

The International Comparative Legal Guide to:

Competition Litigation 2009

A practical insight to cross-border Competition Litigation



Published by Global Legal Group with contributions from:

Accura	Egorov Puginsky Afanasiev & Partners	Shepherd and Wedderburn LLP
Allen & Overy Luxembourg	Eugene F. Collins	SJ Berwin
Andrékó Linklaters	Gernandt & Danielsson Advokatbyrå KB	Softysiński Kawecki & Szlęzak Legal Advisors, L.P.
Ashurst LLP	Kaye Scholer LLP	Stibbe
Barcellos Tucunduva Advogados	Kim & Chang	Stikeman Elliott LLP
Boga & Associates	Kronbergs & Čukste	Thommessen Krefting Greve Lund AS
bpv Hügel Rechtsanwälte	Linklaters	Vasil Kisil & Partners
Čechová & Partners	Lovells LLP	Vejmelka & Wunsch
Cleary Gottlieb Steen & Hamilton LLP	MAQS Law Firm	Walder Wyss & Partners Ltd.
Clifford Chance, S.L.	O'Melveny & Myers LLP	Webber Wentzel
Dittmar & Indrenius	Pachiu & Associates	White & Case LLP
	Sérvulo & Associados	

Romania

Florentina Negrutiu



Alina Deiac



Pachiu & Associates

1 General

1.1 Please identify the scope of claims that may be brought in Romania for breach of competition law.

In case of breach of the provisions of Law No. 21/1996 on competition, republished with the Official Gazette No. 742/16.08.2005 as further amended (hereinafter “**Competition Law**”), individuals and/or legal entities have the right to claim in court the complete remedy of the damages incurred to them through anti-competitive practices banned under the Competition Law, irrespective of the sanctions enforced by the Romanian Competition Council in compliance with the provisions of this law.

The plaintiffs are entitled to seek for interim relief, compensation for damages or declaratory and injunctive relief.

1.2 What is the legal basis for bringing an action for breach of competition law?

Articles 5, 6, 12, 49 and 61 of Competition Law represent the main legal basis for bringing an action for breach of the national competition provisions.

The action for breach of the European competition law is grounded on Articles 81 and 82 of the EC Treaty.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law claims is derived both from international and national law.

The provisions of the *acquis communautaire* in the field of competition have been implemented in the Romanian legislation. Thus, the EC Treaty provisions of Article 81 on cartels, collusion, anti-competitive practices and Article 82 on monopolies or preventing the abuse of firms’ dominant market position (including Regulation No. 1/2003 on the application of these articles) have been implemented by the national competition legislation through Articles 5 and 6 of the Competition Law.

Therefore, Romanian competition law is aligned with the EU policy in the field of competition, ensuring compatibility in the way of approaching and regulating the agreements, concerted practices, abuse of dominant position and the control of the economic concentrations.

1.4 Are there specialist courts in Romania to which competition law cases are assigned?

Any individual or legal entity that seeks compensation as a result of unlawful competition practice may file a claim before the lower civil courts pursuing the general civil procedure rules (i.e. either the Court of First Instance - Rom. *judectorie* - or the Tribunal - Rom. *tribunal*, depending on the claim’s value). The commercial sections within the aforementioned courts of law are competent to solve competition cases.

On the other hand, the decisions and regulations on anti-competitive practices adopted by the Competition Council may be challenged within 30 days as of the date of communication or publication thereof, as the case may be, with the administrative section of the Bucharest Court of Appeal. The decision of this court may be appealed (Rom. *recurata*) before the High Court of Justice.

In case of breaching the provisions of the Competition Law, the Competition Council may apply fines and may take the necessary measures to ensure compliance with the legal provisions in the competition sector. In case such measures are not observed by the entities in default, the Competition Council may request the Bucharest Court of Appeal to enforce one of the following measures:

- annulling contracts or contractual clauses under which the dominant position is abusively exploited;
- annulling the act or acts under which an economic concentration creates a dominant position, even if the issued legal act or acts have established a new legal entity;
- limiting or prohibiting access to the market;
- selling the company’s assets; or
- restructuring the company by spin-off.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

Any individual or legal entity which can justify an actual and legitimate interest may bring action in front of the competent civil courts, in case of breach of the provisions of the Competition Law. As regards multiple claimants, the Romanian civil procedure rules provide that several individuals or natural entities may act jointly as plaintiffs if the subject of the trial is a common right or obligation or if their rights or obligations have the same source. Such “group” is called by Romanian case law “*litisconsortium*”.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The actions grounded on Competition Law or EC competition rules may be brought in front of Romanian civil courts if the infringement of such provisions takes place within the Romanian territory or outside the Romanian territory, when they produce effects within the Romanian territory. The competent courts dealing with claims for damages are the lower civil courts, as described under question 1.4.

The territorially competent court is established on the basis of the general principles set out by the Romanian civil procedure rules (i.e. *actor sequitur forum rei*). Therefore, the claim for damages is brought in front of the court from the defendant's domicile, in case of natural persons, or from the defendant's headquarters, in case of legal entities.

1.7 Is the judicial process adversarial or inquisitorial?

The civil judicial process in Romania is inquisitorial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Interim measures are available in competition law cases.

2.2 What interim remedies are available and under what conditions will a court grant them?

Any interim measure that temporarily provides protection of the plaintiff's rights before a final decision has been reached, is available in front of the civil courts. The court may decide on an interim measure in the following alternative situations:

- any delay in reaching a decision may lead to the permanent loss of the plaintiff's alleged right;
- the necessity to avoid an imminent loss that cannot be otherwise recovered; or
- the necessity to remove any obstacles regarding the enforcement of the final decision.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

According to the Romanian civil procedural rules, the court may decide to grant compensation to the plaintiff for the damages incurred, due to the breach of the competition law.

The relevant court will take into consideration the following criteria, prior to granting such compensation to the plaintiff:

- the violation of the Competition Law's provisions by the defendant;
- the proof that the plaintiff incurred certain damages due to the violation of the Competition Law; and
- the cause-effect link between the defendant's action or lack of action and the claimed damages.

The relevant court may also reach one of the following decisions:

- to declare a certain document concluded without complying

with the provisions of the Competition Law as null and void;

- to establish that the behaviour of the defendant is illegal with regard to the Competition Law;
- to forbid the performance of anti-competitive activities; and
- to take any other adequate measures against the defendant for protecting the plaintiff or other undertakings against the defendant's anti-competitive practices.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available?

The relevant civil court grants compensation to the plaintiff for the damages caused by breach of the Competition Law, taking into consideration the actual and certain damages incurred by the plaintiff. The compensation for the damages have to include both actual losses suffered (*damnum emergens*) as well as lost profits (*lucrum cessans*). Furthermore, damages caused by the defendant both intentionally as well as negligently (if the latter situation has not been excluded based on mutual agreement of the parties) are taken into account when the claimant requests compensation. The plaintiff has to bring in front of the court relevant evidence that can sustain the amount of compensation claimed. The relevant court has full authority to evaluate the evidence brought to the court by the plaintiff, and to decide on the amount of the award. Nevertheless, the relevant court may not establish an award higher than the plaintiff's claim.

Exemplary damages are not available under the Romanian civil law.

3.3 Are fines imposed by competition authorities taken into account by the court when calculating the award?

The Competition Council is the sole authority competent to apply fines on competition matters. The fines are calculated as a percentage of the offender's turnover report from the previous financial year, starting from 1% and reaching 10%. Under the law, amounts representing tariffs, taxes and fines or other penalties imposed by the Competition Council represent revenues to the state budget.

Fines applied by the Competition Council are taken into account by the administrative court when dealing with complaints against the decisions of this body, as described under question 1.4.

Nevertheless, taking into consideration the administrative nature of the sanctions applied by the Competition Council as compared to the scope of the private law suit, the civil courts do not take into account the fines when determining the value of the compensation damages to be awarded to the plaintiff.

4 Evidence

4.1 What is the standard of proof?

Any evidence is allowed to be brought in front of the court, as long as the relevant court deems it necessary for elucidating the case. Evidence can be brought at the initiative of each party and also *ex officio* by the judge. The importance of each piece of evidence is not established separately. The judge has full authority to repeal or accept any piece of evidence. In reaching such decision the judge analyses the entire elements of the case and the connections existing between different pieces of evidence.

4.2 Who bears the evidential burden of proof?

According to the provisions of Romanian civil law, the claimant has the responsibility to prove the facts brought in front of the court. The defendant is entitled to propose to the relevant court contrary evidence in sustaining its interests.

4.3 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

There are no limitations concerning the forms of evidence, with some exceptions, such as the rule regarding the prevalence of written documents over witness testimonies, as shown under question 4.5. Also, special legal provisions apply for obtaining and presenting as evidence audio and/or video recordings.

In general, the most common means of proof are: documents; witness testimonies; expert opinions; site investigation; confessions; and presumptions. Evidence can be brought during the court proceedings in first instance (Rom. *fond*) and appeal (Rom. *apel*), as well as second appeal (Rom. *recurs*) - with the exception in the later case of witness testimonies and expert appraisals.

At the request of the parties or *ex officio*, and when the court deems it necessary for the clarification of a certain aspect, it may order the performance of an expert appraisal. The judge establishes the issues on which the expert(s) have to investigate and the timeframe for such investigation. If the investigation is led by several experts which reach different conclusions, or the results of the investigation are not conclusive, the judge may order a counter-expert appraisal or the supplementation of the initial expert appraisal.

4.4 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

Disclosure is not expressly regulated in Romanian civil litigation. However, in principle the parties or third parties have the obligation to present to the court any evidence they are aware of which would help in clarifying the case, except for the situations presented under question 10.2.

During the civil proceedings, the court may order to the parties or to a third party to submit any necessary documents or it may request documents from the Competition Council. Moreover, when one party proves that the opposite party or a third party is in the possession of a document concerning the case, the court is entitled to order its presentation.

4.5 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

The witness's testimony represents one of the forms of evidence frequently used in the civil trial. Testimony is oral and is made by oath under penalty of perjury. As a general rule, the testimony cannot be used to prove either the content or against the content of a written document. Witnesses can however provide proof on the conditions in which a certain document has been concluded or on the intentions and the real will of the parties thereto.

Usually, the witnesses are proposed by the parties in *limine litis*, with certain exceptions in following cases:

- when the need of such proof results from the hearings;
- when the administration of this proof does not cause delay in the court proceedings; or

- when witness testimony has not been requested by the party in due time because of lack of professional defence.

The court is responsible to summon the witnesses for a hearing. Taking into consideration the active role of the judge, witnesses can be asked *ex officio* to testify, irrespective of the parties' consent. In case the witness refuses to appear in front of the court, the judge may issue a peremptory writ and apply a fine of RON 30 to RON 500 (approx. EUR 8.50 to EUR 143).

Cross-examination by the attorneys or the parties is not admissible. The judge is responsible for questioning directly the witnesses. Moreover, the parties and their attorneys may ask only the judge to address certain questions to the witnesses. The hearing is very dynamic and is based on the principle of contradictoriness.

4.6 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

The Competition Council's decisions and the decisions of competition authorities from other countries may be presented as evidence in court, and such decisions create refutable presumptions. Foreign decisions (issued by courts of law or other competent authorities) are taken into account by the judge to the extent they have been subject of the special recognition and enforcement procedure regulated under the Romanian law.

Article 16 of the Council Regulation No. 1/2003 which provides that the national courts cannot rule counter to the Commission's decision which renders a judgement on the same facts, is applicable.

4.7 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

All evidence that the parties intend to use in front of the court must be submitted with the court's registry. In order to observe the principle of the right of defence, the parties have full access to all the documents submitted by the opposite party and to the case's file. The pieces of evidence proposed by the parties have to be accepted by the judge. The judge accepts only the evidence that meets the following general conditions:

- the evidence is legal;
- the evidence is plausible;
- the evidence is pertinent; and
- the evidence is conclusive.

If the court appreciates that it has all the necessary information to reach a decision and to establish the award to be granted to the plaintiff, it shall not accept the evidence that reveals any confidential element that can cause damages to the parties.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

According to Article 2(1) b of Competition Law, the provisions of the law do not apply to central or local public administration authorities provided that measures taken by such authorities are to enforce other laws or to protect a major public interest.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

Romanian law system does not contain provisions regarding the “passing on defence”. However, a plaintiff may only claim for the loss actually suffered and the lost profits.

Moreover, according to Competition Law, any person who suffered certain damages has the right to sue for the complete remedy of the damage caused by the anti-competitive practices. Considering such, as a matter of principle, indirect purchasers could have legal standing to sue.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

In case of damages actions, the rules of the Romanian civil law and civil procedural law apply. Considering such, a claim for breach of competition law should be brought to justice within three years as of the date at which the damaged party became aware of the damage and the person who caused the damage regardless of the contract or tortious nature.

In case of actions brought to obtain declaratory relief there is no limitation term provided.

As regards the decisions adopted by the Competition Council in matters related to anticompetitive practices, these can be challenged with the Bucharest Court of Appeal within 30 days as of the publication date, or as the case may be as of the communication date (please see question 1.4).

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

It is quite difficult to predict the duration of a trial regardless of the area of law brought to court. Normally, it would take approximately two to three years to get to a final judgement, depending on whether the decision of the Court of First Instance can only be challenged with second appeal (Rom. *recurs*) or the first appeal (Rom. *apel*) is also available.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

The parties can reach a settlement at any time. In this case, the role of the court is being reduced at just confirming the settlement entered into by the parties. Considering such, the parties do not require the permission of the court to discontinue the action brought before it.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Usually, at the request of the other party, the unsuccessful party has to pay all legal costs incurred by the other party. However, as

regards the work performed by the lawyer, Romanian Civil Procedure Code provides that for valid reasons, the court may reduce or increase lawyer’s fees, according to the Bar’s minimum fee table, if it is found that the costs are too high or too low.

Moreover, when each party succeeds on some matters and fails on others, the court shall decide the costs each party has to bear. The court can in this case compensate the costs made by the parties. In case the action of the claimant is partially admitted, the defendant can be bound to pay the legal costs proportionally with the admitted claim.

8.2 Are lawyers permitted to act on a contingency fee basis?

Lawyers are permitted to act on a contingency fee basis. As an exception, in criminal cases, lawyers are not entitled to such fee for their legal services.

The contingency fee is normally added to the fixed fee or hourly fee charged by a lawyer in a case.

8.3 Is third party funding of competition law claims permitted?

There is no specific provision in Romanian legislation as regards third party funding of competition law claims. However, under the general contract law, such agreements can be concluded, provided that, in case of companies, the third party justifies an interest (e.g. compensation with an amount due to the financed party).

9 Appeal

9.1 Can decisions of the court be appealed?

In case the value of the competition claim is up to RON 100,000 (approx. EUR 28,500), the competent court to set the trial is the Court of First Instance. In this case, the parties can only challenge the decision with second appeal with the Tribunal.

In case the value of the competition claim exceeds RON 100,000 (approx. EUR 28,500) the competent court to decide on the case is the Tribunal. The decision of this court can be challenged with appeal, on the merits of the case, with the Court of Appeal. On law matters only, the decision given by the Court of Appeal can be challenged with second appeal with the High Court of Justice.

On the other hand, the decisions and regulations adopted by the Competition Council can be challenged with the Bucharest Court of Appeal, by administrative proceedings. The decision taken at this stage shall be without right of first appeal (Rom. *apel*). However, the parties have the possibility to challenge the decision with second appeal (Rom. *recurs*) before the High Court of Justice.

10 Leniency

10.1 Is leniency offered by a national competition authority in Romania? If so, is (a) a successful and (b) an unsuccessful applicant for leniency given immunity from civil claims?

In Romania, the leniency policy was introduced on May 13, 2004 by Order 93/2004 of the Competition Council on the application of the Guidelines on leniency.

According to such guidelines, an undertaking may benefit of either a total immunity from fines or of the reduction of the fines to be imposed by the Competition Council.

An undertaking may benefit from total immunity from fines if it

cumulatively meets the following conditions:

- cooperates fully, continuously and expeditiously with the Competition Council;
- ends its involvement in the alleged illegal activity no later than the date at which it submits evidence; and
- did not take steps in order to coerce other undertakings to participate in the illegal alleged activity.

An undertaking may benefit of reduction of fines if it cumulatively fulfils the following conditions:

- provides the Competition Council with evidence of the alleged infringement, which represents significant added value with respect to the evidence already in its possession; and
- ends its involvement in the suspected infringement no later than the date at which it submits the evidence to the Competition Council.

However, regardless of the success of the application submitted with the Competition Council by the leniency applicants, such applicants are not granted immunity from civil claims.



Florentina Negrutiu

Pachiu & Associates
4-10 Muntii Tatra Street, 5th floor
Bucharest 1, RO 011022
Romania

Tel: +40 21 312 1008
Fax: +40 21 312 1009
Email: florentina.negrutiu@pachiu.com
URL: www.pachiu.com

Florentina graduated from the Law School of the Bucharest University in 1999 (J.D. equivalent) and is a postgraduate of the international law section of the Law School of Bucharest University. Florentina holds an LL.M. degree in German and EU Law from the Friedrich-Schiller University Jena, Germany.

She served for 8 years as a legal adviser with the Romanian Ministry of Justice in the departments for human rights, international relations, and EU affairs.

Florentina provides legal assistance in matters related to commercial contracts, corporate law, real estate projects, and regulatory. Her expertise covers also matters related to EU and international law, administrative law, and civil law.

Florentina is fluent in Romanian, English and German, and conversant in French.

10.2 Is (a) a successful and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

According to Romanian civil and civil procedural law any party who possesses evidence with regard to a case brought to court has the obligation to present such evidence. The court may order any party who is in the possession of an evidence to present it to court.

An applicant for leniency is only permitted to withhold evidence in the following instances:

- the evidence regards absolutely personal matters;
- the presentation of the evidence would breach the obligation of professional secret; and
- when the presentation of the evidence would entail criminal proceedings of the party or of any other person or would expose such person to public disgrace.



Alina Deiac

Pachiu & Associates
4-10 Muntii Tatra Street, 5th floor
Bucharest 1, RO 011022
Romania

Tel: +40 21 312 1008
Fax: +40 21 312 1009
Email: alina.deiac@pachiu.com
URL: www.pachiu.com

Alina graduated the Law School of West University of Timisoara in 2007 (J.D. equivalent) and holds a Master degree of Business Law awarded by the Law School of Bucharest University.

Alina is a junior member of the Bucharest Bar Association and a member of the National Union of Lawyers. Her area of expertise includes labour and corporate law as well as mergers & acquisition. Alina is fluent in Romanian and English and conversant in Spanish.



PACHIU & ASSOCIATES

ATTORNEYS AT LAW | RECHTSANWALTE | ABOGADOS

Pachiu & Associates is a Bucharest based business law firm established by Romanian attorneys. The firm currently consists of 25 lawyers plus additional staff comprising paralegals, authorised translators and supportive staff. The lawyers of the firm are all graduates of leading universities in Romania or abroad. More than half of the lawyers are senior members of the Bucharest Bar Association. All lawyers are fluent in Romanian and English, and some are fluent in German, French and Spanish. The Firm provides for a full range of commercial and corporate legal advice from its main office in Bucharest and its secondary office in Cluj-Napoca (west of Romania).

The Firm has extensive expertise in matters related to corporate governance, corporate disputes, securities, mergers and acquisitions, insolvency, commercial contracts, offshore and tax structures, labour law, real estate, anti-trust law, intellectual property, banking and project financing, secured transactions, cross-border transactions, public acquisitions, procurement, and litigation. Apart from its consistent mergers & acquisitions and cross-border transactions practice, the firm has developed a strong practice in tax, securitisation and real estate, construction, labour and intellectual property. Any type of transaction is always duly considered from a tax point of view.

The firm maintains a close relationship with some leading multinational law firms and other small and medium-sized law firms from abroad, so as to ensure efficient liaison with important foreign business centres and jurisdictions.