# Competition

## 1. What are the competition rules applicable in Romania?

Competition Law No. 21/1996 (Competition Law) stands at the core of competition legislation in Romania. The provisions on competition set forth in Articles 101 and 102 of the Treaty on the Functioning of the European Union (Treaty/TFEU) also apply directly. As provided by Article 5(6) of Competition Law, when applying national competition rules, the Romanian Competition Council will also apply Articles 101 and 102 of the Treaty where there is an effect (or a potential effect) on trade between Member States.

Second-tier norms issued by the RCC for the application of Competition Law, together with EU guidelines and regulations, are relevant as well.

In addition, Government Emergency Ordinance No. 170 of 16 October 2020 on actions for damages in case of breach of competition law (GEO 39/2017) sets forth an extensive procedure with regards to claims for damages arising from anticompetitive behaviour.

## 2. Are there any notable recent updates of the Romanian competition legislation?

As a matter of principle, the Romanian competition rules are mirroring, to a significant extent, the legislation applicable at the European Commission level.

An important, relatively recent legal amendment is the coming into force of GEO 170/2020 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union that is part of the EU package legislation aimed at encouraging civil damages cases for breach of competition law.

Another important recent amendment of the secondary legislation consists in ensuring the proportionality of the fine by offering a deduction from the level of the fine that can go to up to 90% if the turnover on the relevant market related to the infringement is

very low.

The RCC is currently focused on updating and fine-tuning the second-tier norms. This project is ongoing.

## 3. Given that Romania is part of the EU, how is competence split between the national authority and the European Commission?

The system of parallel competences of the European Commission and the national competition authorities, instituted at the EU level, is directly applicable in Romania. While the European Commission usually intervenes to investigate anti-competitive practices affecting more Member States or justifying an EU-wide interest (i.e. where the practice affects the internal markets' freedoms, or where the case has a novelty character at EU-level), the RCC remains competent to examine practices affecting mainly the Romanian market.

Likewise, in cases of economic concentration, the RCC reviews mergers that would normally have a local impact (country-level), while the European Commission intervenes and removes local jurisdiction in case of transactions where the parties have a significant turnover world-wide and EU-wide and, thus, might have a larger impact on the Single Market (EU-level).

## 4. What are the main concerns of the Romanian competition authority in terms of agreements between undertakings? How about the sanctioning record of the authority?

Agreements between competitors aimed at distorting market competition (commonly known as "cartels") are top targets for the RCC, as well as for the European Commission, being severely sanctioned.

Even though the RCC has historically sanctioned a significantly larger number of vertical anticompetitive agreements than merely cartels (agreements between non-competing undertakings acting on different levels of trade, such as distribution agreements, supply agreements, outsourcing agreements), its more recent practice includes a growing number of cartel cases, as well as cases on abuse of dominance. The cartel cases are now the main focus of the authority.

The RCC has also increased its focus on bid rigging and market sharing in public procurement procedures. The RCC established a special division to deal with

complaints from authorities or bidders affected by anticompetitive bidding practices.

Last but not least, the RCC develops a jurisprudence on the concept of facilitator. For instance, although itself victim of a cartel, the organiser of a tender may also be found in breach of competition law and punished as such where its employees support a transfer of sensitive information between the members of the cartel. Associations are also a key candidate for the facilitator role in case of cartel investigations.

Also, in recent practice the RCC has been showing predilection for reaching a settlement with the parties involved in the investigation, consisting of a reduction in the fine in exchange for admission of guilt. The potential reduction varies from 10% to 30% (details are presented below).

The RCC record of enforcements on agreements between undertakings covers various industries. Some examples are detailed below:

- **Cartels (selections):**
  - 2020 – 31 companies operating on the Romanian wood trading market were sanctioned with a fine amounting to EUR 26,600,000 for participation in anti-competitive agreements and / or concerted practices;
  - 2020 – The Confederation of Romanian Authorised Operators and Carriers (COTAR) and 18 undertakings active in the passenger transport market were sanctioned for concluding an agreement to limit /suspend public road passenger transport;
  - 2018 – 9 insurance companies were sanctioned for price increase signalling on the MTPL (the total amount of fines applied was EUR 53,000,000);
  - 2018 – 15 companies and 1 association were sanctioned for concerted practice consisting of fixing minimum prices on the market for package holidays;
  - 2017 - 34 companies and four associations were sanctioned for fixing the minimum prices on the market for security services;
  - 2016 - Five companies were sanctioned for bid-rigging arrangements in connection with a high-profile governmental support project “the milk and the croissant” for school pupils;
  - 2015 - The RCC sanctioned 3 motor gas wholesalers with approximately EUR 3.7 million for a price fixing and client sharing cartel. The companies admitted guilt and got a fine reduction;
  - 2014 - The RCC sanctioned 11 media companies with a fine of RON 14.567.555 (approximately EUR 3,200,000) for agreeing to eliminate a competitor from the market;
  - 2012 - The National Union of Bailiffs in Romania was sanctioned with a fine of RON 593.089 (approximately EUR 131,798) for fixing tariffs and setting barriers to entering the profession;

- 2011 - Six oil companies were fined with RON 891.729.966 (approximately EUR 200,000,000), the largest fine ever applied by the RCC, for a cartel having as object the removal of a type of gas (Eco Premium) from the market;
- 2010 - Market allocation (based on a 50-50% principle) between the 14 administrators of mandatory private pension funds during the initial sales window upon market set-up (total fine of EUR 1,220,000);
- 2010 - Minimum price fixing by the members of the Romanian Body of Expert and Authorised Accountants (RBEAA) (total fine of EUR 950,000).

- **Vertical agreements (selections):**
  - 2017 - The RCC sanctioned manufacturers, importers and distributors of car batteries for vertical price fixing arrangements;
  - 2015-2016 – The RCC sanctioned various vertical price fixing arrangements on the decorative coating/painting sector;
  - 2015 – The RCC sanctioned Hidroelectrica, the main hydro power producer and 10 energy wholesalers with approximately EUR 37,000,000 for concluding long-term agreements of power supply;
  - 2014 - The RCC sanctioned 25 companies active on the retail market (4 retailers and 21 food products suppliers) with fines totalling RON 154.029.538 (approximately EUR 35,000,000) for direct (minimum) price fixing during certain promotions. The RCC sanctioned the suppliers and retailers for indirect price fixing, identifying promotional forms bearing a so-called "promotions clause" providing that the supplier shall not offer promotional reduced supplier prices to competitor chains (in certain cases such competitors were expressly identified by name) for the period when the respective promotion was available with that retailer;
  - 2011 – Total fines of RON 51.522.130 (approximately EUR 11,500,000) imposed on Bayer and its distributors for entering into anticompetitive limiting parallel trade;
  - 2011 – Total fines of RON 5.993.657 (approximately EUR 1,350,000) imposed on Baxter and its distributors for entering into anticompetitive limiting parallel trade;
  - 2011 – Vertical agreement between Interfruct S.R.L., Albinuța Shops S.R.L. and Profi Rom Food S.R.L. fruits on resale price maintenance sanctioned with fines of RON 16.700.000 (approximately EUR 3,700,000).
- **Bid rigging (selections):**
  - 2020 – Four companies (Vesta Investment S.R.L., Helvespid S.R.L., Loial Impex S.R.L., Girod Semnalizare Rutieră S.R.L.) were sanctioned for big rigging on the market of vertical and horizontal road signs/marking with a total fine of EUR 667,000. The case included a component of transfer of sensitive commercial information;
  - 2020 – Five companies were sanctioned with fines amounting approximately EUR 468,000 for agreeing to participate with a joint bid in a public tender and to

share the afferent contracts

- 2018 – Six companies (Japan Radio Co. Ltd, Navtron SRL, Alphatrom Marine, Alhoutyam Ltd, Space Eletronics Ltd and Polar DenizcilickVe Deniz Malzemeleri A.S were sanctioned for bid rigging, vertical and horizontal agreements on the market of marine electronics maintenance system with fines of approximately RON 16.700.000 (approximately EUR 3,600,000);
- 2017 - Five companies were sanctioned for market sharing arrangements on the market for the sale of electric meters during public tenders organised by operators of power distribution networks Electrica SA, Delgaz Grid SA, E-Distribuție Muntenia SA. An element of novelty was that Electrica was sanctioned as facilitator of the practice by supporting an illicit exchange of information;
- 2016 - The RCC sanctioned the Romanian Chamber of Auditors for restricting competition by setting a minimum fee value. Apart from the EUR 182,000 fine, the RCC also imposed the Romanian Chamber of Auditors the obligation to eliminate the norms triggering the minimum fee value for services;
- 2014 - Four companies active in the oil and gas drilling industry were sanctioned for bid-rigging arrangements regarding bids organised by Romgaz. The fine amounted to RON 12.968.298 (approximately EUR 2,890,000). RCC's investigation was triggered following the submission of a leniency request by one of the participants in the cartel. The leniency applicant was granted full immunity;
- 2013 - Bid rigging by sharing the tendered products in public procurement procedures organised by the Ministry of National Defence. The highest fine imposed by the RCC amounted to approximately EUR 1,569,700;
- 2012 - Bid rigging in public procurement procedures organised by the National Company for Highways and National Roads for the installation of markings on the national roads. Two consortia of companies acting in the road works sector were sanctioned with more than EUR 660,000 in fines;
- 2012 - Bid rigging in public procurement procedures organised by Transgaz S.A. The case also included a component of transfer of sensitive commercial information;
- 2008 - Bid rigging between distributors on the dialysis market (total fine amounting to EUR 1,600,000): three distributors participated in a bid rigging in the context of the national tender organised by the Ministry of Health in 2003.

## 5. Which competition law requirements should companies consider when entering into agreements concerning their activities on the Romanian territory?

Article 5(1) of Competition Law, in line with Article 101(1) of the TFEU, prohibits any

explicit or tacit agreements between undertakings or associations of undertakings, any decisions of associations or any concerted practices between them, pursuing among others (i) price fixing, (ii) customers or markets allocation or (iii) bid rigging. Such agreements include cartels and anticompetitive vertical agreements.

Cartels are illegal secret agreements concluded between competitors intended to fix prices, restrict supply and/or divide up markets. The agreements may take a wide variety of forms (tacitly agreed practices included), but often relate to sale prices or increases in such prices, restrictions on sales or production capacities, sharing out product or geographic markets or customers, and collusion on the other commercial conditions for the sale of products or services.

Although generally considered less restrictive than cartels, vertical agreements also require careful consideration as severe sanctions may apply as well, should competition norms be breached.

Several types of agreements are qualified as hardcore restrictions and consequently banned irrespective of the parties' market share. Such agreements mainly consist of (i) resale price fixing (setting a fixed or minimum resale price), (ii) market or clientele allocation; (iii) parallel trade restrictions and (iv) bid rigging.

Other restrictions included in vertical agreements may be exempted, either by the application of specific block exemptions (the EU block exemption regulations, namely Regulation No. 330/2010 are directly applicable), or following an individual examination undertaken on a case-by-case basis. In this latter case, the individual exemption requires a balance between the negative effects of the vertical agreements (e.g. raising the artificial market entry barriers, restriction on inter-brand and intra-brand competition, etc.) and the expected positive effects (e.g. product quality improvement, investments for entering new markets, better distribution services, etc.).

## 6. Does the leniency policy apply in Romania?

In line with the EU legal framework, the RCC issued guidelines providing for different types of incentives for companies that voluntarily disclose the existence of a cartel, or of restrictive vertical agreements, and bring evidence to prove the infringement or cooperate during the procedure. Exemptions and reductions of the fine vary widely depending on the timing and significant added value of the information and evidence provided by cartel members.

Unlike the EU, where leniency is available only in cartel cases, the RCC broadened the scope of the leniency policy and opened the procedure to distributors or suppliers to

report hardcore vertical anticompetitive agreements. The leniency regime does not apply to horizontal or vertical agreements which may be exempted under Article 101 (3) TFEU.

The first leniency case finalised before the RCC (2010) was a local cartel formed by the taxi drivers in Timiș County. In 2014, the RCC granted a new immunity under a leniency procedure in the oil and gas drilling services cartel finalised. Since then, the RCC took every opportunity to reaffirm clearly that "whistle blowers" are warmly welcomed at the RCC and provided full immunity in a number of cases such as the financial leasing market (2020), the MTLP insurance cartel (2018), electrical meters bid rigging practice (2017).

The RCC operates an on-line platform where, under the protection of anonymity, any person or company may provide information to the authority in connection with anticompetitive practices.

In order to obtain full immunity under the leniency policy, a company that participated in a cartel or a vertical RPM anticompetitive practice must be the first to inform the RCC of the undetected illegal activity, providing sufficient information to allow the authority to open an investigation and launch an inspection at the premises of the companies allegedly involved in the anticompetitive practice. If the RCC is already in possession of enough information to launch an investigation, or has already opened one, the company must provide evidence that enables the RCC to prove the infringement. In all cases, the company must also fully cooperate with the RCC throughout the procedure, provide the authority with all the evidence in its possession and put an end to the infringement immediately.

Companies that do not qualify for full immunity may benefit from a reduction of fines if they provide evidence that constitutes "significant added value" to that already in the RCC's possession and if they have ceased involvement in the anticompetitive practice.

Evidence is considered to be of a "significant added value" for the RCC when it reinforces RCC's ability to prove the infringement.

The first company to meet these conditions may receive 30% to 50% reduction, the second 20% to 30% and subsequent companies up to 20%. Companies that admit guilt during the hearings before the RCC Plenum at the latest may benefit of 10% to 30% fine reduction. This form of cooperation is deemed as special mitigating circumstance which may even trigger a reduction of the fine to 0.2% of the turnover obtained in the year preceding the sanctioning decision.

## 7. How unilateral conduct is treated under Romanian competition rules?

Unilateral conduct is not relevant for Competition Law unless the undertaking concerned holds a dominant position. Below the level of dominance, unfair commercial practices unilaterally applied by companies may be subject to consumer protection rules, which are in line with EU Directives and are generally investigated by the consumer protection agency.

Dominant players on the market could also infringe the antitrust rules, both national (Article 6 of Competition Law) and European provisions (Article 102 of the Treaty), by adopting unilateral market strategies which could harm consumers and/ or competitors.

Dominance is traditionally defined as the ability of a company to act to a large extent independently from its competitors (actual and potential) and its clients in that particular market.

However, under the Competition Law, firms which hold more than 40% of the relevant market in question are presumed to be dominant, should other factors not prove the contrary. The market share is, however, just one factor in assessing dominance. The structure of the relevant market, position of the main competitors, entry barriers or specific advantages enjoyed by a company may also influence the dominance assessment.

Obviously holding a dominant position is not prohibited; it is abusing that position that falls within the scope of the antitrust rules. Abusive behaviour may consist of: (i) exploitative practices by abusing market power in trading relationships with customers or suppliers (e.g. unfair purchase or selling prices, tying arrangements, price discrimination) and (ii) exclusionary practices, i.e. abusing market power with an aim to harm competitors (e.g. refusal to deal, predatory pricing, etc.).

Article 6 of the Competition Law provides a demonstrative list of behaviours that are deemed as abuse of a dominant position:

- Imposing, directly or indirectly, of selling and buying prices, price lists or other inequitable contractual clauses and refusing to negotiate with certain suppliers or beneficiaries (the practice relates mainly to excessive pricing against customers and predatory prices aimed at eliminating competitors);
- Limiting production, distribution, technological development to the disadvantage of the consumers;
- Applying to commercial partners dissimilar conditions for equivalent performances,

to the effect of creating disadvantages in the competitive position of some of them (discrimination);
- Conditioning the conclusion of certain contracts on the commercial partner's acceptance of clauses stipulating supplementary performances which, neither by their nature nor according to commercial practices, have any connection with the object of such contracts.

## 8. Are there any recent local abuse cases of relevance?

The number of cases on abuse of dominance instrumented by the RCC is increasing. Some notable examples include:

- Dante International (Emag) was sanctioned for abuse of a dominant position on the market for intermediation services through online platforms. The fine was of approximately EUR 6,700,000. In addition, the RCC imposed a series of corrective measures.
- The natural gas distributor Premier Energy was sanctioned with a fine of approximately EUR 1,300,000 for imposing discriminatory tariffs. The company benefited of a 15% reduction of the fine as it admitted guilt. At the same time, Premier Energy SRL awarded damages to the victims of infringements in a total value of RON 88.347,74.
- The telecom company Orange was sanctioned for having abused its dominant position on the SMS bulk termination market in relation to an SMS bulk and payment services independent provider. Also, Orange and Vodafone were sanctioned with fines of approximately EUR 34,800,000 and EUR 28,300,000, respectively, for actions related to restriction of access to essential facilities.
- The national post-office operator Poșta Română was sanctioned with a fine of approximately EUR 24,060,000.

It should be noted that companies may undertake, during the investigation procedure, that they will comply with a certain set of rules as to end the alleged infringement (commitment procedure) and avoid the application of fines. The RCC is however ostensively reluctant in making extensive use of the undertaking tool.

## 9. What are the consequences of a competition law infringement?

The sanctions for violations of the Competition Law may amount to up to 10% of turnover obtained in the year prior to the issuance of the sanctioning decision.

The minimum fine that could be applied by the RCC as per Competition Law cannot be lower than 0.5% of the incomes achieved in Romania in the year prior to the issuance of the sanctioning decision.

Other sanctions include invalidation of contract terms, claims for damages submitted in court by the affected competitors, and restrictions imposed by the RCC or the courts on the business activity. The Competition Law also provides cases of criminal liability of the individuals responsible for the violation. So far, based on public information, the RCC has only once remitted a case to criminal prosecution.

Throughout its practice, the RCC applied significant fines, which place the local competition authority among the most active in Europe. The fine level, as well as the number of cases, increased in the last few years, where the RCC accelerated the investigation process in key sectors identified as priorities (retail, financial sector, telecom, oil, public procurement, etc.).

Independently from the sanctions applied under the Competition Law, natural and legal persons have the right to file claim for the recovery in full of the damages resulting from the anticompetitive practice prohibited by the Competition Law under the private enforcement principles.

Private enforcement relates to legal actions that can be brought before a national court by one private party against an undertaking that infringed competition regulations. Private enforcement of competition rules can take different forms, including claims for compensation for damages, actions for injunctive relief (to stop the behaviour that contravenes competition rules), actions for nullity, etc.

Companies having blown the whistle in cartel cases or hardcore vertical agreements which benefit from leniency are also exonerated from the joint liability resulting from claims for compensation for damages, which bears on all participants to the infringement.

As regards the quantum of damages, the Romanian legal system acknowledges the full compensation principle in case of tort liability. Thus, the author of the anticompetitive practice could be compelled to reimburse both the actual damage and the loss of benefit.

To date, there is little practice concerning the private enforcement actions in case of breach of competition norms, but considering the international trend, we could expect an increase in actions for damages in the near future.

In addition, managers, legal representatives, or any other person in a management

position who intentionally conceive or organise one of the prohibited practices under the Competition Law are subject to criminal liability.

## 10. Is there any competition law requirement in case of mergers & acquisitions occurring or impacting the Romanian market?

The merger of two or more previously independent parties, or the direct or indirect control brought about by share capital/assets acquisition, by contract or by other means qualifies as an economic concentration and may trigger a notification obligation in the competent jurisdiction. In merger cases, a division of competence between the European Commission and the RCC applies.

The Commission has exclusive power to examine concentrations with a Community dimension determined on the basis of very high turnover thresholds set under EU Merger Regulation No. 139/2004, while the RCC assess concentrations with a national dimension.

Should the merger not fall within the jurisdiction of the European Commission, it would require clearance by the RCC if the following thresholds are **cumulatively** met in the fiscal year preceding the transaction:

- The parties' combined worldwide turnover exceeds EUR 10,000,000; and
- At least two of the parties involved in the transaction have a turnover in Romania exceeding EUR 4,000,000.

The concept of parties is rather complex and not limited to only the entities signing the transaction documents, but also includes group structures. The turnover thresholds should be verified on a case-by-case basis.

The business environment considers the turnover thresholds triggering the notification obligation to be low. Further to recent amendments, the Competition Law allows the RCC to adjust the turnover thresholds triggering the notification requirement. However, based on recent statements of the competition authority, there is no short or medium-term plan to adjust the notification thresholds.

Romania is considered a "suspensive jurisdiction", where a transaction may not be implemented prior to clearance issued by the RCC.

For justified cases, the buyer may obtain derogation from the above rule from the RCC (however, derogation decisions were issued on few occasions).

The RCC can impose fines of up to 10% of the turnover achieved by the buyer for completing a notified merger before the mandatory clearance.

Apart from the merger-related procedures in front of the RCC, economic concentrations occurring in Romania in certain key sectors (i.e. (i) security of citizens and collectivities; (ii) security of borders; (iii) energy; (iv) transportation; (v) security of vital resource supply systems; (vi) critical infrastructure; (vii) IT and communications; (viii) financial, fiscal, banking, insurance activities; (ix) arms, ammunition, explosives, toxic substances; (x) industrial security; (xi) the protection against disasters; (xii) the protection of agriculture and of the environment; (xiii) privatisations) should be notified to the Superior Council of State Defence for verifying compliance with the state defence rules.

Also, it is expected that a new government ordinance will be issued to implement locally the procedures necessary for the application of the EU Foreign Direct Investment Regulation (i.e. Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union). An increase in the scrutiny of mergers & acquisitions from the perspective of their compatibility with state defence is expected.

## 11. What is the normal merger review period?

The RCC shall issue a decision to either authorise a merger or open an in-depth investigation within 45 days after the submission becomes effective (upon registration at the RCC or, upon submission of additional required information).

In practice, the review period (phase I) is likely to take up to 60-90 days, since the authority usually takes 15-25 days before it declares the submission complete and the statutory time starts to run. In certain cases, a simplified procedure is available.

If an investigation is opened (phase II), the RCC shall issue a decision of refusal/authorisation/conditional authorisation within a 5-month term after the notification becomes effective.

## 12. Are there any fees applicable where transactions are subject to local competition review?

Where prior RCC clearance is required, the notifying party/parties must pay an initial review fee of RON 4.775 (approximately EUR 1,000).

If the authorisation of the economic concentration is granted, an authorisation fee ranging from EUR 10,000 up to EUR 25,000 shall be paid.

In addition, in case of transactions triggering phase II assessment (i.e. an investigation is opened in view of performing the merger assessment), the authorisation fee is set from EUR 25,001 to EUR 50,000.

## 13. Is there any possibility for companies to obtain State Aid in Romania?

The Treaty rules and principles on State aid are directly applicable in Romania (in particular Article 107-109 of the Treaty). The European Commission has sole competence in State aid matters, while the RCC acts as contact authority for the Romanian State. In Romania, there are aid schemes in place for different sectors of activity (a list is available at www.ajutordestat.ro). Such were either subject to prior authorisation from the Commission or issued under an EU exemption regulation or *de minimis* aid principles. Also, the Commission authorised, in certain cases, individual aid for companies located in Romania.

## 14. What were the major changes brought by the COVID-19 crisis in the field? Will these changes stick?

In order to manage the economic impact of the COVID-19 outbreak, the European Commission adopted a new Temporary Framework which enabled various types of aid, i.e direct grants, subsidised public loans, tax advantages etc., Member States having the possibility to design measures in line with existing EU State aid rules.

At national level, multiple stated aid schemes were adopted, such as individual aid, state aid scheme to support SMEs, aid to support the activity of regional airports etc.

With regard to the activity of the RCC during the COVID-19 crisis, the competition authority provided assistance to other national authorities in the field of state aid and also issued various recommendations for the companies to assure the maintenance of correct market behaviour in line with the Competition Law.

Thus, even in the exceptional circumstances of the COVID-19 pandemic, the application of the Competition Law is not suspended and the RCC is vigilant to the protection of the market and consumers.