The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Romania: Cartels

This country-specific Q&A provides an overview to cartels laws and regulations that may occur in Romania.

This Q&A is part of the global guide to Cartels. For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/practice-areas/cartels/

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1. What is the relevant legislative framework?

At national level, cartels are prohibited under article 5 of the Competition Law no. 21/1996 as republished and further amended and supplemented ('Competition Law'), which provides that:

'*[a]ny agreements between undertakings, decisions of associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition on the Romanian market or part thereof, in particular those which:*

a) directly or indirectly fix purchase or selling prices or any other trading conditions;

b) limit or control production, markets, technical development or investments;

c) share markets or sources of supply;

d) apply unequal conditions to equivalent transactions in their relations with trading partners, thereby creating a competitive disadvantage;

e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

EU-level enactments are also applicable to cartels affecting the Romanian market and the Romanian Competition Council ('CC') is vested with the power to directly enforce the provisions of article 101 of the Treaty on the Functioning of the European Union ('**TFEU**').

The CC has not issued particular secondary legislation in the field of cartels, but has nonetheless created a legislative framework regulating investigation and prosecution of cartels affecting the Romanian market.

2. To establish an infringement, does there need to have been an effect on the market?

Under current policy terms, cartels amount to infringements of competition by object, which are thus subject to sanctions irrespective of their effects. However, there has been a notable development in the sense that although the existence of a cartel is sufficient to conclude that an infringement of competition law occurred, the anticompetitive effects thereof are almost always taken into consideration. Nonetheless, given the diminished level of proof required, reliance is had on the "by object" nature of the infringement.

3. Does the law apply to conduct that occurs outside the jurisdiction?

The Competition Law applies to extraterritorial anticompetitive behaviour, inasmuch as it affects competition on the Romanian market. There has recently been a case (indicated in the last section of this paper) where the extraterritorial reach of the Competition Law is clear.

4. Which authorities can investigate cartels?

In Romania, the sole authority vested with the powers to investigate cartels (in light of both article 5 of the Competition Law and article 101 TFEU) is the CC.

Nevertheless, if a case falls in ambit of the European Commission, the latter, acting as investigative authority, may undertake enforcement activities directly in Romania, with the assistance of the CC and upon authorization from the Bucharest Court of Appeals.

5. What are the key steps in a cartel investigation?

The CC has discretion in opening investigations. It may do so either following a formal complaint being submitted thereto, or *ex offcio* (based on information received through the online whistleblowing platform recently implemented, or on information received by the members of the Plenum of the CC or the CC as an institution, from different sources). It may also open investigations based on formal notices from other state bodies (including criminal investigation authorities), as it has done is several bid-rigging cartels involving state-run public procurement procedures.

The rule is that an investigation is launched only when the CC holds sufficient elements that allow it to reasonably suspect that an infringement of competition has taken place. It must have elements which, corroborated with other means of proof which it may

collect via dawn raids or requests for information, will allow it to bring charges of infringement of competition rules.

The official deed launching the investigation is an order issued by the Chairman of the CC (of a deputy-chairman, as the case may be) stating the grounds for investigation, the scope of the procedure and appointing the rapporteur, i.e. the public servant leading the overall investigative effort. The order launching the investigation is subject to court review at the end of the procedure, alongside the decision that ends the procedure and imposes fines (if the case).

Under current enactments, there are no specific deadlines to be observed when launching an investigation other than the statutes of limitation, which is of 5 years in the case of infringements of competition rules. This duration is calculated as of the perpetration (for *uno ictu* deeds) or since the last act of infringement (for continuous deeds).

Apart from on-site inspections (commonly referred to as 'dawn-raids'), the CC gathers information via requests made in the form of questionnaires issued during the investigation and concerning matters specific to the object of the procedure. It is common practice for the CC to grant answering deadlines of two weeks, which may be extended (usually out of courtesy) by another week and seldom by two additional weeks. There are cases, for instance in procedures that are of high priority to the CC, that such deadline extensions will not be granted. During an investigation procedure, it is common practice for there to be two or three such requests for information.

In terms of duration of the procedure, at present, the CC strives to keep them at 2 or maximum 3 years. Shortening the duration of the investigations was taken on board as a policy matter by the management of the Council and, in past years, it has been duly observed.

During the investigation, the case team holds meetings with the persons involved, in order to discuss cooperation matters or for obtaining or receiving eventual clarifications for different matters. Such state-of-play meetings are not compulsory under the law and are held exclusively out of courtesy of the CC (nonetheless they may also serve as proof of the parties' cooperation with the competition authority).

6. What are the key investigative powers that are available to the relevant authorities?

In conducting cartel investigations, the CC is vested with extensive powers. In general terms, the CC's powers of inspection are nevertheless confined to the limits set by a judicial authorization that is compulsory to be obtained ex ante any investigative procedure and is normally granted within an 'in chambers' session presided over by the Presiding Judge of the Bucharest Court of Appeals.

In Romania, investigations normally begin with an unannounced inspection at the premises of the investigated companies. Simultaneous inspections are carried out for multiple premises and multiple investigated companies. The inspections are ordered by the President of the CC via a formal order and are authorized by a court ruling, as mentioned above. Private residences and vehicles of individuals may also be raided, subject to a due authorization from the court. The order of the CC President for undertaking unannounced inspections is subject to review by a court of law.

In recent years, the CC has decided to simplify the manner in which unannounced inspections are being carried out so that the disruption of an investigated company's activity is kept to a necessary minim. Specifically, electronic-form documents and correspondence are printed only in exceptional cases, and entire hard drives and/or servers (including cloud storage, and mobile terminals as well) are collected by making true copies thereof with the aid of special forensic software and equipment. Documents and information existing solely in hard copy are nevertheless still copied via mechanical means. Personal information should not be copied, likewise information and documents covered by the attorney-client privilege.

The inspectors running the dawn-raid are also empowered to ask the questions that they consider necessary and to solicit that employees or management members provide written statements during the dawn-raid. The latter may refuse to be interviewed (and are always entitled to specialized counsel), but such interviews have been quite scarce in the CC's practice.

After the dawn-raid is completed, a forensic inspection at the headquarters of the CC begins in respect of electronically-collected data and information. It is run by the investigation team and it is duly authorized by the Presiding Judge of the Bucharest Court of Appeals for an initial period of up to three months. Such period may be extended by the court, if requested by the CC. During such forensic examination phase, the documents copied are identified and skimmed through (forensic tools allowing also the identification and preview of deleted documents). Also in this phase, the rapporteur and its team may ask questions and conduct interviews, if the case. Documents are marked and collected at the end of the forensic investigation procedure. True copies are made from the collected documents for both the investigation team and the investigated party. Only these are part of the investigation file, while the electronic copies made on occasion of the dawn-raid are sealed and must be destroyed at the end of the investigation procedure.

7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

According to article 38 paragraph (8) of the Competition Law only correspondence with outside counsel that is related to the object of the investigation is subject to protection under legal privilege. If in doubt or a dispute arises between the inspectors running the unannounced inspection and the party under investigation, such documents are placed in a sealed envelope and remitted to the President of the CC, who decides by way of an order. This order may be challenged in court.

8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

According to the Guidelines on the conditions and criteria for enforcing a leniency policy approved by order of the President of the CC no. 610/2009, as further amended and supplemented ('**Leniency Guidelines**'), there are two types of leniency

applications depending on the quality of information provided by the applicant. The information put forth must allow the CC to either (i) launch an investigation and carry out inspections - '*Type A Immunity*', or (ii) establish an infringement of article 5 paragraph (1) of the Competition law and/or article 101 TFEU - '*Type B Immunity*'.

For the Type A Immunity, the applicant must be the first who delivers to the CC information placing it in a position to launch an investigation and carry out unannounced inspections, meaning that at the moment when such information is provided, the CC is not in possession of sufficient proof to allow it either to launch an investigation or to carry out dawn-raids. Such information must be provided in a statement to the CC containing a description of the anticompetitive deed and means of proof in connection therewith.

For the Type B Immunity, the applicant must be the first in providing the CC with sufficient data for it to establish that an infringement of article 5 paragraph (1) of the Competition Law and/or article 101 TFEU has occurred (in the form of a statement and supporting evidence), meaning that at the moment when such information is provided, the CC should not be in possession of sufficient elements that would allow it to establish such an infringement. Additionally, no other undertaking should not have acquired Type A Immunity before such proof is provided to the CC.

General conditions for obtaining immunity are the following, and must be cumulatively met:

(i) the undertaking cooperates truthfully, completely, continuously and promptly with the CC throughout the investigation procedure;

(ii) the undertaking must have desisted from the anticompetitive deed which it brings to the attention of the CC and

(iii) the undertaking refrains from revealing its intention of achieving a leniency application or the elements thereof to others than other authorities than competition enforcement bodies.

The Leniency Guidelines do not offer qualification in terms of the types of proof that must be put forth, but they do require that such elements of proof be of a certain probative value, so as to enable the CC to perform its enforcement powers.

The immunity is conditional and consolidates at the end of the investigative procedure, when the CC takes its final decision in respect of the application(s).

9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

Full immunity as a consequence of a leniency application is conditional upon being the first either to bring an anticompetitive deed to the attention of the CC or to offer the CC the necessary proof to establish that an infringement occurred. The Leniency Guidelines provide that in the case in which leniency applicant do not qualify for either Type A or Type B Immunity, they nevertheless may qualify for a reduction of the fine that would have normally been applied thereto by the CC. The sole condition is that their application make a "*substantial supplementary contribution*" to the overall elements of proof held by the CC.

This reduction is granted on a first-come first-served basis. Thus, the first applicant will benefit from a reduction of the fine between 30%-50%, the second between 20%-30%, while all the other will benefit from a maximum 20% reduction.

10. Are markers available and, if so, in what circumstances?

The Leniency Guidelines provide for the undertakings' possibility to request they be granted markers securing their priority in leniency applications. The marker is valid for a time-frame determined on a case-by-case basis.

The application of securing a marker is made based on a high-level disclosure of the applicant's identity, of the infringement that it wants to put forth and of eventual other disclosures made in respect of such infringement to other authorities.

In order to secure the leniency application, the applicant must put forth, in the CC-specified time-frame data and information, including elements of proof substantiating its allegations. If so, the leniency application will be deemed as having been fully filed with the CC on the date on which the marker was granted. If not, then the application will be rejected. The applicant whose application is thus dismissed will only qualify for obtaining a reduction of the fine, and will not be eligible for full immunity.

11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

Confidentiality is paramount to the entire leniency procedure. On one hand, confidentiality must be observed by the applicant in relation to the other undertakings, especially those that are or will be under investigation as a consequence of its application. The confidentiality of the entire leniency procedure is applicable up to the point when the investigation report drafted by the investigation team is served upon the investigated parties, at the end of the procedure. At that moment, the other parties acknowledge the leniency applications made. During the procedure of access to the investigation file, the other parties may acknowledge in full or partially (depending on the degree of confidentiality bestowed thereupon) the contents of the leniency application and of the evidence produced.

Moreover, the same confidentiality obligation extends to other state authorities, inasmuch as disclosure of the intention to apply for leniency or the contents of the leniency application must not to be disclosed to any other state authority apart from other competition authorities.

12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

The grant of full immunity or a reduction of the fine secured by an undertaking under the provisions of the Competition Law and the Leniency Guidelines does not

automatically relieve criminal liability form the applicant's current/former employees/directors.

According to article 65 paragraph (2) *et seq*., full criminal immunity is available to such persons as directors, legal representatives or managers of an undertaking who denounce the occurrence of the criminal deed consisting in conceiving or organizing acts prohibited by article 5 paragraph (1) of the Competition Law. Criminal liability is mitigated if the denunciation occurs before the criminal legal action is set in motion and if it allows the investigators to identify and sanction other participants. If the criminal legal action is commenced, but the whistleblowing is made and it allows the identification and sanctioning of the other participants, then the limits of the sanctions are reduced by half.

13. Is there an ‘amnesty plus’ programme?

At present, there is no such programme. After the implementation of the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market ('**ECN Plus Directive**') into the Competition Law, then full immunity from fines under the leniency programme will also relieve criminal liability from the undertakings' directors/employees.

14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

The CC is vested with the authority to enter into negotiations and conclude settlements in order to expedite the investigation process and keep a lid on investigation costs incurred by the State. Settlements are regulated by the CC's Guidelines for the individualization of sanctions for misdemeanours provided by article 55 of the Competition Law, approved by Order no. 694/2016 of the CC President, as

subsequently amended and supplemented ('**Individualization Guidelines**').

According to the Individualization Guidelines, should the CC deem appropriate, it will initiate consultations with the investigated undertakings to ascertain their availability to admit the perpetration of the anticompetitive deed(s) under investigation. The investigated undertakings must respond within 15 days. This deadline may be extended once with another 15 days. If the undertaking is interested, then a first meeting is held with the investigation team to lay down the grounds of this type of cooperation. If the undertaking is interested in proceeding, then access to the investigation file is granted upon request. A second meeting with the team is granted within 30 days as of the date when the undertaking expressed its interest into continuing with the procedure. The undertaking must put forth to the investigation team its opinion concerning the potential acknowledgement of the misdemeanour (definition, duration, implications etc.) and the envisaged amount of the fine. If common ground is reached, then the CC informs the undertaking that it has 15 days to put forth a draft acknowledgement ("proposal"). If the investigation report fully reflects the elements of the proposal, then the undertaking will file the formal acknowledgement of guilt within the deadline in which it would have filed observations against the investigation report.

Should the acknowledgement procedure be commenced before the investigation report is issued, then the investigation procedure will be a simplified one. Should an undertaking desire to acknowledge its participation in a misdemeanour after the investigation report is communicated, then it must put forth its proposal for acknowledging at the date of the hearings at the latest.

In any case, should a proposal for acknowledgement be withdrawn, the CC will not be allowed to rely on it as means of proof for establishing the perpetration of a misdemeanour.

15. What are the key pros and cons for a party that is considering entering into settlement?

Should a settlement procedure be launched prior to the investigation report being

served, especially in the early stages of the investigation (e.g. after the proof collected via the forensic examination procedure has been assessed by the investigated undertaking with the aid of specialized counsel), it could save the undertaking money and it may relieve it from the burdening tasks of gathering supplementary information and putting forth explanations trying to infer the CC's goals during the procedure.

However, the aspect to be considered is that even though financially it may profit the undertaking both in terms of legal costs and in terms of the overall fine to be paid, a completed settlement procedure has the following downsides:

(i) An acknowledged infringement of competition laws could serve as an aggravating circumstance in the event of a future anticompetitive behaviour from the acknowledging undertaking being investigated and sanctioned;

(ii) An acknowledgement is part of the CC's decision and the decision amounts to proof of an anticompetitive behaviour in private damages cases brought by individuals or other undertakings who incurred losses due to such behaviour;

(iii) In order to secure the reduction of the fine as an outcome of the settlement, the acknowledging undertaking is barred from appealing the CC's decision in court. Should it not abide by such abstention obligation, it loses the reduction, and the full amount of the fine will be due. Procedurally, there has been no such situation so far, in order to say whether there is need for a new CC decision ordering such undertaking to pay the entire amount of the fine (without any reduction whatsoever).

16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?

The CC cooperates fully with the European Commission in terms of the support it must afford it for enforcement of EU competition rules. It also cooperates with other national competition authorities within the European Competition Network, based on the rules laid down in the 2004 Commission Notice on cooperation within the Network of Competition Authorities. To the best of our knowledge, there is no publicly available

information in respect of settlement or leniency applications made via such inter-agency cooperation.

17. What are the potential civil and criminal sanctions if cartel activity is established?

Legal entities are only subject to potential civil sanctions, i.e. fines applied against the turnover that they will have achieved in the year preceding the one when the sanction is actually applied. The turnover taken into account is the overall turnover, and not only that achieved in connection with the relevant market on which the infringement occurred. There is a general maximum of 10% of such turnover, which cannot be exceeded in any case. For cartels, the Individualization Guidelines provide a basic amount of the fine between 4% - 8% of the turnover.

Criminal liability is applicable only to natural persons who served as directors, legal representatives and managers of any sort of the undertaking fined for cartel activities. The penalty provided by article 65 paragraph (1) of the Competition Law is imprisonment between 6 months - 5 years or a criminal fine and the prohibition of certain rights.

18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

Under the Individualization Guidelines, the CC must take into account both mitigating (attenuating) circumstances, as well as aggravating ones, if any. They are exemplified in the said enactment and their applicability determines either a decrease or an increase of the basic level of the fine. By way of applying the mitigating circumstances in addition to the acknowledgement of the anticompetitive deed, in no case may the fine be lower than the absolute general minimum of 0.2%. In the event in which aggravating circumstances are applicable, then the absolute general maximum of 10%

may not be exceeded. In a recent case, the CC went as high as 9% of the turnover achieved by a participant to a cartel.

19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?

Although an undertaking is directly and personally responsible for its own activity, there is a recent tendency to apply the fine to the turnover of the entire group. This is due to the willingness to consider that a national subsidiary could not have acted otherwise than with the approval or under the guidance of its parent company / group and due to the increase value of the resulting fine.

20. Are private actions and/or class actions available for infringement of the cartel rules?

Private actions for damages can be filed in court by any natural or legal person who has incurred damages due to cartel activities. As on May 2017, the provision of the EU Directive on Antitrust Damages Actions (2014/104/EU) were transposed into the Competition Law. Recently, in a non-cartel case, the Bucharest Court of Appeals granted the claim for damages of a courier company which had suffered damages due to abuse of its dominant position by the state-owned Romanian Post. The latter was offering discriminatory trading conditions to the claimant's direct competitors, thus placing it in a competitive disadvantage.

In what class actions are concerned, these may be put forth by the following types of applicants:

(i) Consumer protection NGOs in the name of consumers affected by cartel behaviour; and

(ii) Associations of professionals or employers in the name of such categories affected

by cartel behaviour.

21. What type of damages can be recovered by claimants and how are they quantified?

Courts may grant compensations amounting to the overall damages incurred (comprising loss of profits and applicable interest rates, per the law). Since they are granted via a civil suit, litigation costs, including attorneys' fees, may also be granted. Damages, costs and attorneys' fees are calculated based on evidence produced (including expert reports, if allowed) that ascertain the amount thereof.

The CC is vested with the power to order interim measures in cases where there is an emergency in the form of risk of an irreparable and material affectation of competition on the Romanian market. Such interim measures decision is subject to appeal before a court of law.

22. On what grounds can a decision of the relevant authority be appealed?

Article 51 of the Competition Law provides that the CC's decisions in cartel cases are subject to review by courts within 30 days of the date when they were communicated.

Although it is an administrative litigation procedure, the grounds are confined to the lawfulness of the CC's decision.

23. What is the process for filing an appeal?

The appeal must be filed within 30 days of the communication of the CC's decision, directly with the Bucharest Court of Appeals, which is the court of law exclusively competent in hearing appeals against CC decisions. The motion must be grounded both

on the provisions of the Competition Law and on those of the Law no. 554/2004 on administrative litigation.

The motion is assessed by the assigned judge (in terms of compliance with the rules on procedure) and thereafter served upon the CC for it to prepare and file a statement of defence within 30 days as of service, which is compulsory. Such statement of defence is thereafter served upon the claimant, which has 15 days to file its written response. Thereafter, a first hearing is set by the court, upon which occasion the elements of proof are discussed. Expert reports are allowed inasmuch as they do not seek to explain points of competition law. Witnesses are usually not allowed in competition law cases, although their testimony may be requested.

The party bringing legal motion may seek via the same motion, or via a separate one, the suspension of the enforcement of the CC decision until a final solution is passed by the courts on the matter of the lawfulness of said decision. Such suspension may be granted subject to the payment of a bond, but suspension solutions are scarcely passed by the Bucharest Court of Appeals or the High Court of Cassation and Justice, in the final appeal phase.

The decision passed by the Bucharest Court of Appeals (in both merits and suspension litigation) is subject to final appeal before the High Court of Cassation and Justice, which may either order a retrial or retain the case and decide it directly (depending on the points of law under appeal).

24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

In terms of recent developments, one case stands out as it is a cartel sanctioned by the CC based on leniency applications by one of the participants thereto. Decision no. 77/2017 (published in 2018) concerns the sanctioning of a bid-rigging and market-sharing cartel by undertakings delivering remote meter reading systems and electronic meters to Electrica S.A., one of the largest Romanian state-held electricity suppliers.

The investigation uncovered a cartel between suppliers of software and electricity meters, concerning the establishment of a procurement procedure participation pattern. Draft tender documentations were circulated by Electrica S.A. with the cartel members ahead of the dates when it held its procurement procedures. As a novelty, the role of a facilitator of Electrica S.A. was assessed, and a full immunity leniency programme was implemented in respect of one of the participants.

In another recent case, decided in December 2018, the CC fined the National Union of Insurance Companies in Romania ('**UNSAR**') and 9 insurance companies active on the Romanian market for a hub-and-spoke cartel aimed at increasing prices for insurance policies in for damages produced by motor vehicles. The decision is not yet published, but the CC's press release indicates that between 2013-2016, the insurance companies did not act independently in determining the prices for such insurance policies, but coordinated their price increases based on discussions held under the UNSAR umbrella, the association acting as a facilitator to collusion. One of the participating insurance companies participated in the leniency program, admitted to participating in the cartel and was granted a reduction of the fine, due to a "substantial supplementary contribution" brought by the elements of proof that it put forth during the investigation.

25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, etc.)?

At least from the CC's side, the trend is to encourage both whistleblowing activities (via a modern, readily-available platform) and also to nurture the availability of leniency and acknowledgement procedures in ongoing or future investigations. The aim of the CC in recent years is to have swifter proceedings and ensure a high collection rate of fines.

26. What are the key expected developments over the next 12

months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?

In terms of developments, it is the CC's aim to implement into Romanian legislation the provisions of the ECN Plus Directive by mid-2019 (in the context of Romania's Presidency of the Council of the European Union). This will most likely lead to extending the benefits of immunity form competition fines to immunity from criminal prosecution. Also, it is expected to see an intensified trans-border activity of the CC, as it premiered in 2018 its first foreign inspections in Belgium and Italy (in an ongoing investigation on the market for immunoglobulins).