

**in 25 jurisdictions worldwide**

# 2013

Published by  
***Getting the Deal Through***  
in association with:



Yoon & Yang LLC



## Private Antitrust Litigation 2013

**Contributing editor**  
Samantha Mobley  
Baker & McKenzie LLP

**Business development managers**  
Alan Lee  
George Ingledew  
Robyn Hetherington  
Dan White

**Marketing manager**  
Alice Hazard

**Marketing assistants**  
William Bentley  
Zosia Demkowicz  
Megan Friedman

**Admin assistant**  
Cady Atkinson

**Marketing manager (subscriptions)**  
Rachel Nurse  
Subscriptions@  
GettingTheDealThrough.com

**Assistant editor**  
Adam Myers

**Editorial assistant**  
Lydia Gerages

**Senior production editor**  
Jonathan Cowie

**Chief subeditor**  
Jonathan Allen

**Subeditors**  
Caroline Rawson  
Charlotte Stretch

**Editor-in-chief**  
Callum Campbell

**Publisher**  
Richard Davey

**Private Antitrust Litigation 2013**  
Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 7908 1188  
Fax: +44 20 7229 6910  
© Law Business Research Ltd 2012  
No photocopying: copyright licences  
do not apply.  
ISSN 1742-2280

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of August 2012, be advised that this is a developing area.

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112

**Law  
Business  
Research**



## CONTENTS

<b>Overview</b> Patrick Heneghan, Gary MacDonald, Ingrid Vandenborre, Thorsten Goetz, Ben Lasserson and Tiffany Rider <i>Skadden, Arps, Slate, Meagher &amp; Flom LLP</i>	<b>3</b>
<b>Argentina</b> Miguel Ángel De Dios and Federico A Volujewicz <i>De Dios &amp; Goyena</i>	<b>6</b>
<b>Australia</b> Ross Zaurrini and Simon Rudd <i>Ashurst</i>	<b>11</b>
<b>Austria</b> Stephan Polster <i>Dorda Brugger Jordis Rechtsanwälte GmbH</i>	<b>17</b>
<b>Brazil</b> Paulo Brancher and Luiz Eduardo Salles <i>Barretto Ferreira, Kujawski e Brancher (BKBG)</i>	<b>22</b>
<b>Canada</b> David Kent, Martin Low QC and Eric Vallières <i>McMillan LLP</i>	<b>28</b>
<b>China</b> Christine Kang, George (Zhao) Wang and Mark H Chu <i>Jun He Law Offices</i>	<b>34</b>
<b>England &amp; Wales</b> Elizabeth Morony and John Alderton <i>Clifford Chance LLP</i>	<b>40</b>
<b>France</b> Jacques Buhart and Lionel Lesur <i>McDermott, Will &amp; Emery</i>	<b>56</b>
<b>Germany</b> Alexander Rinne <i>Milbank, Tweed, Hadley &amp; McCloy LLP</i>	<b>64</b>
<b>Italy</b> Mario Siragusa, Marco D'Ostuni and Cesare Rizza <i>Cleary Gottlieb Steen &amp; Hamilton LLP</i>	<b>70</b>
<b>Japan</b> Hideto Ishida <i>Anderson Mōri &amp; Tomotsune</i>	<b>78</b>
<b>Korea</b> Sang Mo Koo and Jeong Ran Lee <i>Yoon &amp; Yang LLC</i>	<b>83</b>
<b>Lithuania</b> Ramūnas Audzevičius and Tomas Samulevičius <i>Motieka &amp; Audzevičius</i>	<b>88</b>
<b>Netherlands</b> Frederieke Leeftang and Marc Kuijper <i>Boekel De Nerée</i>	<b>94</b>
<b>Poland</b> Krzysztof Kanton <i>Sołtysiński Kawecki &amp; Szlęzak</i>	<b>100</b>
<b>Portugal</b> Mário Marques Mendes and Pedro Vilarinho Pires <i>Marques Mendes &amp; Associados</i>	<b>106</b>
<b>Romania</b> Sorina Olaru (Cretu) and Georgeta Harapcea <i>Nestor Nestor Diculescu Kingston Petersen</i>	<b>111</b>
<b>Russia</b> Igor Akimov and Ilya Lifshits <i>EDAS Law Firm</i>	<b>117</b>
<b>South Africa</b> Mark Garden and Rutendo Hlatshwayo ENS ( <i>Edward Nathan Sonnenbergs</i> )	<b>122</b>
<b>Spain</b> Juan Jiménez-Laiglesia, Alfonso Ois, Raúl Partido, Samuel Rivero and Sabrina Hueso <i>DLA Piper Spain SL</i>	<b>130</b>
<b>Sweden</b> Tommy Pettersson, Stefan Perván Lindeborg and Cecilia Beijar <i>Mannheimer Swartling</i>	<b>137</b>
<b>Switzerland</b> Christophe Rapin and Pranvera Këllezi <i>Meyerlustenberger Lachenal Attorneys at Law</i>	<b>142</b>
<b>Turkey</b> Sahin Ardiyok, Ali Ilicak and Hilal Utku <i>ACTECON Competition and Regulation Consultancy</i>	<b>147</b>
<b>Ukraine</b> Oleksiy V Filatov and Andriy V Stelmashchuk <i>Vasil Kisil &amp; Partners</i>	<b>153</b>
<b>United States</b> Mark McLaughlin, Andrew Marovitz and Britt Miller <i>Mayer Brown LLP</i>	<b>157</b>

# Romania

**Sorina Olaru (Cretu) and Georgeta Harapcea**

Nestor Nestor Diclescu Kingston Petersen

## Legislation and jurisdiction

- 1** How would you summarise the development of private antitrust litigation?

Romania has not yet acquired practical experience in terms of private antitrust litigation, although recent legislative developments (amendment of the Competition Law No. 21/1996 by the Government Emergency Ordinance No. 75/2010 in July 2010 and by the Law No. 149/2011 in July 2011, together with the new Civil Procedure Code, expected to come into force on 1 September 2012) support private actions for damages.

Despite the possibility of obtaining compensation for damages, often potential claimants do not take cases to court, due to a series of obstacles (such as the costs and length of litigation, the difficulty of proving a proper causal link between the damage and the breach of competition law, and national courts' limited experience in antitrust matters).

- 2** Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

To ensure the full effectiveness of competition rules, the Competition Law provides that any person may seek compensation for losses suffered due to a contract or conduct liable to restrict or affect competition; in addition, the tort liability regime under the Romanian Civil Code mandates antitrust actions for damages by providing that any person harmed by way of an illicit deed is entitled to compensation. This principle is applicable both with regard to direct and indirect purchasers, namely those purchasers who had no direct commercial relationship with the author of the infringement, but who nonetheless may have suffered harm because an illegal overcharge was passed on to them along the distribution chain. In this respect, the Competition Law No. 21/1996 expressly provides that if a product or service is purchased at an excessive price, it cannot be stated that no injury has occurred because the product or service was resold.

- 3** If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

The relevant legislation applicable to private actions consists of the Romanian Competition Law No. 21/1996, the Civil Procedure Code and the Civil Code.

With regard to the subject-matter jurisdiction, the current Civil Procedure Code provides that ordinary courts shall settle all matters of little value and/or minor complexity; however, in practice, tribunals will frequently become courts with full competence to settle matters on their merits in the first instance, courts of appeal will settle the first appeals brought against the decisions of first instance, and the High Court of Cassation and Justice will become the court of common law settling the second appeals. This trend is also

maintained by the new Civil Procedure Code which is soon to enter into force.

- 4** In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction?

The national courts are empowered to rule upon the claims of individuals and undertakings in relation to all types of antitrust matters, such as infringements of articles 5 (cartels and other agreements restrictive of competition) and 6 (abuse of dominance) of the Romanian Competition Law and articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

The private actions for damages may be brought to court either before or after the Competition Council issues a final decision finding an infringement of the competition rules (either stand-alone, or follow-on actions). While the finding of an infringement by the Competition Council is not required to initiate a private antitrust action, in cases where there is a Competition Council's decision sanctioning an anti-competitive practice, the national court may ask the Competition Council for the documents in the file at the basis of the decision when settling claims for compensation. To this end, in receiving these documents, the courts will observe the confidentiality of information constituting business secrets and other confidential information.

- 5** What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

As a matter of principle, the claimant has to address his or her claim to the competent court of the judicial district of the place of residence or of the registered office of the defendant. In actions based on tort liability (all actions concerning damages resulting from anti-competitive conduct), the plaintiff may also bring the action before the court where the anti-competitive practice has taken place.

In terms of subject-matter jurisdiction, the jurisdiction depends on the value of the claim. According to the Romanian Civil Procedural Code, in civil lawsuits, if the value of the claim exceeds 500,000 lei, the Tribunal is competent to judge the case in first instance. Claims not exceeding 500,000 lei will be judged by district courts or lower courts. In terms of jurisdiction, Romania is currently a party to the revised Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; also, as Romania is an EU member state, the Rome II Regulation (EC) No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations is applicable.

As such, the relevant nexus required to found a private action is the place where the harmful event occurred.

The parties cannot therefore influence the jurisdiction in which a claim will be heard, outside the generally applicable rules described above.

- 6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Private actions can be brought against both corporations and individuals. Individuals or corporations from other jurisdictions may generally be sued in Romania, the principle being that the actions filed in order to obtain compensation based on illegitimate restriction of competition shall be governed by the laws of the state where the damage occurred. Law No. 105/1992 regarding private international law relationships or the bilateral or multilateral treaties on jurisdiction may apply, depending on the nationality of the parties involved.

#### Private action procedure

- 7 May litigation be funded by third parties? Are contingency fees available?

There are no provisions prohibiting third-party financing of litigation. As to contingency fees, although success fees are allowed under Romanian law, it is forbidden to conclude a legal assistance agreement – prior to the final resolution of the matter – which establishes the entire amount of the attorney's fees depending on the judicial outcome of the matter, regardless of whether those fees represent money, a product or a different value. Such agreements are also known as *quota litis* pacts and are expressly prohibited by the Romanian Statute of the Lawyers Profession.

- 8 Are jury trials available?

Not applicable.

- 9 What pretrial discovery procedures are available?

There is no such instrument as pretrial discovery, as it is known in the US, under Romanian procedural rules. However, the Romanian Civil Procedure Code currently in force provides for a procedure for the preservation of evidence that is considered to be a kind of *in futurum* enquiry, which may be requested either before an actual claim is lodged before a court or during the court proceedings. Any person who has an interest may request a court order for the urgent ascertaining of a person's testimony, the point of view of an expert, the state of certain movable or immovable assets, for documents to be recognised or for a state of facts to be ascertained, if there is a threat that such evidence may disappear at a later stage. The New Civil Procedure Code, in force from 1 September 2012, contains a similar provision.

In addition, during the course of the litigation, the court is entitled to order each of the parties to the proceedings to disclose the documents required for settling the dispute. Under specific conditions, a party may also request that the court orders the other party to disclose a certain document. The Romanian Civil Procedure Code provides that the court is compelled to take into consideration this kind of request in the following circumstances: the document emanates from both parties; the opponent itself referred to it during the proceedings; or a legal provision expressly provides for the opponent's obligation to disclose such document. Non-disclosure of written evidence by the party holding such evidence within the term fixed by the court may be sanctioned by applying a judicial fine.

- 10 What evidence is admissible?

As a matter of principle, in order for evidence to be deemed admissible it has to be permitted by law, plausible (not seeking to prove an impossible fact), relevant (in connection to the subject matter of the case) and conclusive (related to circumstances that are able to solve the case).

In particular, the following evidence is admissible: statements of the parties, testimonies of witnesses, inspections on parties,

independent experts' opinions, presumptions and, as a general rule, written documents. In practice, in order to determine or clarify the status of facts (*de facto* situation), the court usually requests an expert's appraisal.

The New Civil Procedure Code expressly states the possibility to use, as material evidence, photos, photocopies, movies, disks, sound recording tapes and other such technical evidence provided they were not obtained in violation of the law or good morals.

Both the Romanian Civil Code and the New Civil Procedure Code provide for certain limitations in relation to the possibility to use witness statements in order to prove judicial deeds in civil cases worth more than a certain amount of money and requiring written evidence.

In addition to the general civil rules referred to above, the Romanian Competition Law provides that in cases where a Competition Council decision sanctions an anticompetitive practice, the courts may ask the Competition Council for the documents in the file that was the basis for issuing that decision when settling claims for compensation. To this end, in receiving these documents, the courts will enforce the confidentiality of information constituting trade secrets and other information classified as confidential. The Competition Council may submit observations to national courts on matters concerning the application of articles 5 and 6 of the Competition Law, as provided in the Romanian Civil Procedure Code.

- 11 What evidence is protected by legal privilege?

Under general procedural rules, the court will dismiss a request seeking disclosure of a document in the following cases: the document concerns strictly personal matters, or disclosure of the document would infringe a confidentiality obligation or would trigger the criminal prosecution of the party or another person, or could expose it to public contempt. There is a similar provision in the New Civil Procedure Code, according to which the court may reject a claim for filing a document to the case file when the document concerns strictly personal matters regarding the dignity or the private life of a person, when the disclosure of the document would infringe a legal obligation of preserving confidentiality or a secret or would trigger the criminal prosecution of the party, of their spouse, relative or in-law up to the third degree.

According to the statute regarding organisation of the Lawyers' Profession, attorneys are bound to preserve the secrecy and confidentiality of their activities. Professional secrecy covers any form of information or support provided by the client to the attorney with the aim of receiving legal assistance and with respect to which the client has requested the preservation of confidentiality, as well as any documents drafted by the attorney containing information provided to the client for the same purpose and which the client has requested be kept confidential.

Written documents or goods held by the attorney may only be taken by a prosecuting officer, on the basis of a mandate issued according to the law.

According to the recent amendments brought to the Competition Law, the following two categories of documents may not be collected or used as evidence during the investigation procedures performed by the Competition Council:

- communications between the undertaking/association of undertakings and their lawyers belonging to a bar association accomplished within and for the exclusive purpose of exercising the rights of defence (either before or after the initiation of the investigation); and
- preparatory documents drafted by the undertaking or the association of undertakings for the exclusive purpose of exercising the rights of defence.

Should undertakings fail to prove the protected nature of a certain communication, competition inspectors shall seal and collect the

communication, with a decision being subsequently issued in this respect by the President of the Competition Council. Should the decision also reject the protected nature of the communication, the seals may only be removed after the expiry of the term allowed for challenging the decision or after the decision of the court becomes final and binding. The undertaking concerned can challenge before the Bucharest Court of Appeal the decision of the president of the Competition Council regarding the protected nature of such document within 15 days from the date such decision is communicated to it; the decision of the Court of Appeal is subject to a final appeal within five days from the communication of such court decision to the undertaking.

Trade secrets are subject to the usual confidentiality obligations under competition rules regarding access to the file.

- 12** Are private actions available where there has been a criminal conviction in respect of the same matter?

Romanian competition law provides that if a natural person participates with fraudulent intent and in a way decisive to the conception, organisation or performance of practices prohibited by article 5 of the Competition Law (cartels), and is not exempted, he or she has committed a criminal offence. The respective person can be sanctioned with imprisonment for a term of between six months and three years, or a fine, and prohibition from holding certain positions or fulfilling professions or activities of the nature of that used in committing the offence.

With respect to the frequency of criminal convictions for anti-trust infringements, it is worth noting that the end of 2009 saw the first instance of the Romanian Competition Council referring a natural person to criminal investigation bodies. The former president of an association of undertakings was referred in the context of a cartel investigation conducted on the bread market in Romania and related markets.

In this context, private actions can also be available where there has been a criminal conviction. Note that if a criminal proceeding is pending, any civil court dealing with the same matter must stay proceedings until the criminal court renders a judgment.

- 13** Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

According to the general Criminal Procedure rules, the civil courts are bound by the findings of the criminal courts only with regard to the existence of the punishable act, the identity of the offender and the form of guilt.

Regarding the influence of leniency applications on private anti-trust litigation, Romanian competition law provides that the undertaking benefiting from immunity from a fine will not be held jointly liable for the damage caused through its participation in an anticompetitive practice prohibited by article 5 of the Romanian competition law and article 101 of the TFEU.

There has not yet been any case to test the extent to which the Competition Council would disclose to private claimants the documents obtained in the investigation (especially, leniency-related documents). The general rules on relevance, necessity and proportionality should therefore apply, with the observance of the confidential information and business secrets, which cannot be revealed.

- 14** In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

In the case of a civil claim filed in parallel with a complaint submitted to the Competition Council, the court has the option of suspending

judgment on the file until the Council has concluded its investigation and issued a decision regarding the existence of the anti-competitive practice.

- 15** What is the applicable standard of proof for claimants and defendants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

The applicable standard of proof in private litigation is the preponderance or balance of probabilities. Under Romanian law, evidence has no pre-determined rank of importance: the court is free to appraise each piece of evidence by taking into consideration all the relevant circumstances of a specific case. According to the Latin principle of *actori incumbit probatio*, the plaintiff has the burden of proof and is obliged to provide evidence in front of the court regarding all four elements that are to be cumulatively satisfied in order to 'activate' the civil tort liability: the illicit action; the damage; the causation between the damage and the illicit action; and the infringement author's guilt. If the defendant raises a counterclaim, the burden of proof is reversed and will be on the defendant.

However, in competition matters, the illicit practice (and sometimes also the damage and the causation between the damage and the illicit practice) may be already established by the Competition Council, through a sanctioning decision.

- 16** What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

Collective actions have a limited application under Romanian law (see question 19) and current Romanian law does not provide for any specific timetable in this respect.

As far as the timetable for single-party proceedings is concerned, civil litigations generally include four to six hearings. The period between hearings is not regulated by the law, but in practice it could take up to one year to obtain the first instance resolution. However, the actual duration of a civil litigation depends on the complexity of the evidence which is to be administered within the case file.

As regards the possibility of accelerating proceedings, following the initiation of a civil tort claim against the author of an anti-competitive infringement, the plaintiff can start (in parallel) a procedure conducted on an expedited basis, by which the court can be requested to order the plaintiff to stop its illicit behaviour (this does not, however, apply to damages claims). In order to obtain the above-mentioned injunction, the plaintiff has to demonstrate the cumulative fulfilment of the following mandatory conditions:

- emergency – if temporary measures are not undertaken/imposed against the defendant, the plaintiff will suffer imminent damage;
- the temporary character of the injunction (until the civil court pronounces on the merits of the civil case);
- no adjudication on the merits of the case.

There is growing interest in ensuring that court proceedings are conducted on an expedited basis. To this end, the new Civil Procedure Code provides that any party to the proceedings who deems that the resolution of the case is unreasonably delayed may request the enactment of appropriate legal measures in order to ensure fast fulfilment of the process.

- 17** What are the relevant limitation periods?

According to the recent changes in the Competition Law, individuals or undertakings who believe they have been harmed by an anti-competitive practice prohibited by the Competition Law may claim compensation within two years of the date on which the Competition Council's decision remains final and irrevocable. Otherwise, in the absence of a decision issued by the Competition Council, the general three-year statute of limitation (from the moment the claimant was

aware or should have been aware with respect to the author of the act) applies. The New Civil Code provides that the limitation must be invoked through the statement of defence or otherwise the defendant is precluded from further invoking such defence. Should the damages derive from an act which at the same time is regulated by the criminal law, and based on such law, it enjoys a longer limitation period. Such limitation period shall also apply to the civil claim for damages.

**18** What appeals are available? Is appeal available on the facts or on the law?

There are two subsequent ways to appeal: an appeal judged by the Court of Appeal and a second appeal judged by the High Court of Cassation and Justice. According to the Romanian Civil Procedural Law, the Court of Appeal will perform a new analysis on the merits of the case; a final appeal before the High Court of Justice and Cassation is available only on the law.

### Collective actions

**19** Are collective proceedings available in respect of antitrust claims?

Collective actions have a limited application under Romanian law practice – several statutes have allowed actions by an association either for the defence of individual interests or for the defence of a collective interest. Thus, Government Ordinance No. 21/1992 on consumers' protection provides that consumers' associations may file complaints defending the rights and legitimate interests of consumers.

In this respect, the New Civil Procedure Code expressly provides that in cases and under the terms provided exclusively by law, organisations, institutions or authorities may file complaints or defences without justifying a personal interest, but rather acting in the defence of the rights and legitimate interests of certain persons who are in a special position or, as the case may be, for the purpose of defending a group or general interest.

The Competition Law amendments also clarify that claims for damages caused by an anti-competitive practice may be submitted by consumer protection associations on behalf of consumers and by trade associations on behalf of their members.

In addition, the Civil Procedure Code currently in force provides that several individuals may act together as plaintiffs or defendants in litigation, provided that the object of the litigation is represented by a common right or obligation or in case their rights or obligations derive from the same cause. The new Civil Procedure Code expressly states that the same possibility exists if the parties' rights or obligations do not derive from the same cause but instead there is a strong connection between them (the same approach already existed under the current text of the Civil Procedure Code, although not expressly stated). The advantage of such possibility (also known as *litis consortium*) is that conflicts between court decisions are avoided and time or unnecessary expenditure are saved.

The relationship between parties to the proceedings is governed by the principle of independence, according to which the acts, defences and observations/conclusions of one of the plaintiffs or defendants may not profit or harm the other parties to the proceedings. However, there is an exception to the above-mentioned principle: where the nature of the legal relationship (solidarity between parties) or, on the basis of a legal provision, the effects of a court decision also extend to/cover the other plaintiffs or defendants, the acts accomplished by only part of them or the procedural terms approved only in respect of some of them will also profit the other parties to the proceedings. Should the procedural acts harm the other parties to the proceedings, only the most favourable acts will be taken into account.

**20** Are collective proceedings mandated by legislation?

Collective proceedings are governed by the Civil Procedure Code and special statutes (Government Ordinance No. 21/1992 on consumers' protection) as detailed above.

**21** If collective proceedings are allowed, is there a certification process? What is the test?

This is not particularly regulated.

**22** Have courts certified collective proceedings in antitrust matters?

Not to our knowledge.

**23** Can plaintiffs opt out or opt in?

This is not particularly regulated.

**24** Do collective settlements require judicial authorisation?

This is not particularly regulated.

**25** If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

**26** Has a plaintiffs' collective-proceeding bar developed?

Not applicable.

### Remedies

**27** What forms of compensation are available and on what basis are they allowed?

Judiciary courts are entitled to grant full compensation for damages in case of breach of articles 5 and 6 of the Competition Law or articles 101 and 102 TFEU.

According to the general tort law regime under the New Civil Code, in force since 1 October 2011, compensation covers not only the actual loss (*damnum emergens*) but also the unearned benefit which could be obtained by the injured person in normal conditions (*lucrum cessans*) and the expenses made by the injured person for the avoidance or the limitation of the damage. If the tort also determined the loss of the chance to obtain an advantage or to avoid damage, the compensation shall be proportional with the probability to obtain the advantage or to avoid the damage, taking into consideration the circumstances and the specific/concrete situation of the victim. Moreover, the author of the anti-competitive conduct is liable for both the foreseen and the unforeseen consequences of the antitrust infringement.

In principle, compensation must be performed in kind. Where in kind performance is not possible or the victim/injured person is not interested in the performance in kind, the damages shall be covered by financial compensation.

If in kind performance is objectively possible, where the non-performance of an affirmative covenant is at stake (which is not *intuitu personae*), the Civil Code provides that the creditor may be authorised by the court to perform the obligation instead of the debtor. Such authorisation shall not exclude the right of compensation of the plaintiff towards the defendant.

Apart from compensation for patrimonial damage, the Romanian legislation also recognises the possibility of obtaining financial compensation for moral damages and/or emotional distress (*pretium doloris*), especially considering that the Romanian Civil Code makes no distinction between the types of harm suffered.

**28** What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

Judiciary courts which are entitled to grant compensation for damages in case of breach of articles 5 and 6 of the Competition Law or articles 101 and 102 TFEU may also order precautionary measures (such as a charging order or garnishment order) and may grant legal costs.

In addition, the court may order temporary measures in urgent cases by way of injunctions, with the aim of preventing imminent damage which could not be remedied or preserving a right which would be otherwise prejudiced, or for overcoming the difficulties which might occur throughout an enforcement procedure. Provisional orders are possible provided that they do not interfere with the settlement of the case on the merits and that the measure sought by the plaintiff is not permanent in nature.

In order to obtain such an injunction, the claimant has to prove the cumulative fulfilment of the following mandatory conditions:

- emergency – if temporary measures are not undertaken or imposed against the defendant, the plaintiff will suffer imminent damage;
- the temporary character of the injunction; and
- no adjudication of the merits of the case.

**29** Are punitive or exemplary damages available?

Under Romanian law, financial compensation is granted by way of compensatory damages (aiming at covering in full the damages caused by the competition law breach or covering the loss incurred due to the defendant's delay in performing the obligations).

In order to ensure the in-kind performance of affirmative or negative covenants (respectively those which are *intuitu personae*), the court may order, according to the provisions of the Romanian Civil Procedure Code currently in force, the payment of a civil fine (representing an income to the state budget) as a civil sanction meant to compel the debtor to perform the respective obligation. This, however, does not preclude the possibility of applying compensatory damages, as described above.

**30** Is there provision for interest on damages awards and from when does it accrue?

According to the principle of full compensation, the victim of a competition infringement may also request the payment of statutory interest on damages awards. In such a case, the statutory interest is calculated from the date on which the court decision granting damages has become final and binding until full payment of damages.

The statutory interest is set at the reference rate published by the National Bank of Romania plus 4 per cent.

**31** Are the fines imposed by competition authorities taken into account when settling damages?

The fines imposed by the competition authorities do not represent criteria for settling damages in private enforcement claims.

**32** Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

Legal costs are incumbent on the losing party upon the request of the successful party. The new Civil Procedure Code details what

legal costs include (judicial stamp fees, judicial stamps, attorneys' and experts' fees, amounts due to witnesses and, as the case may be, transport and accommodation expenses, as well as any other costs necessary for the due conduct of the process).

The court may, even *ex officio*, decrease the amount of the lawyers' fees or expert fees to be recovered if it deems them unreasonable in relation to the volume and complexity of the case and the lawyer's activity (without affecting the relationship between the lawyer and his client). If the claims of each of the parties to the proceedings have been only partially approved, the court will assess to what extent each of them may be obliged to pay the legal costs. If a defendant acknowledges (accepts, recognises and agrees with) the claims until the first court hearing, when the parties are duly summoned, such defendant cannot be obliged to pay the plaintiff's legal costs.

Where several plaintiffs or defendants are involved in the process, they could be compelled to pay the legal costs on an equal, proportionate or joint basis, according to the position held by each of them within the process or according to the nature of the legal relationship existing between them.

**33** Is liability imposed on a joint and several basis?

According to general tort liability rules, the perpetrators of illegal conduct (including competition law breaches) are held jointly liable towards the victim of their behaviour. This rule is also applicable in respect of anti-competitive conduct.

**34** Is there a possibility for contribution and indemnity among defendants?

The defendant may sue other parties for payment of some or all of the damages (contribution or respective indemnity), should the conditions be met in fact (the damage is caused by several parties/other parties). Note should be made that the defendant who paid the entire amount of the damages established by the court has the possibility to file a claim against the other defendants requesting their part of the damages.

**35** Is the 'passing-on' defence allowed?

The recently amended Romanian Competition Law expressly provides that if a product or service is purchased at an excessive price, it cannot be stated that no injury has occurred because the product or service was resold. While this provision seems to have been intended to clarify the existence of the possibility to claim damages even if the claimant has resold the product (and thus to bring certain limits to an 'absolute' passing-on defence), the passing-on defence can still be invoked, and its success depends on the *de facto* situation.

**36** Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

In case of an alleged infringement of article 5 of the Competition Law or of article 101 TFEU, the main available defence is to prove the cumulative fulfilment of the following conditions: the alleged anti-competitive agreement/practice (i) contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; (ii) does not impose restrictions which are not indispensable to the attainment of these objectives; and (iii) does not afford the possibility of eliminating competition in respect of a substantial part of the products in question.

In case of an alleged breach of article 6 of the Romanian Competition Law or of article 102 TFEU, the author of the alleged infringement may argue that the alleged abusive conduct may be objectively justified.

The case law has showed that other arguments may also be invoked and serve at least as mitigating factors, such as the conduct being required by national legislation, the elimination of any possibility of competitive activity by the legal framework, limited actual impact or certain specific circumstances of the case.

However, these serve as factors in assessing the existence of the breach of the law, rather than in assessing liability for damages once the breach of the law has already been established.

### 37 Is alternative dispute resolution available?

A permanent arbitration institution or a third-party arbitrator can solve, in accordance with the Civil Procedural Code rules, competition damages claims, should both parties agree after the dispute has occurred. The dispute can be solved in equity, should the parties expressly agree. While this alternative solution has not yet been tested in practice for antitrust claims, it can reasonably be anticipated that it will be successful and that people will wish to use it, given

### Update and trends

Romania is still waiting for its first private antitrust litigation case, which seems more likely to occur given the sanctions imposed by the Competition Council in the past year.

the benefits of out-of-court proceedings. Mediation is also available, under the rules provided by Law No. 192 of 16 May 2006 regarding mediation and the organisation of the mediator profession, and can be requested even while litigation is ongoing before the ordinary judicial courts (at the parties' own initiative or upon the court's recommendation, accepted by parties to the proceedings). This alternative dispute resolution has not yet been tested in practice with respect to antitrust claims either but, considering its advantages, it can be anticipated that it could be successful in the future.



**Nestor Nestor Diculescu Kingston Petersen**  
ATTORNEYS & COUNSELORS

**Sorina Olaru (Cretu)**  
**Georgeta Harapcea**

**sorina.cretu@nndkp.ro**  
**georgeta.harapcea@nndkp.ro**

Bucharest Business Park, Entrance A, 4th Floor  
1A, Bucuresti-Ploiesti National Road, 1st District  
013681 Bucharest  
Romania

Tel: +40 21 20 11 200 / +40 31 22 53 300  
Fax: +40 21 20 11 210 / +40 31 22 53 310  
[www.nndkp.ro](http://www.nndkp.ro)



## Annual volumes published on:

Air Transport	Licensing
Anti-Corruption Regulation	Life Sciences
Anti-Money Laundering	Merger Control
Arbitration	Mergers & Acquisitions
Banking Regulation	Mining
Cartel Regulation	Oil Regulation
Climate Regulation	Patents
Construction	Pharmaceutical Antitrust
Copyright	Private Antitrust Litigation
Corporate Governance	Private Equity
Corporate Immigration	Product Liability
Dispute Resolution	Product Recall
Dominance	Project Finance
e-Commerce	Public Procurement
Electricity Regulation	Real Estate
Enforcement of Foreign Judgments	Restructuring & Insolvency
Environment	Right of Publicity
Foreign Investment Review	Securities Finance
Franchise	Shipbuilding
Gas Regulation	Shipping
Insurance & Reinsurance	Tax on Inbound Investment
Intellectual Property & Antitrust	Telecoms and Media
Labour & Employment	Trademarks
	Vertical Agreements



**For more information or to  
purchase books, please visit:**  
[www.GettingTheDealThrough.com](http://www.GettingTheDealThrough.com)



Strategic research partners of  
the ABA International section



THE QUEEN'S AWARDS  
FOR ENTERPRISE:  
2012



The Official Research Partner of  
the International Bar Association