

The International Comparative Legal Guide to:

Cartels & Leniency 2008

A practical insight to cross-border Cartels & Leniency



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Delia Vasiliu



Ramona Lie

Pachiu & Associates

THE CARTEL PROHIBITION

1 The Legislation

1.1 What is the basis and general nature of the cartel prohibition?

The basis for cartel prohibition is represented by Article 5 (1) of the Competition Law No. 21/1996 (the “Law”) which defines antitrust agreements as any express or tacit agreements between undertakings, decisions of the associations of undertakings or concerted practices, having as the object or effect the restriction, prevention or distortion of competition on the Romanian market or on a part of it.

Violation of the prohibition regarding antitrust agreements constitutes administrative offence, criminal offence and tort and therefore triggers contraventional, criminal or civil liability, as the case may be.

1.2 What are the specific substantive provisions for the cartel prohibition?

In particular the prohibition refers to those practices consisting of: (i) concerted fixing, directly or indirectly, of the selling or purchase prices, tariffs, rebates, markups, as well as any other terms of trading; (ii) limiting or controlling production, distribution, technological development or investments; (iii) allocating distribution markets or supply sources according to territorial criteria, sales-and purchase volume or other criteria; (iv) imposing unequal terms for equivalent services to trading partners, thus causing a competitive disadvantage to some of them; (v) conditioning the conclusion of contracts by imposing upon partners the acceptance of certain clauses stipulating additional services which, either by their nature or by commercial usage, do not relate to the object of such contracts; (vi) participating, in a concerted manner, with rigged bids in auctions or any other forms of competitive tendering; or (vii) eliminating competitors from the market, limiting or preventing access to the market and the free exercise of competition between other undertakings, as well as agreements not to buy from or to sell to certain parties without reasonable justification.

The provisions of Article 5 (1) are not applicable to undertakings: (i) if their turnover for the fiscal year prior to the alleged antitrust behavior does not exceed the threshold annually set by the Competition Council; and (ii) if the market share of the involved undertakings does not exceed 5% on any of the relevant affected

markets, for cases of agreements among competing undertakings (“horizontal agreements”) and 10% on any of the relevant affected markets, for cases of agreements among undertakings which do not compete (“vertical agreements”). Nevertheless, the aforementioned limitations are not applicable to antitrust practices when they refer to prices, tariffs, market division agreements or auctions.

1.3 Who enforces the cartel prohibition?

Identification and investigation of the violations of the cartel prohibition are incumbent to Competition Council (rom.: “*Consiliul Concurentei*”) who is represented by the competition inspectors.

The Competition Council is an autonomous administrative authority. It includes seven members, appointed by the President of Romania, at the proposal of the Government, for a five-year term of office. They may be reappointed for one term.

The Competition Council has the power to conduct investigations through its competition inspectors, upon its own initiative or upon a third party complaint, claim or notification. The Competition Council is entitled to make decisions regarding the violations of cartel prohibition.

When an alleged antitrust practice is confirmed, the Competition Council may decide either to order that the antitrust practices found are stopped or to formulate recommendations, to impose special conditions and other obligations to the parties involved, or to fine the undertakings.

The Competition Council may impose - through a decision of interlocutory measures - to the undertakings part of the cartel to take any measure that it deems necessary for re-establishing the normal competitive environment and for bringing the parties back to their previous status quo. The suspension or banning of the identified antitrust practices, as well as the injunctions sent to the undertakings and requesting them to return to the previous circumstances, shall be ordered by the Competition Council only when finding obvious illicit actions that constitute antitrust practices expressly banned by this law and that must be terminated without delay in order to forestall or stop a serious and certain damage from being done. Such measures shall be strictly limited, in duration and scope, to what is necessary for correcting an obvious and intolerable alteration of free competition.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The basic procedural steps between the opening of an investigation and the imposition of sanctions are the following:

- The competition inspectors propose to the plenum of the Competition Council in the investigation report, the sanctioning of the offences.
- The competition inspectors propose in a note to the commissions of the Competition Council the application of the comminatory fines.
- The Competition Council resolves by decision upon the measures to be adopted by the offender.
- In case within 45 days from communicating the decision, the offender does not comply with the measures disposed, the Competition Council may apply the maximum fine stipulated by Law.
- In case the offender does not adopt the measures disposed by the Competition Council, the competition inspectors shall apply sanctions and, for this purpose, shall draw up a report for the acknowledgement of the offence and the application of the sanction.

The competition inspector will inform the offender regarding his right to object to the contents of the acknowledgement and sanctioning document.

1.5 Are there any sector-specific offences or exemptions?

There are sector-specific block exemptions for the following categories of practices: selective distribution; aggregate or exclusive distribution; exclusive buying; research-development; specialisation; patent license and know-how; franchise; motor vehicles distribution; spare parts and service; and insurance.

In such cases, the exemptions are established through Competition Council regulations.

However, the benefit of block-exemption is granted only if the agreements including such block-exemption contribute to: (i) improving the production or distribution of goods, executing work operations or supplying services; (ii) promoting technical or economic progress, improving the quality of goods or services; (iii) consolidating the competitive position of the small and medium-sized undertakings on the domestic market; or (iv) charging, over the long run, substantively lower prices to the consumers. Moreover, it is necessary that the following conditions should be cumulatively met: (i) the positive effects prevail over the negative ones or are sufficient to compensate the restriction of competition; (ii) customers or consumers are assured a benefit corresponding to that realised by the parties from the respective practices; (iii) the possible restrictions of competition are critical to obtain the expected advantages, and the respective practices do not impose upon the parties restrictions that are not necessary to attain the aforementioned objectives; and (iv) the respective practices do not allow the undertakings to eliminate competition from a substantial part of the product or service market in question.

1.6 Is cartel conduct outside Romania covered by the prohibition?

Yes, cartel conduct outside your jurisdiction is covered by the prohibition when it has effects within the Romanian territory.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	No
Carry out compulsory interviews with individuals	Yes	No
Carry out an unannounced search of business premises	Yes	No
Carry out an unannounced search of residential premises	Yes*	No
■ Right to 'image' computer hard drives using forensic IT tools	No	No
■ Right to retain original documents	No	No
■ Right to require an explanation of documents or information supplied	Yes	No
■ Right to secure premises overnight (e.g. by seal)	Yes	No

Please Note: * indicates that the investigatory measure requires the authorisation by a Court or another body independent of the competition authority.

2.2 Specific or unusual features of the investigatory powers referred to in the summary table.

The Law does not provide specific or unusual features of the investigatory powers referred to in the summary table.

2.3 Are there general surveillance powers (e.g. bugging)?

At local level, territorial units of the Competition Council do in general survey the undertakings' behaviour on the market in view of early detection of antitrust practices.

However, the use of surveillance technical means such as telephone tapping, room bugging or other forms of registration is allowed in Romania only in very limited cases - criminal investigations or intelligence specific activities - and the performance of such operations takes place in very strict conditions prescribed by the law.

2.4 Other powers of investigation.

In general, competition inspectors have the following inspecting powers: (i) to access the properties, locations or headquarters of the undertakings; (ii) to examine any documents, ledgers, financial/accounting papers and commercial papers or other evidence related to the activity of the undertakings, regardless of their location; (iii) to take statements from the representatives and the employees of the undertakings regarding the relevant facts or documents; (iv) to collect any documents, ledgers, financial/accounting papers and commercial papers or from other evidence related to the activity of the undertakings or to obtain, in any form, copies or excerpts from these documents; and (v) to seal any location where the undertakings carry on their activity and any documents, ledgers, financial/accounting papers and commercial papers or other

evidence related to the activity of the undertakings for the period and to the extent this is necessary for the inspection.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The Competition Council through its competition inspectors carries out searches on both business and residential premises.

Nevertheless, the competition inspectors may carry out searches on residential premises, i.e. at any other locations than the business premises, including the residence, lands or means of transportation of the leaders, administrators, directors and other employees of the undertakings subject to investigation, only on the basis of the judicial authorisation granted by a judge.

The fundamental right to defence is recognised and guaranteed by the Romanian Constitution. Still, the cases when the presence of a lawyer is compulsory for the validity of the procedural acts are limited to situations regarding either restrictions to personal freedom (e.g. in criminal cases, when the defendant is under arrest) or vulnerable persons (e.g. minors). In all other circumstances, searches performed by the inspectors of the Competition Council can take place without a lawyer being present.

2.6 Is in-house legal advice protected by the rules of privilege?

The legal advisor has the mandatory obligation to preserve the confidentiality on all aspects of the case and he/she cannot be forced by any individual/legal entity to divulge such aspects.

2.7 Other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals.

The competition inspectors having access to the documents, data and information of central and local public administration bodies, as well as of any other institutions and public authorities shall observe the state secret or business secret character legally attributed to such documents, data and information.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used in connection with a cartel investigation?

The obstruction of investigations represents a misdemeanour and is sanctioned by the competition inspectors with fines of up to 1% of the aggregate turnover of the financial year prior to the sanctioning.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The violations of cartel prohibitions are deemed as administrative offences, sanctioned by fines of up to 10% of the aggregate turnover of the undertaking involved, calculated for the financial year prior to the year of sanctioning.

In addition, on the basis of findings of a Competition Council's decision, the returns or, as the case may be, the supplementary incomes achieved by undertakings as consequence of perpetrating administrative offences shall be disgorged and deposited to the state budget.

Moreover, the Competition Council may issue a decision to force

the undertakings to pay comminatory fines of up to 5% of the daily average turnover of the financial year prior to the year of sanctioning, for each day of delay, calculated from the date set up in the decision, in order to influence them to observe the provisions of Article 5 (1) of the Law regarding cartel prohibition.

Furthermore, individuals and/or legal entities reserve the right to sue for the complete remedy of the damages caused by employment of such antitrust practices.

3.2 What are the sanctions for individuals?

Participation by an individual with fraudulent intent and in a decisive way to the conceiving, the organisation or the realisation of any of the antitrust practices prohibited under Article 5 (1) of the Law which are not deemed as exemptions, shall be considered a criminal offence and shall be convicted to imprisonment from 6 months to 4 years or shall be fined. In certain cases, payment of a fine may replace the imprisonment.

3.3 What are the applicable limitation periods for the imposition of sanctions for cartel conduct?

The right of the Competition Council to apply sanctions for violations of the provisions of the Law regarding antitrust practices shall be applicable for a limited period of 5 years. The statute of limitations of the Competition Council begins the day when the antitrust practice stopped. For violations of the Law which are continuous or reiterative, the statute of limitations begins the day the last antitrust action or fact stopped.

3.4 Is cartel conduct by individuals potentially an extraditable offence?

The general rules on extradition apply, and they provide that the extradition of an individual can be granted if: (i) a criminal investigation or trial is undergoing in the requesting state or if the requested person has to execute a punishment or a safety measure; (ii) the level of punishment for the alleged offence is minimum 1 (one) year imprisonment or in case of the execution of the punishment, at least 4 (four) months; and (iii) the offence is punishable under the Romanian criminal law (condition of double criminality). Romanian citizens can be extradited to countries which entered with Romania into such an extradition treaty, and with fulfilment of some additional conditions.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

There is no express legal prohibition regarding a company paying the legal costs and/or the financial penalties imposed on its former or current employees.

LENIENCY / WHISTLE-BLOWING

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Yes, pursuant to the provisions of Article 51 (2) of the Law, the Guidelines regarding the conditions and application criteria of a

leniency policy were adopted under Competition Council Order No. 93/2004.

According to the aforementioned guidelines, the Competition Council will grant an undertaking immunity from fine if such undertaking is the first to submit evidence that, in the Competition Council's view, may enable the Council: (i) to open the investigation procedure pursuant to Article 40 of the Law; or (ii) to prove an infringement of Article 5 (1) of the Law.

An undertaking may benefit from immunity from fines if it cumulatively fulfills the following conditions: (i) cooperates fully, continuously and expeditiously with the Competition Council; (ii) renounces to participate in the alleged illegal activity, no later than the date at which it submits evidence; and (iii) did not take steps in order to coerce other undertakings to participate in the illegal alleged activity.

An undertaking may benefit from a reduction of fines if it cumulatively fulfills the following conditions: (i) the undertaking must provide the Competition Council with evidence of the alleged infringement of the law, which represents significant added value with respect to the evidence already in its possession; and (ii) the undertaking must end its involvement in the suspected illegal infringement no later than the date at which it submits the evidence to the Competition Council.

For the first undertaking which informs the Competition Council with respect to the existence of a cartel, the Competition Council grants immunity.

The reduction level an undertaking will benefit from, relative to the fine which would have been normally imposed will be granted within the following thresholds: (i) for the first undertaking that meets the conditions for reduction of fines - a reduction of 30% to 50%; (ii) for the second undertaking that meets such conditions - a reduction of 20% to 30%; and (iii) for the subsequent undertakings that met the respective conditions - a reduction of up to 20%.

In order to determine the reduction level within each of those bands, the Competition Council will take into consideration the date at which the evidence was submitted as well as the significant added value brought by it.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Any undertaking wishing to apply for immunity from a fine should contact the Competition Council, either directly or through its representative or attorney. If it is proved that the conditions related to the granting of immunity are not met, the undertaking will immediately be informed that it may not benefit from immunity from the fine regarding the suspected infringement. When the granting of the immunity from a fine is possible for a presumptive infringement of the Law, in order to comply with the conditions stipulated above, as the case may be, the undertaking may: (i) provide as soon as possible to the Competition Council all the evidence already, available to it, relating to the suspected infringement; or (ii) present in the first stage the available information in hypothetical terms. In this case, the undertaking must present a descriptive list of the evidence proposed to be disclosed at a later agreed date. This list should reflect accurately the nature and the content of the evidence, keeping, at the same time, the hypothetic character of its disclosure. The copies of the documents from which the sensitive parts have been eliminated, may be used to illustrate the nature and the content of the evidence presented in the descriptive list.

4.3 Can applications be made orally (to minimise any possible subsequent disclosure risks in the context of civil damages follow-on litigation)?

Normally, the application is made in writing. However, for the hypothesis that the leniency application is made orally, such shall be registered in order for the interviewed person to further have the possibility to rectify the registered statement. Moreover, once the application was made, all necessary evidence shall be produced.

4.4 To what extent will the application be treated confidentially and for how long?

The Competition Council should ensure the protection of business secrets and other confidential information and should be able to request undertakings that have submitted documents or statements to identify confidential information.

Where business secrets and confidential information are necessary to prove the infringement, the Competition Council should balance the interest in the protection of such information and the public interest in having the infringement of the competition rules terminated. To that end, it should assess for each document whether the need to disclose is greater than the harm which might result from disclosure.

4.5 At what point does the continuous cooperation requirement cease to apply?

The undertaking which intends to benefit from the leniency policy shall cooperate with the Competition Council throughout the entire procedure pending before the Competition Council.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

No, there are no procedures for individuals to report cartel conduct independently of their employer. However, such individuals may petition the Competition Council asking that an inspection should be performed by the Council with regard to certain cartel conducts of their employer.

6 Plea Bargaining Arrangements

6.1 Are there settlement or plea bargaining procedures (other than leniency)?

No settlement or plea bargaining procedures are possible.

APPEALS AND DAMAGES ACTIONS

7 Appeal Process

7.1 What is the appeal process?

The decisions of the Competition Council may be challenged by the interested individual or legal entity within 30 days as of the date of communication of the decision. The claim challenging such

decision shall be submitted before the Bucharest Court of Appeal. The verdict may be appealed before the High Court of Cassation and Justice. Upon request, the Court may decide to suspend execution of the decision, while court proceedings are pending.

7.2 Do courts frequently adjust the level of penalty imposed by the competition authority? If so, on what grounds?

According to the Romanian legislation, the Bucharest Court of Appeal and the High Court of Cassation and Justice are allowed to review the decisions of the Competition Council from all points of view, and to decide accordingly, including with respect to the adjustment of the penalties level. The jurisprudence reflects that the courts insist upon the correct application of the Law. Consequently, courts either confirm the Competition Council decisions, and hence the level of the imposed penalties, or cancel such decisions and invalidate the imposed penalties.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct?

According to the Law, apart from the sanctions enforced based on the provisions of the Law, individuals and/or legal entities have the right to sue for the complete remedy of the damages caused by antitrust practices, such as cartel conduct practices.

There are no special procedures for civil damages actions, and therefore the rules of the Romanian civil law and procedural law shall apply. Pursuant to the provisions of the civil law, the individual and/or legal entity claiming for damages caused by a cartel conduct, shall prove (i) the fault of the defendant (the intention or negligence in breaking the Law); (ii) the loss suffered as a consequence of the defendant's behaviour; and (iii) the direct casual connection between the defendant's acting/behaviour and the loss suffered. In this type of civil damages claim the recoverable damages represent the actual loss of the complainant.

8.2 Do your procedural rules allow for class-action or representative claims?

No class-action or representative claims are allowed by the current Romanian procedural rules.

8.3 Have there been successful civil damages claims in the past?

No such civil damages claims reported on cartels have been settled by the competent courts. A possible reason could be the fact that the litigations on cartels, in fact, are very few until the present moment.

OTHER MATTERS

9 Miscellaneous

9.1 Provide brief details of significant recent or imminent statutory or other developments in the field of cartels and leniency.

A special measure to be adopted refers to the establishment of a "competition record", similar to the criminal or fiscal records, which shall enable the Competition Council to evaluate an undertaking from the point of view of its previous conduct in the field of competition. This would have a particular effect in assessing whether an undertaking is qualified to benefit from leniency measures.

9.2 Please mention any other issues of particular interest in Romania not covered by the above.

The Competition Council has the power to give binding opinions on draft laws which may have an antitrust impact. Thus, legislative proposals are evaluated by the Competition Council also from the perspective of their possible favouring or determining cartel-like behaviour.

**Delia Vasiliu**

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: delia.vasiliu@lp-legal.com
URL: www.lp-legal.com

Delia graduated the Law School of West University in Timisoara in 2004. She is also a Master of Business Law postgraduate and a Ph.D. candidate in international commercial law at the Law School of Bucharest University.

She is a senior member of the Bucharest Bar Association and a member of the National Romanian Bars Association.

Delia has an extensive experience in assisting Austrian and German investors in Romania and is also a regular contributor to several reviews and law publications specialised in intellectual property law. Her expertise covers corporate law, commercial contracts, civil law, litigation, and regulatory matters. Delia is fluent in Romanian, German and English and conversant in Italian.

**Ramona Lie**

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: ramona.lie@lp-legal.com
URL: www.lp-legal.com

Ramona graduated the Law School of Babes-Bolyai University from Cluj-Napoca in 2001. She is also a postgraduate in constitutional and administrative law of the Law School of Babes-Bolyai University and a graduate of the LL.M programme in Comparative Constitutional Law of the Central European University from Budapest, Hungary.

She is a junior member of the Bucharest Bar Association and a member of the National Romanian Bars Association and she provides legal assistance in matters related to corporate law, commercial contracts, banking law, real estate law and tax law. Ramona is fluent in Romanian and English and conversant in French.



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