

Romania

Musat & Asociatii

Anca Buta Musat



1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in [insert country]? If more than one, please describe the division of responsibilities between the different authorities.

In Romania, the Competition Council is the only administrative authority in charge with the application of the law no. 21/1996 on competition (the "Competition Law"). The role of the Competition Council is not only to investigate and sanction any agreements, practices or unilateral conduct that is likely to restrain the competition on a given market, but also to prevent any such effects. Therefore, the council is the authority that monitors the markets, carries out sector inquires and intervenes anytime there is a likelihood that a distortion of competition will occur.

The Competition Council consists in several departments, out of which the most important are the Department for Services, the Department for Consumer Goods, the Department for Industry and Energy and the State Aid Department. Identifying which department is competent to assess and decide on an agreement or unilateral conduct depends on the object of the agreement and/or the statutory activities of the companies involved. For example, a cooperation agreement between two pharmaceutical companies for the production of a new drug will normally be notified and eventually authorised by the Department for Consumer Goods. It is noteworthy that despite the market players' demands, there is no further division between the Competition Council's responsibilities, meaning that the same counsellors belonging to a department will review all forms of agreements and conducts, including vertical and horizontal agreements, mergers, joint venture agreements, etc, across all commercial fields. This proved to be difficult in practice, leading to maximum time-limits for completing the authorisation procedures imposed by the law.

The State Aid Department was in charge with the application of law no. 143/1999 on State aids and the secondary legislation in this field. In the wake of Romania's accession to the EU from the 1st of January 2007, the State Aid Department's role was reduced to a mediator between the public authorities granting the aid and (possibly) the beneficiaries on one hand and the European Commission on the other hand.

Last but not least, it is also noteworthy that unfair competition acts and consumer protection rules fall within the ambit of different authorities.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

It should be underlined from the outset that the Competition Council is the only authority at administrative level that may enforce the provisions of the Competition Law and its secondary legislation such as regulations and guidelines passed by the Competition Council for the application of the Competition Law. Although there are certain legal provisions in certain specific sectors that among other responsibilities set out on the part of the respective sector's regulator provide for the maintenance of a competitive environment and market liberalisation, it is only the Competition Council that can make use of the investigative and preventive powers conferred by the Competition Law, as well as of the sanctions made available by the said enactment.

At a judicial level, the Romanian courts have the authority to directly apply the Competition Law in relation to any matter, regardless of whether the case was first assessed and decided upon by the Competition Council or not. The difference between the two foregoing situations would be that where the case was previously reviewed by the council, it is actually the decision of the Competition Council that is challenged before court as opposed to the situation where the case is brought before the court for the first time and where the practice or the conduct is primarily challenged.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Romania?

There are no guidelines or criteria that the Competition Council must follow when prioritising its duties and resources. There are usually the market specifics that dictate the approach of the competition authority towards a certain industry, sector or market. The simultaneous media statements made within a certain economic or commercial context also generated the launch of a sector inquiry by the Competition Council. Recently it has been noticed also the ambition of the Competition Council to follow the same priorities of the Commission and therefore pursue the same cases as the ones investigated at the EU level (e.g. investigations on pharma markets, sector inquiry into the retail sector focused on the buying abusive practices, etc.).

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The Competition Law represents the main piece of legislation whereby the Competition Council was established as the sole authority in charge with enforcement duties in the competition field. Article 5 of the Competition Law prohibits any agreement or concerted practice by undertakings or associations of undertakings which are likely to distort, limit or eliminate the competition on a given market. Article 6 of the same law prohibits any abuse by a dominant company which may have the same effects and therefore negatively impact on trade and consumers. Last but not least, Chapter III of the law defines the concept of economic concentration and mandatorily subjects the transactions qualifying as an economic concentration to the prior assessment and authorisation of the Competition Council should certain turnover thresholds be concurrently met. The Competition Law also lays down extensive rules regulating the Competition Council's activity as administrative authority and the investigative powers thereof, including the sanctions and interim measures that may be imposed only by the Competition Council. Article 60 of the above-mentioned law qualifies as criminal offence the participation of a natural person, with a fraudulent intention and in a decisive manner to the conception, organisation or achievement of the practices prohibited by Article 5 and by Article 6, and which are not exempted according to the provisions of the Competition Law. The afore-said criminal offence shall be punished by imprisonment from six months to four years or by fine. The criminal proceeding shall be initiated upon the notification of the Competition Council. The court of law qualifying the practice as a criminal offence may order the publication of the final judgment in the media, at the expense of the party at fault.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

The provisions applicable only to specific sectors relate to the method of computation of the turnover for the purpose of the thresholds laid down in cases of economic concentrations and de minimis exemptions. The enforcement authority of the Competition Council is the same irrespective of the sector envisaged.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

Yes. The parties to an agreement may either (i) subject an agreement in relation with a proposed merger to the Competition Council for its approval, (ii) notify an agreement or unilateral conduct for obtaining the so-called certification of the non-intervention of the Competition Council, (iii) notify an agreement for obtaining an individual exemption from the application of Article 5 of the law, or (iv) request the council to issue an guidance non-binding letter if the agreement raises a novel or unresolved legal issue.

By certifying its non-intervention, the Competition Council admits that the agreement in question does not fall within the scope of

Article 5 or Article 6 of the Competition Law and may be implemented with no other formalities being necessary to that effect. By contrast, by means of an individual exemption granted in relation to an agreement, the Competition Council acknowledges that the notified agreement falls within the scope of Article 5 of the Competition Law but its positive effects offset the negative consequences of such. The certification of the non-intervention of the Competition Council may be granted only if the agreement has not been put into practice already whilst the individual exemption may be granted anytime during the period of the agreement and in all instances it requires an investigation of the Competition Council before the individual exemption is eventually granted.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

As a general rule, it is only the person (be it natural or legal person) which has a legitimate interest that can file a complaint with the Competition Council. The Regulation of the Competition Council for the application of Articles 5 and 6 of the Competition Law following a complaint (the "Regulation") provides for a Form that has to be completed by the person filing a complaint. Exceptionally, the Council may agree to first receive only a part of the information required under the above-said Form, if it deems that the remaining missing information are not necessary for the case at hand. The complaint will be filed in two hard-copies and one electronic copy. The complainant will also provide the council with a non-confidential version of the complaint.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

In 2007 half of the investigations carried out by the Competition Council were launched ex officio, as opposed to 2008 when out of 18 investigations started by the council, only a third were as a result of a complaint made to that effect by a third party. It is worthy of note that not all the complaints eventually lead to the launch of an investigation by the council. Therefore, the number of the complaints during 2007 and 2008 was significantly higher than the number of investigations opened by the council on the bases of a previous complaint.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

Normally, a complaint filed and registered with the Competition Council opens a formal procedure under the Regulation that covers the following stages: (i) the examination of the complaint; (ii) the investigation being launched and carried out by the Competition Council if the latter concludes that there are sufficient grounds for such an investigation; (iii) the decision of the council; and (iv) the process of monitoring the measures imposed by the Competition Council in its decision. It is noteworthy that the investigation may be launched by the council only within 30 days as of the date when the complaint was registered with the council. In the absence of sufficient grounds justifying the investigation, the Competition Council will issue within the same 30-day term a decision whereby

it rejects the complaint.

The investigation procedure typically comprises the following: (i) successive requests of information made by the council; (ii) on-the-spot inspections; (iii) the report on the investigation which is drawn up by the Competition Council and communicated to the parties involved; (iv) the hearing before the plenum of the council; and (v) the decision of the council.

In case the Competition Council decides to start an investigation, rather than reject the complaint (in which case the council has to comply with the 30-day time limit mentioned above), it is worth noting that the Competition Council is not restricted by any time-limits in conducting and completing its investigation. The period of time covered by the investigation may vary according to the complexity of the allegations in the complaint.

The time limits are usually incumbent on the parties subject to the investigation, which have to provide the requested information and data until a certain date established by the Competition Council, make comments on the investigation report within 30 days as of the date when the report was communicated to them, etc.

During the investigation, the Competition Council has a number of persuasive powers, such as the power to apply fines for inexact, incomplete or inaccurate information. In accordance with the provisions of Article 50 of the Competition Law, the following acts are contraventions and sanctioned with a fine up to 1% of the total turnover achieved in the year previous to the application of such sanction:

- providing inaccurate, incomplete or misleading information within a notification;
- providing inaccurate, incomplete or misleading information or documentation or refusal to provide such information requested by the Competition Council during its investigation; and/or
- refusal to submit to an inspection.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

Yes, the Competition Council may require any piece of information and any data that it deems relevant for the matter under the investigation. In its investigatory work, the Competition Council was delegated the power to require information, having the prerogatives to apply a fine for incorrect or false information. The Council may use information that is already available to it, information that is provided voluntarily, information that the parties were compelled to provide based on a specific request, as well as documentary evidence seized during a dawn raid.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

Apart from requiring the production of specified information, based on an order issued by the chairman the Competition Council may carry out on-site unannounced inspections at the business premises of the investigated company where it has unlimited access to information and it can seize documents that are relevant for the case under assessment. The dawn raid may cover all the offices, lands and transport means belonging to the investigated undertaking. During the dawn raid the council may also interview the representatives and employees of the investigated company 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 in other premises, lands, or transport means, such as the ones belonging to the managers, directors or employees of the investigated company, the Competition Council may enter and search such other places based on an order issued by the chairman of the council and a court warrant issued by the president or the delegated judge of the tribunal which has territorial jurisdiction over the place where the inspection is envisaged to be conducted. If the Competition Council envisages carrying out simultaneous on-site inspections at premises which fall within the territorial jurisdiction of different tribunals, the president of any of the competent tribunals may grant a sole court warrant for all the inspections.

According to Article 38 of the Competition Law, the request of the Competition Council for a court warrant must include all relevant information that justify the purpose of the inspection and the judge that has to rule on the request must verify whether the request is grounded or not. It is noteworthy that the judge may also participate in the inspection and suspend or end the inspection anytime it deems appropriate.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

According to Article 9 of the Regulation, the Competition Council may interview any person from the company which is investigated. A copy of the recorded interview will be made available to the company in question, the latter having the possibility to adjust the answers if the interviewed person was not authorised by the company to make any public statements in relation to and implicitly engaging the company.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

The Regulation provides that during a dawn raid the Competition Council may remove any copies or excerpts of the documents that it considers to be relevant for the matter investigated. In practice, the Competition Council asks for and takes only copies of the companies' documents and not the originals.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

Yes. During the on-site inspections, the council may check all the computers and electronic correspondence and, in relation to the data found to be relevant, the council may also ask for such information to be produced in a form that can be taken away.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

Besides requesting relevant information and data, inspecting the premises or other lands and interviewing the employees, representatives and/or managers of the investigated company during a dawn raid, the Competition Council may also at any time ask the parties under investigation to provide verbal information at the Competition Council premises.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

When the Competition Council considers that the investigation file is complete, it draws up a report that typically provides for a market description before and during the period covered by the alleged infringement, identifies the incriminated agreement, practice or unilateral conduct, as well as the parties involved, and proposes certain measures to be taken in relation to the above. The findings of the council during the investigation as they are included in the report must be grounded on clear evidence that is also explicitly and thoroughly referred to in the report so that the incriminated parties can build up a proper defence. After the report is communicated to the involved parties, the latter have 30 days for submitting their comments to the report and provide new evidence supporting their final arguments, if any. The foregoing term may be extended by the Competition Council to 60 days altogether and only once, if the respective involved party submits a grounded request to that effect.

Before submitting the comments to the report, within the same term of 30 days the Competition Council invites the concerned parties to inspect the entire investigation file at the Competition Council's premises and make copies of the documents that they consider relevant for its defence. The invitation normally has attached the list of all documents forming the investigation file that may consist of written correspondence, market surveys, answers to the council's questionnaires, agreements of the parties involved, information and data provided by competitors or relevant authorities, documents seized by the council during an unannounced on-site inspection, etc. The confidential information is generally excluded from the parties' review.

After submitting the comments to the report, the party accused of anti-competitive conduct has also the opportunity to make oral representations before the plenum of the Competition Council. The applicable legal provisions allow for new evidence to be brought also at this stage. Based on the other parties' representations and the issues discussed before the plenum, the parties may also, at their own initiative or upon the request of the council, submit new information before a final decision is made. It is also noteworthy that it is not mandatory for the Competition Council to produce minutes of the oral hearing. However, statements made at the oral hearing will be recorded and the parties may, on request, obtain a copy of the recording, bearing in mind that the business secrets and other confidential information will be deleted.

4.9 How are the rights of the defence respected throughout the investigation?

First of all, the undertaking subject to an investigation of the Competition Council is informed about the subject matter of the investigation. The undertaking normally has the right to be represented by a legal advisor and consequently have the requests of the Competition Council communicated to it through its legal advisor. The investigated undertaking may at any time submit evidence or information in support of its stance. When being requested by the council to provide or produce certain documents or information, the undertaking under investigation is usually granted sufficient time for drafting its response, time-limit that can also be extended based on a justified request to that effect. Moreover, in relation to the information provided, the council is bound to respect and safeguard the confidentiality.

Among its fact-finding powers mentioned above, the Competition Council may ask the parties subject to the investigation to make available all the documents and information which are in their possession regardless of whether such documents or information

are self-incriminating or not.

The question, whether the lawyer-client communications are protected from disclosure, remains open despite the market players' demands to receive an official stance of the Competition Council. Given the jurisprudence of the European Court of Justice in this regard, we deem that there is a strong likelihood for the Competition Council to take the same approach and treat the said communications as an exemption from disclosure obligations incumbent upon the investigated companies.

For more information concerning the rights of defence of the accused parties, please refer to question 4.8 above.

4.10 What rights do complainants have during an investigation?

The most important rights that the complainants have further to filing a complaint are the following: (i) the right to submit all the information, data and documents that it deems necessary for the case at issue; (ii) the right to receive the decision of the council whereby the latter either rejects its complaint or starts an investigation within a 30-day maximum time-limit as of the date when its complaint was registered with the council; and (iii) the right to express its views in writing and verbally before the council rejects its complaint. Any other possibilities of getting involved during the investigation, such as the possibility of participating in a meeting together with the accused parties, or accessing the file and being granted the right to be heard, fall within the discretionary power of the council.

A complaint may be rejected by the Competition Council where (i) the complainant has not provided sufficient information to sustain the likelihood of an infringement of the competition rules, (ii) the conduct in view does not fall within the scope of the Competition Law (possibly due to the *de minimis* thresholds), or (iii) the conduct in view falls within the ambit of the Competition Law but it does not have an appreciable negative effect on trade and/or final consumers. Regarding the first ground for rejection mentioned above, it is noteworthy that according to the Guidelines of the Competition Council for the application of Articles 5 and 6 of the Competition Law following a complaint (the "Guidelines"), the council is not obliged to take into account all the factual circumstances that were not brought into its attention by the claimant but could have been discovered by the council during an investigation.

In case the Competition Council rejects the complaint before launching an investigation, Article 4 of the Regulation requires the council to inform the complainant of its reasons for rejecting the complaint and fix a time for it to submit further comments in writing and be heard before the commission of the Competition Council that decided upon its complaint. Before submitting its comments, the complainant may request to be granted access to the documents and information based on which the council rejected its complaint.

The Council's failure to adequately state its reasons may lead to the annulment of the decision in court.

In case the Council decides to launch an investigation, the Instructions provide that the Council may admit the request of the complainant to be heard, in which case the council will communicate to the complainant the investigation report only upon request and if it deems necessary for the purpose of the oral hearing.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

When launching an investigation, the council usually publishes a press release on its website whereby it states the purpose of the

investigation and invites the third parties to submit relevant information or comments. Therefore, the third parties normally have the right to submit any piece of information or evidence that they consider relevant for the subject matter of the investigation. Third parties may also file a request for being heard and implicitly having access to the file (taking due account of the confidentiality obligations incumbent upon the council), but the final decision always belongs to the council.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

According to Article 47 of the Competition Law, before issuing a final decision, the Competition Council may impose the undertakings concerned - by means of a decision for interim measures - to take any measure that the council considers necessary for restoring the competitive environment and maintaining the status quo.

The measures for suspension or prohibition of the ascertained anti-competitive practices as well as the mandatory instructions given to the undertakings to reinstate the previous situation shall only be ordered by the Competition Council, in the application of Arts. 45 and 46, upon ascertaining manifestly illicit deeds, constituting anti-competitive practices expressly prohibited by this law and which shall be removed immediately, in order to prevent or stop the occurrence of a serious and certain prejudice.

The measures outlined above are strictly limited, both in terms of duration and in terms of object, to what is necessary in order to correct the alteration of free competition.

The decisions made by the Competition Council with respect to interim measures are immediately communicated to the parties. Such decisions may be challenged by administrative way at the Bucharest Court of Appeal, within 30 days from the communication. The court may order, upon request, the suspension of the enforcement of the challenged decision.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

The right of the Competition Council to apply sanctions is subject to the following statutory limitations: (i) three-year statutory limitation for sanctioning the refusal to provide the requested information or the provision of the requested information in an incomplete, inaccurate or misleading manner and the refusal to submit itself to a dawn raid; and (ii) five-year statutory limitation for sanctioning all other infringements of the Competition Law. The foregoing statutory limitation applies to the right of the Competition Council to apply fines and it does not preclude the council from finding an infringement by means of a decision. Moreover, it is noteworthy that the afore-said time constraints apply unless the council has taken formal steps to investigate or prosecute the infringement. In such case, the five-year limitation period is extended to a further five-year period from each such step.

7 Co-operation

7.1 Does the competition authority in Romania belong to a supra-national competition network? If so, please provide details

The Treaty establishing the European Community ("EC Treaty") provides common competition rules for the EU member states, which must be applied in a uniform manner within the entire EU. In this respect, Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty creates a system of parallel competences in which the European Commission and the competition authorities in EU member states can apply the competition rules laid down by the Treaty establishing the European Community. Based on their competences, the competition authorities of the member states and the European Commission form a network of public authorities acting in the public interest and cooperating closely in order to protect competition, called "European Competition Network" (ECN). By virtue of Romania being an EU member state, the Romanian Competition Council is a member of the ECN.

The ECN acts as a forum for discussion and cooperation in the application and enforcement of EC competition policy. The ECN also provides a framework for the cooperation of European competition authorities in cases where Articles 81 and 82 of the Treaty are applied, in order to detect multiple procedures and to ensure that each case is dealt with by a well placed competition authority.

At European level, Romania is also member of the ECA (European Competition Authorities) a network founded in Amsterdam in April 2001 as a forum for discussion of the competition authorities in the European Economic Area (EEA) (the Member States of the European Community, the European Commission, the EFTA States Norway, Iceland, Liechtenstein and the EFTA Surveillance Authority). The ECA is an informal association which serves as a forum where competition authorities operating within the EEA (European Economic Area) meet to discuss about the application and enforcement of competition rules and to improve the working relations amongst them.

The Romanian Competition Council is also a member of the International Competition Network (ICN). The concept for the ICN originated out of recommendations made by the International Competition Policy Advisory Committee (ICPAC). Embracing the IPAC initiative, on October 25, 2001, top antitrust officials from 14 jurisdictions - Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States, and Zambia - launched the ICN. The ICN provides antitrust agencies from developed and developing countries with a focused network for addressing practical antitrust enforcement and policy issues of common concern. The ICN constitutes a specialised yet informal venue for maintaining regular contacts and addressing practical competition concerns.

The Romanian Competition Council also participates in the meetings of the Competition Committee of the Organization for Economic Co-operation and Development (OECD) and of the Intergovernmental Competition Group of Experts within the UN Conference for Trade and Development (UNCTAD), Romania being member to the said organisations.

The Romanian Competition Council has also established formal bilateral relations with the competition authorities of the following states: Hungary; Italy; Croatia; Portugal; Turkey; Russia; Czech Republic; Belarus; Georgia; Bulgaria; South Korea; France; Slovakia; and the Republic of Moldova.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

The ECN constitutes a network aimed at enforcing a unitary approach of the EC competition rules by applying in a consistent manner the EC Treaty competition rules and also by ensuring the effective implementation of the procedural rules which amount to a system of parallel competences in which the European Commission and the competition authorities in EU member states deal with competition cases.

To such effect, the national competition authorities cannot - when ruling on agreements, decisions and practices under Article 81 or Article 82 of the Treaty which are already the subject of a European Commission decision - take decisions which would run counter to the decisions adopted by the Commission. Also, no later than 30 days before the adoption of a decision applying Articles 81 or 82 of the Treaty and requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block-exemption regulation, national competition authorities must inform the European Commission by sending a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. Also, although the obligation is to inform the European Commission, the information may be shared with the other members of the network. Mention must be made that any decision concerning the above can be adopted as long as the European Commission has not initiated proceedings based on the previous information.

From a procedural standpoint, the cooperation between member states also covers investigations, the European Commission or a national competition authority having the right to ask another national competition authority for assistance in order to carry out fact finding information. As regards the use of such information within law enforcement, the consultations and exchanges within the network are matters between public enforcers and do not alter any rights or obligations arising from EC or national law for companies. Each competition authority remains fully responsible for ensuring due process in the cases it deals with.

As regard the other networks to which the Romanian Competition Council is member, such constitute rather informal form in which members share individual issues raised in the enforcement of competition law and develop a common policy towards competition, which may be implemented nationally subject to the specific requirements of the applicable law.

8 Leniency

8.1 Does the competition authority in [insert country] operate a leniency programme? If so, please provide details.

The Competition Council operates a leniency policy which is subject to detailed provisions and procedures outlined in the Guidelines of the Competition Council regarding the criteria for the application of the leniency policy in accordance with Article 56 (2) of the Competition Law (the "Leniency Guidelines"). The Leniency Guidelines apply to the most severe restrictions on competition which are considered to be the following: (i) price fixing; (ii) fixing the level of the production; (iii) fixing the sale shares; (iv) market or client sharing; (v) bid rigging; and (vi) export or import bans or restrictions. The said guidelines provide for total immunity from fine and alternatively for the reduction of fines. In order to benefit from total immunity, the undertaking in question must provide sufficient conclusive information that permits the

council to either open an investigation or find an anti-competitive practice. Additionally, for full immunity the following two conditions must be concurrently met: (i) the council did not hold the information provided from other source; and (ii) there was no other company involved in the cartel that was granted full immunity before. Moreover, cooperation remains an essential condition for the application of immunity. Thus, the applicant will not be granted immunity if it does not cooperate fully and permanently with the Competition Council during the entire procedure for the detection of the existence of the cartel, it does not end its involvement in the alleged cartel immediately after its application was filed or the latest when it provides the evidence, and it has not taken any steps in coercing other undertakings to join the cartel.

An applicant which does not qualify for immunity may nevertheless receive a reduction in fine if it provides the council with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the council's possession, and if it ends its participation in the cartel immediately after filing the formal application for the reduction or (the latest) when submitting the evidence. The reduction in fine may be of up to 50% and is established by the council based on certain criteria.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

As previously mentioned, the Competition Council may start an investigation either ex officio or following a complaint. The investigation is usually closed by means of a decision whereby the Competition Council finds that either (i) the conduct does not fall within the scope of the Competition Law, (ii) the conduct although falls within the scope of the said law is not likely to have an appreciable negative effect on competition and consumers, or (iii) the conduct is anti-competitive and contrary to the requirement of the law. In the latter case the council will normally apply a fine of up to 10% of the turnover of the incriminated companies. For the purpose of the fine computation, the council will have in view the total revenues achieved in the preceding year, regardless of whether they were achieved on the relevant market on which the anti-competitive conduct took place or on a different market.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

In case the Competition Council finds a breach of the Competition Law it may impose fines and periodic penalty payments. The council shall apply a fine of up to 10% of the total turnover achieved by the involved parties in the preceding year for anti-competitive agreements or practices, abuse of dominance and implementing an economic concentration without the prior authorisation of the Competition Council when such authorisation was mandatory. In addition to the foregoing, the council may fine an undertaking also for the refusal to provide information or providing information in an incomplete or inaccurate manner, as well as for the refusal to submit itself to an announced on-the-spot inspection. The level of the fine in this latter case shall not exceed 1% of the turnover achieved by the fined company in the preceding business year. It is well-established that the reference to the turnover is to the total turnover achieved in Romania and not restricted to the turnover in the products on the relevant geographic market.

The exact amount of fine is established by having regard to the basic amount of fine and the aggravating and mitigating circumstances. In fixing the basic amount of fine, the council has in view the gravity and the duration of the infringement.

Article 54 of the Competition Law empowers the council to apply periodic penalty payments not exceeding 5% of the average daily turnover in the preceding year per day and calculated from the day of the decision, in order to compel the infringing party to comply with the decision and bring the infringement to an end, produce the required information and/or submit to an inspection.

In addition to the foregoing, the Competition Council may request the Bucharest Court of Appeal to eradicate a dominant position by taking one of the following measures suggested by the council:

- annulling the contracts that facilitate the abusive conduct, entirely or partially;
- limiting or prohibiting the access on the market;
- the sale of assets; and
- the spin-off or restructuring of the dominant company.

It is noteworthy that to date no such structural remedies were pursued by the competition authority.

Last but not least, it is worth mentioning that in the wake of the Romania's accession to the EU, the Competition Council and the domestic courts may directly apply Article 81 EC and Article 82 EC and impose sanctions triggered by the application of the aforesaid Community provisions.

The foregoing fines and penalties are not of a criminal law nature. They are administrative sanctions and they can also be applied directly by the court. However, personal criminal sanctions for cartel activities are also made available under the Competition Law (please see question 2.1 for more details).

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

The Competition Council may impose a fine of up to 1% of the total turnover from the preceding year for the refusal to submit to an inspection or provide complete and accurate information requested by the Council. For more information, please refer to question 9.2 above.

10 Commitments

10.1 Is the competition authority in Romania empowered to accept commitments from the parties in the event of a suspected competition law infringement?

Besides imposing fines as outlined above, it is also possible for the Competition Council to bind into decisions obligations on the parties as their future behaviour and monitoring programs (e.g. case TREFO from 1997). The obligations are limited in time as explicitly provided in the decision. Based on the monitoring programs, the Council may either decide that although the time limit was not reached, there are no grounds for keeping the obligations in place, or extend the time-limit. It is worth mentioning that it is not a common practice for the investigated companies to offer commitments. However, the possibility to discuss commitments with the council's case handlers before a final decision is reached depends on the level of communication established with the council during the investigation.

10.2 In what circumstances can such commitments be accepted by the competition authority?

The Competition Council has discretion as to whether to accept the proposed commitments or not. Normally, the commitments may be accepted if they are likely to be implemented effectively and in a timely manner. The commitments are hardly accepted in cases involving serious breaches of competition.

10.3 What impact do such commitments have on the investigation?

The commitments proposed by the parties subject to the investigation are not susceptible of undermining the council's investigative powers. However, depending on the specifics of the case, the commitments may speed up the investigation process by alleviating the most important concerns of the council. It is noteworthy that nothing precludes the council from re-opening an investigation where there is a material change in the facts or the parties infringe their commitments. In the latter case the council may also apply a fine for failure to comply by the infringing companies with a council's previous decision.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

During an investigation and until the final decision is made, the Competition Council may take a number of decisions, such as the decision for fining a company that refused to submit to a dawn raid, the decision for imposing periodic penalty payments or interim measure. The afore-said decisions represent administrative deeds and may be challenged by the concerned company in court under the conditions mentioned below at question 11.2.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

According to the Competition Law, the decisions of the Competition Council may be challenged only before the Court of Appeal in 30 days as of their communication. Given that the decision is communicated only to the parties involved, it is presumed that only those companies may file an appeal against such decision. The appellants may hold in their appeal that the decision of the Competition Council is either illegal or ungrounded. Upon request, the Court may decide to suspend execution of the contested decision until a final judgement on the merits of the case is rendered.

The judgement rendered by the Court of Appeal may be further challenged by means of a second appeal lodged with the High Court of Cassation and Justice (which is the highest tier in Romania) within 15 days as of the communication of the judgement of the Court of Appeal.

Before the Court of Appeal and High Court of Cassation both aspects may be raised, factual and legal.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

The decisions of the Competition Council whereby the latter finds an infringement and imposes the proper remedies are binding per se and therefore do not need to be endorsed by an administrative or judicial body. However, as previously mentioned, such decisions are open to appeal before the Court of Appeal within a prescribed time-limit.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

There is no express provision which states that if a court action is filed under the Competition Law the Competition Council has to be informed and/or granted access in the court proceeding. Moreover, the Competition Council has not expressed its intention in the past to intervene in court proceedings whose subject matter was the application of the Romanian or EC competition law. Therefore, the input of the Competition Council in court actions in which it is not a party, is dramatically reduced. The parties to the litigation may nonetheless provide as evidence in support of their allegations the past decisions of the council which are relevant for the application of the legal provisions referred to in the court action. However, it is noteworthy that the past decisions of the Competition Council are not mandatory for the courts.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Yes, and there is no pre-condition to first address the matter to the Competition Council before going to court.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

The jurisprudence of the national courts in connection with private actions is rather scarce and non-conclusive given the difficulty in determining and proving the actual loss and the time and costs required by a trial.

14 Miscellaneous

14.1 Is anti-competitive conduct outside [insert country] covered by the national competition rules?

The Competition Law applies to all anti-competitive agreements and conducts that have effects on the Romanian territory irrespective of the actual place where they have been concluded or taken place.

14.2 Please set out the approach adopted by the national competition authority and national courts in Romania in relation to legal professional privilege.

As previously mentioned, although the market players and the legal practitioners expressly asked the Competition Council in various occasions to officially reveal its stance towards the attorney-client professional privilege, the competition authority refrained itself from doing so. However, taking due account of the jurisprudence of the European Court of Justice in this regard, it is expected that once facing the argument the Competition Council will follow the same approach.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Romania in relation to matters not covered by the above questions.

It is undoubted that the Competition Council has recently made a significant progress in ensuring a proper enforcement of the Competition Law. During 2008 the Competition Council has conducted no less than 104 unannounced on-site inspections, as opposed to 2007 when only 42 such inspections were carried out by the competition authority. The total amount of fines imposed has also increased dramatically in 2008 as compared to the preceding year. Thus, last year the council imposed fines of more than 27 million Euro, this amount being almost 250 times higher than the total amount of fines applied in 2007.

The Competition Council acknowledges that the enforcement of the competition rules is essential taking into account the deterrent effects that it can produce. Third party actions play a material role in this structure by significantly increasing the litigation risk. However, the case law on third party actions is almost inexistent in Romania and this is most probably due to the lack of awareness on the part of the final consumers as well as the litigation costs which are significant and sometimes higher than the actual damages requested. It is indispensable for this mechanism to work within the envisaged parameters that the Competition Council adopts a more pro-active approach in this regard by organising seminars, promptly publishing its decisions on its website thereby inviting the third parties to ask for damages in court, launching consultative programs and propose legislative amendments implementing the developments of the European Commission at the EU level and facilitating the collective redress mechanism by allowing class actions.



Anca Buta Musat

Musat & Asociatii
43 Aviatorilor Blvd
1st District, Code 011853
Bucharest, Romania

Tel: +40 21 202 59 09

Fax: +40 21 223.37.59

Email: ancam@musat.ro

URL: www.musat.ro

Ms Anca Buta Musat, Partner, coordinates Musat & Asociatii's long recognised Competition practice. She has an extensive experience in dealing with the whole array of competition issues, covering merger control, agreements between competitors, restrictive vertical agreements such as licensing and distribution, abuse of dominant position, exclusivity arrangements, technology transfer agreements and category management contracts. Ms Buta Musat has substantial knowledge and expertise in assisting the clients both before the European Commission and the Romanian antitrust authority for obtaining the requisite approvals, such as merger control authorisations or individual exemptions in connection with various agreements or transactions across a wide range of industries, including automotive, aviation, food and beverages, biotechnology, pharmaceutical, broadcasting and communication, chemicals, consumer products, energy, forest products manufacturing, packaging and telecommunications. The expertise of Ms Buta Musat also covers cartel investigations and related damage claims, leniency filings, sector inquiries, dawn raids, compliance programmes, State aid, public procurement and liberalisation.

Ms Buta Musat also specializes in Intellectual Property law, with particular focus on patents and technology litigation, industrial designs and trademarks registrations, as well as designing programs for ensuring transnational protection.

Ms Buta Musat holds an LLM in Transnational Business Practice from the University of Salzburg/University of the Pacific and a PGD in Competition from King's College in London. She speaks Romanian, English, French and Greek and is a member of the Bucharest and Romanian Bar Associations.

MUȘAT & ASOCIAȚII

Attorneys at Law

Musat & Asociatii's name stands for a high level of expertise in business matters and is therefore a leading law firm in Romania.

For almost 20 years, Musat & Asociatii has acted on behalf of multinational investors, banks and other financial institutions, venture capital funds, major Romanian public and private companies and government agencies. The firm focuses on providing value-added legal services, having proven to contribute full capacity and resources to properly understand and address its clients' goals and demands.

The practice covers the entire spectrum of business activities, the firm being the undisputed market leader in the fields of commercial and corporate law, competition, project finance, banking / finance and capital markets, mergers / acquisitions and privatisation, communications and information technology, and intellectual property law, delivering a broad and unparalleled expertise in all these areas. Musat & Asociatii has developed particular expertise in areas as pharmaceutical industry, broadcasting and communication, aviation, IT technology and financial services, as well as food industry. The firm has excellent litigation resources as well, extending to dispute management and arbitration.

Musat & Asociatii is the exclusive TerraLex representative in Romania, and has close contacts and alliances with some of the most prestigious law firms in the European Union and US, enabling the provision of a fully global client service.