Romania

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MERGER CONTROL

1. Are mergers and acquisitions subject to merger control in your jurisdiction? If so, please describe briefly the regulatory framework and authorities.

Mergers and acquisitions are generally subject to merger control in Romania unless they are an intra-group transaction. If they qualify as a potentially notifiable transaction and pass certain turnover thresholds (see *Question 2*), mergers and acquisitions are subject to prior assessment and approval by the competition regulatory authority, the Romanian Competition Council (*Consilul Concurentei*) (RCC) (*see box, The regulatory authority*).

The main legislation applicable to merger control is:

- Law no. 21/1996 on competition (Competition Law), as supplemented and republished.
- Merger Regulation, issued by the RCC in 2004.

Other secondary legislation issued by the RCC in the form of Guidelines may also be applicable.

2. What are the relevant jurisdictional triggering events/thresholds?

Triggering events

Transactions that amount to an economic concentration are subject to the Competition Law.

A concentration exists when either:

- Two or more previously independent undertakings merge.
- One or more persons, already holding control over at least one or more undertakings, directly or indirectly acquires control over one or more other undertakings or part, whether through the acquisition of share capital, assets, or by contract or other means.

The key determination to be made when deciding whether a transaction should potentially be notified to the RCC as a concentration is whether control is acquired over the target undertaking. Control can be direct or indirect, as well as sole, or joint with other existing or new shareholders. It is obtained when rights, contracts or other means that, employed either together or separately, allow a person or an undertaking (or group of undertakings) to exercise a decisive influence over another undertaking (or group of undertakings) are acquired (*Competition Law*).

Decisive influence means the power to block actions that determine the strategic commercial behaviour of the controlled undertaking (such as appointment of the management and approval of the income and expenses budget, the approval or rejection of the business plan, or decisions in relation to investments).

A qualitative change of control (from sole to joint control or from joint to sole control) is also caught by the merger rules. In addition, any other circumstances that lead an undertaking to exercise a decisive influence over another are deemed to result in an economic concentration potentially subject to notification.

A full function joint venture (JV) is regulated by the Merger Regulation while the partial JV (short-term co-operative joint venture) is governed by the rules on anti-competitive practices.

Thresholds

An economic concentration that meets the following thresholds in the preceding fiscal year is subject to prior notification to and approval by the RCC if (*Competition Law*):

- The parties' combined worldwide turnover exceeds EUR10 million (about US$14.7 million).
- At least two parties involved in the transaction individually achieved a turnover in Romania exceeding EUR4 million (about US$5.8 million).

For the purpose of the second threshold test, the turnover should be calculated by considering all sales in Romania, after deducting export values and excises due to the state (if any). Intra-group turnover must also be excluded from the assessment.

In relation to transactions involving the acquisition of assets, the value of those assets is determined by reference to the percentage that they represent of the target's total assets as included in its aggregate turnover.

3. Please give a broad overview of notification requirements. In particular:

- **Is notification mandatory or voluntary?**
- **When should a transaction be notified?**
- **Is it possible to obtain formal or informal guidance before notification?**
- **Who should notify?**
- **To which authority should notification be made?**
- **What form of notification is used?**
- **Is there a filing fee? If so, how much?**
- **Is there an obligation to suspend the transaction pending the outcome of an investigation?**

- **Mandatory or voluntary.** Notification is mandatory if the relevant thresholds are met (see *Question 2*).
- **Timing.** The parties to the transaction must file a notification within 30 calendar days of the date that the binding agreement is signed. This deadline can be extended by up to 15 days. It is also possible to submit a notification based on an intention to purchase. In the case of a privatisation of a state-owned company, the interested party must inform the RCC of its intention to acquire the relevant stock before submission of the final offer. The subsequent notification sometimes requires proof that the RCC has already been informed of the party's intention.
- **Formal/informal guidance.** It is possible to seek informal guidance from the RCC before the notification is filed. While the RCC is not compelled to give informal guidance, its staff are usually available for informal meetings and discussions with the parties on various aspects of the notification process, even before the signing of a binding agreement.
- **Responsibility for notification.** In an acquisition of sole control, the acquirer must submit the notification. If there is more than one acquirer, notification must be jointly submitted on behalf of all the acquiring parties. In a merger, notification must be submitted by all merging parties. Where a joint venture is to be created, the obligation to notify rests with all parent companies.
- **Relevant authority.** Notification must be filed with the RCC. If the turnover thresholds in Regulation (EC) No. 139/2004 on the control of concentrations between undertakings are met, the transaction will probably need to be notified to the European Commission.
- **Form of notification.** The Merger Regulation sets out the notification format (*see website, www.competition.ro*). Notification must be carefully drafted as providing inaccurate or incomplete information may be penalised by a fine of up to 1% of the notifying parties' turnovers.
- **Filing fee.** The current filling fee is RON2,800 (about US$954).
- **Obligation to suspend.** There is an obligation to suspend the transaction. Until clearance is issued by the RCC, the parties involved can take only those measures related to the concentration that are not irreversible and do not permanently modify the structure of the relevant market (*Merger Regulation*). Examples of measures that are considered to be irreversible are:
  - the acquired undertaking enters or leaves a new market;
  - selling assets or dismissing employees of the acquired undertaking;
  - listing the acquired undertaking on a stock exchange.

  However, the RCC can disapply this requirement on the basis of a reasoned request by the parties.

4. Please set out the procedure and timetable.

If the RCC deems that the notification is complete (that is, no additional information is necessary to make a decision), it has 30 days to issue one of the following decisions (*Competition Law*):

- Non-intervention, if it finds that the notified transaction does not fall within the scope of the Competition Law.
- Authorisation (possibly subject to remedies (*see Question 8*)) if the notified transaction does fall within the scope of the Competition Law but is compatible with a normal competitive environment.
- A decision to open a further (phase 2) investigation if the notified transaction raises serious doubts concerning its compatibility with a normal competitive environment.

If notification is incomplete, the RCC can ask for additional information within 20 days of the date that notification was filed (*Merger Regulation*). If this is the case, the parties must provide the RCC with the additional information required within 15 days. Notification becomes effective once the RCC deems that it is complete (it then has 30 days to issue one of the above decisions).

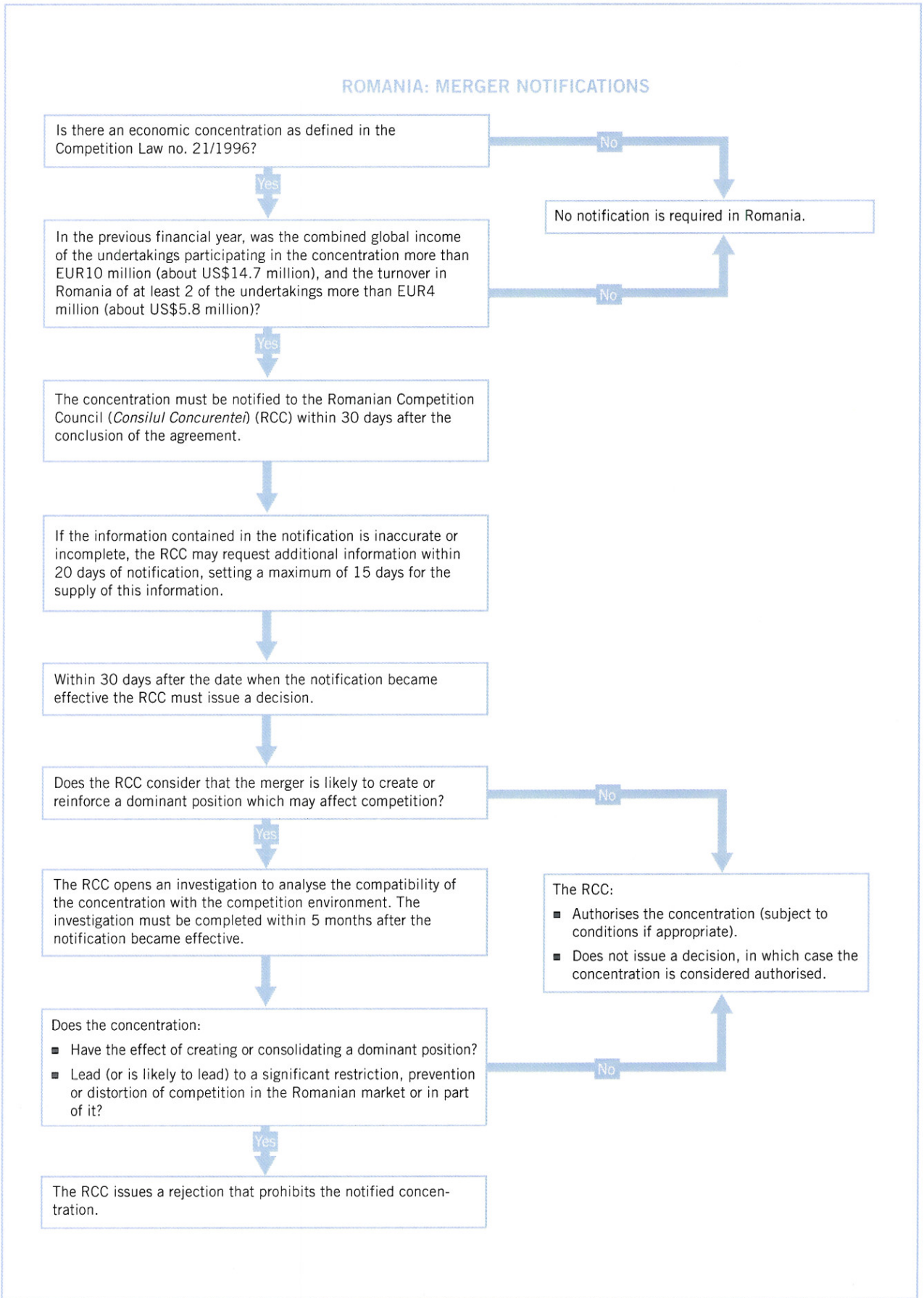
A phase two review begins when the notified transaction raises serious doubts as to its compatibility with a normal competitive environment (*Merger Regulation*). Usually an economic concentration is considered to be incompatible with a normal competition environment when it leads to the creation or consolidation of a dominant position on any of the relevant markets. The RCC must complete its investigation and issue a decision within five months of the date that filing was complete (that is, became effective) (this includes the initial 30-day waiting period).

The final decision issued at the end of the phase two review can be one of the following:

- Authorisation.
- Conditional authorisation.
- Refusal.

There is also simplified notification procedure, permitted only in certain situations (*Merger Regulation*). For example, a merger, as well as an acquisition of sole or joint control over an undertaking may be authorised by the RCC under the simplified procedure if the parties are not present in the same product or geographic market, or in an upstream or downstream market.

For an overview of the notification process, see flowchart *Romania: merger notifications*.



5. In relation to merger inquiries:

- **How much publicity is given?**
- **At what stage of the procedure is information released?**
- **Is certain information automatically kept confidential?**
- **Can the parties request that certain information be kept confidential?**

As a general rule, all information requested by the RCC is kept confidential. The RCC must respect the confidentiality of the information disclosed to it, if such information is identified as such. Any infringement of this obligation can trigger criminal liability and damages.

To increase transparency, the RCC has recently published all of its decisions on its website. If the parties want a non-confidential version of the clearance decision to be published, they must expressly request this from the RCC within a reasonable timeframe of the communication of the decision. Usually the RCC first communicates to the parties the confidential version of the decision and asks the parties to indicate during the following days what data is confidential and therefore should be left out of the publicly available decision.

After receiving a notification, the RCC usually publishes a press release mentioning the parties involved and the subject matter of the notification.

6. Can third parties be involved in the procedure and, if so, how? What rights do they have to make representations, access documents or be heard?

If a notified transaction raises serious doubts as to whether it is likely to create or consolidate a dominant position in a given market, the RCC may contact the main market players and ask them to provide their comments. However, the RCC is not bound by such comments when reaching a decision.

Following publication of the RCC's press release about the notification, any interested party can submit its comments to the RCC. In addition, third parties claiming to hold relevant information can be heard by the RCC on their request. In this case, a copy of the investigation report is provided if deemed necessary.

7. What is the substantive test?

The substantive test applied by the RCC is whether the transaction leads (or could lead) to the creation or the consolidation of a dominant position in the relevant market. In its assessment, the RCC applies a number of criteria, such as the market shares of the parties involved and of their respective competitors, entry barriers, the extent to which the transaction may lead to market foreclosure and so on.

Since being established in 1997, the RCC has unconditionally cleared most transactions.

8. What remedies can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

When an economic concentration is likely to create or consolidate a dominant position, both structural and behaviour remedies may be negotiated by the parties with the RCC to alleviate the latter's concerns. Such remedies can include:

- Divestments.
- Termination of existing exclusive agreements.
- Access to necessary infrastructure or key technologies by way of licence agreements or otherwise.
- Price reporting obligations.

In principle, structural remedies are preferred by the RCC. However, in markets dominated by brands or other intellectual property rights, behavioural remedies (such as promises by parties to abstain from certain commercial behaviour such as, for example, bundling products) may provide stronger guarantees.

The RCC can accept commitments in either phase of the review procedure. In phase one, the proposals must be submitted to the authority before the date that notification became effective or within two weeks of the effective date. If the proposals are acceptable, the RCC issues a decision on the notified transaction within 30 days.

If phase one proposals are not acceptable, then the second phase of the review process begins. The remedies proposed in this phase must be submitted to the RCC within 30 days of the date that the investigation was launched.

9. What are the penalties for:

- **Failure to notify correctly?**
- **Implementation before approval or after prohibition of the merger?**
- **Failure to observe a decision of the regulator (including any remedial undertakings)?**

- **Failure to notify correctly.** Failure to notify within the prescribed time limits can result in a fine of up to 1% of the total turnover of the undertaking(s) in question in the preceding year. The same fine can be imposed for providing inaccurate or incomplete information.
- **Implementation before approval or after prohibition.** Implementation before clearance or after prohibition is subject to a fine of up to 10% of the total turnover of the parties involved in the transaction in the preceding year.
- **Failure to observe.** Failure to observe a decision or to implement remedies can result in fines of up to 10% of the turnover of the parties in the previous year.

The RCC can also impose periodic penalty payments of up to 5% of the average daily turnover of the undertakings for each day of delay in complying with a previous decision by the council.

The fines are imposed on the undertaking that is in breach of the competition rules.

10. Is there a right of appeal against any decision and, if so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties or only the parties to the decision?

A decision issued by the RCC can be appealed to the Bucharest Court of Appeal within 30 days of the communication of that decision. For third parties the 30-day time limit starts running as of the publication of that decision.

11. If a merger is cleared, are any restrictive provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?

The notification form includes a section referring to ancillary restrictions (such as non-compete or non-solicitation), requesting information in this respect. If the parties provide complete information on this and mention all restrictions contained in the notified agreement, any clearance issued by the RCC covers all ancillary restrictions, if acceptable and necessary for the implementation of the transaction.

However, depending on the gravity of the restriction, the RCC may require that certain provisions be separately notified under the provisions on restrictive agreements and practices and granted individual exemptions (*see Question 15*).

12. Are any industries specifically regulated?

The only industry-specific provisions relate to the assessment of turnover achieved by undertakings in different sectors, such as banking and insurance.

RESTRICTIVE AGREEMENTS AND PRACTICES

13. Are restrictive agreements and practices regulated? If so, please give a broad overview of the substantive provisions and regulatory authority.

Article 5 of the Competition Law prohibits any express or tacit agreements between undertakings or associations of undertakings, any decisions by associations of undertakings and any concerted practices, which have as their object or may have as their effect the restriction, prevention or distortion of competition on the Romanian market or a part of it. Article 5 also contains a non-exhaustive list of anti-competitive practices including, among others:

- Price-fixing.
- Market partitioning.
- Bid-rigging.
- Limiting or controlling production, distribution, technological development or investments.

The RCC reviews, assesses, investigates and makes rulings on anti-competitive practices and agreements. It also imposes penalties and requests remedies under the Competition Law.

14. Do the regulations only apply to formal agreements or can they apply to informal practices?

Both agreements (tacit or express) and collusive practices fall within the scope of Article 5 of the Competition Law.

15. Are there any exemptions? If so, please provide details.

Agreements falling within the scope of Article 5 of the Competition Law can benefit from either:

- A block exemption, in which case no notification is required.
- An individual exemption, granted by the RCC following notification by the parties.

A number of regulations and guidelines issued by the RCC provide for the benefit of a block exemption in relation to vertical agreements (that is, agreements between two or more parties, each of them operating at different levels of the production-distribution chain) and certain other types of agreement. Agreements concluded in the following sectors may benefit from a block exemption:

- Research and development (R&D).
- Technology transfer.
- Specialisation.
- Insurance.
- Maritime shipping.
- Aeronautical shipping.
- Motor vehicles.

To be block-exempted, an agreement must fully comply with the provisions of the applicable block exemption regulation or guideline. The following thresholds must not be exceeded:

- **Agreements between non-competitors.** The individual market share of the parties involved in the agreement must not exceed 30%, or, in limited cases, 35%.
- **Agreements between competitors.** The thresholds vary from one type of agreement to another. For example, in cases concerning specialisation agreements, the combined market share of the parties involved must not exceed 20%, while for R&D agreements the combined market share must not exceed 25%.

If an agreement cannot benefit from a block exemption, it may be individually exempted by the RCC if all of the following conditions are met:

- The positive effects prevail over the negative ones or are sufficient to compensate the restriction of competition caused by the agreement.
- Consumers are given a benefit corresponding to that realised by the parties from the agreement.
- The expected advantages can only be achieved along with the potential restrictions of competition, and the agreement does not impose on the parties restrictions that are unnecessary to attain the expected advantages.

- The agreement does not allow the undertakings to eliminate competition from a substantial part of the product or service market in question.

In addition, the agreement in question must contribute or be likely to contribute to one of the following:

- Improving the production or distribution of goods, executing work operations or supplying services.
- Promoting technical or economic progress and improving the quality of goods or services.
- Consolidating the competitive position of small and medium-sized undertakings on the domestic market.
- Charging consumers significantly lower prices in the long run.

16. Are there any exclusions? If so, please provide details.

Intra-group agreements are generally excluded from the application of the Competition Law. Genuine agency agreements, as well as agreements or practices that fall below a *de minimis* threshold are also excluded from the ambit of Article 5 of the Competition Law.

The *de minimis* threshold currently applies where both (*Article 8, Competition Law*):

- The turnover achieved in the preceding year by the undertakings party to the agreement does not exceed RON4 million (about US$1.36 million).
- The undertakings involved in the agreement hold a market share of either:
  - 10% or less if they are not competitors (calculated individually); or
  - 5% or less if they are competitors (calculated by combining the market shares of all parties to the agreement).

Agreements or concerted practices between parties that fall below the *de minimis* threshold are not subject to the Competition Law, provided they do not contain any hard-core restrictions (bid-rigging, price-fixing or market partitioning).

17. Please give a broad overview of formal notification requirements. In particular:

- **Is it necessary (or, if not necessary, possible/advisable) to notify to obtain an individual exemption or other clearance?**
- **Is it possible to obtain informal guidance before, or instead of, formal notification? If there is no formal notification procedure, can any type of informal guidance or opinion be obtained?**
- **Who should/can notify?**
- **To which authority should/can notification be made?**
- **What form of notification is used?**
- **Is there a filing fee? If so, how much?**

- **Notification.** Individual exemptions can only be granted if a prior notification is filed with the RCC requesting this.
- **Informal guidance/opinion.** If the parties to an agreement are not certain whether the agreement benefits from a block exemption, or is subject to the Competition Law at all, they can seek informal guidance from the RCC. Such informal guidance is usually obtained verbally and does not provide the same legal certainty as a formal decision. As a result, the parties to an agreement may seek a formal decision from the RCC to the effect that it will not intervene where the agreement is not subject to the Competition Law or should benefit from a block exemption.
- **Responsibility for notification.** The parties involved in the agreement or concerted practice must notify.
- **Relevant authority.** Notification must be filed with the RCC.
- **Form of notification.** Notifications must comply with Form A/B, which can be found in the Regulation on form content, which also contains further details on applications and notifications.
- **Filing fee.** The application fee for RCC's non-intervention is RON250 (about US$85). The application fee for an individual exemption is RON1,500 (about US$511).

18. Can investigations be started by:

- **The regulator on its own initiative?**
- **A third party by making a complaint?**

- **Regulators.** The RCC can begin an investigation whenever it has suspicions that an anti-competitive practice is taking place.
- **Third parties.** Third parties can lodge a complaint with the RCC if they can prove a legitimate interest.

19. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

See *Question 20*.

20. Please set out the stages of the investigation and timetable.

Not all complaints lead to an investigation by the RCC. However, if an investigation is started, the RCC is not restricted by any time limits in conducting and completing its assessment.

The investigated undertaking has a right to a defence. It typically has access to the file and can make copies of all the documents that may help to build a defence.

If the investigation leads to the conclusion that there is no infringement of Article 5 of the Competition Law, the RCC closes the investigation by order of its chairman. If the investigation was not based on a third party's complaint, the RCC may close the file even without giving the investigated undertaking the opportunity to be heard.

However, if the investigation reveals a breach of Article 5, an investigation report is drawn up and communicated to the parties involved 30 days before the oral hearing is scheduled to take place. During and after the hearing, the participants can raise new issues and provide new evidence. Third parties can be heard and have access to the investigation report only if the RCC deems it necessary.

The investigation normally results in a decision by the RCC that either:

- A practice or agreement is anti-competitive and a fine is imposed, together with any other relevant measures.
- No anti-competitive practice or agreement has been found and the investigation is consequently closed.

The application for an individual exemption always leads to an investigation being launched by the RCC, which follows the same stages given above, namely:

- Requests for information.
- Dawn raids, if considered to be necessary.
- Investigation report being communicated to the parties.
- Access to the file.
- Hearing the parties.
- Final decision of the RCC.

By contrast, the application for RCC's non-intervention does not automatically trigger an investigation and it generally follows the same procedure as (*see Question 31*).

21. In relation to an investigation into a potentially restrictive agreement or practice:

- **What details (if any) of the investigation are made public?**
- **Is certain information automatically kept confidential?**
- **Can the parties (or third parties) request that certain information be kept confidential?**

- **Publicity.** The RCC can make public the fact that it has launched an investigation, and can mention the name of the companies investigated and the suspicions that it has in relation to them. The final decision by the RCC typically provides more details on its findings during the investigation. Although it is not mandatory, whenever it receives a notification, for the sake of transparency the RCC publishes a brief note on its website.
- **Automatic confidentiality.** Although not expressly laid down by law, correspondence between a client and its external lawyer benefits from legal professional privilege. As a result, such communications are not subject to review by the RCC.
- **Confidentiality on request.** When requesting information, the RCC usually asks the parties concerned to identify the documents that in their view contain business secrets and confidential information, and to explain why such information should be treated as confidential.

22. Please summarise any powers that the relevant regulator has to investigate potentially restrictive agreements or practices.

The RCC has various investigative powers. It can undertake investigations on its own initiative (*ex officio*), or following a complaint lodged by a natural or legal person, or by a public authority. During its investigation, the RCC has the power to require information, and can impose a fine for incorrect or false information. The RCC can use:

- Information that is already available to it.
- Information that is provided voluntarily.
- Information that the parties have been compelled to provide based on a specific request.
- Documentary evidence seized during a dawn raid.

Apart from requiring the production of specified information, based on an order issued by the chairman, the RCC can carry out on-site unannounced inspections at the business premises of the undertaking under investigation, where it has unlimited access to information and can seize documents that are relevant to the case. Such a dawn raid can cover all offices, land and means of transport belonging to the investigated undertaking. During the dawn raid, the RCC can also interview the representatives and employees of the undertaking under investigation in connection with any relevant facts and documents.

If a reasonable suspicion exists that relevant documents related to the subject matter of the investigation are being kept at other premises, on other land, or in other means of transport, such as those belonging to managers, directors or employees of the investigated company, the RCC can enter and search such other places. This will be based on an order issued by the RCC's chairman and a court warrant issued by the president or the delegated judge of the tribunal that has territorial jurisdiction over the place where the inspection is to be conducted.

The RCC can also launch sector inquiries when it does not have specific information about anti-competitive conduct but is concerned that the market is not operating as it should. A sector inquiry can only be started if it falls within the scope of Articles 5 or 6 of the Competition Law. During a sector inquiry, the RCC has the same powers as those mentioned above.

23. Can the regulator reach settlements with the parties without reaching an infringement decision (for example, by accepting binding or informal commitments)? If so, please summarise the procedure and the circumstances in which settlements can be reached.

The RCC's power to accept binding commitments is not currently regulated. However, a proposed amendment to the Competition Law allows for investigated undertakings to address the RCC's concerns by proposing binding commitments (*see Question 39*).

24. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice? In particular:

- **What orders can be made?**
- **What fines can be imposed on the participating companies? What are the consequences if they are not paid?**
- **Can personal liability, including fines, attach to individual directors or managers?**
- **Is it possible to obtain immunity/leniency from any fines?**
- **Can an entire agreement be declared void (that is, not only any restrictive provisions)?**

- **Orders.** The RCC can order (by means of an order for interim measure or a final decision) that the participants in an anti-competitive practice or agreement put an end to that agreement or practice. It can also impose certain measures on the participants that are designed to restore competition to the market. These must be periodically reviewed by the RCC, which decides whether such measures or other measures remain necessary.
- **Fines.** The RCC can levy fines of up to 10% of the annual turnover of a participant in an anti-competitive practice. If the fined undertaking fails to comply with the RCC's decision, the RCC can impose periodic penalty payments of up to 5% of the average daily turnover for each day of delay.

  The RCC can impose a fine of up to 1% of the total turnover from the preceding year if a party refuses to submit to an inspection or provide complete and accurate information requested.
- **Personal liability.** Individuals intentionally involved in an anti-competitive agreement or practice can be subject to a criminal fine or imprisonment for between six months and four years (*Article 60, Competition Law*). Only the RCC can file a complaint with the criminal authorities in relation to the conduct. Only recently, the RCC filed such a criminal complaint against the director of a company allegedly involved in cartel activities.
- **Immunity/leniency.** Any participant in an anti-competitive practice that reveals the practice to the RCC may benefit from leniency and be granted immunity from any fines imposed by the RCC. If the RCC already suspects the practice in question, any participant that collaborates with the RCC to provide conclusive evidence of it, may be granted a reduction in the fine imposed on it of up to 50%.
- **Impact on agreements.** Any agreements or contractual clauses referring to an anti-competitive practice are null and void (*Competition Law*). As such, they are not enforceable against the contractual party or any third persons.

25. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, please summarise any special procedures or rules that apply. Are class actions possible?

Any third party affected by an anti-competitive practice can seek redress in court. There is no requirement to first address the matter with the RCC.

Class actions are available in Romania. The Civil Proceedings Code also allows persons to act jointly as claimants in the same trial if certain requirements are met.

26. Is there a right of appeal against any decision of the regulator and, if so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

Decisions by the RCC can be appealed to the Court of Appeal within 30 days of their communication or publication. On request, the Court of Appeal can suspend execution of the contested decision until a final judgment on the merits of the case is handed down.

The Court of Appeal's decision can be appealed to the High Court of Cassation and Justice (the highest court in Romania) within 15 days of the handing down of the Court of Appeal's decision.

Third parties can also challenge decisions by the RCC in the courts of law, if they can show an interest in doing so.

MONOPOLIES AND ABUSE OF MARKET POWER

27. Are monopolies and abuses of market power regulated under civil and/or criminal law? If so, please give a broad overview of the substantive provisions and regulatory authority.

Article 6 of the Competition Law prohibits the abuse of a dominant position, which is defined as anti-competitive behaviour by a dominant company that either has as its object or effect the distortion of economic activity or harm to consumers. Article 6 contains a non-exhaustive list of actions that may amount to an abuse of dominance (see *Question 29*).

Public bodies, in so far as they do not act as undertakings, do not fall within the scope of Article 6 of the Competition Law. However, their conduct may be assessed under Article 9 of the Competition Law, which prohibits any actions of central or local public bodies that have as their object, or might have as their effect, the distortion, restriction or elimination of competition, in particular relating to the following:

- Limiting free trade or the ability of undertakings to freely compete in accordance with the law.
- Establishing discriminatory conditions against some undertakings.

The RCC is the competent regulatory authority.

28. How is dominance/market power determined?

Dominance is not defined by the law or any regulation subsequently issued by the RCC. The RCC's guidance refers to the definition of dominance developed by the case law of the European Court of Justice in relation to the application of Article 102 of the TFEU (formerly Article 82 of the EC Treaty).

However, the RCC has acknowledged that there are several criteria based on which dominance may be found including:

- Market share of the undertaking.
- Market shares of competitors.
- Existence of entry barriers.

However, the most important factor is the ability to act independently on the market. In the first case dealing with an abuse of dominance, the RCC found that a company was dominant despite its low market share of 18% due to the fact that the company had the ability to act independently (*decision in the case of TREFO no. 14 from 6 October 1997*).

Since then, the RCC has, on many occasions, clarified that the existence of dominance in the absence of a market share of at least 40% is unlikely. The extent to which buyer power countervails that of the seller is also an important consideration.

29. Are there any broad categories of behaviour that may constitute abusive conduct?

The following actions are deemed an abuse of dominance (*Article 6, Competition Law*):

- Directly or indirectly imposing a purchase or resale price, tariffs or other unfair trading conditions, and the refusal to trade with certain undertakings.
- Limiting production, markets or technical development to the prejudice of consumers.
- Applying dissimilar conditions to equivalent transactions with other trading partners, placing them at a competitive disadvantage.
- Making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
- Applying excessive or predatory prices for the purpose of eliminating competition, or exporting goods below production costs and covering the loss by imposing excessive prices domestically.
- Taking advantage of the economic dependency of a different undertaking due to a lack of viable alternatives under equivalent conditions.
- Terminating a contractual relationship for the sole reason that the other party refuses to comply with unjustified commercial restrictions.

This list is not exhaustive, so other types of behaviour may amount to an abuse of dominance.

30. Are there any exclusions or exemptions?

There are no block exemption regulations in relation to Article 6 of the Competition Law, or a list of behaviours that are considered to be of minor importance. However, market shares are an important factor in determining a dominant position.

31. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, please set out briefly the procedure.

A dominant company wanting to act in a certain way can apply to the RCC for confirmation that the latter will not intervene, by filing a prior notification requesting such non-intervention. However, an abuse of a dominant position cannot be individually exempted as such conduct is always prohibited.

An application for non-intervention by the RCC essentially follows the same procedure as in cases concerning anti-competitive agreements and practices (*see Question 17*).

After the application for non-intervention is filed, the RCC can either request additional information, or declare the notification effective. If more information is required, the applicant is bound by a deadline set by the RCC. If the applicant does not provide the information within the deadline, the RCC rejects the notification as inadmissible.

The RCC may revert to the applicant with information requests until it deems the notification complete and declares it effective. Within 30 days of the date that the notification becomes effective, the RCC takes one of the following decisions:

- Certifies its non-intervention in relation to the notified conduct, where such conduct does not amount to an abuse of a dominant position and therefore is not caught by Article 6 of the Competition Law.
- Opens an investigation, where there are suspicions that the notified conduct may amount to an abuse of a dominant position and be prohibited

The investigation can include any of the following:

- Further requests for information.
- Unannounced investigations carried out by the RCC at the premises of the applicant.
- Receipt of comments from third parties.
- Drafting of the investigation report.
- A hearing, involving the applicant and third parties.

The investigation typically results in a final decision by the RCC in which it either certifies its non-intervention or prohibits the conduct subject to its previous assessment.

32. Where different than for restrictive agreements and practices, please explain how investigations are started, the procedures that apply, the rights of third parties, what details are made public and whether the regulator can accept commitments.

See *Questions 18 to 21* and *Question 23*.

33. Please summarise the regulator's powers of investigation.

See *Question 22*.

34. What are the penalties for abuse of market power and what orders can the regulator make?

See *Question 24*.

Additionally, if the measures or penalties imposed by the RCC are ineffective, the latter may request the Bucharest Court of Appeal to remove the dominant position by taking one of the following measures suggested by the RCC:

- Annulling the contracts that facilitate the abusive conduct, entirely or partially.
- Limiting or prohibiting the undertaking's access to the market.
- The sale of assets.
- The spin-off or restructuring of the dominant company.

To date, no such structural remedies have been pursued by the RCC.

In addition, following Romania's accession to the EU, the RCC and the domestic courts can directly apply Article 102 of the TFEU (formerly Article 82 of the EC Treaty) and impose penalties triggered by the application of those Community provisions.

35. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, please summarise any special procedures or rules that apply. Are class actions possible?

See *Question 25*.

EU LAW

36. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

The Competition Law and almost all of the RCC's regulations and guidelines were adopted before Romania acceded to the EU. As a result, there are no legal provisions dealing specifically with the application of Article 101 of the TFEU (formerly Article 81 of the EC Treaty) and Article 102 of the TFEU.

However, both Article 101 of the TFEU and Article 102 of the TFEU may be applied directly by the RCC and the Romanian courts by virtue of their direct effect. In applying such provisions, the RCC employs the procedures set by the domestic rules or by the TFEU, as applicable. In addition, any infringement of Article 101 of the TFEU or Article 102 of the TFEU entitles third parties to seek redress before domestic courts for any loss suffered as a result.

JOINT VENTURES

37. Please explain how joint ventures are analysed under competition law.

A joint venture that functions as an autonomous economic entity, and does not co-ordinate the competitive conduct between its parents or between the joint venture and its parents, is considered a full function joint venture and subject to the merger control rules (see *Questions 1* to *12*).

A full junction joint venture is an economic concentration in the sense of the Competition Law, if it fulfils all of the following conditions:

- Existence of joint control.
- Structural autonomy of the joint venture.
- The joint venture must not have as its object or effect the co-ordination of the competitive conduct of the parent companies and/or their controlled companies.

By contrast, a partial joint venture that has the effect of co-ordinating the competitive behaviour of its parent companies is subject to the provisions relating to anti-competitive agreements (see *Questions 13 to 26*).

INTER-AGENCY CO-OPERATION

38. Does the regulatory authority(ies) in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

The RCC is a member of the:

- European Competition Network (ECN).
- European Competition Authorities (ECA) network.
- International Competition Network (ICN).

In addition, the RCC participates in the meetings of the Competition Committee of the Organisation for Economic Co-operation and Development (OECD) and of the Intergovernmental Competition Group of Experts within the UN Conference for Trade and Development (UNCTAD), as Romania is a member of these organisations.

The RCC has entered into bilateral agreements with various national competition authorities, such as the competition authorities of Hungary, Italy, Croatia, Portugal, France, the UK, Germany and South Koreea.

PROPOSALS FOR REFORM

39. Please summarise any proposals for reform.

To accelerate reform of the Romanian legal framework, in December 2009 the RCC proposed a series of amendments to the Competition Law and published them on its website.

THE REGULATORY AUTHORITY

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Outline structure. The RCC consists of a number of departments, of which the most important are:

- Department for services.
- Department for consumer goods.
- Department for industry and energy.
- State aid department.
- Department for research activities.
- Legal services department.

Identifying which department is competent to deal with a specific matter or request depends on the matter itself and/or the activities of the companies involved.

Apart from the Chairman, the RCC is managed by:

- The Plenum, consisting of the Chairman, two vice-chairmen and four competition counsellors.
- The Commission, consisting of a competition counsellor appointed by the Chairman to deliberate on a number of specific cases.

Responsibilities. The RCC's main responsibilities are to:

- Conduct investigations and take decisions in cases dealing with anti-competitive agreements, abuse of dominance and merger control.
- Where necessary, certify its non-intervention or grant an individual exemption.
- Provide informal guidance or issue non-binding guidance letters in relation to a proposed agreement, practice or conduct.
- Notify the government of anti-competitive activity and propose remedies likely to restore competition.
- Endorse state aid policy and state aid schemes regarding possible effects on competition.
- Submit to the government and to administrative public authorities recommendations likely to facilitate market evolution and competition.

Procedure for obtaining documents. Legislation (including regulations and guidelines) is available on the RCC's website in Romanian and English. The same website makes available decisions, press releases, orders in relation to investigations, recommendations, annual reports and publications.

Among other things, the amendments propose:

- Acknowledging the RCC's power to directly apply Articles 101 and 102 of the TFEU to agreements affecting intra-community trade.
- The RCC's obligation to apply the relevant TFEU provisions, alongside Articles 5 and 6 of the Competition Law, where the agreement or the unilateral conduct in question is likely to affect trade between EU member states.
- Eliminating procedures concerning non-intervention certification and individual exemptions, and replacing them with the requirement that undertakings make a prior self-assessment of their proposed conduct or agreement to ensure its compliance with the Competition Law and the TFEU.
- Increasing the RCC's powers in relation to acts that negatively affect competition on a given market or in a given sector or industry.
- Including in the law provisions that guarantee legal professional privilege.
- Providing for minimum levels of fines applicable to infringements.
- Removing the legal provision that only the RCC can file a criminal complaint with the competent criminal bodies.
- Providing for the possibility that undertakings under investigation can offer commitments that are likely to alleviate the RCC's concerns in relation to restrictive agreements and practices.

The proposals made by the RCC regarding such amendments are not final and may be subject to change. An estimate as to the enactment of any of these provisions cannot be made at this early stage.

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