

# Cartel Regulation

The application of competition regulation  
in 48 jurisdictions worldwide

# 2013

Contributing editor: D Martin Low QC



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# Romania

**Georgeta Harapcea and Marius Stefana**

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## Legislation and jurisdiction

### 1 Relevant legislation

What is the relevant legislation and who enforces it?

Competition is regulated under Competition Law No. 21/1996 (the Competition Law), as subsequently amended and supplemented, and under Competition Council Regulations and Guidelines. Romanian competition legislation generally follows the provisions of that of the EU, with certain specificities.

The Competition Council is an autonomous administrative authority that has regulatory as well as enforcement powers and which works, deliberates and takes decisions in plenary sessions or in commissions. Competition inspectors also play an important role in enforcing the Competition Law (eg, imposing fines, conducting investigations and dawn raids, handling cases).

### 2 Proposals for change

Have there been any recent changes or proposals for change to the regime?

The Competition Law has been recently amended by Law No. 149/2011 for the approval of the Government Emergency Ordinance No. 75 of 30 June 2010, in force from 15 July 2011.

The amendments to the Competition Law aim at, among other things, introducing provisions under which:

- it is presumed, until proven otherwise, that one or more undertakings are dominant where the share or the aggregated market shares exceed 40 per cent in the relevant market in the period under review;
- the appointment of the members of the Competition Council's Plenum is made by the president of Romania, following the proposal of the Competition Council Advisory Board, with the government's advice and after the hearings of the candidates in specialised Parliament committees;
- an advisory board is created within the Competition Council, as a non-permanent body, composed of 11 to 17 representatives of academic competition or business environment, consumer protection associations or prestigious people in the economic, legal or competition field. The advisory board issues non-binding opinions on the main aspects of competition policy;
- the authorisation fee for mergers is between €10,000 and 25,000;
- at the proposal of the Supreme Council of National Defence, where an operation of taking over control of undertakings or utility assets presents risks to national security, the government will issue a decision prohibiting such operation, subject to the European Commission's jurisdiction in this area. The Competition Council has an obligation to inform the Supreme Council of National Defence about notified merger transactions, which may be analysed from the perspective of national security;

- a Competition Council decision to impose fines may be suspended by the Court of Appeal only on the condition of a bail payment according to the provisions of Law No. 571/2003 on fiscal code, as subsequently amended and supplemented;
- central and local authorities can be sanctioned with fines for failing to provide requested information and documents or for providing inaccurate or incomplete data;
- the fine imposed on an undertaking can be reduced by 10 to 30 per cent in the case of an acknowledgement of having committed an anti-competitive act;
- at the request of the Commission or other national competition authorities, the Competition Council would perform dawn raids on the national territory; and
- the economic concentration compatibility test changed from the 'dominance test' to the substantial impediment of effective competition test (the SIEC test).

Regarding the harmonisation with EU competition rules, the individual exemption system has been eliminated and replaced with the self-assessment rule, parties to an economic concentration have the obligation to notify prior to implementing (and not in 30 days from signing, as was the case in the past) and the risk of private enforcement for undertakings benefiting from immunity from fines has been removed.

The Competition Law also provides the sole application of the EU block exemption regulations and the possibility of accepting commitments during an investigation regarding anti-competitive practices.

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### 3 Substantive law

What is the substantive law on cartels in the jurisdiction?

Pursuant to article 5(1) of the Competition Law, any agreements between undertakings, any decisions by associations of undertakings and any concerted practices that have as their object or effect the restriction, prevention or distortion of competition in the Romanian market or in a part thereof are prohibited, especially those aimed at:

- fixing prices and trading conditions;
- limiting or controlling production, marketing, technical development or investments;
- sharing markets or supplies;
- applying discriminatory terms for equivalent services;
- conditioning the conclusion of contracts upon the acceptance of additional services that are not related to these contracts;
- bid rigging;
- eliminating competitors from the market;
- limiting or preventing access to the market; and
- agreeing not to buy from or sell to certain undertakings without reasonable justification.

The above-mentioned prohibitions do not apply to agreements, decisions or concerted practices in cases where three conditions are cumulatively met:

- they contribute to improving production and distribution or promoting technical and economic progress, assuring a corresponding benefit for the consumers;
- they impose on the undertakings involved only those restrictions that are indispensable for achieving these goals; and
- they do not offer the possibility of eliminating competition in a substantial part of the respective product markets.

The same prohibitions also do not apply in the following situations:

- the cumulative market share of the undertakings involved does not exceed 10 per cent on any affected relevant markets in cases where the respective undertakings are competitors; and
- the market share of each undertaking party to the agreement does not exceed 15 per cent on any affected relevant markets, in case the respective undertakings are not competitors.

These 'de minimis' provisions do not apply to agreements between competitors that have as their object setting prices to customers, limiting production or sales and sharing markets or clients. Other restrictions that cannot be subject to exemptions are the agreements between competitors, each of which operating, for the purposes of the agreement, at a different level of the production or distribution chain, or between non-competitors that, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- the restriction of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services, except:
  - the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer;
  - the restriction of sales to end users by a buyer operating at the wholesale level of trade;
  - the restriction of sales to unauthorised distributors by the members of a selective distribution system; and
  - the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
- the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;
- the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade; or
- the restriction agreed between a supplier of components and a buyer who incorporates those components, which limits the supplier to selling the components as spare parts to end users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

The sanctions can be both of an administrative and a criminal nature, as detailed below.

#### 4 Industry-specific offences and defences or antitrust exemptions

Are there any industry-specific offences and defences or antitrust exemptions?

There are no industry-specific offences or immunities expressly regulated. For certain sectors such as telecommunications and energy, the sector regulators also have certain competition-related duties and responsibilities and sometimes act in cooperation with the Competition Council (due to their specific legal provisions or based on cooperation protocols) to maintain a competitive environment. There are also no industry-specific antitrust exemptions.

#### 5 Application of the law

Does the law apply to individuals or corporations or both?

The law applies to undertakings (individuals or legal persons) carrying out economic activity, associations of undertakings and to local or central public administration bodies (to the extent that they restrict, prevent or distort competition by limiting free trade and undertakings' autonomy, exercised in compliance with legal provisions, or by setting up discriminatory business conditions for undertakings).

#### 6 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what legal basis does the authority claim jurisdiction?

Pursuant to article 2 of 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, produces effects on Romanian territory.

#### Investigation

##### 7 Steps in an investigation

What are the typical steps in an investigation?

The Competition Council may order the initiation of investigations, if there is sufficient factual and legal basis:

- ex officio; or
- at the complaint of an individual or legal person actually and directly affected by the infringement of the provisions regarding anti-competitive agreements.

Following the initiation of the investigation, the competition inspectors can carry out the following activities:

- dawn raids at the headquarters of the undertakings involved or in any other areas where they operate;
- requesting necessary information and documents;
- applying sanctions for the undertakings that are not complying with their obligations correlative to the authority's powers above;
- sending to the undertakings concerned the statement of objections and receiving statements of defence; and
- managing requests for access to the file.

If an investigation was triggered by a complaint, after the issuance of the statement of objections by the case handler, to which the parties are entitled to submit a written statement of defence, the undertakings involved are invited to support their comments during hearings before the Competition Council's Plenum (composed of seven members). After the hearings, the Competition Council's Plenum will deliberate and issue the decision.

There are no legal provisions regarding certain time limits from the initiation of the investigation until the final decision.

## 8 Investigative powers of the authorities

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 legally 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 physical or electronic media that are kept;
- request explanations from representatives and employees of the undertaking or association of undertakings pertaining to facts or documents related to the object and purpose of inspection, and to register or record their answers;
- take statements from any natural or undertaking's legal representative who agrees to give such statements;
- 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 the result will be recorded in inspection minutes. Competition inspectors are vested with inspection powers through an order of the president of the Competition Council. They can request any kind of information or justification related to accomplishing their mission, both onsite and on call at the Competition Council's premises. The Romanian competition authority can also carry out inspections at the request of the European Commission or another competition authority from a member state.

Based on a judicial authorisation granted through a decision from the president of the Bucharest Court of Appeal, or by a judge delegated by him, 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 High Court of Cassation and Justice within 48 hours; the appeal does not, however, stay enforcement.

## International cooperation

### 9 Inter-agency cooperation

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

Following Romania's accession to the EU on 1 January 2007, the Competition Council is a full member of the ECN and is able to exchange information with other European competition authorities under article 12 of Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition provided in articles 101 and 102 of the Treaty on the Functioning of the European Union (ex articles 81 and 82 of the EC Treaty). The inspections carried out at the request of the European Commission or another competition authority from a member state are based on the provisions of article 22 of Council Regulation (EC) No. 1/2003 and article 12 of Council Regulation (EC) No. 139/2004.

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

The content of the Competition Council's cooperation agreements with other domestic sector-specific regulators (such as national authorities for regulation in telecom, energy and municipal public services) have not been made public.

### 10 Interplay between jurisdictions

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

From the point of view of foreign laws, the Romanian Competition Council, as a full member of the ECN, shall cooperate with the other competition authorities upon the investigation, prosecution and punishment of a cartel activity, in accordance with the provisions of articles 12 and 22 of Regulation No. 1/2003. The cooperation process, as detailed in the Commission Notice on cooperation within the Network of Competition Authorities, affects the Competition Council in relation to the scope of investigation and the exchange and use of confidential information. The Competition Council must exchange and use information and cooperate during the investigation procedure regarding the actions and facts that took place in Romania or, even if the conduct takes place outside the territory of Romania, if the effects occur within Romania. Where the Competition Council acts on behalf of another national competition authority, it shall respect the Romanian procedural rules.

### 11 Adjudication

How is a cartel matter adjudicated?

The Competition Council is competent to investigate and sanction cartels. Any infringement of a competition law provision relating to cartels is adjudicated by the Competition Council, through a decision.

### 12 Appeal process

What is the appeal process?

The Competition Council's decisions are subject to appeal, which may be filed with the Bucharest Court of Appeal within 30 days of communication. The mere challenge of the decisions of the Competition Council does not stay their enforcement. A separate request for such stay may be filed by the claimant and the Court may dispose suspension of the referred decision. For fines, the suspension may be granted only with the condition of a bail payment according to the provisions of Law No. 571/2003 on the fiscal code. While the Competition Law makes reference to the fiscal code, the bail is regulated under the fiscal procedure code, in an amount to be decided by the court in each specific case, without exceeding 20 per cent of the fine.

The decision of the Bucharest Court of Appeal may be further challenged before the High Court of Cassation and Justice. The Competition Council's order through which the investigation was initiated can be challenged only together with the decision that finalises the investigation.

### 13 Burden of proof

With which party is the burden 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 fulfilment 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.

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## Sanctions

### 14 Criminal sanctions

What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions? Do individuals face imprisonment for cartel conduct?

Under the Competition Law, participation of individuals with fraudulent intent and in a decisive way to the conception, organisation or performance of the practices prohibited by article 5 and not exempted according to article 5(2) of the Competition Law represents a criminal offence, punished by imprisonment for a period from six months to three years or with a criminal fine and with the prohibition of some rights. These provisions do not apply for the practices prohibited by article 5 referring to agreements between participating parties with rigged bids in auctions or any other forms of competitive tendering for distorting the prices of adjudication, where specific regulations in this field will apply. The court may decide to publish the condemnation decision in the press at the guilty party's expense.

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### 15 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

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

If, within 45 days of 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 damages for each day of delay in order to induce them to comply with the provisions of article 5 of the Competition Law. The amount of the daily damages is up to 5 per cent of the daily average turnover in the fiscal year prior to the sanctioning.

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### 16 Civil and administrative sanctions

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Both criminal and administrative sanctions are possible for cartel activities. Administrative sanctions are usually pursued in relation to the infringing undertakings, while criminal sanctions will be pursued in relation to any individual who participates with fraudulent intent and in a decisive way to the conception, organisation or performance of the practices prohibited by article 5 (even if the possibility to apply criminal sanctions to undertakings was introduced in Romanian legislation).

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### 17 Private damage claims and class actions

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. These claims must be filed within two years from the date when the Competition Council's decision on which the action was based remains final or has been maintained, in whole or in part, as final and irrevocable by a court decision. The undertakings benefiting from immunity from fines are not jointly liable for the damages caused by participating in an anti-competitive act. Punitive or exemplary damages are not available under the law.

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### 18 Recent fines and penalties

What recent fines or other penalties are noteworthy?

The first semester of 2012 brought no decisions imposing fines for the breach of article 5 of the Competition Law. Although several investigations regarding anti-competitive agreements on the market for prepaid cards in Romania were concluded during this period, a series of commitments were proposed and have been accepted by the competition authority who decided to close the investigations and make these commitments mandatory for the parties involved. Many other investigations are still ongoing.

As regards anti-competitive agreements, the last fine was the €12 million fine imposed in December 2011 for breach of article 5 in the form of agreements containing clauses prohibiting exports between two pharmaceutical suppliers and their distributors in Romania.

The highest fine imposed by the Competition Council for breach of article 5 of the Competition Law is the €200 million fine imposed in December 2011 on the motor fuel distribution market in Romania. The competition authority concluded that six oil companies had jointly agreed to withdraw from the market the range of Eco Premium gasoline. The Competition Council's decision was challenged in court.

The maximum fine that may be applied for a cartel may reach 10 per cent of the turnover of the undertaking concerned. First, 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 (for example, repeated breaches, refusal to cooperate and obstruction of the investigation team, acting as ringleader, repressive measures against other undertakings to force them to comply with infringing conduct, continuing violation after the initiation of the Competition Council's procedure, etc) or mitigating circumstances (for example, non-implementation of the agreement, cessation of infringement immediately upon the intervention of the Competition Council, the conduct was authorised or encouraged by public authorities or existing legislation, effective cooperation with the Competition Council, etc) or both.

At the time of writing, no criminal sanctions have yet been levied against individuals (only a case of referral to the criminal investigation bodies).

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## Sentencing

### 19 Sentencing guidelines

Do sentencing guidelines exist?

The Competition Council issued new sentencing guidelines in September 2010 and amended and supplemented them in 2011.

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### 20 Sentencing guidelines and the adjudicator

Are sentencing guidelines binding on the adjudicator?

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

**21 Leniency and immunity programmes**

Is there a leniency or immunity programme?

The Competition Council revised its leniency guidelines in September 2009, aiming at catching up with the changes made in December 2006 to the EU Commission Leniency Notice (eg, introducing the marker system).

As a novelty, the scope of application of the leniency policy was extended to include vertical agreements and concerted practices. The Competition Council will further assess the efficiency of this extension, depending on the evolution of the economic conditions in which the undertakings active on the Romanian market operate.

**22 Elements of a leniency or immunity programme**

What are the basic elements of a leniency or immunity programme?

An undertaking may be granted immunity or a reduction of the fine. To be granted immunity an undertaking must be the first one to submit information and evidence that, in the Competition Council's view, allows it either:

- to initiate an investigation procedure and perform unannounced inspections (Type A Immunity); or
- to prove an infringement of article 5(1) of the Competition Law or of article 101(1) TFEU (Type B Immunity).

Type A Immunity will only be granted if the undertaking is the first one to submit information and evidence allowing the Council to initiate an investigation procedure and perform unannounced inspections, at a moment when the Competition Council did not have sufficient elements to initiate an investigation or perform an unannounced inspection.

Type B Immunity will be granted only if the undertaking is the first one to submit information and evidence allowing the Council to prove the breach of article 5 of the Competition Law or of article 101 TFEU, at a moment when the Competition Council did not have sufficient evidence to establish the infringement; in addition, no other undertaking must have obtained conditional immunity in relation to the same cartel.

Regardless of the type of immunity sought, an undertaking that seeks to benefit from immunity must also meet the general conditions below:

- cooperating effectively, fully, permanently and promptly with the Competition Council throughout the entire procedure (submitting all the evidence that comes into its possession or that might be available to it relating to the alleged cartel; remaining at the disposal of the Competition Council in order to answer any request that might contribute to establishing the facts; not destroying or concealing relevant information or evidentiary documents; not disclosing the existence or content of the leniency application before the competition authority conveys the statement of objections to the parties);
- ending the involvement in the alleged illegal activity at the request of the Council;
- not having disclosed the intention to submit a request for leniency or elements of the leniency application; and
- not having acted as ringleader.

If an undertaking does not qualify for immunity, either for having acted as a ringleader or for not being the first one to apply for leniency, 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 that represents significant added value with respect to that already in the Competition Council's possession; and
- meet the above general conditions (except for the prohibition to have acted as ringleader).

**23 First in**

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

Full immunity from a 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 minutes, could still result in serious fines.

**24 Going in second**

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

The second undertaking that comes forward (to the extent the first undertaking qualified for immunity) will qualify for a reduction of fine and, if it fulfils 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, if an undertaking benefited from immunity in the end) may benefit from a 20 to 30 per cent reduction in the amount of the fine, while all the other undertakings that come forward after that can only get a reduction of up to 20 per cent of the amount of the fine.

Should the second-in undertaking have any information to offer on a previously unknown offence it will, if it meets the conditions, be able to qualify for immunity from fines in relation to that specific offence. No further reductions will be made in relation to the fine received for its involvement in the primary offence.

**25 Approaching the authorities**

What is the best time to approach the authorities when seeking leniency or immunity? Are there deadlines for applying for leniency or immunity, or for perfecting a marker?

Only one undertaking can be granted immunity, and once the Competition Council has launched an investigation, immunity is even more difficult to obtain (especially if a dawn raid has already taken place). 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 fines. Consequently, it would be advisable to approach the authorities as soon as the relevant undertaking acquires knowledge of being part of a cartel. The undertaking can also make use of the marker system in order to secure priority until it provides the requested evidence. The guidelines also provide for simplified applications for immunity: the undertaking, having filed or contemplating filing a leniency application with the EU Commission, can file a simplified application to the Competition Council when it considers that the Romanian competition authority could be better placed to intervene. The undertakings may successfully apply for Type A Immunity only prior to the initiation of an investigation procedure and performance of unannounced inspections regarding the possible breach of article 5 of the Competition Law or of article 101 TFEU. On the other hand, Type B Immunity, reduction of the fine and the application for granting a marker have to be requested prior to the date when the statement of objections is submitted to the parties involved.

**26 Confidentiality**

What confidentiality is afforded to the leniency or 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

**Update and trends**

During the first Semester of 2012, the Romanian Competition Council has initiated 10 investigations, out of which eight for the analysis of certain anticompetitive horizontal agreements, one for the analysis of a possible vertical agreement and one for both possible cartel and vertical agreement. There were 63 investigations envisaging possible anticompetitive agreements still in progress at the end of June 2012.

such, cannot be used or disclosed for any other purpose than the enforcement of article 5(1) of the Competition Law or of article 101 TFEU. Nevertheless, when issuing its decision, the Council will always make clear who collaborated and to what extent, so that it can justify the immunity or reduction of fine granted.

**27 Successful leniency or immunity applicant**

What is needed to be a successful leniency or immunity applicant?

Choosing the best time to approach the Council is of the essence, together with the provision of sufficient information and evidence. The standard of evidence taken into account by the Competition Council is not defined in the relevant legislation, although the revised leniency guidelines include a clearer list of information and evidence required in order for an undertaking to qualify for immunity from fines or for a reduction of fines. It is expected that the Competition Council would consider evidence that is admissible in court. In terms of 'significant added value', for example, written evidence originating from the period of the infringement has greater value than evidence subsequently established, and evidence directly relevant to the facts has a greater value than indirectly relevant evidence. In terms of conclusiveness, it is important that the evidence does not require verification and corroboration with other sources.

**28 Plea bargains**

Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

The Competition Council does not have the authority to enter into either a 'plea bargain', which does not exist under Romanian legislation, or into a binding resolution to resolve liability and penalty for alleged cartel activity.

**29 Corporate defendant and employees**

What is the effect of leniency or immunity granted to a corporate defendant on its current and former employees?

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

**30 Cooperation**

What guarantee of leniency or 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 fines or acknowledge the possibility of reducing the fines (see above). The undertakings concerned must still meet the pending conditions (for example, cooperation throughout the investigation) to qualify for immunity or reduction of fines, which will be confirmed by the final decision at the end of the investigation.

**31 Dealing with the enforcement agency**

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 fines 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 fines, 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 fines 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.



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**32 Ongoing policy assessments and reviews**

Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

No. The Competition Council issued new leniency guidelines in September 2009.

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**Defending a case**

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**33 Representation**

May counsel represent employees under investigation as well as the corporation? Do individuals 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 could be a conflict of interest, counsel can represent employees as well as the corporation. Present or past employees should be advised to seek independent advice when their interests conflict with the corporation's – for example, the corporation seeks immunity but this could lead to a particular employee being found criminally liable.

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**34 Multiple corporate defendants**

May counsel represent multiple corporate defendants?

There is no express rule prohibiting a joint defence, as long as the defendants and the counsel do not see this as a potential conflict of interest.

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**35 Payment of legal costs**

May a corporation pay the legal costs of and penalties imposed on its employees?

Employees found criminally liable can have criminal fines imposed upon them. There is no express Competition Law prohibition regarding a corporation paying the legal costs and financial penalties in such situations, but there are other legal factors that must be taken into account (best interests of the company, minority shareholders, tax aspects, etc).

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**36 Getting the fine down**

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

One can lower fines by cooperating with the Competition Council in one of the available forms (by benefiting from leniency, by expressly acknowledging having committed the anti-competitive act (after a company having received the statement of objections and having exercised its access to the file) and, in general, by invoking and proving mitigating circumstances.

## GETTING THE DEAL THROUGH

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