



Cartels Regulation – Romania Chapter

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Legislation and jurisdiction

1. What is the relevant legislation and who enforces it?

Competition is regulated under Competition Law no. 21/1996, as subsequently amended and supplemented (the Competition Law), and under Competition Council regulations and guidelines. The Romanian competition legislation generally follows the provisions of European Community legislation.

Recent changes and developments to the Competition Law include: notification of agreements falling under the block exemption is no longer required; the role and investigatory powers of the competition authority have been strengthened; and the Competition Council is entitled to issue compliance endorsements for legislative projects which may have an anti-competitive impact.

The Competition Council is an autonomous administrative authority entitled to draw up its own budget. It has regulatory as well as enforcement powers and works, deliberates and takes decisions in plenary sessions and in commissions. The Competition Council's total staff at 31 December 2005 consisted of 267 persons; it has central headquarters and 41 territorial inspectorates, one for each of the 41 Romanian counties.

2. What is the substantive law on cartels in the jurisdiction?

Pursuant to article 5(1) of the Competition Law, any express or tacit agreements between undertakings or associations of undertakings, any decisions by associations of undertakings and any concerted practices which have as their object or may have as their effect the restriction, prevention or distortion of competition in the Romanian market or in a part thereof are prohibited, especially those aimed at: price fixing; limiting or controlling production; market sharing; applying discriminatory terms for equivalent services; conditioning the conclusion of contracts upon the acceptance of additional services; bid rigging; eliminating competitors from the market; limiting or preventing access to the market; and understandings not to buy from or to sell to certain undertakings without reasonable justification.

Cartels may be either horizontal or vertical, they are illegal per se, there is no de minimis requirement in relation to cartels and no exemption is available. The sanctions are both of a civil and a criminal nature, as detailed below.

3. Are there any industry specific offences/defences?

There are no industry-specific offences or immunities expressly regulated. For certain sectors the sector regulators also have certain competition-related duties and sometimes act in cooperation with the Competition Council to maintain a competitive environment.

4. Does the law apply to individuals or corporations or both?

The law applies to undertakings (natural or legal persons) carrying out economic activity, associations of undertakings and to local or central public administration bodies (to the extent that they interfere in market operations, influencing competition by the issuance of decisions or the adoption of regulations, except for the case that they take such measures in the application of other laws or for the defence of a major public interest).

5. Does the regime extend to conduct that takes place outside the jurisdiction?

Pursuant to the Competition Law, the regime applies both to conduct that takes place on Romanian territory, and to conduct that, although taking place outside the territory of Romania, only produces effects on the Romanian territory.

6. Are there any current proposals for change to the regime?

There are no current proposals for change to the regime. Most of the regulations and guidelines were recently issued by the Competition Council and were aimed at closely mirroring the EU legislation. Investigation.

7. What are the typical steps in an investigation?

The Competition Council may order the initiation of investigations ex officio; upon the complaint of a natural or legal person effectively and directly affected by the infringement of the provisions regarding anti-competitive agreements; upon the request of the undertakings or associations of undertakings interested; or upon the request of certain authorities, institutions or organizations (the Presidency, members of Parliament, central and local public administration bodies, professional organisations, consumer protection organisations and judiciary courts).

In performing the investigation, the competition inspectors may request information and documents and have inspection powers as detailed below. The investigation finishes with the issuance of a report by the case handler, to which the parties are entitled to submit a written defence before the hearings. After the hearings, the Competition Council will deliberate and issue the decision.

There is no time limit from the initiation of the investigation until the final decision (in practice, the longest investigation in a cartel case lasted for four years).

8. What investigative powers do the authorities have?

To investigate infringements of the Competition Law, competition inspectors are empowered to conduct inspections at the premises of an undertaking. The power to inspect includes the right to:

- enter premises, grounds or vehicles owned by the undertaking or association of undertakings;

- examine any documents, account books, financial, accounting or commercial documents and other evidence related to the business of the undertaking or association of undertakings, regardless of their location;
- take statements from representatives and employees of the undertaking or association of undertakings pertaining to facts or documents which are deemed relevant;
- take or obtain, in any form, copies or excerpts from any documents, account books, financial, accounting or commercial documents and other evidence related to the business of the undertaking or association of undertakings;

and

- apply seals on business locations of the undertaking or association of undertakings and on documents, account books, financial accounting and commercial documents or other evidence related to the business of the undertakings or association of undertakings, for the period and to the extent necessary for the inspection.

Competition inspectors will carry out the aforementioned acts only if there are indications that documents may be found or information may be obtained that is deemed necessary to fulfil their task, and only on the basis of an underlying investigation regarding the company (or the relevant market), opened pursuant to an order of the president of the Competition Council.

Based on a judicial authorisation granted through a court decision, competition inspectors may perform inspections on any premises, including domiciles, land or means of transportation belonging to managers, directors, executives and other employees of undertakings or associations of undertakings under investigation. The judiciary authorisation may be appealed before the Bucharest Court of Appeal; the appeal does not, however, stay enforcement. The inspection and related acts shall be carried out under the authority and control of the judge having authorized them. The judge may inspect the searched places, and may decide to suspend or cease the search at any moment.

The right to remain silent (privilege against self-incrimination) has limited application in practice and an employee's testimony can be used against his employer. There are no records on border watches so far.

International cooperation

9. Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

Romania is currently an observer country to the European Competition Network (ECN). Once Romania joins the European Union (1 January 2007), the Competition Council will become a full member of the ECN, and will be able to exchange information with other European competition authorities under article 12 of EC Regulation no. 1/2003 on the implementation of the rules on competition provided in articles 81 and 82 of the Treaty.

There are no legal assistance treaties on competition in place, but cooperation agreements are concluded with other competition authorities (eg, Hungary, Italy, Croatia, Portugal, Bulgaria, and Slovakia).

The Competition Council's cooperation agreements with other domestic sector-specific regulators have not been made public.

10. How does the interplay between jurisdictions affect the investigation, prosecution and sanction of cartel activity in the jurisdiction?

Judicial authorisation is required in case of dawn raids at the domiciles of employees or directors of undertakings. Insofar as the sanctioning process is concerned, the competent

courts of law will intervene only in case an appeal is filed against a Competition Council decision. So far, no criminal investigation or decision has been reported with respect to competition matters. The Competition Council's cooperation with the police and the public prosecutor is not yet regulated.

Adjudication

11. How is a cartel matter adjudicated?

The Competition Council is competent to investigate and sanction cartels.

12. What is the appeal process, if any?

The Competition Council's decisions are subject to appeal which may be filed with the Bucharest Court of Appeal.

The mere challenge of the decisions of the Competition Council does not stay the enforcement thereof. A separate request for such stay may be filed by the claimant, but the grant thereof remains at court's discretion.

The decision of the Bucharest Court of Appeal may be further challenged before the High Court of Cassation and Justice.

13. With which party is the onus of proof?

The burden of proof is on the authority alleging the infringements, which needs to produce sufficiently precise and coherent proof to issue a sanctioning decision. Accordingly, in assessing cartel behaviour, the Competition Council needs to prove fulfillment of all the requirements under article 5 of the Competition Law: the existence of an agreement or decisions of an association of undertakings or concerted practice; the quality of 'undertaking'; and the object or effect of prevention, restriction, or distortion of competition on a defined relevant market.

Sanctions

14. What criminal sanctions are there for cartel activity? Are there maximum/minimum fines/sanctions?

Under the Competition Law, participation of a natural person with fraudulent intent and in a decisive way to the conceiving, organisation or performance of the practices prohibited by article 5 represents a criminal offence, sanctioned with imprisonment for a period of six months up to four years or with a criminal fine. Criminal action is initiated upon the referral of the case by the Competition Council. The court may decide to publish the condemnation decision in the press at the guilty party's expense.

15. What civil or administrative sanctions are there for cartel activity?

Under the Competition Law, any agreements, conventions or contractual clauses in infringement of article 5 of the Competition Law are null and void. Such infringements represent administrative offences and are sanctioned with a fine of up to 10 per cent of turnover in the fiscal year prior to the alleged anti-competitive behaviour. The actual fine will take into account the gravity, duration and consequences of the breach.

If within 45 days after notification of the decision issued by the Competition Council the undertaking does not comply, the Competition Council may impose the maximum fine. The Competition Council may also oblige undertakings to pay fines per each day of delay of up to 5 per cent of the daily average turnover in the fiscal year prior to the sanctioning, to induce them to comply with the provisions of article 5 of the Competition Law.

16. Are private damage claims or class actions possible?

Pursuant to article 61 of the Competition Law, a party having suffered losses as a result of an anti-competitive act (direct or indirect purchasers) has the right to be indemnified for such losses by the infringing party following a private damage claim. Punitive or exemplary damages are not available under the law.

17. What recent fines or other penalties are noteworthy? What is the history of fines? What is the number of times fines have been levied? What is the maximum fine possible and on what basis are fines calculated?

The total value of fines imposed in 2005 for infringement of article 5 was of approximately €40 million (91 per cent of the total amount of fines in 2005 and 30 times more than in 2004). The highest fine applied in a cartel case was in a recent case in 2005 when the Competition Council imposed fines of €27 million in aggregate on three cement producers.

The maximum fine that may be applied for a cartel may reach 10 per cent of the turnover of the undertaking concerned. Firstly, a basic level of fine has to be determined, depending on the gravity and duration of the infringement. The actual level of the fine shall be further adjusted depending on aggravating circumstances (eg, repeated breaches, refusal to cooperate and obstruction of the investigation team, taking the role of ringleader, repressive measures against other undertakings to force them to comply with infringing conduct, high gains resulting from the illicit conduct, etc) or mitigating circumstances (eg, a passive role, non-implementation of the agreement, cease of infringement immediately upon intervention of the Competition Council, reasonable doubt as to the illegal nature of the conduct, lack of intention, effective cooperation with the Competition Council, etc) or both.

Sentencing

18. Do sentencing guidelines exist?

Sentencing guidelines were formally introduced by the Competition Council in May 2004.

19. Are sentencing guidelines binding on the adjudicator?

The sentencing guidelines are binding on the Council and, insofar as the legality of the guidelines themselves is not challenged before the court, they should be binding on the court. No court decisions have yet been issued on this matter.

Leniency/immunity programmes

20. Is there a leniency/immunity programme?

The leniency programme currently in force was implemented in April 2004 through the Competition Council's 'Guidelines regarding the conditions and application criteria of a leniency

policy' and offers either total immunity from fines or a reduction of the fine, provided the necessary conditions are met.

21. What are the basic elements of a leniency/immunity programme, if one exists?

An undertaking may receive immunity or a reduction of fine.

To receive immunity an undertaking must either:

- submit evidence which, in the Competition Council's view, allows it to initiate an investigation procedure; or
- submit evidence which, in the Competition Council's view, allows it to prove an infringement of article 5 (1) of the Competition Law.

Immunity from fine in the first case will only be granted if, at the date of the submission of evidence by the undertaking, the Competition Council did not have enough evidence relating to the alleged cartel to open an investigation.

Immunity from fine in the second case will be granted only if, at the date of the submission of evidence by the undertaking, the Competition Council did not have sufficient evidence to establish an infringement of article 5 of the Competition Law (the equivalent of article 81) and no other undertaking has obtained immunity relating to the same cartel.

Regardless of the situation, an undertaking that seeks to benefit from immunity must also:

- cooperate fully, permanently and promptly with the Competition Council throughout the entire procedure and submit all the evidence that comes into its possession or might be available to it relating to the alleged cartel; and
- renounce participation in the alleged illegal activity no later than the date at which it submits evidence; and
- not have acted as ring leader.

If an undertaking does not qualify for immunity, either for failing to meet the conditions stated above or for coming in second, it can nevertheless benefit from a substantial reduction of fine. To qualify for such a reduction, the undertaking must:

- provide the Competition Council with evidence relating to the alleged infringement of the law which represents significant added value with respect to that already in the Competition Council's possession; and
- end its involvement in the suspected illegal infringement no later than the date at which it submits the evidence to the Competition Council.

22. What is the importance of being 'first-in' to cooperate?

Full immunity from fine is only available to the first company that comes forward and meets the conditions of the programme.

Being second, even by a matter of hours, could still result in serious fines.

23. What is the importance of going second? Is there an 'immunity plus' or 'amnesty plus' option?

The second undertaking that comes forward will qualify for a reduction of fine programme and, if it fulfills all the conditions mentioned above, may benefit from a reduction in fine of between 30 and 50 per cent. The third undertaking to come clean overall (the second regarding the reduction of fine programme) may benefit from a 20 to 30 per cent reduction in the amount of the fine; all the other undertakings that come forward get nothing.

Should the second-in undertaking on an offence have any information to offer on a previously unknown offence, it will, if it meets the conditions, be able to qualify for immunity

from fine in relation to that offence. No further reductions will be made in relation to the fine received for its involvement in the primary offence.

24. What is the best time to approach the authorities when seeking leniency/immunity?

Only one undertaking can be granted immunity and once the Competition Council has launched an investigation, immunity is even more difficult to obtain. Furthermore, the granting of a reduction of fine depends upon the undertaking providing information that represents significant added value to the information already in the Council's possession. The longer an investigation goes on before the undertaking comes forward, the greater the chance that the information disclosed will not represent 'significant added value' and thus the undertaking concerned will not benefit from a reduction of fine. Consequently it would be advisable to approach the authorities as soon as the relevant undertaking acquires knowledge relating to the said violation taking place.

25. What confidentiality is afforded to the leniency/immunity applicant and any other cooperating party

Any declaration or any other type of written document submitted to the Council is regarded as part of the Council's file and, as such, cannot be used or disclosed for any other purpose than the enforcement of article 5(1) of the Competition Law. Nevertheless, when issuing its decision, the Council should always make clear who collaborated and to what extent, so that it can justify the immunity or reduction of fine granted.

26. What is needed to be a successful leniency/immunity applicant (or other cooperating party)?

The standard of evidence taken into account by the Competition Council is not defined in the relevant legislation. It is expected that the Competition Council would consider evidence that is admissible in court. Regarding leniency, the sole provisions in relation to the evidence submitted are that written evidence originating from the period of the infringement has greater value than evidence subsequently established and that evidence directly relevant to the facts has a greater value than indirectly relevant evidence. The 'significant added value' brought about by the new evidence is taken into account when establishing the precise amount of the reduction. It should be noted that evidence relating to the gravity or duration of the alleged cartel are not taken into account by the Council.

27. What is the effect of leniency/immunity granted to corporate defendant on employees of the defendant?

The granting of immunity from fine or the reduction of fine to a corporate defendant has no effect on the possible liability of its employees. Consequently, even if an undertaking is granted immunity, one of its employees could still be found criminally liable if he participated with fraudulent intent and in a decisive way to the conceiving, organisation or performance of the cartel.

28. What guarantee of leniency/immunity exists if a party cooperates?

If all the necessary steps are followed and all the relevant conditions fulfilled, the Council will, in writing, either grant a conditional immunity from fine or acknowledge the possibility of

reducing the fine (see below). The undertakings concerned must still meet the pending conditions (eg, cooperation throughout the investigation) to qualify for immunity or reduction of fine. The written documents are binding on the Council and, presumably, they would be binding on the Courts as well. As stated above there have been no leniency cases yet, so this has not been tested.

29. What are the practical steps in dealing with the enforcement agency?

When applying for immunity, an undertaking can either submit all the evidence it has about the ongoing infringement to the Competition Council or submit the available information in hypothetical terms. The submission should disclose the nature and content of the documents while keeping, at the same time, the hypothetical character of its disclosure. Should the Competition Council find the evidence satisfactory it will grant a conditional immunity from fine in writing, provided that the disclosed information is the same in nature and content as the information presented in hypothetical terms.

When applying for a reduction of fine, an undertaking must submit all the evidence it possesses to the Competition Council. If, upon examination, it is found satisfactory, a written acknowledgement of the possibility of a reduction of fine will be issued.

There is no rule forbidding the counsel to act on behalf of corporate defendants as well as its directors, officers and employees at the same time as long as no involved party feels that there might be a conflict of interest.

30. Are there any ongoing or proposed leniency/immunity policy assessments or policy reviews?

There are no ongoing or proposed leniency or immunity policy assessments or policy reviews. Nevertheless, considering the leniency review that is ongoing at Community level and that Romanian competition legislation is almost fully harmonized with Community legislation, it can be said with a fair degree of certainty that any change in the Commission's leniency policy will be followed in Romania before too long.

Defending a case

31. Can counsel represent employees under investigation as well as the corporation? Do individuals involved require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

As long as the represented parties and counsel do not feel that there may be a conflict of interest, counsel can represent employees as well as the corporation. A present or past employee should be advised to seek independent advice when his or her interests conflict with the corporation's interests – eg, the corporation sought immunity but this could lead to this particular employee being found criminally liable.

32. Can counsel represent multiple corporate defendants?

There is no express rule prohibiting a joint defence, so long as the defendants and the counsel do not see this as a potential conflict of interest. The Competition Council might view this as proof of the strong, close links that exist between the defendants and thus further proof of a cartel.

33. Can a corporation pay the legal costs of and/or penalties imposed on its employees?

Employees cannot be fined, they can only be found criminally liable. There is no express competition law prohibition regarding a corporation paying the legal costs of its employees, but there are other legal factors that must be taken into account (best interests of the company, minority shareholders, etc). A definitive answer can only be given on a case-by-case basis.

Getting the fine down

34. What is the optimal way in which to get the fine down?

The only way to get the fine down or, indeed, to avoid it, is to cooperate with the Competition Council. There is no authority in our jurisdiction that is enabled to negotiate a particular sentence.