



# PRACTICAL LAW

MULTI-JURISDICTIONAL GUIDE 2012

## COMPETITION AND CARTEL LENIENCY

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# Romania

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## MERGER CONTROL

### 1. Are mergers and acquisitions subject to merger control in your jurisdiction? If so, what is the regulatory framework and what authorities are responsible for merger control?

#### Regulatory framework

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 meet 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 (*Consiliul Concurenței*) (RCC) (see box, *The regulatory authority*).

The main legislation applicable to merger control comprises:

- Law no. 21/1996 on competition (Competition Law), republished, as further amended and supplemented.
- Merger Regulation, issued by the RCC in 2010.

Other secondary legislation that the RCC has been issuing in the form of Guidelines since August 2010 is also applicable. The most relevant Guidelines are as follows:

- Guidelines on the concepts of economic concentration, undertakings concerned, full functioning and turnover.
- Guidelines on the definition of the relevant market.
- Guidelines on ancillary restraints.
- Guidelines on the enforcement of Article 32 of the Competition Law regulating the calculation of the authorisation fee in cases of merger control.
- Guidelines on commitments in merger control proceedings.

#### Regulatory authority

The regulatory authority is the RCC.

#### Triggering events/thresholds

### 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 acquire control over one or more other undertakings or part of an undertaking. This can be 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) being 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 (see *Question 37*).

#### 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 (as at 1 December 2011, US\$1 was about EUR0.7).
- At least two parties involved in the transaction individually achieved a turnover in Romania exceeding EUR4 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 excise duties 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 turnover generated or, if that is not applicable, the percentage that they represent of the target's total assets as included in its aggregate turnover.

### Notification

#### 3. What are the notification requirements for mergers?

##### 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 after signing and before implementing the binding agreement.

It is also possible to submit a notification based on an intention to buy, provided that the main aspects of the transaction (for example, number of shares, type of control) are determined. This notification can lead to a formal decision (as in the case of the ordinary notification procedure) and can also be used as an opportunity to obtain formal guidance from the RCC in relation to the closing of the transaction.

##### Formal/informal guidance

It is possible to seek formal guidance from the RCC before the formal notification is filed, by notifying an intention to buy. In this case consultation meetings with the RCC representatives can be organised to clarify certain aspects regarding the economic concentration. The formal guidance is not binding on the parties, but may offer a useful insight into the RCC's view of the notified transaction, as well as in relation to certain auxiliary restrictions that the parties might wish to include in the transaction documents.

While the RCC is not obliged to give informal guidance, its staff is 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

As a general rule, the notification must be submitted by the entities acquiring control or undergoing a change in the type of control exercised. As such, the following parties are responsible 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) 139/2004 on the control of concentrations between

undertakings (Merger Regulation) are met, the transaction must be notified to the European Commission.

##### Form of notification

The Merger Regulation sets out the notification format (see *website*, [www.competition.ro](http://www.competition.ro)). Notification must be carefully drafted as providing inaccurate or incomplete information may be penalised by a fine of between 0.1% and 1% of the notifying parties' turnovers.

##### Filing fee

The current filing fee is RON 4,775 (as at 1 December 2011, US\$1 was about RON3.3).

##### Obligation to suspend

Until clearance is issued by the RCC, the parties involved cannot implement the transaction and 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:

- Entering or leaving a new market by the acquired undertaking.
- Selling assets or dismissing employees of the acquired undertaking.
- Listing the acquired undertaking on a stock exchange.

However, the RCC can approve the implementation of a particular measure on the basis of a grounded request by the parties.

### Procedure and timetable

#### 4. What are the applicable procedures and timetable?

If notification is incomplete, the RCC can ask for additional information within 20 days of the date the 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.

If the RCC deems that the notification is complete (that is, no additional information is necessary to make a decision), it has 45 calendar 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 conditional (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 two) investigation if the notified transaction raises serious doubts concerning its compatibility with a normal competitive environment.

Usually an economic concentration is considered to be incompatible with a normal competition environment when it impedes effective competition, in particular through 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 45-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 a 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*.

#### Publicity and confidentiality

#### 5. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

##### Publicity

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.

The new merger control notification form implemented as of 2010 requires the parties to provide a non-confidential disclosure of the main features of the transaction, which can be published by the RCC on its website.

To further increase transparency, the RCC has recently published all of its decisions on its website.

##### Procedural stage

After receiving a notification, the RCC usually publishes a press release mentioning the parties involved and the subject matter of the notification. Under the new merger control notification form, the notifying party (parties) must disclose non-confidential information.

When the RCC reaches the decision in relation to a merger, it usually first communicates to the parties the confidential version of the decision and asks the parties to indicate any confidential information that should not be published within a reasonable time frame. Usually, the parties then have seven to ten days comment on the non-confidential version of the decision.

##### Automatic confidentiality

The Competition Law guarantees the confidentiality of data and information provided by the parties during merger control proceedings. Moreover, in view of third parties' right to access

the investigation file during a phase two investigation, the parties are required to highlight the confidential data and information provided to the RCC. The members and staff of the RCC must keep secret the information that they are provided with during their tenure with the RCC.

##### Confidentiality on request

If the parties want some information from the decision to be withdrawn they must request this from the RCC within a reasonable time frame of the communication of the decision.

#### Rights of third parties

#### 6. What rights (if any) do third parties have to make representations, access documents or be heard during the course of an investigation?

##### Representations

If a notified transaction raises serious doubts as to whether it is likely to impede effective competition in particular through the creation or consolidation of 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 these 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.

##### Document access

Third parties are allowed to consult the investigation file kept by the RCC on request and if they prove a legitimate interest. However, they do not have access to documents, data and information marked as confidential by the parties from which they were collected or which presented them to the RCC during the first phase of the merger control procedure.

##### Be heard

If a phase two investigation is launched, 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.

Hearings may also take place if requested by the parties and deemed appropriate by the RCC.

#### Substantive test

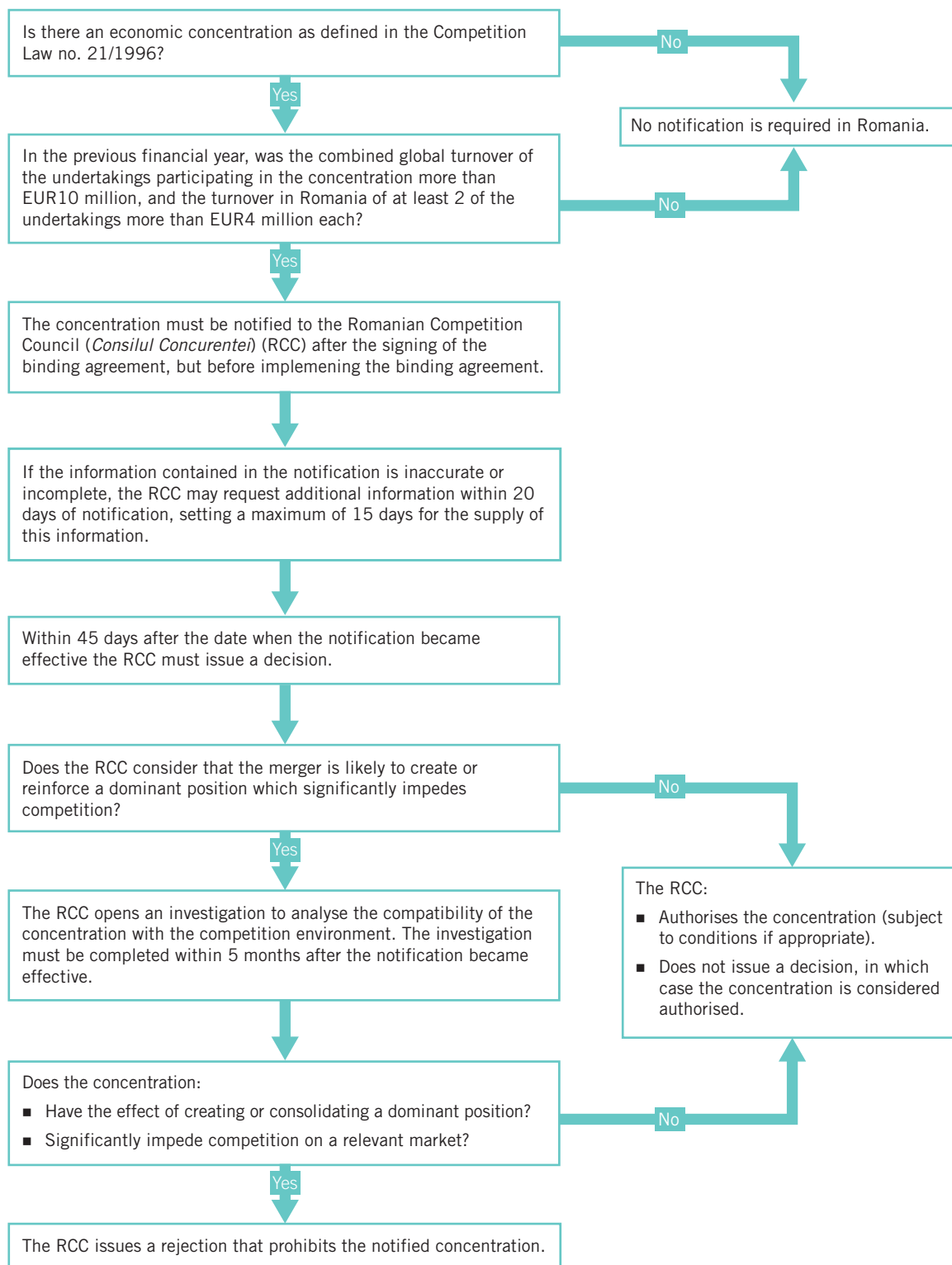
#### 7. What is the substantive test?

One of the amendments recently made to the Competition Law affects the substantive test that the RCC applies in cases of economic concentrations. Therefore, the current test is whether the relevant transaction significantly impedes competition on a relevant market or not. However, according to the RCC's recent practice, a major indicator in applying this test continues to be 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.



## ROMANIA: MERGER NOTIFICATIONS



- Entry barriers.
- The extent to which the transaction may lead to market foreclosure.

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

#### *Remedies, penalties and appeal*

#### **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 behavioural remedies can be negotiated by the parties with the RCC to alleviate the latter's concerns. Such remedies can include:

- Divestments.
- Elimination of ties with competitors.
- Access to necessary infrastructure or key technologies by way of licence agreements or otherwise.
- Amendment of long term exclusive agreements.

In principle, the RCC prefers structural remedies. However, in markets dominated by brands or other intellectual property rights, behavioural remedies (as may be undertakings 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 on which the 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 45 days.

If phase one proposals are not acceptable, then the second phase investigation begins. The remedies proposed at this stage must be submitted to the RCC within 30 days of the date on which the investigation was launched (the term may be extended by 15 days on a reasonable request submitted with the RCC within the initial 30-day term).

#### **9. What are the penalties for failing to comply with the merger control rules?**

##### **Failure to notify correctly**

Failure to provide complete or accurate information may result in a fine between 0.5% and 1% of the total turnover achieved in Romania by the notifying party during the year preceding the year of the sanctioning decision.

##### **Implementation before approval or after prohibition**

Implementation before clearance or after prohibition is subject to a fine between 0.5% and 10% of the total turnover achieved by the notifying party(ies) in the year preceding the sanctioning decision.

##### **Failure to observe**

Failure to observe a decision or to implement remedies can result in a fine between 0.5% and 10% of the turnover of the parties in the preceding 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 the applicable decision of the RCC.

#### **10. Is there a right of appeal against any decision? 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?**

##### **Rights of appeal and procedure**

A decision issued by the RCC can be appealed to the Bucharest Court of Appeal within 30 days of the communication of that decision.

##### **Third party rights of appeal**

Interested third parties may also challenge the decision before the Bucharest Court of Appeals. For third parties the 30-day time limit starts running as of the publication of that decision.

#### *Automatic clearance of restrictive provisions*

#### **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 obligations). Therefore, the relevant information must be provided. If the parties provide complete information in relation to this and mention all restrictions contained in the notified agreement, any clearance issued by the RCC covers all ancillary restrictions.

However, depending on the gravity of the restriction, the RCC may require that the parties involved conduct a self-assessment of certain provisions, under Article 5 of the Competition Law (see *Question 15*).

#### *Regulation of specific industries*

#### **12. What industries (if any) are 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**

#### *Scope of rules*

#### **13. Are restrictive agreements and practices regulated? If so, what are 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? Are there broad categories of agreements that might violate the law?

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

#### Exemptions and exclusions

#### 15. Are there any exemptions? If so, what are the criteria for individual exemption and any applicable block exemptions?

Following the Competition Law reform, which took place in 2010, the RCC's block exemption regulations have been repealed. The EU block exemption regulations for the application of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) are now directly applicable.

In addition, it is now not possible to notify an agreement for a decision granting an individual exemption. The parties to an agreement must now conduct a self-assessment, applying the following criteria and the relevant practice of the RCC or the European Commission:

- The agreement should both:
  - contribute to the improvement in the production or distribution of goods, or promote technical or economic progress;
  - ensure an advantage to consumers comparative to the one obtained by the parties involved.
- The expected advantages can only be achieved with a potential restriction 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 parties to eliminate competition on a substantial part of the relevant market.

#### 16. Are there any exclusions? Are there statutes of limitation associated with restrictive agreements and practices?

##### Exclusions

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 the undertakings involved in the agreement hold a market share of either (*Article 8, Competition Law*):

- 15% or less if they are not competitors (calculated individually).
- 10% or less if they are competitors (calculated by combining the market shares of all parties to the agreement).

However, if competition on a relevant market is reduced by the cumulative effect of several agreements, both of these thresholds are reduced to 5%.

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).

##### Statutes of limitation

There are two types of statutes of limitation under the Competition Law. The latter provides, as an exception to the New Civil Code:

- A three-year limitation period applicable in relation to providing incomplete or incorrect information, or refusal to allow inspectors to perform a dawn raid.
- A five-year limitation period in relation to all other infringements of the Competition Law.

The limitation periods can be interrupted only by an action undertaken by the RCC with a view to conduct a preliminary assessment or launch an investigation in connection with an infringement of the law (*Competition Law*). The following RCC actions may interrupt the limitation period, as exemplified under the Competition Law:

- Written information requests.
- Order of the RCC Chairman to launch an investigation.
- The commencement of legal proceedings.

##### Notification

#### 17. What are the notification requirements for restrictive agreements and practices?

The Competition Law no longer provides for a formal notification procedure. For situations that have not been previously dealt with by the RCC or the Romanian courts, the RCC may issue guidance letters on request. These guidance letters should clarify whether or not the envisaged agreement falls within the prohibition under Article 5 of the Competition Law. They are issued within 30 days of the interested party's request.



## Investigations

### 18. Who can start an investigation into a restrictive agreement or practice?

#### Regulators

Only the RCC can launch an investigation if it suspects that an anti-competitive practice is taking place.

#### Third parties

Third parties cannot launch an investigation directly, but they may lodge a complaint with the RCC which may lead to the launching of an investigation.

### 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. What are the stages of the investigation and timetable?

The RCC is not restricted by any time limits in conducting and completing its investigation.

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. 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 in the structuring of its defence. Third parties can have access to the investigation report only if the RCC deems it necessary.

Following the submission of the investigated undertaking's defence, hearings are scheduled before the RCC Board, involving both the investigation team and the representatives of the investigated undertakings. During the hearings, the participants can raise new issues and provide new evidence.

Following the hearings, the RCC adopts a decision that either:

- The investigated 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.

This procedure is the same irrespective of whether the investigation is started further to a complaint or on the RCC's own initiative.

### 21. How much information is made publicly available concerning investigations into potentially restrictive agreements or practices? Is any information made automatically confidential and is confidentiality available on request?

#### 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.

#### Automatic confidentiality

Following the Competition Law reform, the correspondence between a client and its external lawyer currently benefits from expressly regulated 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. What are the powers (if any) 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, subject to legal professional privilege rules. 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 both:

- An order issued by the RCC's Chairman.



- 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.

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**23. Can the regulator reach settlements with the parties without reaching an infringement decision? If so, what are the circumstances in which settlements can be reached and the applicable procedure?**

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The RCC's power to accept binding commitments has been recently regulated. Under this recent enactment, the parties can engage in negotiations with the RCC in relation to proposed binding commitments for behavioural or structural remedies. The RCC, having approved these commitments, will not sanction the relevant undertakings. The RCC has:

- Sole discretion in deciding whether the commitments proposed would eliminate the situation which caused the investigation.
- Monitoring powers in relation to the fulfilment of the commitments.

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**Penalties and enforcement**

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

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**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 in the market. These measures must be periodically reviewed by the RCC, which decides whether such measures or other measures remain necessary.

In addition, following Romania's accession to the EU, the RCC and the domestic courts can directly apply Article 101 of the TFEU and impose any applicable penalties (see *Question 36*).

**Fines**

The RCC can levy fines of between 0.5% and 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 between 0.1% and 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 of 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. Recently, the RCC has filed such a criminal complaint against the director of a company in the bread making business 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 of up to 50%.

**Impact on agreements**

Any agreements or contractual clauses referring to an anti-competitive practice are void (*Competition Law*). As such, they are not enforceable against the contractual parties or any third persons.

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**Third party damages claims and appeals**

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

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**Third party damages**

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.

**Special procedures/rules**

All procedures are subject to the Civil Proceedings Code.

**Class actions**

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

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**26. Is there a right of appeal against any decision of the regulator? 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?**

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**Rights of appeal and procedure**

Decisions by the RCC can be appealed to the Bucharest Court of Appeals within 30 days of their communication or publication. Following the latest amendments to the Competition Law, an order of the Chairman of the RCC launching an investigation can only be challenged together with the investigation's final decision.

On request, the Bucharest Court of Appeals can suspend execution of the contested decision until the final judgment on the merits of the case is handed down. However, a suspension can only be awarded subject to payment of a security of maximum 20% of the fine set by the appealed decision. The court will decide the exact amount of the security.

The Court of Appeals' 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 party rights of appeal

Third parties can also challenge decisions by the RCC in the courts of law, provided that they can show a legitimate interest.

## MONOPOLIES AND ABUSES OF MARKET POWER

### Scope of rules

#### 27. Are monopolies and abuses of market power regulated under civil and/or criminal law? If so, what are 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, if 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.

There are no rules regulating abuse of market power not amounting to dominance.

#### 28. How is dominance/market power determined?

Dominance is not specifically 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.

In addition, 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 (*case of TREFO no. 14 from 6 October 1997*).

Further to recent amendments of the Competition Law, there is a positive presumption that an undertaking or an association of undertakings having a (consolidated) market share of 40% is dominant.

#### 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.

### Exemptions and exclusions

#### 30. Are there any exemptions or exclusions?

There are no block exemption regulations in relation to Article 6 of the Competition Law. Nor is there a list of behaviours that are considered to be of minor importance.

### Notification

#### 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, what is the applicable procedure?

Following the Competition Law reform, it is no longer possible to formally notify a conduct to the RCC to obtain clearance.



## THE REGULATORY AUTHORITY

### Romanian Competition Council (*Consiliul Concurentei*) (RCC)

**Head.** Bogdan Chiritoiu

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

- Department for services.
- Department for consumer goods.
- Department for industry and energy.
- Department for tenders and complaints.
- 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 Board, comprising the Chairman, two vice-chairmen and four competition counsellors.
- The Commission, comprising a vice-chairman of the RCC and two competition counsellors 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.
- 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.

For situations that have not been previously dealt with by the RCC or the Romanian courts, the RCC can issue guidance letters on request. These guidance letters should clarify whether or not the envisaged unilateral conduct falls within the prohibition in Article 6 of the Competition Law. They are issued within 30 days of the interested party's request.

### Investigations

#### 32. What (if any) procedural differences are there between investigations into monopolies and abuses of market power and investigations into restrictive agreements and practices?

There are no procedural differences between the two types of investigations (see Questions 18 to 21 and 23).

#### 33. What are the regulator's powers of investigation?

This is the same as in relation to restrictive agreements and practices (see Question 22).

### Penalties and enforcement

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

See Question 24.

Penalties for abuse of market power range between 0.5% and 10% of the liable entity's annual turnover. The RCC can also impose any structural and/or behavioural remedies which may be necessary for ceasing the anti-competitive conduct.

In addition, following Romania's accession to the EU, the RCC and the domestic courts can directly apply Article 102 of the TFEU and impose any applicable penalties (see Question 36).

### Third party damages claims

#### 35. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, what special procedures or rules (if any) apply? Are class actions possible?

This is the same as in relation to restrictive agreements and practices (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 reform aligned the Competition Law with the provisions of Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the TFEU (Modernisation Regulation). Therefore, the Competition Law now expressly provides that the RCC must apply Article 101 and Article 102 of the TFEU alongside domestic law whenever the agreement or the unilateral conduct in question affects intra-community trade.

In applying these provisions, the RCC uses the procedures set by the domestic rules. 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. The RCC has frequently applied Article 101 and Article 102 of the TFEU in its recent investigations.

## JOINT VENTURES

### 37. How are joint ventures 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 function joint venture is an economic concentration for the purposes 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 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 Korea.

## PROPOSALS FOR REFORM

### 39. Are there any proposals for reform of competition law?

Following the adoption by the Romanian government of Emergency Ordinance no. 75/2010 and the latter's approval by the parliament, the RCC is now vested with the power to also enforce the provisions of Law no. 11/1991 on unfair competition. It may be said that the role of the RCC is now complete following the said unification, as it is now empowered to deal with both anti-trust and unfair competition issues.

The RCC is in the process of drafting secondary legislation relating to the enforcement of Law no. 11/1991.

## CONTRIBUTOR DETAILS



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**Areas of practice.** Merger control/anti-trust; intellectual property; healthcare and pharmaceuticals.

#### Recent transactions

- Representing Generali Holding Vienna AG in a complex price fixing cartel investigation on the privately administered compulsory pensions market.
- Assisting the Rompetrol Group, one of the largest companies on the Romanian oil market, in relation to state aid-related issues arising in connection with the conversion into bonds of the company's historic debts to the Romanian State.
- Assisting Eli Lilly, a leading pharmaceuticals corporation, in relation to the court proceedings initiated against a decision of the Romanian Competition Council (RCC)

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  - Project Finance (IFLR 1000, Legal 500)
- Dispute Resolution (PLC Which Lawyer?, Legal 500, Chambers Global)
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