on international treaties and conventions regulating co-operation on competition matters, such as those concluded by the EU or separately by Romania.

### 3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases

All criminal cases are prosecuted by criminal investigation bodies and tried by the criminal courts in accordance with the legislation governing criminal procedure.

The RCC co-operates closely with criminal prosecution bodies in competition matters entailing criminal law components. As per the legislation governing criminal procedure, when it becomes aware of a possible infringement that may equally amount to a criminal offence, the RCC will draw up minutes describing the circumstances of which it has become aware. The minutes will also have to include any statements or objections raised by the authors of the deed or any other persons present at any inspection carried out by the RCC.

Per the same legal provisions, the RCC is bound to preserve the means of evidence and to send them to the criminal prosecution bodies, along with the relevant minutes.

### 3.7 Procedure for Issuing Complaints/Indictments in Civil Cases

Parties aggrieved by anti-competitive conduct may claim compensation for damages incurred due to said conduct, with or without a decision from a competition authority finding that there has been an unlawful cartel. However, if such a decision exists, the claimant's burden of proof will be considerably diminished.

Compensation claims are filed with the Bucharest Tribunal in first instance and are judged on appeal by the Bucharest Court of Appeal and on second appeal by the High Court of Cassation and Justice. Trials are conducted based on the common rules of Romanian civil procedure and Government Emergency Ordinance

Both claimants and respondents may request the court to order production of evidence held by the other or a third party. The evidence (or evidence category) must be relevant, and must be identified in the relevant court order as clearly and precisely as possible. In deciding on evidence production requests, the court will have to observe the principle of proportionality, by balancing the interests of all parties concerned and in considering, amongst other matters, (i) the way the existing evidence and facts support the evidence production request, (ii) costs and (iii) confidentiality concerns.

The RCC may be requested to produce evidence only if that evidence cannot be obtained from other parties. In view of granting requests to produce evidence addressed to the RCC, the court will have to take into account additional aspects. Moreover, such requests cannot be granted while the relevant RCC investigation procedure is still pending.

The production of leniency statements and settlement proposals may not be ordered, but the court may access them to ensure that the relevant documents amount to genuine leniency statements and settlement proposals. The authors of such documents may also be heard by the court. However, the parties to the trial and third parties will not be granted access to said documents.

Evidence obtained by way of exercising rights to access the file of the RCC during the investigation may not be used in compensation claims until the RCC procedure is complete. Such evidence cannot be used by parties other than those who obtained them and their successors.

In addition to compensation claims, other civil matters pertaining to cartels (eg, claims that cartel-related agreements or clauses are null and void) may equally be heard by the relevant courts of law.

### 3.8 Enforcement Against Multiple Parties

A complaint may be filed with the RCC with regard to multiple parties. It is customary for the RCC to proceed with investigations against multiple parties.

Parties aggrieved by an anti-competitive conduct may file compensation claims against multiple parties in accordance with the common rules of civil procedure. In any case, undertakings involved in an infringement will be jointly liable for damages caused.

Parties wishing to obtain separate trials may do so in accordance with the common rules of civil procedure.

### 3.9 Burden of Proof

In investigations, the burden of proof lies with the RCC, except for cases where the parties claim certain exceptions from the application of cartel legislation.

In actions regarding private damages, the burden of proof regarding the existence of the competition breach and the evidence concerning the quantum of the damages lies with the claimant.

However, the competition breach may be proven by a final decision of the RCC, the EC or a Romanian court of law. Decisions of foreign competition authorities and courts of law swap the burden of proof towards the respondent.

Additionally, the standard of proof required for the quantification of harm should not render the exercise of the right to damages practically impossible or excessively difficult. It is also presumed that infringements in the form of cartels trigger prejudices. The authors of the infringement cannot rebut such a presumption.

During damages proceedings, the RCC may assist the court on request with quantification of damages, should such assistance be deemed adequate.

### 3.10 Finders of Fact

In investigations, the RCC is the body finding the facts and applying the law to the facts in accordance with the Competition Act and other procedural enactments.

In criminal proceedings, the criminal prosecution bodies act as finders of fact and the relevant criminal courts will apply the law.

In private actions for damages, the court will act as fact-finder, based on evidence submitted by the parties and the judges' active role in discerning the truth, as regulated by civil procedure legislation. The court will also apply the law.

However, in certain respects (eg, existence of the infringement, where there is a final decision of the RCC, EC or a

Romanian court, or the fact that cartels cause damages), the facts and law are considered to be irrefutably established.

### 3.11 Use of Evidence Obtained from One Proceeding in Other Proceedings

In order to enforce competition legislation, the RCC may use documents and evidence collected by other authorities throughout their proceedings, and may request to be provided with such information.

The RCC may also exchange evidence and information with the European Commission and any other national competition authority within the EU.

Any such information exchanged with other authorities is to be kept confidential where its nature requires it, and must only be used for the purpose of enforcing competition legislation.

### 3.12 Rules of Evidence

Under Romanian competition law, the minimum standard of proof simply requires evidence concerning an alleged breach of the Competition Law in order to be "sufficient".

In this context, the RCC usually takes into consideration the evidentiary material as a whole, and findings are not always based on direct evidence. Thus, when direct evidence is missing or is inconclusive, circumstantial evidence (the interference of the actions of the relevant parties on the relevant market) will be taken into account.

This approach has been repeatedly endorsed to date by the Romanian courts of law.

### 3.13 Role of Experts

Experts (such as competition law specialists, economists, market analysts, etc) are customarily used by the parties both throughout the investigation and in court.

The President of the RCC can also appoint experts where needed.

The role of the expert is always advisory, and expert evidence will be taken into account by the RCC or the court, at their discretion.

As a matter of practice, expert market studies and economic evidence are given due consideration by the RCC.

### 3.14 Recognition of Privileges

Communications between undertakings (or associations of undertakings) under investigation and their attorneys, conducted with the exclusive purpose of exercising the right of defence, either before or after the commencement of the administrative procedure, cannot be seized or used as evidence in the procedures of the RCC, provided that such

communications are connected to the subject matter of the investigation.

When the undertakings concerned do not prove the protected nature of a communication, the competition inspectors conducting the dawn raid shall seal and seize the evidence, in two copies.

The President of the RCC shall decide urgently whether the evidence is privileged, based on the evidence and arguments provided.

Such decision can be challenged before the Bucharest Court of Appeal within 15 days of its communication, and subsequently before the High Court of Cassation and Justice, within five days of its communication.

The right of a party not to incriminate itself should also be recognised in theory, but in practical terms it is rather difficult to enforce.

### 3.15 Possibility for Multiple Proceedings Involving the Same Facts

As a rule, the infringement of both EU and national competition legislation should be sanctioned only once if it concerns the same parties and the protection of the same interest.

Moreover, at EU level, there are rules on the allocation of cases between national competition authorities and the European Commission.

Hence, it is unlikely (although not entirely impossible) that the same anti-competitive deed would trigger multiple penalties in various EU jurisdictions. Nonetheless, multiple investigation proceedings may well be carried out.

If the infringement is equally pursued in countries outside the EU, the same conduct could potentially be sanctioned multiple times.

## 4. Sanctions and Remedies in Government Cartel Enforcement

### 4.1 Imposition of Sanctions

The RCC may impose fines for the infringement of Article 5 of the Competition Act and Article 101 of the TFEU, ranging from 0.5% (or 0.2% in certain cases) to 10% of the total turnover obtained by the undertaking in the year preceding the sanctioning.

Furthermore, the RCC may impose other fines for the following:

- providing inexact, incomplete or misleading information, or failing to provide information;

- the obstruction of a dawn raid;
- failure to comply with a commitment imposed by a decision;
- delaying dawn raids or delaying observing RCC requests, etc.

### 4.2 Procedure for Plea Bargaining or Settlement

Under Romanian competition law, there is a settlement procedure whereby the basic fine applied by the RCC can be lowered by 10-30%.

The settlement procedure can be initiated either before or after the investigation report is circulated with the parties (but in the latter case, the maximum fine reduction available would be lower).

From a practical perspective, the settlement procedure entails a number of meetings between the RCC and the potential applicants in order to reach a common vision on the material, geographic and temporal dimensions of the anti-competitive deed, the amount of the fines, and the remedies to be undertaken by the applicant.

Subsequently, the RCC informs the interested parties in writing of the conditions in which the settlement can take place – namely, the description of the deeds that form the object of the investigation, the legal framing of the investigation, the gravity and duration of it, liability, the description of the main evidence and the amount of the fine, as well as the deadline for the submission of the settlement proposal, which cannot be less than 15 days.

Thereafter, the interested parties are to submit in writing an express, clear and unequivocal admission of liability in line with the RCC's findings.

### 4.3 Collateral Effects of Establishing Liability/Responsibility

There may be several consequences when liability is established for anti-competitive practices.

An infringement of competition law found by a final decision of the RCC is deemed to be irrefutably established for the purposes of an action for damages brought before the Romanian courts. Such a decision may also amount to a presumption of liability or a piece of evidence if used in compensation claims filed in other jurisdictions (particularly within the EU).

Also, a company that is found to have infringed competition legislation may be barred from participating in public procurement procedures.

From an employee's perspective, criminal liability may arise for individuals who are found to have intentionally conceived or organised an anti-competitive practice. However,

under certain circumstances such individuals may escape criminal liability if they duly co-operate.

#### 4.4 Sanctions and Penalties Available in Criminal Proceedings

Under Romanian competition law, companies are not subject to criminal liability. However, criminal liability may arise pursuant to criminal legislation for certain deeds concerning public procurement procedures.

Employees that took part in the infringement may be held criminally liable under certain circumstances.

In both cases, proceedings are conducted by criminal prosecution bodies and eventually brought to the criminal court, which will decide on the facts and law. The RCC has no bearing on the actions of the criminal prosecution bodies or the decision of the criminal court.

#### 4.5 Sanctions and Penalties Available in Civil Proceedings

Under Romanian law, no civil sanctions are applicable to infringements of competition law.

However, specific sanctions may be applied throughout civil proceedings on damages claims, in cases such as:

- the failure to present evidence with regard to which the court has ordered discovery;
- the destruction of evidence;
- the failure or refusal to comply with measures for the protection of confidential information; and
- the failure to comply with the limits on the use of certain evidence.

#### 4.6 Relevance of ‘Effective Compliance Programmes’

The existence and implementation of an effective compliance programme by an investigated party is a mitigating factor that the RCC may take into consideration when adjusting the basic level of the fine (by 5-10%).

There are no particular rules for considering effectiveness, which is left to the RCC’s discretion. As a matter of practice, the RCC may take into account a variety of forms of compliance programmes. However, to this end it is essential that competition compliance becomes a legally binding policy throughout the organisation, and that training is conducted to instruct the staff on the content of competition legislation.

The RCC has also recently published guidelines on the drafting and implementation of an effective compliance programme.

#### 4.7 Mandatory Consumer Redress

The entire Competition Act has as its fundamental purpose the protection of consumer interests, as per Article 1. Consumers’ general interest is also one of the criteria upon which RCC investigations are prioritised. Given the purpose of the law, this is also one of the most important criteria applied in practice.

Although there is no mandatory consumer redress, any person incurring harm from an infringement of competition law can claim damages, including consumers. Consumer associations may act on behalf of consumers to this end.

#### 4.8 Available Forms of Judicial Review or Appeal

The decision of the RCC may be appealed at the Bucharest Court of Appeal within 30 days of its communication or, as the case may be, the publication of the decision. In turn, the decision of the Bucharest Court of Appeal may be challenged at the High Court of Cassation and Justice.

Statistically, while there has been an increase in the number of appeals of the RCC’s decisions, there is a strong tendency of the courts to dismiss appeals and maintain the decisions of the RCC.

## 5. Private Civil Litigation Involving Alleged Cartels

#### 5.1 Private Right of Action

As per Government Emergency Ordinance 39/2017 of 31 May 2017 (“GEO 39/2017”), transposing the EU Directive on Antitrust Damages Actions (2014/104/EU), anyone who has suffered harm caused by an infringement of competition law (the Competition Act and the TFEU) by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association.

There are no thresholds imposed for exercising such an action.

The action can be brought before the Bucharest Tribunal and is barred in five years, which shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know, the following:

- of the anti-competitive conduct and the fact that it constitutes an infringement of competition law;
- of the fact that the infringement of competition law caused harm to it; and
- the identity of the infringer.

The relief covers the entire amount of the damages incurred, as well as loss of profits generated by the cartel and the due interest rate.

To date, there is little case law in Romania regarding damages awarded for competition infringements.

## 5.2 Collective Action

As per the Competition Act, class actions can be brought by:

- consumer protection-focused non-governmental organisations for consumers affected by breaches of competition rules; and
- professionals' or employers' associations for professionals or employers affected by breaches of competition rules.

## 5.3 Indirect Purchasers and 'Passing-on' Defences

As per GEO 39/2017, the defendant in an action for damages can invoke the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law as a defence against a claim for damages.

The burden of proving that the overcharge was passed on shall lie with the defendant, who may reasonably require disclosure from the claimant or third parties.

## 5.4 Admissibility of Evidence Obtained from Governmental Investigations/Proceedings

The court can request the disclosure of evidence included in the file of a competition authority only if such evidence cannot be obtained from another party or a third party. Upon the receipt of such evidence, the court shall ensure the protection of the documents containing business secrets or confidential information (as per competition rules).

At the same time, where there is a decision of a competition authority sanctioning an anti-competitive practice, the court may request from such authority – for the purposes of the settlement of the damages requests – the documents from the file that supported the conclusion (while also ensuring the protection of the business secrets or confidential information contained therein).

The court cannot request, at any moment, that a party involved in the proceedings or a third party discloses leniency applications or settlement proposals.

Furthermore, leniency applications and settlement proposals obtained by a natural person or an undertaking exclusively through access to the file of a competition authority cannot be used in damages claims, being deemed inadmissible.

## 5.5 Frequency of Completion of Litigation

Cases on damages claims are extremely scarce and, thus, a pertinent conclusion regarding the completion of litigation cannot be drawn at this moment in time.

## 5.6 Compensation of Legal Representatives

The defeated party is bound to reimburse all or part of the successful party's costs with attorneys. The relevant amount is to be established by the competent court on a case-by-case basis, based on the documents submitted in relation thereto.

## 5.7 Obligation of Unsuccessful Claimants to Pay Costs/Fees

As with attorney fees, the defeated party is bound to reimburse all or part of the successful party's litigation costs. The relevant amount is to be established by the competent court on a case-by-case basis, based on the documents submitted in relation thereto.

## 5.8 Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation

The decision of the Bucharest Tribunal can be appealed at the Bucharest Court of Appeal, while the latter's decision can subsequently be challenged at the High Court of Cassation and Justice.

## 6. Supplementary Information

### 6.1 Other Pertinent Information

A reliable source of information is the website of the RCC: <http://www.consiliulconcurrentei.ro/ro/despre-noi.html>.

### 6.2 Guides Published by Governmental Authorities

The RCC has published several guides during previous years, with the following being worth mentioning:

- a guide on compliance with competition laws in the case of participating as an association to a public tender procedure, which also covers the potential association of competitors (available in Romanian at <http://www.consiliulconcurrentei.ro/uploads/docs/items/bucket11/id11008/ghid20042016.pdf>); and
- a competition compliance guide (available in Romanian at [http://www.consiliulconcurrentei.ro/uploads/docs/items/bucket13/id13010/ghid\\_privind\\_conformarea\\_cu\\_regulile\\_de\\_concurrenta\\_decembrie.pdf](http://www.consiliulconcurrentei.ro/uploads/docs/items/bucket13/id13010/ghid_privind_conformarea_cu_regulile_de_concurrenta_decembrie.pdf)).

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