

# Cartel Regulation

Getting the fine down  
in 42 jurisdictions worldwide

**2010**

Contributing editor: Martin Low QC



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# Romania

**Georgeta Harapcea**

Nestor Nestor Diculescu Kingston Petersen

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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, as subsequently amended and supplemented (the Competition Law), and under Competition Council regulations and guidelines. Romanian competition legislation generally follows the provisions of that of the EU.

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 and in commissions.

### 2 Proposals for change

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

The Competition Council has recently made public a proposal for the amendment of the Competition Law, expected to be enacted at the beginning of 2010.

The amendments to the Competition Law aim at, among other things, filling the regulatory voids, as evidenced by existing case law, and propose an express definition of the concept of 'undertaking', the express regulation of the attorney-client legal privilege, and an outline procedure in case of contested documents during an inspection.

Regarding the harmonisation with EU competition rules, the Competition Law proposes to eliminate the individual exemption system, to provide that in economic concentrations, the parties have the obligation to notify prior to implementing (and not in 30 days from signing, as it is the case now) and to eliminate the risk of private enforcement for undertakings benefiting from immunity from fines.

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

### 3 Substantive law

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 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:

- 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 sell to certain undertakings without reasonable justification.

Cartels are illegal per se. There is no de minimis requirement in relation to cartels and no exemption is available. The sanctions are both of an administrative and a criminal nature, as detailed below.

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### 4 Industry-specific offences and defences

Are there any industry-specific offences and defences?

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 sometimes act in cooperation with the Competition Council to maintain a competitive environment.

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### 5 Application of the law

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 where they take such measures in the application of other laws or in defence of a major public interest).

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### 6 Extraterritoriality

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, produces effects on the Romanian territory.

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## Investigation

### 7 Steps in an investigation

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;
- the request of the undertakings or associations of undertakings interested; or
- the request of certain authorities, institutions or organisations (the president, 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 concludes with the issuance of a statement of objections by the case handler, to which the parties are entitled to submit a written statement of 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 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 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 that 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 authorised them. The judge may inspect the searched places, and may decide to suspend or cease the search at any time.

The right to remain silent (privilege against self-incrimination) has limited application in practice and an employee's testimony can

be used against his or her employer. There are no records on border watches so far.

#### **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 now a full member of the ECN and is able to exchange information with other European competition authorities under article 12 of EU Regulation 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).

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 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 the domestic law, there is significant jurisdictional interplay in competition enforcement. 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 if 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 specifically regulated.

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, but the grant thereof remains at the court's discretion.

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

### 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.

## Sanctions

### 14 Criminal sanctions

What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

Under the Competition Law, participation of a natural person with fraudulent intent and in a decisive way to the conception, organisation or performance of the practices prohibited by article 5 represents a criminal offence, punished by imprisonment for a period from six months 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 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.

### 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 concept, organisation or performance of

the practices prohibited by article 5 (also because the possibility to apply criminal sanctions to undertakings is new in Romanian legislation).

### 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. Punitive or exemplary damages are not available under the law.

### 18 Recent fines and penalties

What recent fines or other penalties are noteworthy? What is the history of fines? How many times have fines been levied? What is the maximum fine possible and how are fines calculated? What is the history of criminal sanctions against individuals?

2008 brought three decisions imposing fines for the breach of article 5 of the Competition Law, and a decision fining a company for failure to submit to an unannounced inspection. 2009 saw confirmation in court of the first decision to impose a fine for failure to submit to a dawn raid.

On the history of fines, the following must be noted:

- the €22.6 million fine imposed on the insulin market in March 2008 for breach of article 5 in the form of market-sharing;
- the €7.5 million fine imposed on the cable TV market in December 2006 for breach of article 5 in the form of market-sharing and for abuse of dominant position in the form of imposing increased tariffs; and
- the €5.5 million fine imposed on the chewing gum market in December 2005 to Wrigley Romania and its distributors for breach of article 5 of the Competition Law in the form of price fixing and market sharing.

The highest fine imposed by the Competition Council for breach of article 5 of the Competition Law remains the €27 million fine on the cement market in March 2005 (one of the undertakings subsequently obtained the annulment of the decision in its respect 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, high gains resulting from the illicit conduct, etc) or mitigating circumstances (for example, 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.

At the time of writing, no criminal sanctions have yet been levied against individuals.

## Sanctions

### 19 Sentencing guidelines

Do sentencing guidelines exist?

Sentencing guidelines for the administrative offences specified in article 56 (currently renumbered as article 51) of the Competition Law



No. 21/1996 were formally introduced by the Competition Council in May 2004.

## 20 Sentencing guidelines and the adjudicator

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.

## 21 Leniency and immunity programmes

Is there a leniency or immunity programme?

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

The scope of application of the leniency policy was also 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 receive immunity or a reduction of the fine. To receive immunity an undertaking must submit evidence that, in the Competition Council's view, either allows it to:

- initiate an investigation procedure; or
- 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 (which is the first to submit the information), 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 (which is the first to submit the information), the Competition Council did not have sufficient evidence to establish an infringement of article 5 of the Competition Law (the equivalent of article 101 TFEU) and no other undertaking has obtained conditional immunity in relation to the same cartel.

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

- cooperating 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;
- 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;
- renounce participation in the alleged illegal activity no later than the date at which it submits evidence; and
- not have acted as ringleader.

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 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 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.

## 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 will qualify for a reduction of fine programme 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) may benefit from a 20 to 30 per cent reduction in the amount of the fine, while all the other undertakings that come forward 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 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?

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 fines. Consequently, it would be advisable to approach the authorities as soon as the relevant undertaking acquires knowledge relating to the said violation taking place. 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.

## 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 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.

## 27 Successful leniency or immunity applicant

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

The standard of evidence taken into account by the Competition Council is not defined in the relevant legislation, although the new 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. Regarding leniency, 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. 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 is not taken into account by the Council.

## 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 neither 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 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 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.

## Update and trends

The new leniency guidelines and the proposed amendments to the Competition Law described above are the latest developments in cartel enforcement in Romania.

## 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. 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.

## 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 acknowledgment 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?

The Competition Council has issued new leniency guidelines in September 2009.

**Defending a case****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.

**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. The Competition Council might, however, view this as proof of the strong, close links that exist between the defendants and thus further proof of a cartel.

**35 Payment of legal costs**

May a corporation pay the legal costs of and 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.

**36 Getting the fine down**

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 co-operate with the Competition Council. There is no authority in our jurisdiction that is enabled to negotiate a particular sentence.

An indirect way to obtain a lower fine is due to mitigating circumstances – see question 18.





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