

Romania

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

In Romania, cartels are regulated by Competition Law No. 21/1996 (the Law). Additionally, the Romanian competition authority has issued a set of guidelines and regulations addressing cartel cases, such as leniency applications, the handling of complaints, and the setting of fines.

The Law empowers the national competition authority and courts to also apply articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) to agreements and practices that may affect trade between Member States, in accordance with Council Regulation (EC) No. 1/2003. The European block exemption regulations are applicable accordingly.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Competition Council is the sole national competition authority of Romania. It has jurisdiction over the investigation of cartel allegations, both under the Law and under the provisions of article 101 TFEU. In the case of criminal charges brought under the Law, the Competition Council's power to investigate is limited, however, to the acts expressly provided by the Romanian Criminal Procedure Code.

Competition Council decisions can be challenged before the Bucharest Court of Appeals, whose decisions can be challenged before the High Court of Cassation and Justice of Romania. The latter's ruling is final and binding.

3 Changes

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

On 1 February 2014, the new Criminal and Criminal Procedure Codes came into force and brought a number of amendments to the Law, mainly regarding dawn raids and criminal liability for anti-competitive agreements and concerted practices.

First, if under the old regime judicial authorisations were required only exceptionally for conducting dawn raids (eg, in the case of the domicile of administrators, directors and other employees of the undertakings under investigation), the Law as amended provides that judicial authorisations must now be obtained in regard to any dawn raid.

Secondly, the maximum jail term for individuals involved in a cartel has been increased from three to five years, while the category of individuals subject to criminal liability has been narrowed to administrators, legal representatives and any other individuals with management responsibilities who wilfully conceive and organise anti-competitive practices sanctioned under article 5 of the Law. Additionally, these persons can now apply for immunity or for a reduction of the sentence under certain circumstances.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Cartels are regulated by article 5 of the Law, which transposes into national legislation article 101 TFEU. The wording of article 5 mirrors to a great extent that of article 101 TFEU.

The Law prohibits among others horizontal agreements having as object or effect the prevention, restriction or distortion of competition on the Romanian market or on a significant part of it.

While article 101 TFEU provides a non-exhaustive list containing five examples of anti-competitive conduct (eg, price fixing, market sharing, discrimination, tied sales and the limiting or control of production or investments), the Law expressly includes as a matter of policy two additional examples, concerning tenders and market foreclosure. This highlights the importance placed by the Competition Council on conduct during tenders and explains the authority's focus in recent years on bid rigging and related anti-competitive agreements and practices. In 2013 alone 5 such investigations were finalised, representing approximately a quarter of the Competition Council's total ongoing investigations. Market foreclosure has also played a significant role in the authority's decisions over the past years, representing an issue often raised by complaints of anti-competitive conduct.

The terms used throughout article 5 are defined and interpreted in accordance with the European competition provisions and case law. This applies also in regard to the qualification of a violation as per se or by effect, as well as concerning the level of knowledge or intention required to impose sanctions.

Furthermore, the Law provides for criminal liability in respect to administrators, legal representatives and any other individuals with management responsibilities who wilfully conceive and organise anti-competitive conduct prohibited under article 5.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

The Law makes no distinction between industries in regard to the application of the cartel provisions. Nevertheless, the European block exemption regulations are applicable accordingly.

6 Application of the law

Does the law apply to individuals or corporations or both?

The Romanian cartel legislation applies both to individuals and to corporations. The Law provides that it is applicable to undertakings or associations of undertakings – natural or legal persons – of Romanian or foreign citizenship or nationality, as well as to the authorities and institutions of the central or local public administration.

Criminal liability for competition law violations regards, however, only certain individuals, as provided by the Law.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Under the Law, the Competition Council has jurisdiction over all anti-competitive agreements and concerted practices that either take place in Romania or produce effects in the country.

Thus, conduct outside Romania is subject to the Competition Council's jurisdiction only to the extent that it has as an effect the prevention, restriction or distortion of competition on the Romanian market or on a significant part of it. Compared to other jurisdictions, foreign conduct with the object of harming Romanian competition cannot be sanctioned by the Romanian competition authority if it produces no actual effect on competition within the country.

The same rules apply also in regard to criminal liability for cartel offences.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

An investigation can be opened by the Competition Council following either a complaint, or by its own initiative. A complaint does not automatically lead to the initiation of an investigation. Instead, the authority conducts a pre-assessment of its merits, following which it can either reject or pursue the complaint.

Investigations are opened by order of the Competition Council president, if there are sufficient factual and legal grounds to trigger serious competition concerns. During the investigation, the tool most often used to gather information is the request for written information. Questionnaires are sent out to various market players, which must answer truthfully and accurately. The Competition Council can also carry out dawn raids, a tool which the authority has used more often in recent years. Throughout the investigation, the involved undertakings may submit commitment proposals.

If sufficient evidence has not been produced, the investigation can be closed and the involved parties will be notified accordingly. If, however, the investigation team has collected sufficient incriminating evidence it issues a report, which is served to the involved undertakings. These are given access to the (non-confidential version of the) investigation file and can submit a statement of objections within a period established by the authority which cannot be less than 30 days.

The final decision rests with the plenum of the authority and is passed only after the involved undertakings are heard in a public hearing session. At the end of the procedure, the Competition Council can impose fines, order the termination of the anti-competitive conduct, impose interim measures, accept commitments, issue recommendations and impose conditions or other obligations. The authority can also take no action, when it deems that the requirements for an anti-competitive conduct are not met.

9 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

Aside from requests for information, the Law enables the Competition Council to carry out dawn raids, during which competition inspectors – with the exception of junior inspectors – have the power:

- to enter spaces, land or means of transport;
- to examine any documents related to the activity of the undertaking, regardless of where or how they are stored;
- to request from any representative or employee explanations regarding the facts or documents related to the object and purpose of the inspection;
- to collect or obtain in any form copies or excerpts from any documents related to the activity of the undertaking; and
- to seal any site destined for the activity of the undertaking and any documents related to the activity of the undertaking, during, and to the extent necessary for the inspection.

While communications with internal counsel are not covered by the legal professional privilege during dawn raids, communications with external attorneys are held privileged only if they are made in connection to the

investigation and for the exclusive purpose of exercising the undertaking's right to defence.

Dawn raids can also be carried out in any other places, such as the domicile, land or means of transport belonging to directors, administrators or other employees of the undertaking.

A dawn raid always requires both an order issued by the Competition Council president and a judicial authorisation by the president of the Bucharest Court of Appeals.

International cooperation

10 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The Competition Council is part of the European Competition Network (ECN) and as such it cooperates strongly with the European Commission and with the other national competition authorities.

11 Interplay between jurisdictions

Are there other jurisdictions where there is significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in the jurisdiction?

Cross-border cartel cases affecting trade between the member states may require the application by the Competition Council both of article 5 of the Law and of article 101 TFEU. In such event, the Competition Council cooperates with the European Commission, as provided under Council Regulation No. 1/2003. Such cooperation also covers the exchange of evidence, including confidential information, the protection of which must be safeguarded.

If the European Commission initiates a cartel investigation, this relieves the Competition Council of its jurisdiction to apply article 101 TFEU. However, if the Competition Council has already opened an investigation, the European Commission will only initiate proceedings after consulting with the Romanian competition authority.

Cartel proceedings

12 Adjudication

How is a cartel proceeding adjudicated or determined?

Please see questions 2 and 14.

13 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The burden of proof in regard to an article 5 violation rests with the Competition Council. The Law does not contain any provisions regarding the actual standard of proof. However, according to European case law, the Competition Council must produce a sufficiently precise and coherent body of evidence to show the existence of a cartel.

Competition Council case law shows that the presumption of innocence can be quite easily overturned, especially given that the majority of cartel allegations have been analysed as by-object violations. Considering that in such instances more in-depth effects assessments were not required, the burden of proof was easily met.

Concerning criminal liability, sanctions can only be imposed if the prohibited conduct is proven beyond reasonable doubt.

14 Appeal process

What is the appeal process?

The decisions of the Competition Council for infringement of article 5 can be challenged before the Bucharest Court of Appeals within 30 days either from their notification in the case of the involved parties, or from their publication in the case of third persons.

Administrative appeals are governed by Law No. 554/2004, which provides that any person harmed by a Competition Council decision may seek in court its total or partial annulment, compensation for the harm and, accordingly, moral damages.

Appeal are to be adjudged urgently, and the hearings are public. Filing an administrative appeal does not in and of itself suspend the execution of the Competition Council decision. However, under the Law, the court may issue a suspension order, subject to a bail of 10 per cent of the fine imposed. In certain cases, the Court of Appeals can allow undertakings a payment term, delaying the payment of the fine.

Within 15 days from communication, the Court of Appeals' decision can be challenged before the High Court of Cassation and Justice of Romania. This second appeal suspends the execution of the decision and is supposed to be adjudged urgently. If the appeal is upheld, the Court of Appeal's decision will be reversed and the case is either retried on the substance by the High Court of Cassation and Justice of Romania, or is remanded to the Court of Appeals. In practice, both appellate proceedings take together an average of three to four years.

Sanctions

15 Criminal sanctions

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

The Law provides for criminal liability only in regard to conduct wilfully conceived and organised in breach of article 5 by individuals, namely by an undertaking's administrators, legal representatives and any other individuals with management responsibilities.

If found guilty, these persons face a jail sentence between six months and five years, or a fine of between 1,800 and 150,000 lei, as well as other ancillary penalties imposed under the Romanian Criminal Code. However, such individuals can be granted immunity from criminal sanctions, if prior to the start of the criminal investigation they notify the authorities of their involvement in the prohibited conduct and help prosecutors identify and convict the other cartel participants. If the criminal investigation is already under way, only a 50 per cent reduction of the legal sentencing limits may be obtained.

These provisions do not apply to agreements on price rigging in a public tender, conduct which is governed by separate legislation.

The investigation into criminal cartel activity is under the jurisdiction of the Public Prosecutors' Office. Criminal proceedings are set in motion by the competition authority's referral. The Competition Council is empowered to conduct only a limited number of investigative acts, as provided by the Criminal Procedure Code (eg, it must establish the relevant factual circumstances, as well as preserve evidence, take statements and draft reports).

Up to now no conviction has ever been made for competition law offences.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The Competition Council can sanction cartel agreements or concerted practices by imposing on the involved undertakings or associations of undertakings a fine between 0.5 and 10 per cent of their aggregate turnover for the financial year preceding the sanctioning. The fine can be imposed regardless of whether the conduct was wilful or the result of negligence.

The case law is not settled regarding the actual scope of the fine. While the Law provides that the fine is calculated by taking into account the aggregate turnover for the financial year preceding the sanctioning, it is not clear if this turnover is that of the undertaking alone or if it includes the turnover of the undertaking's group. Likewise, the Law is not clear whether for fining purposes the relevant turnover is that achieved solely in Romania by the undertaking or its group, or the worldwide turnover of the undertaking or of its group. In the more recent case law the authority has used as a basis the Romanian turnover achieved by the undertaking involved in the infringement.

In 2013, the Competition Council imposed fines in total of approximately €20 million, of which around 80 per cent represented sanctions for horizontal agreements. The fines levied in 2013 grew by 187 per cent compared with 2012, but were 15 times less than the fines imposed in 2011, when one of the most important cartel cases regarding the oil market was finalised. This shows that it is hard to establish a clear pattern of the Competition Council's fining activity.

Romanian legislation does not provide for civil sanctions in regard to competition law violations.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

In 2010 the Competition Council issued a set of guidelines on the individualisation of sanctions, according to which fines are determined by calculating a base level, which can then be adjusted by taking into account mitigating or aggravating circumstances. The fining limits under the Law are binding on authorities.

The investigation team starts by determining the base level of the fine, considering the gravity and duration of the prohibited conduct in relation to the total turnover of the involved undertaking.

Cartels concerning price fixing and market sharing are expressly qualified as high-gravity violations, for which a fine of between 4 per cent and 8 per cent of the total turnover of the involved undertaking is applied.

The fine can then be further increased by various percentages depending on the duration of the prohibited conduct. The resulting figure represents the base level of the fine.

The base level can be adjusted by taking into account a series of mitigating or aggravating circumstances.

The Competition Council gives a number of examples of aggravating circumstances, such as the role of leader or initiator of the cartel, as well as any measures taken to coerce other undertakings into joining in or implementing the cartel.

Likewise, the following represent usual examples of mitigating circumstances:

- the undertaking provides evidence that its participation to the violation was extremely reduced and proves that it avoided to implement the cartel and that it adopted a competitive market conduct; and
- the involved undertaking cooperates fully and effectively with the Competition Council, regardless of any leniency applications.

In general, for each aggravating and mitigating circumstance the fine can be lowered or raised by a certain percentage, usually between 5 and 10 per cent off the base level.

Furthermore, the Competition Council can take steps to ensure that the fine outweighs any illegal benefits. However, in no case can the fine exceed 10 per cent of the involved undertaking's total turnover for the year preceding the sanctioning (again, the definition of total turnover remains open).

Exceptionally, the Competition Council can consider a reduction of the fine if its payment endangers the undertaking's very existence (eg, the company would become insolvent as a result).

Regarding criminal liability, the Criminal Procedure Code applies accordingly. The limits of the prison sentence, together with the minimum and maximum fine levels are binding on authorities.

18 Debarment

Is debarment from government procurement procedures automatic or available as a discretionary sanction for cartel infringements? If so, what is the usual time period?

Cartel sanctions do not represent a cause for debarment from government procurement procedure. Debarment is mandatory only when during five years preceding the procurement procedure the applicant had been found guilty by final decision of corruption, fraud, money laundering or of participation in the activities of a criminal organisation. Debarment can also take place on a discretionary basis in a number of other instances, for example if the applicant goes bankrupt following a decision issued by the bankruptcy judge.

19 Parallel proceedings

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?

Administrative and criminal sanctions cannot be pursued simultaneously for the same conduct. The Law provides that if the Competition Council considers that the conduct may represent a criminal offence it must notify the prosecution body with jurisdiction over the matter, which will take over the case. Regardless, the *ne bis in idem* principle prohibits the sanctioning

of the same conduct twice, both with administrative and with criminal sanctions. So far no undertaking has been criminally sanctioned for a competition law violation.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Separate from any competition fines, the Law provides for the right of injured persons to recover the losses incurred as a result of anti-competitive conduct prohibited under the Law or the TFEU.

The right to recovery is recognised both with regard to individuals and to corporations. Claims for damages can be filed by anyone that suffers a loss as a result of a prohibited conduct, including indirect purchasers, on the condition that the requirements for tort law liability are met. Claims can also be filed by consumer associations on behalf of consumers, as well as by business or professional associations on behalf of their members.

Regarding the level of damages, the compensation must cover in full the losses incurred following a prohibited conduct, more precisely actual losses and loss of profit.

Aside from damages, costs are awarded to the winning party, if they are requested and proven. If the damages claim is granted only in part, costs will be adequately awarded.

Damages can be sought even if the Competition Council has not issued a decision regarding the conduct. If such is the case, for example if the investigation has not been finalised, the damages claim can be filed no later than three years from when the injured party became aware of the loss and of the person responsible for it. If, however, a Competition Council decision is issued, the claim can be filed no later than two years after the moment when the decision becomes final or is upheld, in whole or in part, by a final court judgment.

Jurisdiction over the claim is determined based on several factors as provided under the Civil Procedure Code, including for example the value of the claim. Furthermore, under EC Council Regulation No. 1/2003, Romanian courts are bound by previous European Commission decisions, and cannot override them in regard to the same anti-competitive conduct.

21 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are not available per se in Romania's civil law jurisdiction. The Civil Procedure Code allows for claims to be joined before a court only in certain circumstances (ie, when the claims are at the same jurisdictional level and there are sufficient ties between them for the cases to be handled together).

Furthermore, Romanian law provides for certain instances in which a group or person may sue on behalf of a number of injured persons. For example, this is the case of:

- actions filed by trade unions on behalf of their members in regard to employment disputes;
- actions filed by shareholders against administrators, directors, founders, etc for financial losses incurred by the company as a result of the breach of these individuals' obligations toward the company; and
- actions filed by consumer associations in regard to the infringement of their members' legal rights and interests as consumers.

To date there has been no case law regarding such matters.

Cooperating parties

22 Immunity

Is there an immunity programme? What are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

In 2009, the Competition Council issued a set of guidelines establishing a leniency programme. Leniency in Romania regards two types of severe agreements, cartels and absolute territorial protection. Leniency is not available when such agreements or practices can be exempted under article 101(3) TFEU and article 5(2) of the Law.

Immunity can be granted when the applicant provides information allowing the Competition Council to open an investigation and conduct dawn raids (Type-A immunity), or when the applicant provides information allowing the establishment of an article 5 or article 101 violation (Type-B immunity). In both cases, the applicant must be the first to approach the authority, and the Competition Council must not have at the time of the application sufficient information for opening an investigation or for establishing a competition violation.

While leniency applications can be submitted by any undertaking participating in a cartel or an agreement establishing absolute territorial protection, the undertakings acting as initiators of the agreement and the undertakings that constrained others to join in or continue to take part in the agreement are strictly prohibited from submitting an immunity application. These can nevertheless apply for partial leniency.

An application for leniency includes: (i) a statement with a detailed description of the agreement and of its functioning, the identification data for all participants in the agreement and mentions of all other competition authorities approached or which will be approached with a leniency application; and (ii) evidence in the possession of the applicant, regarding the alleged agreement.

Concerning criminal sanctions, total immunity is granted if prior to the start of the criminal investigation the person liable notifies the authorities of its involvement with the cartel and helps prosecutors identify and convict the other participants. If the criminal investigation is already under way, only a 50 per cent reduction of the legal sentencing limits may be obtained.

23 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after the immunity application? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Partial leniency is reserved to the undertakings that fail to meet the requirements for immunity, but which provide a significant additional contribution to the investigation (ie, information which strengthens the authority's case).

If the requirements for partial leniency are not met, undertakings can still claim a mitigating circumstance for cooperating with the Competition Council.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Undertakings applying for partial leniency may benefit from a fine reduction on a first-come, first-served basis:

- the first applicant may receive a fine reduction of between 30 and 50 per cent;
- the second applicant may receive a fine reduction of between 20 and 30 per cent; and
- any other subsequent applicants may receive a fine reduction of a maximum 20 per cent.

25 Approaching the authorities

Are there deadlines for making or completing an application for immunity or leniency? Are markers available and what are the time limits and conditions applicable to them?

There are no specific per se deadlines for approaching the Competition Council. However, in regard to immunity, the application must be submitted while the authority still has insufficient information for opening an investigation or for establishing the existence of a competition violation. Furthermore, the application must be received by the authority before other leniency applications are submitted.

Concerning partial leniency, the only deadlines are those regarding the order in which applications are submitted to the Competition Council, based on which various fine reductions may be granted.

Markers are available both for immunity and partial leniency. The authority may grant a marker for a certain period determined on a case-by-case basis, during which the undertaking can complete its leniency application.

26 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

In order to qualify for immunity or partial leniency, an applicant must cumulatively meet three conditions:

- it has genuinely cooperated in a total, continuous and prompt manner with the Competition Council, throughout the entire investigation, by:
 - providing the Competition Council with all the relevant information and evidence at its disposal or which it might obtain;
 - staying at the disposal of the authority in order to answer any relevant request;
 - not destroying, forging or hiding relevant information or evidence; and
 - not revealing to anyone the leniency application or its content before the authority sends the parties the investigation report;
- it has ceased taking part in the alleged agreement at the Competition Council's request; and
- it has not revealed its intention to apply for leniency or any parts of the application.

27 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties?

Both immunity and leniency applications are afforded the same level of confidentiality protection. Any statements and information in regard to such applications are considered part of the case file and cannot be revealed or used for purposes other than those regarding the enforcement of the prohibition under article 5 of the Law or of article 101 TFEU. Access to this information may be granted only to the involved parties, on the condition that they do not make any copies of it. Other persons, such as the authors of the complaints, will not be granted access to the information submitted by leniency applicants.

28 Settlements

Does the enforcement authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

The Law provides for settlement (ie, admission of fault) in a number of cases, including cartels. An admission of fault can occur either after the investigation report is received and the interested party exercises its right to access the file, or during the following hearings.

Admission of fault can be made only in writing and consists in an express admission to having violated the law, which may be accompanied, where appropriate, by proposals to cure the effects of the violation.

Admission of fault can be full or partial, but in both cases it must be direct and unequivocal, and must regard the conduct as described by the authority's investigation report.

A valid admission of fault represents a special mitigating circumstance, for which the fine is reduced by a percentage of between 10 and 30 per cent off its base level, considering the nature of the violation, the degree of admission and the availability of leniency in the case. If a party clearly admits its fault, the fine reduction becomes mandatory and leaves little if no room for judicial review.

To date no undertaking has made use of this procedure. The main aspect dissuading undertakings is that at the time the settlement needs to be initiated, the base level of the fine to which the reduction percentage should apply is not yet established. Furthermore, once a settlement is reached, the parties practically waive their right to challenge the authority's decision.

29 Corporate defendant and employees

When immunity or leniency is granted to a corporate defendant, how will its current and former employees be treated?

Immunity or partial leniency applications are strictly personal. Anyone facing liability under the Law must apply for leniency only on its own behalf. Thus, if employees face liability separate from their employers, leniency can only be obtained by individual application.

30 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Immunity or partial leniency requires an application to be made with the Competition Council. Afterwards, the applicant must cooperate actively, fully and at all times with the authority in order to bring down the cartel and the other participants. Unlike other jurisdictions, the applicant is not required to cease its cartel activity on filing the leniency application. This serves practical reasons, for example not to alert the other cartel participants. The applicant must, however, terminate its cartel involvement if the Competition Council so requests.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

At this time there are no ongoing or anticipated assessments or reviews in regard either to immunity or to leniency.

Defending a case

32 Representation

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to seek independent legal advice?

An attorney can represent both an employee and the employer, if the provisions on conflicts of interest are observed. Conflicts of interest generally arise (i) when the attorney cannot inform a client fully, loyally and unreservedly without harming the interests of other clients; and (ii) when the representation and assistance of two or more clients would determine the attorney to resort to a defence different than the one he or she would have used for a single client.

However, an attorney may represent several defendants at once if each of them have been adequately informed of the conflict of interest and of the risks involved, and have given their informed consent. Otherwise, the attorney must refrain from representing or advising the client, and must recommend independent legal advice. The failure of the attorney to do so represents a serious disciplinary offence.

33 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Several corporate defendants can be represented simultaneously by the same attorney, if the provisions on conflicts of interest are observed.

An attorney may represent two or more clients simultaneously if their defence involves a common strategy and the clients have been informed and have consented in advance. An attorney can even represent clients with conflicting interests, however only if they have been informed of the risks involved. In this last case, the attorney has a legal duty to try to reconcile the clients.

34 Payment of legal costs

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

A corporation or any other undertaking is not prohibited from paying the legal costs incurred by, or penalties imposed on, its employees. However,

this is not possible when such payments represent a form of credit, which companies are expressly prohibited from offering to their administrators.

While payments may be possible, it is important to stress that they cannot be tax-deducted.

35 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

The Fiscal Code of Romania provides for the deduction of certain expenses for tax purposes. Fines are, however, expressly excluded from this category. Regarding private damages awards, no mention is made of them. Because such awards are not included in the limitative list of tax-deductible expenses, they cannot be deducted.

36 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The Law contains no provisions regarding fines levied in other European or non-European jurisdictions for the same violation. However, article 50 of the Charter of Fundamental Rights of the European Union provides for the general principle of *ne bis in idem* in European law.

Although the principle pertains to criminal law, it is applicable also in competition law proceedings, especially since competition fines have been interpreted by the European Court of Human Rights as being similar to criminal sanctions. Thus, an undertaking cannot be fined twice for the same conduct by national competition authorities from two member states, if the requirements for the application of the *ne bis in idem* principle are met, ie, identity of facts, unity of offender and unity of the legal interest protected.

Likewise, when applying article 101 TFEU, the Competition Council can levy only a single fine. The *ne bis in idem* principle cannot, however, be raised in regard to fines imposed by non-EU competition authorities. This principle applies also in respect of sentences for criminal cartel conduct. Furthermore, Romanian legislation provides for extensive rules and regulations on international judicial cooperation in criminal matters.

Update and trends

In February and August 2014 a number of amendments were brought to the cartel regime, following the entry into force of the new Criminal and Criminal Procedure Codes and of Government Ordinance No. 12/2014. The amendments concern mainly aspects of criminal liability and dawn raids.

If previously judicial authorisations were a requirement for dawn raids only in exceptional circumstances (eg, in the case of the domicile and means of transportation of administrators), following the amendments judicial authorisations must now be obtained in regard to any such raid.

Furthermore, the maximum jail term for individuals involved in a cartel has been increased from three to five years, while the category of individuals subject to criminal liability has been narrowed to administrators, legal representatives and any other individuals with management responsibilities who wilfully conceive and organise anti-competitive practices. Also, these persons can now apply for immunity or for a reduction of the sentence under certain circumstances.

So far, 2014 has not seen any major cartel decisions.

37 Getting the fine down

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

An interested party may obtain a reduction of the fine or even total immunity from sanctions by cooperating with the Competition Council throughout the investigation, as well as in various procedures such as settlement and leniency. This is applicable under similar terms also to criminal liability. Cooperation generally involves the active support given to the Competition Council for establishing a competition violation or for identifying and sanctioning the participants. Regardless of leniency or settlements, cooperation can always be argued and claimed as a mitigating circumstance.

Aside from cooperation, it is advisable for undertakings to argue as many mitigating circumstances as possible, considering that for each the fine can be reduced by a percentage of between 5 and 10 per cent.



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Romania				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
The regime is essentially administrative in nature, but provides also for criminal sanctions for cartel conduct. Furthermore, injured persons are entitled to claim damages for any harm suffered as a result of a cartel.	Undertakings involved in a cartel face fines of up to 10 per cent of their total turnover for the year preceding the sanctioning. It is still not clear whether the total turnover includes also the group turnover, or whether it includes, aside from the turnover achieved in Romania, also the worldwide turnover. The maximum prison sentence under the Law is five years. Regarding private damages claims, Romanian law provides that compensation must cover both actual losses and loss of profit.	The Competition Council has in place a leniency programme covering both immunity and partial leniency. Similarly, immunity and the partial reduction of the sentence are available in regard to criminal liability.	The Competition Council has jurisdiction over foreign conduct insofar that it has as effect the prevention, restriction or distortion of competition on the Romanian market or on a significant part of it. However, the ne bis in idem principle applies accordingly.	The Romanian cartel regime is mostly in line with European provisions, benefiting also from the strong cooperation within the European Competition Network. The past years have seen some of the biggest fines ever levied in Romania for cartels.