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Cartels

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LAW AND PRACTICE:

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Contributed by Popovici Nițu Stoica & Asociații

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

Contributed by Popovici Nițu Stoica & Asociații

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Popovici Nițu Stoica & Asociații is a leading Romanian independent law firm. Established in 1995, as one of the first incorporated partnerships, the firm brings together strong local resources, with exceptional credentials, outstanding records and distinguished careers in law, business and academia. Popovici Nițu Stoica & Asociații acts as outside counsel to a wide spectrum of legal entities, including key players in major industries, financial institutions, public authorities and investment funds. Popovici Nițu Stoica & Asociații is experienced in most major legal fields. Popovici Nițu Stoica & Asociații provides quality legal services combined with a sincere relationship with its clients. Competition and antitrust is central to the firm

and a core area of practice. The competition practice covers a full range of competition and antitrust legal services including guidance during merger control proceedings, restrictive agreements and abuses of dominant position, antitrust and state aid litigation. The competition team has been involved in competition proceedings in almost all industries investigated by the Romanian Competition Council. Lawyers offer “one-stop shop” services, clients retaining the firm from the beginning of investigations until closure. The competition team has strong litigation practice which covers counselling and assistance before the Romanian Competition Council, disputes, and judicial review before the courts.

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1. Basic Legal Framework

1.1 Statutory Basis/Bases for Challenging Cartel Behaviour

The Competition Act No 21/1996 (the Competition Act) establishes the primary rules regarding cartel sanctioning. Article 5 of the Competition Act mirrors the content of Article 101 of TFEU and prohibits all agreements, concerted practices and decisions of associations of undertakings that have as their object or effect the prevention, restriction or distortion of competition.

Article 5 of the Competition Act lists several deeds that would qualify as anti-competitive agreements, including:

- establishing – directly or indirectly – to fix purchase or sale prices or any other trading conditions;

- the limit or control of production, commercialisation, technical development or investments;
- the practice of sharing markets or sources of supply;
- applying dissimilar conditions to equivalent transactions in relation to commercial partners, thereby placing them at a competitive disadvantage; and
- concluding contracts that are subject to the acceptance of supplementary obligations by their partners which, by their nature or according to commercial usage, have no connection to the subject of such contracts.

As set out expressly in Article 7 paragraph 4 of the Competition Act, price fixing, production or sales limitations and market or client allocation practices between competitors are included within the hardcore restrictions category, and are all subject to stricter enforcement actions, with de

minimis exclusion not being available for such serious anti-competitive conduct.

1.2 Public Enforcement Agencies

The Romanian Competition Council (RCC) is the national authority charged with enforcing the antitrust policy. The RCC will also apply Article 101 of the TFEU to cases of cartels affecting trade between Member States.

1.3 Private Right of Action for Challenging Cartel Behaviour

There are private actions complementing the public enforcement of the Competition Act.

The legal framework for private competition enforcement is contained within Article 66 of the Competition Act, which mainly states that victims (both legal and natural persons) of an anti-competitive act can seek relief in court, and within Ordinance No 39/2017, which details the competent courts and the persons who are entitled to introduce such actions. Within a private enforcement case, the claimant should prove an infringement of national or EU competition rules, the defendant's fault, the damage caused and the link between the infringement and the damage caused to the claimant. However, in follow-on action cases, the infringement is considered to be already proved by the sanctioning decision (sanctioning decisions of the European Commission and the RCC represent conclusive evidence, while sanctioning decisions issued by foreign competition authorities or courts represent a rebuttable presumption of the infringement). In addition, the above-mentioned Ordinance establishes a rebuttable presumption that cartels cause harm.

1.4 Potential Liability

There are three forms of liability for cartel conducts:

- Administrative liability: the undertakings can be sanctioned by the RCC with fines ranging from 0.5% to 10% of the turnover realised by the infringer in the year preceding the sanctioning decision. In practice, cartels are usually sanctioned with fines ranging from 4% to 8%.
- Criminal liability: individuals initiating a cartel may not be sanctioned by the RCC. However, the Competition Act (article 65) sets out the conditions under which individuals (only those with management responsibilities) can be subject to criminal liability.
- Civil liability may be triggered under private enforcement rules.

1.5 Statutes Indirectly Taking Account of Alleged Cartel Behaviour

Cartel behaviour may be challenged indirectly under public acquisitions law and also under criminal law.

Law No 98/2016 on public acquisitions includes two cases of debarment from governmental tenders due to cartel infringement or a potential breach of competition law:

- Article 167 paragraph 1 (c) of Law No 98/2016 on public acquisitions provides that contracting public authorities shall exclude a company from the public tender if it has engaged in bid-rigging schemes. Therefore, the mere existence of a decision issued by the RCC is sufficient for the public contracting authorities to exclude the companies from the public tenders. Within this specific point, there are several discussions regarding whether or not the decision issued by the RCC should be final/irrevocable. In fact, companies have been excluded based on this specific Article, despite the fact that the RCC's decision was not irrevocable.
- Where there is no prior decision of the RCC, Article 167 paragraph 1 (d) of Law No 98/2016 on public acquisitions provides that, if the contracting authority has sufficient reasonable indicia or concrete information with respect to the conclusion of agreements that distort competition within the public tender, it shall exclude the companies concerned from the tender. Before doing so, the contracting authority shall request the RCC's point of view on the identified indicia with respect to the distortion of competition.

Article 246 of the Criminal Code provides that removing a bidder from a public tender, due to coercion or corruption, or to engaging or colluding with the other bidders in order to distort the award price, is punishable with imprisonment of one to five years.

1.6 Definition of "Cartel Conduct"

There is no express definition of cartel conduct within the Competition Act, but it does enumerate the hardcore anti-competitive practices of price-fixing, production or sales limitations, and market or client allocation between competitors. In fact, the RCC follows the European Commission Guidance with respect to cartels, invoking it directly in the sanctioning decisions issued.

The RCC has issued several guidelines detailing the conditions under which some joint actions between competitors would not qualify as cartels – eg, RCC Guidelines with respect to common actions/petitions undertaken by competitors in front of courts/public authorities, and RCC Guidelines with respect to co-operation between competitors within tenders.

1.7 Variety of Competition Law Violations

Articles 5 and 7 of the Competition Act, alongside RCC practice, establish a variety of agreements/conducts that are seen as cartel conduct, including price-fixing, market and client allocation, bid-rigging, collective boycott, and limitation of production and sales.

1.8 Limitations Period(s)

The time limitation period for sanctioning anti-competitive deeds (including cartels) is five years from the date when the deed was committed. In a case of continuous cartel behaviour, the time limitation of five years applies from the date of the last anti-competitive act. Also, the Competition Act sets out a ten-year global limitation period starting from the date of the end of the infringement for cases when the RCC has not ruled on the potential infringement within this timeframe.

1.9 Industries, Sectors or Other Activities Exempt from Scrutiny Under Statutes or Precedent

In the past, the Competition Act excluded the securities market and the labour market and labour relationships from the competition law area, to the extent that competition on these markets may be subject to special regulations. Nowadays, no industry or activity sector that involves cartels is formally exempted from scrutiny under the Competition Act.

1.10 Limits on the Exercise of Personal Jurisdiction Over Alleged Cartel Participants

The Competition Act provides that the RCC has jurisdiction to sanction anti-competitive deeds that are committed in Romania, or that are committed abroad but produce effects in Romania. Therefore, the key aspect is whether the anti-competitive agreement has effect on the Romanian territory, regardless of whether the companies involved in the cartel are foreign or not. The RCC has already issued several decisions in which it sanctioned foreign companies engaged in anti-competitive practices having effects in Romania.

1.11 Principles of Comity

Where the cartel being investigated has an effect on trade between EU Member States, as well as within Romania, Article 101 TFEU will apply in parallel with the equivalent national provisions. In these cases, the RCC and the European Commission co-operate in co-ordinating the investigations. Also, the RCC will co-ordinate with other national authorities' members of the European Competition Network (ECN).

With respect to the co-operation limits between the RCC and other members of the ECN, Article 34 (b) of the Competition Act states that the RCC may provide the European Commission or other EU national competition authority with all information included in the file, even confidential information. However, the receiving national competition authority must use this information exclusively to apply competition law and for the purpose for which it was collected by the RCC, and must protect the confidential character of such information. Any transmission to third parties can be done only with the prior approval of the RCC. Likewise, the RCC can use information provided by the European Commission or any other national competition authority as evidence.

2. Procedural Framework for Cartel Enforcement - Initial Steps

2.1 Initial Investigatory Steps

Investigations or preliminary examinations may be launched following third party complaints, ex-officio, members of the cartels directly approaching the RCC (under leniency rules), or following information from "whistle-blowers".

The first step for the RCC after a case comes to its attention is to collect information through dawn raids (based on an order issued by the President of the RCC and approved by the Bucharest Court of Appeal) and through requesting information from the investigated parties or other third parties (including public authorities) that can provide useful information for the investigation.

After collecting the necessary information, if the case handler and its team considers that there is sufficient evidence of an infringement of the Competition Act, the investigated parties will be served with a formal statement of objections. After this stage, the parties are allowed to have access to the investigation file (based on the order issued in this respect by the RCC's President) and to respond to the statement of objection in writing and also during the hearings that take place in front of the RCC's Plenum. The parties usually have an average of 30 days to prepare and submit their responses to the statement of objections.

After the hearings, the Plenum might decide that the report (statement of objections) needs to be completed and therefore return it to the investigation team, or issue a sanctioning decision or an order to close the investigation without sanctions.

The decision/order closing the investigation must be communicated to the parties no more than 120 days from the Plenum's deliberation. The RCC also publishes the non-confidential decisions/orders on its official website: www.consiliulconcurentei.ro. The decisions (or at least a summary of the decisions) are also sometimes published in English.

2.2 Dawn Raids or Surprise Visits

The RCC has extensive investigative powers, including the power to request information, to conduct dawn raids, and to take voluntary statements.

Dawn raids are widely used by the RCC as a means of collecting information during the investigation, and can only be conducted following orders issued by the President of the RCC detailing the object and the purpose of the dawn raid and its date, and the decision issued by the Bucharest Court of Appeal.

In order to receive court authorisation, the RCC must provide indicia to the court regarding the possible existence of documents and the information necessary to the investigation on the premises that are subject to the dawn raid. In practice, authorisation is always granted.

The dawn raid order of the RCC President may be challenged before the Bucharest Court of Appeal within 15 days of its communication, while the decision issued by the Bucharest Court of Appeal may be challenged in 72 hours from its communication.

The investigated party must submit to the inspection, not hinder the conduct of the dawn raid, and fully co-operate during the dawn raid. Failure to do so may be sanctioned with fines ranging from 0.1% to 1% of the turnover realised in the year previous to the sanctioning decision. The RCC can also apply penalty fines of up to 5% of the average daily turnover of the year previous to the sanctioning for each day of delay in providing information or hindering the conduct of the dawn raid. The RCC has issued fines sanctioning companies for breaching these legal obligations.

During the dawn raid, the investigated company may be assisted by its attorney. However, as the presence of an attorney is not mandatory, its absence cannot justify the delay of the dawn raid.

2.3 Restrictions on Dawn Raids or Surprise Visits

The RCC may conduct a dawn raid not only in the investigated party's business premises but also within any means of transport used for the activity, even if the investigated party is not the legal owner of such premises. In addition, dawn raids may be conducted on premises (residence, land, means of transport) belonging to directors, administrators and other employees of the investigated parties.

During the dawn raid, the RCC is entitled to examine any documents, books or records related to the business, regardless of the way they are stored (electronic or otherwise). The RCC must be granted full access to all types of documents, including on computers, external hard drives, USB keys, CD-ROMs and DVDs, etc. When examining electronic devices, the company must appoint persons to assist and offer support to the RCC's inspectors. The RCC may choose to use its own forensic IT tools.

Under some conditions (for instance, if there is a high volume of data, if the data is particularly complex, if there is a risk of alteration to the data, etc), the RCC can copy all the data stored on electronic devices.

In its recent practice, the RCC almost always copies all data stored on electronic devices, and invites parties to its prem-

ises to examine the contents in the presence of the representatives of the undertaking concerned.

Before the amendment of the RCC Procedure Regulation in 2017, the entire process of data search, processing and extraction of relevant information from electronic devices was performed in the presence of the investigated party's representatives.

Due to a recent change in the law, a copy of the hard disk will be analysed and processed at the RCC's headquarters without the presence of the company's representatives being required, and only the last phase – ie, the extraction of the documents necessary for the investigation – will be done in the presence of the company's representatives.

As there were several debates about the legality of this amendment, mainly regarding a potential breach of the right of defence of the parties being investigated, the RCC claimed that the right of defence of the companies is ensured as the extraction of the information that is relevant for the investigation – considering the relevant/most important phase – is still performed in the presence of the company's representatives.

2.4 Obligations to Prevent or Avoid Spoliation of Potentially Relevant Information

The investigated party must co-operate fully with the RCC's officials, facilitate access to all documents, provide the documents and information required in a complete form, and provide any passwords necessary to access electronic devices. In order to avoid the deletion of relevant information, the RCC's inspectors may even request an e-mail password to be changed during the investigation.

Also, if the dawn raid is not completed in one day, the RCC may seal any premises, documents or devices in order to avoid any spoliation of evidence. Should the RCC decide to seal any part of the premises as part of its inspection, clients are strongly advised to ensure that the seal is not broken, either intentionally or by accident. If the seals are removed or destroyed, the party investigated is criminally liable but also subject to fines for breaching the legal obligation to fully co-operate with the RCC during the dawn raids.

2.5 Responding to Interviews/Questions During the Dawn Raid or Surprise Visit

There are two means through which the RCC can request information and/or clarification from representatives and/or employees of the investigated company:

- on-the-spot oral clarification regarding the facts and documents related to the subject-matter and purpose of the dawn raid; or

- interviews with any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of the investigation.

If the employees refuse to provide the officials with the requested clarification, or fail to provide complete and correct answers during the dawn raid, this will potentially subject the company to a risk of being fined. The RCC is not prohibited from questioning the employee in the absence of a lawyer. If the answers were provided by an employee who was not authorised to provide clarification in the name of the investigated party, the RCC will establish a deadline for the company to rectify, modify or complete the explications provided.

As the interview is voluntary, company employees can decline to be interviewed without exposing the company to the risk of a fine. As long as the interviewee agrees, interviews may be conducted at the RCC's premises, by telephone or by electronic means.

2.6 Companies/Interviewees Obtaining Copies of Documents

At the end of the dawn raid, the RCC must prepare a record detailing the documents copied and seized, and provide it to the investigated company, as well as a copy of the documents seized. When the RCC has requested further clarifications from the representatives of the company/its employees during the dawn raid, it has to provide the investigated company with a document reflecting the requests and the clarifications or the recordings of such discussions. Also, in case of an interview, the RCC must provide the interviewee with a record of the transcription of the audio-video recording in order to verify the accuracy of such recording. The transcription will be signed by all the participants and will be included in the RCC's file.

2.7 Right to Counsel

Even if the right to legal representation is not specifically stipulated in the Competition Act, in practice the RCC permits any employees who are subject to an interview to be accompanied by a lawyer.

2.8 Requirement to Obtain Separate Counsel

The issues relating to individual legal representation are not common as the Competition Act stipulates no personal liability for cartel conduct. The necessity for a separate attorney may arise only when there are parallel proceedings – ie, both the RCC proceeding and a criminal investigation with respect to the managers of the companies being investigated.

2.9 Principal Initial Steps Undertaken by the Defence Counsel

Companies that are subject to dawn raids are strongly advised to co-operate with RCC officials. The company's rep-

resentative should request a copy of the RCC and Court approvals for review, paying attention to whether its scope is sufficiently defined as regards subject-matter and timeframe. They should also ask the officials to wait until the lawyers are present, although there is no legal obligation for the officials to do so.

At the same time, the reaction team for such cases should be announced internally. Each official should be accompanied by company personnel, who are advised to take notes about what the official does and to take a copy of all the documents copied by the official. The companies' representative should avoid answering interpretative questions, and it is very important that no documents are destroyed during the dawn raids.

2.10 Obtaining Documentary Evidence or Testimony

Almost all the documentary evidence is obtained by the RCC during dawn raids or following a request for information being sent to the companies under investigation and third parties. Part of the documentary evidence is also provided to the RCC on a voluntary basis by the third parties who have raised a complaint regarding an alleged cartel, and by members of the cartel, under the leniency programmes.

Also, relevant information regarding cartel behaviour may be obtained via the competition whistle-blowers' online platform, where third parties may provide voluntary information regarding competition law infringements. This platform may be used anonymously by any individual.

The requests for information are addressed in writing, setting up the legal basis and purpose of the request along with the penalties for not submitting the answer or for providing misleading/inaccurate data.

2.11 Obtaining Other Types of Information

The RCC might obtain other useful information from other public authorities and other national competition authorities. Some of the decisions issued by the RCC expressly mention that the investigations were launched based on a notification received by the RCC from other public authorities.

2.12 Obligation to Produce Documents or Other Evidence

As long as the companies are located on Romanian territory, the RCC considers that it has the power to ask them to provide the documents required, regardless of the location of such documents. If the companies decide not to provide the RCC with the requested documents, or not to allow access to documents stored in the "cloud", the RCC may impose fines and has the means to enforce any such fine easily.

2.13 Principles of Attorney-Client Privilege

Under the Competition Act, communications between a company and an external lawyer benefit from legal privilege and cannot be seized and used as evidence when/if such communication occurs with the exclusive purpose of exercising a company's right to defence before or after the launching of an investigation, and if the communication is linked to the object of the investigation. If the company under investigation invokes legal privilege over a document during an inspection, RCC officials are still allowed to take a cursory look at the document to verify that it is indeed of a privileged nature.

In the case of a dispute between the company and RCC official, the document in question should be placed in a sealed envelope pending the resolution of the dispute. The President of the RCC must take a decision, which may be further challenged by the companies in court.

2.14 Other Recognised Privileges

The companies have certain rights and privileges during the investigation, including the right not to be required to incriminate itself, the right to legal advice, the right not to be required to produce privileged documents, and the right not to submit to the dawn raid if the legally required approvals were not properly obtained by the RCC.

2.15 Resisting Initial Requests for Information

The Competition Act does not set out a two-stage procedure with respect to requests for information. As the first simple request from the RCC demands compliance, the companies co-operate with the RCC from the beginning, providing all the information requested and thereby avoiding the risk of being fined.

According to the national rules, providing inaccurate information or refusing to provide any information at all can be sanctioned with fines ranging from 0.1-1% of the turnover realised in the year previous to the sanctioning decision. In addition, the RCC may apply penalty fines of up to 5% of the medium daily turnover realised in the year previous to the sanctioning for each day of delay.

2.16 Protecting Confidential or Proprietary Information

Business secrets cannot be disclosed without the consent of the owner of such data. Other confidential information (eg, seized during the dawn raids or provided by the investigated party) may be disclosed if it is necessary for the conduct of the investigation or for proving the existence of the cartel under investigation.

There is no express provision in the Competition Act with respect to the protection of third parties' confidential information. However, it is provided that the RCC must keep such

information in its possession secret. In addition, European Regulation 1041/2011 and Law No 544/2001 on public access to public interest information provide that public authorities (including the RCC) shall not disclose information that may harm the commercial interests of the owner of said information. However, this does not preclude the RCC from using documents taken from one company that disclosed potential infringements of other companies in order to launch a separate investigation against the latter.

2.17 Persuading the Enforcement Agency to Modify Its Enforcement Action

Starting from the opening of the investigation, the defence counsel may provide the RCC with information, documents and arguments regarding the absence of an infringement, on a voluntary basis. Also, within the answers to the RCC's information requests, the defence counsel may provide additional documents and arguments that could prove the absence of the alleged infringement.

After receiving the formal statement of objections and having obtained access to the investigation file, the companies prepare their defences by responding in writing to the statement of objection received and also during the hearings that take place in front of the RCC's Plenum.

2.18 Leniency, Immunity and/or Amnesty Regime

Under the Competition Act, any company implicated in cartel activity such as price-fixing, production or sales quotas, or market sharing (including through bid-rigging) may apply for leniency, which can lead to total fine immunity or fine reductions. However, the company that influenced the other companies to participate in or to continue participating in the cartel cannot benefit from total fine immunity, but may qualify for fine reduction.

Within the RCC there is a special Leniency Module that ensures the relationship between the RCC and leniency applicants. However, up until now there have been few leniency applications, because recognising the anti-competitive practice may trigger criminal exposure.

There are two types of fine immunity:

- Type A immunity: the RCC will grant fine immunity to the first undertaking that provides information that enables the RCC to launch an investigation and conduct dawn raids, if the RCC did not previously have sufficient data to do so.
- Type B immunity: the RCC will also grant fine immunity to the first undertaking that provides information and evidence that enables the RCC to establish a violation of the Competition Act if the RCC did not previously have sufficient elements to establish such violation and if no undertaking provided information that enabled the RCC to launch the investigation.

The companies may request a marker in order to reserve their place in the leniency queue, until they collect and provide to the RCC all relevant information and submit a formal leniency application.

In addition, any undertaking that discloses its participation to a cartel but does not fulfil the conditions for obtaining total fine immunity can obtain a reduction of the fine. To benefit from such reduction, the company must provide evidence regarding the cartel that forms a significant supplementary contribution.

In any case, in order to benefit from leniency (in the form of either fine immunity or fine reduction), the company must totally, continuously, effectively and promptly co-operate with the RCC, cease its participation in the cartel and not disclose its intention to apply for leniency or other elements of its leniency application.

3. Procedural Framework for Cartel Enforcement - When Enforcement Activity Proceeds

3.1 Seeking Information Directly from Company Employees

In practice, the RCC does not usually seek information from employees within the investigations launched. There have only been a few cases where the RCC has used this means of obtaining information based on interview procedure. Even if not specifically targeting the employees of the companies under the investigations already launched, the RCC seeks information from them that would enable it to launch new investigations through the whistle-blowers' platform launched in this respect. The identity of such individuals is protected, and providing information within this framework is not considered to be a violation of any confidentiality obligations provided in employment agreements or by the Labour Code.

3.2 Seeking Information Directly from the Target Company or Others

The RCC can seek any documentary information that is relevant to the investigation directly from the investigated parties or from any other party. It will send requests for information indicating the legal grounds, the deadline for providing the information and the sanctions in case of refusal to provide such information or for providing incomplete or inaccurate information, ie, a fine ranging from 0.1-1% of the turnover generated by the party concerned in the year previous to the sanctioning.

3.3 Seeking Information Directly from Companies or Individuals Outside the Jurisdiction

The RCC has requested companies located abroad that are under investigation to respond to their inquiries; in practice,

where possible, it has addressed such requests to both the foreign company and any subsidiary it has in Romania. In cases where no answers were received, the RCC has sought the co-operation of other national competition authorities. In practice, however, some of the national competition authorities did not give assistance to the RCC in such cases, stating that the conditions for co-operation under the ECN umbrella were not met. If the RCC should decide to issue a fine on companies based outside Romania for not responding to its inquiries, it is not settled whether or how the RCC could enforce any such fine.

3.4 Inter-Agency Co-operation/Co-ordination

The RCC actively co-operates with the European Commission, other national competition authorities and domestic public authorities in matters of cartels.

The co-operation limits between the RCC and other members of ECN are set out in Article 34 (b) of the Competition Act. In fact, the receiving national competition authority must use the information provided by the RCC exclusively for applying competition law and for the purpose for which it was collected by the RCC, and must protect the confidential character of such information.

With respect to co-operation with other national authorities, the RCC signed a collaboration agreement with the National Anticorruption Directorate (NAD). It has also signed collaboration agreements with public authorities that are competent in matters of public acquisitions – the National Authority for Public Acquisitions (NAPA) and the National Council for Solving Complaints (NCSC) – with the purpose of monitoring and preventing violations of competition law within public tenders (bid-rigging cartels). This co-operation was formalised within the “Module on Bid Rigging”.

The RCC has also started the Big Data Project, which is a tool for cartel screening and will be used for analysing big data volumes in order to support investigative activities and ensure effective communication between the RCC and other public authorities (eg, NDA, NAPA, the National Agency for Fiscal Administration – NAFA).

The Competition Act provides that the information collected by the RCC may be used for the sole purpose of applying competition legislation. However, the RCC may inform other public authorities if aspects related to their activity are discovered.

3.5 Co-operating with Enforcement Agencies in Foreign Jurisdictions

So far, the RCC has co-operated mainly with the European Commission within all the cartel cases investigated under Article 101 of TFEU. In addition, the RCC offered assistance to the European Commission in the dawn raids launched

with respect to several Romanian companies. From the public documents available, there have been no cases where the RCC has exchanged information and evidence collected during an investigation with other national competition authorities.

3.6 Steps Taken to Issue a Complaint/Indictment Against a Criminal Case

There are no specific criminal sanctions applied directly by the RCC for cartel activity. However, as per Article 65 of the Competition Act, individuals initiating a cartel may be subject to criminal liability. In addition, both companies and individuals may be subject to criminal liability, under the boundaries set out by Article 246 of the Criminal Code, for removing a bidder from a public tender by coercion or corruption, or by engaging or colluding with the other bidders in order to distort the award price. General criminal procedure rules would apply in both such cases.

3.7 Steps Taken to Issue a Complaint/Summons in a Civil Case

Private enforcement actions are regulated by the Romanian domestic civil proceedings rules. In addition, Ordinance 39/2017 (transposing Directive 2014/104) provides some specific procedural rules regarding the following:

- the exclusive competence of the Bucharest Court of Appeal;
- the presumption of culpability and harm – a breach of competition law confirmed by a final decision of the RCC, the European Commission or a court represents an irrefutable presumption as to the infringer's culpability. A final decision taken in another Member State attests, until proven otherwise, that an infringement of competition law has occurred. There is also a rebuttable presumption that cartels cause harm; and
- disclosure - the court can request disclosure from the defendant or third parties, taking into account the obligation of proportionality and observing the legitimate interests of the parties to the case and any third parties. The court can also request disclosure of evidence from the file of a competition authority when that evidence cannot be obtained from a party or a third party.

In order to document their private claims, the defendants may rely on the general right of access to the documents of the RCC under Law 544/2001. However, the RCC may refuse access to a document where disclosure would undermine the protection of commercial interests of natural or legal persons. The companies that are part of the RCC investigation may use the documents from the RCC investigation file only after the investigation is closed.

3.8 Enforcement Actions Against Multiple Parties in a Single Proceeding

As a general rule, enforcement actions involving cartels are brought by the RCC against all the infringers during a single proceeding. Nonetheless, the President of the RCC may order separate hearings, upon a motivated request regarding the necessity to safeguard confidential information. Parties can therefore obtain separate hearings but not separate trials, or they can decide to separate if the specificities of the case allow it.

3.9 Definition and Application of Burden of Proof

The Competition Act expressly states that the RCC bears the burden of proof. However, in certain cases, the burden of proof is shifted and lies with the parties under investigation. According to Article 5 paragraphs 2 and 3 of the Competition Act, a block exemption or the existence of positive effects that outweigh the negative effects of the anti-competitive practice (individual exemption) must be proven by the parties under investigation.

3.10 Finder of Fact in Enforcement Proceedings

In private claims, a breach of competition law confirmed by a final decision of the RCC, the European Commission or a court represents an irrefutable presumption as to the infringer's culpability, so the judge will only decide on the other conditions of the tort liability (damages to be afforded to the claimant, and the existence of a cause and effect relationship between the deed and the damages). There is also a rebuttable presumption that cartels cause harm. In civil proceedings, the Bucharest Court of Appeal has exclusive competence for private enforcement matters.

3.11 Evidence Obtained in One Proceeding Being Used in Other Proceedings

The RCC cannot use evidence obtained within one investigation in another investigation against the same company, nor evidence submitted by leniency applicants, without the express consent of the investigated party. However, even if the party does not give its consent, the RCC can still send a request for the particular evidence to be provided. If the party does not comply, the RCC may apply sanctions. The RCC can also request the assistance of other national competition authorities under ECN rules.

3.12 Application of Rules of Evidence

The RCC does not have a unitary approach with respect to the standard of proof. It has stated in some cases that it should support its case with "sufficiently precise and coherent proof" or a "firm, precise and consistent body of evidence" that gives grounds for a firm conviction that the alleged infringement took place. In other cases (mainly those closed without sanctions/fines), the RCC has also applied the "beyond any reasonable doubt" standard.

3.13 Role Typically Played by Retained Experts

At the administrative stage, the RCC President can appoint experts during hearings whenever their presence is deemed necessary.

In court actions, parties also enjoy the right to bring expert appraisals to support their allegations, and can propose several experts to be appointed by the Court. However, there are no certified experts officially acknowledged in the field of competition, although the court may appoint so-called specialists in the area, and have in fact begun to appoint both national and European specialists.

Expert appraisals or specialist opinions are not binding, and thus the court will take them into account together with all the other evidence. In addition, the court can refer a case to the RCC in order to obtain its opinion on competition aspects. The fields of expertise may vary from precise subjects within the competition field (eg, definition of the relevant market), to economic or even technical expertise.

3.14 Recognised Privileges

Several general principles and procedural guarantees apply during enforcement proceedings, including the right to defence, the right to access the investigation file, the presumption of innocence and the benefit of the in dubio pro reo principle. In fact, all procedural guarantees provided in Article 6 of the ECHR apply to procedures conducted before the RCC.

3.15 Multiple or Simultaneous Enforcement Proceedings Involving the Same or Related Facts

International cartels are highly likely to result in the company being exposed to investigation and further sanctions in multiple jurisdictions. As per ECN rules, according to European Regulation No 1/2003, parallel enforcement actions conducted by several national competition authorities are possible, especially when the anti-competitive practices have substantial effects in several jurisdictions.

4. Sanctions and Remedies in Government Cartel Enforcement

4.1 Investigatory Agency Imposing Sanctions Directly

The RCC's Plenum can impose administrative fines on undertakings for breaching the Competition Act, which may range from 0.5-10% of the turnover realised in the year preceding the sanctioning decision. In practice, fines for cartels range between 4% and 8%. The level of the fine may be increased or reduced, depending on any aggravating or mitigating circumstances. The RCC has issued guidelines detailing the criteria used for determining the level of the fine.

The RCC may also impose periodic penalty payments in cases of non-compliance with a decision that imposes a penalty or orders the application of certain measures, of up to 5% of the average daily turnover of the infringing undertaking in the year preceding the decision, for each day of delay. It can impose interim measures ordering the suspension of a restrictive practice at any stage of the proceedings, if the findings indicate that the practice in question is about to cause serious and irreparable damage, or damage that is difficult to repair.

4.2 Procedure of "Plea Bargaining" or Settlement

The Romanian domestic legal framework does not regulate a settlement procedure similar to the European one. However, while the companies involved in cartels cannot submit commitments, they can apply for the recognition procedure, which can lead to significant fine reductions (of between 10% and 30%). The fine cannot be reduced below 0.2% of the turnover obtained in the financial year preceding the sanction.

There are specific rules detailing the recognition conditions and procedure. The latest that an investigated party may acknowledge its participation in the cartel is before the hearings. The company must submit a request that includes, among other information, an express acknowledgement of the cartel and acceptance of the maximum fine provided. The recognition procedure is also available to companies that have benefited from a fine reduction under the leniency policy but, in this case, the total reduction cannot exceed 60% of the fine.

The benefit of recognition is lost when the RCC is challenged in court. In such cases, the RCC decisions will expressly set out the amount of the fine to be reduced for recognition, and also the amount of the fine that would be applied to the company if it decides to challenge the RCC's decision in court.

4.3 Collateral Effects if Liability or Responsibility is Established

Law No 98/2016 on public acquisitions includes one specific case of debarment from governmental tenders in case of a cartel infringement. These collateral effects may be avoided if the companies can bring evidence regarding their rehabilitation within self-cleaning programmes (including competition compliance programmes), and the authority accepts such programme.

In addition, a sanctioning decision issued by the RCC may trigger criminal liability for the individual who has conceived the cartel, or in cases of bid-rigging schemes as developed here above. However, criminal liability will not be triggered if the individual reports its anti-competitive practice to the prosecution authorities.

4.4 Sanctions and Penalties in Criminal Proceedings

As mentioned above, the RCC is allowed to apply one administrative fine in the case of an undertaking breaching the competition rules. The criminal liability of individuals is triggered in only two cases, and the criminal sanctions are not applied by the RCC but by the criminal court. The RCC has wide discretion when setting the amount of the administrative fine, but has no competence for the criminal sanctions applied.

4.5 Sanctions and Penalties in Civil Proceedings

No civil sanctions are applicable in the case of competition law infringement. Nonetheless, within private enforcement actions, the parties who do not comply with the evidence disclosure order issued by the court, nor with the obligations imposed with respect to the safeguard of confidential information, or who destroy relevant evidence or breach the limits of the use of evidence can be sanctioned. The court may sanction the claimant or defendant, as well as other third parties and their legal representatives, with a fine ranging from approx. EUR120 to EUR1,200 for individuals, and with a fine ranging from 0.1-1% of the turnover realised in the year preceding the sanctioning for companies.

4.6 “Effective Compliance Program”

The implementation of a competition compliance programme may be deemed a mitigating circumstance, leading to potential fine reductions.

The RCC has recently issued a set of guidelines regarding the characteristics that a competition compliance programme should have in order to qualify as a mitigating circumstance, with the general principle being the effective implementation of the competition compliance programme.

According to the RCC’s guidelines, a competition law compliance programme must include, inter alia, information materials (compliance manuals) and warning operational mechanisms – audit, alert, advising and awareness – and also should be accompanied by structural measures.

4.7 Sanctions Extending to Mandatory Consumer Redress

The sanctions applied by the RCC cannot extend to mandatory consumer redress. Consumers can repair damages resulting from the cartel by bringing a private enforcement action before the court.

The Competition Act expressly provides that registered consumer protection associations and professional or employers’ associations may bring opt-in class actions on behalf of their members.

4.8 Forms of Judicial Review or Appeal Available from Decisions in Governmental Enforcement Proceedings

The RCC’s sanctioning decision may be challenged before the Bucharest Court of Appeal within 30 days of its publishing or communication. The parties can also file a final appeal against the decision issued by the Bucharest Court of Appeal before the Supreme Court.

The Bucharest Court of Appeal is competent to review the finding of facts and legal assessment. The Supreme Court will have only jurisdiction to review the legal grounds of the appealed judgment, unless a manifest error in the evaluation of the facts has occurred.

In practice, almost all decisions issued by the RCC are challenged. However, the number of challenged decisions has diminished as the parties that have benefited from a fine reduction due to their recognition of the anti-competitive deed will lose this benefit if they decide to challenge the decision.

5. Private Civil Litigation Involving Alleged Cartels

5.1 Private Right of Action to Seek Relief

According to Article 66 of the Competition Act and Ordinance No 39/2017, transposing Directive No 2014/104, any victim of cartel behaviour (either firm or individual) can seek relief from harm resulting from the cartel.

The victim of the infringement may bring a private enforcement action against any of the infringers for the full amount of damages, as they are held jointly and severally liable. The action may also be brought against companies that benefited from full leniency. However, such companies may be held jointly liable towards their own indirect and direct suppliers/buyers and towards other injured parties only if full reparation cannot be obtained from the other companies involved in the same cartel.

Damages claims may be brought before the Bucharest Tribunal both before (standalone action) and after the issuance of a sanctioning decision (follow-on action). The claimant must prove the infringement of national or EU competition rules, the defendant’s fault, the damage caused and the link between the infringement and the damage caused to the claimant.

In follow-on actions, the infringement is considered to be already proved by the sanctioning decision. The evidence is either conclusive when there is a sanctioning decision issued by the RCC or the European Commission, or a rebuttable presumption of the infringement when the decision is issued by foreign competition authorities or courts.

The damage caused by cartels is also presumed (rebuttable presumption).

In both cases, the time limitation period is five years from the date when the infringement ceased and the plaintiff knew or should have known of the behaviour and the fact that it constitutes an infringement of competition law, the damage and the person responsible for it. The limitation period will be suspended for the period in which the RCC takes administrative measures in view of launching an investigation, or during the investigation. In addition, the time limit will elapse within one year after the sanctioning decision becomes final or after the proceedings otherwise terminated. Also, the time limitation is suspended or will not start running for the duration of the consensual dispute resolution procedure.

5.2 Threshold Requirements

There are no threshold requirements for bringing a private action claim. A claim for damages can be brought exclusively before the Bucharest Tribunal and on appeal before the Bucharest Court of Appeal.

5.3 Actions Styled as “Class Actions” or Other Forms of Collective Action

The Competition Act expressly enables registered consumer protection associations and professional or employers’ associations having these powers within their statutes or being expressly mandated by their members to bring representative collective actions on behalf of their members. Collective damages based on the Competition Act therefore follow the opt-in system, and are exempted from the obligation to pay stamp duty.

5.4 Handling Questions of Indirect Purchasers or “Passing-on” Defences in Private Actions

Both direct and indirect purchasers can seek relief in courts for the harm caused by cartels. However, an indirect buyer can only seek relief in court for damages if he did not pass on the overcharged price resulting from the cartel activity. If the indirect buyer did pass on the harm suffered to its own clients, the defendant can invoke the pass-on defence against said buyer. In fact, the indirect buyer has already repaired its damage, but the infringer bears the burden of proof of the overcharge.

5.5 Process for Hearing and Resolving Claims

The procedural rules that apply to private enforcement actions are no different from the general domestic civil procedure rules. However, Ordinance No 39/2017 sets out several specific rules that apply to the disclosure procedure. The proportionality principle governs the disclosure procedure. Upon a requested claim of disclosure, the court may order disclosure of evidence to the defendant, the plaintiff or an-

other third party. The effectiveness of the disclosure order is assured by the express provision of pecuniary sanctions.

5.6 Evidence from Governmental Investigations or Proceedings

Evidence collected by the RCC during the investigation is admissible, with the exception of leniency and recognition statements.

The main condition under which evidence disclosure can be ordered is the proportionality principle, under which the court will balance the reasonable justification of the disclosure claim with the scope and cost of the disclosure and the confidential nature of the information requested to be disclosed. The RCC can also submit observations regarding the proportionality of such disclosure.

Disclosure of evidence included in the RCC’s file can be ordered only if such evidence cannot be obtained from another party, and under the condition that the RCC has finalised its proceedings by issuing a decision or any other administrative act. Likewise, the interested party cannot bring evidence from the RCC’s file obtained through exerting its right to access the RCC’s file if the investigation has not yet been finalised.

5.7 Differences in Standards for Relief in a Private Civil Action and Governmental Proceedings

There is a complementary relationship between the public and private enforcement of competition law. While the RCC seeks the relief within the public enforcement of competition rules by having in mind the general/public interest protected within private cases, the parties seek their particular/private interest. When setting the amount of the fine within the administrative phase, the RCC aims not only to punish but also to deter. In private claims, the claimants are entitled to receive only compensatory damages.

5.8 Forms of Relief That Can Be Sought by the Claimant

According to Ordinance No 39/2017, damages are awarded according to the principle of full reparation of the harm. Under this principle, the victim of an infringement of competition law can claim damages for the actual loss (*damnum emergens*), any loss of profit (*lucrum cessans*) and the payment of interest. Under Romanian law, no punitive damages can be awarded.

5.9 Forms of Relief Commonly Obtained

The only form of relief available is the award of compensatory damages.

5.10 Claims Proceeding to Completed Litigation as Opposed to Dismissal or Settlement

To date, there have been only two standalone private enforcement litigation cases. In both cases, the first instance courts dismissed the actions as they considered that the infringement was not proved by the claimants. However, in one of the cases, the Bucharest Court of Appeal imposed the payment of approximately EUR930,000 as indemnification, and the High Court of Cassation and Justice upheld the decision. The typical timeframe from inception of the claim to resolution is three to four years.

5.11 Compensating Successful Attorneys

Under domestic general civil procedure rules, the losing party may have to pay the legal expenses of the successful party, including attorney fees.

However, the judge has the power to assess the proportionality of the amount of the attorney's fees and may reduce the amount accordingly if he considers that the attorney's fees are not proportional with the value or complexity of the case, or with the activity carried out by the attorney.

5.12 Obligation for the Unsuccessful Claimants to Pay Defence Costs and/or Attorneys' Fees

The judge may order the losing party to pay the legal expenses incurred by the successful party if requested. The amount of the legal expenses is determined based on justifying documents. The Romanian domestic civil procedure rules specifically regulate the payment of legal expenses in the case of collective actions. In such actions, the payment of the legal expenses may be realised equally, proportionally or jointly and severally.

5.13 Forms of Judicial Review or Appeal Available from Decisions Involving Private Civil Litigation

The decision rendered by the Bucharest Tribunal can be challenged before the Bucharest Court of Appeal, which has full jurisdiction and can therefore review the finding of facts as well as the legal assessment of such facts. A final appeal may be filed before the Supreme Court against the decision of the Bucharest Court of Appeal. In the two cases concerning private enforcement brought to date, the parties have challenged the decision rendered by the Bucharest Court of Appeal.

6. Supplementary Information

6.1 Other Items of Information Pertinent to an Understanding of the Process, Scope and Adjudication of Claims

The RCC is very active and provides useful information on its website, some of which is also in English: www.consiliul-concurentei.ro/en/about-us.html.

6.2 Governmental Authorities Publishing Written Guides

- Guidelines regarding joint tendering: www.consiliul-concurentei.ro/uploads/docs/items/bucket11/id11008/ghid20042016.pdf
- Guidelines regarding competition law compliance programmes: www.consiliulconcurentei.ro/uploads/docs/items/bucket12/id12280/ghid_privind_conformarea_cu_regulile_de_concurenta.pdf
- Recommendations regarding collective petitioning: www.consiliulconcurentei.ro/uploads/docs/items/bucket8/id8255/indrumari-bune_practici_in_activitatea_de_petitionare.pdf
- Other reports may be consulted here: www.consiliulconcurentei.ro/en/publications/latest.html

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