The Private Competition Enforcement Review

third Edition

Editor

Ilene Knable Gotts

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The Private Competition Review

THIRD EDITION

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EDITOR'S PREFACE

Private antitrust litigation has been a key component of the antitrust regime for decades in the United States and reflects the societal views generally towards the objectives and roles of litigation. The United States litigation system is highly developed – using extensive discovery, pleadings and motions, use of experts, and, in a small number of matters, trials, to resolve the rights of the parties. As a result, the process imposes high litigation costs (in time and money) on all participants and promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs has created an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty from the competition authorities. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high litigation activity in the near-term, particularly involving intellectual property rights and cartels.

Most of the other jurisdictions discussed in this book have each sought to initiate or increase the role of private antitrust litigation recently (in the past few years, for instance, in Brazil and Israel) as a complement to increased public antitrust enforcement. In April 2008, the European Commission published a White Paper suggesting a new private damages model for achieving compensation for consumers and businesses who are victims of antitrust violations, noting that 'at present, there are serious obstacles in most EU Member States that discourage consumers and businesses from claiming compensation in court in private antitrust damages actions […]. The model is based on compensation through single damages for the harm suffered'. The key recommendations include collective redress, in the form of representative actions by consumer groups and victims who choose to participate, as opposed to class actions of unidentified claimants; disclosure of relevant evidence in the possession of parties; and final infringement

decisions of Member States' competition authorities constituting sufficient proof of an infringement in subsequent actions for damages. Commissioner Kroes was unable to achieve adoption of the legislation on private enforcement before the end of her term. Commissioner Almunia plans to enter into a new round of consultations and is likely to combine the initiative with forthcoming legislation on consumer protection. Both proposals will likely contain some form of collective redress.

Even in the absence of the issuance of final EU guidelines, however, states throughout the European Union (and indeed in most of the world) have increased their private antitrust enforcement rights or are considering changes to legislation to provide further rights to those injured by antitrust law infringement. Indeed, private enforcement developments in many of these states have supplanted the EU's initiatives. The English and German courts are emerging as major venues for private enforcement actions. Collective actions are now recognised in Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England are currently also contemplating collective action legislation. Some jurisdictions have not to date had any private damages awards in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages (e.g., Lithuania or Romania).

Almost all jurisdictions have adopted an extraterritorial approach premised on 'effects' within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of forum non conveniens as well as comity considerations.. In contrast, some jurisdictions, such as the UK, are prepared to allow claims in their jurisdictions where there is relatively limited connection, such as where only one of a large number of defendants is located. In South Africa, the courts will also consider 'spill-over effects' from antitrust cartel conduct as providing a sufficient jurisdictional basis. Jurisdictions also vary regarding how difficult they make it for a plaintiff to have standing to bring the case. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its actors; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil or Canada with respect to Competition Act claims) or injunctive litigation. Some jurisdictions base the statute of limitations upon when a final determination of the competition authorities is rendered (e.g., Romania or South Africa) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions (e.g., Australia or Chile), it is not as clear when the statutory period will be tolled.

The litigation system in each jurisdiction to some extent reflects the perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands or the UK), with liability arising for actors who negligently or knowingly engage in conduct that injures another party. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway or the Netherlands), others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, while others are concerned that private antitrust litigation might thwart public enforcement and may require what is in essence consent of the regulators before allowing the litigation or permit the enforcement officials to participate in the case (e.g., in Germany the President of

the Federal Cartel Office may act as *amicus curiae*). A few jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Spain, until legislation loosened this requirement somewhat). Interestingly, no other jurisdiction has chosen to replicate the United States system of treble damages for competition claims, taking the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for punitive damages for common law conspiracy and tort claims), neither does any other jurisdiction permit the broad-ranging and court-sanctioned scope of discovery permitted in the United States. Only Australia seems to be more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Varying cultural views also clearly affect litigation models. Jurisdictions such as Germany or Korea generally do not permit representative or class actions, but instead have as a founding principle the use of courts for pursuing individual claims. In Japan, class actions are not available except to organisations formed to represent consumer members. Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Korea, the Netherlands or Spain), also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work-product or joint work-product privileges in Japan, limited recognition of privilege in Germany; extensive legal advice, litigation and common interest privilege in the UK, and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents to the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan or the Netherlands); others view it as subject to judicial intervention (e.g., Israel or Switzerland). The culture in some places, such as Germany, so strongly favours settlement that judges will require parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pre-trial settlement conference is mandatory.

Private antitrust litigation is largely a work in progress in most parts of the world, with the paint still drying even in the United States several decades after private enforcement began. Many of the issues raised in this book, such as pass-on defence and the standing of indirect purchasers, are unresolved by the courts in many countries and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues such as privilege are subject to proposed legislative changes. The one constant cutting across all jurisdictions is the upwards trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

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New York
September 2010

Chapter 16

ROMANIA

*Silviu Stoica and Mihaela Ion**

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The basis for private cartel enforcement in Romania is Act No. 21/1996 ('the Competition Act'). Currently the Competition Act is primarily enforced by the Romanian Competition Council ('the Council').

On 6 July 2010, important amendments to the Competition Act were published in the Official Gazette (by way of an Emergency Government Ordinance), entering into force on 5 August 2010. The amendments incorporate elements of European competition law and European Commission best practice, but also of European court practice, with the aim of better coordinating domestic legislation with Articles 101 and 102 of the Treaty on the Functioning of the European Union ('the TFEU') and Regulation No. 1/2003.

Among the main changes, the new legal framework introduced the right of natural and legal persons to initiate legal proceedings to seek compensation for damages incurred resulting from anti-competitive practices prohibited according to the provisions of the Competition Act or of Articles 101 and 102 of the TFEU.

It must also be stressed that undertakings enjoying immunity from fines are not held jointly and severally liable for their participation in anti-competitive practices prohibited by Article 5 of Competition Act or by Article 101 of the TFEU.

The new amendment also regulates the manner in which the documents within the Council's investigation files may be used as evidence in legal proceedings before the courts of law. Thus, when settling claims for damages, whenever there is a Council decision to sanction an anti-competitive practice, the courts may request that the Council provide the file documents on the basis of which the decision was issued. After receiving

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such documents, the court must ensure that any information deemed a trade secret, or other pieces of information classified as sensitive, are kept confidential.

Any natural or legal persons that claim to have incurred damages as a result of any anti-competitive practice prohibited by the Competition Act may file a subsidiary claim for damages within two years of the date of the Council's decision on which the claim is based.

Amicus curiae was also introduced, allowing the Council to submit opinions to the national courts of law in connection with matters related to the enforcement of Articles 5 and 6 of Competition Act, as well as of the provisions of Articles 101 and 102 of the TFEU, under the terms and conditions provided under the Civil Procedure Code ('the CPC').

If the national courts directly or indirectly enforce the provisions of Articles 101 and 102 of the TFEU after the parties have been provided with a judgment that may be challenged, such courts shall immediately send a copy of the judgment to the European Commission by means of the Council.

Furthermore, the new amendments to the Competition Act also introduce the concept of 'commitments' that companies may undertake in order to rectify the situation that initially led to the investigation. The Council will set out the terms and conditions, criteria, deadlines and procedure for the approval and assessment of the commitments proposed by the parties both in connection with anti-competitive practices and economic concentrations.

Despite the fact that the national antitrust legal framework regulates both the private and public enforcement of competition rules, the enforcement of the Competition Act remains in practice a matter of administrative law.

To date, the courts have not been called to rule on any antitrust private claims, as the only role exercised has been that of reviewing the decisions adopted by the Council. In the absence of relevant precedent, the approach to claims available to those harmed by infringements of competition are subject to further confirmation in practice.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The Competition Act prohibits:

a any express or tacit agreement between undertakings or associations of undertakings, any decisions taken by the associations of undertakings and any concerted practices that have as subject matter or effect the restriction, prevention or distortion of competition on the Romanian market or on part of it; and

b the abusive use of a dominant position held by one or more undertakings on the Romanian market or on a substantial part of it that, by way of anti-competitive deeds, may harm the business activity or consumers.

The basis for private competition law litigation is represented by the Competition Act and the Guidelines on the settlement by the Council of claims concerning Articles 5 and 6 of the Competition Act (corresponding to Articles 101 and 102 of the TFEU) ('the Guidelines').

Article 61 provides the general framework for the private enforcement of the Competition Act, explicitly stating that the persons harmed as a result of anti-competitive practices are entitled to seek relief in court, irrespective of whether or not there is a sanction imposed by the Council. This principle is developed in Article 5 of the Guidelines, which includes provisions regarding the role of courts and of the Council, as well as the advantages of a legal action brought in court.

As regards jurisdiction, while the Council is guided by the priority principle, the courts have the jurisdiction and obligation to rule on all matters submitted to them. In particular, the courts can rule on the validity or voidance of agreements and have exclusive subject matter jurisdiction over the awarding of damages to individuals in cases of violations of Articles 5 and 6 of the Competition Act.

Court actions do have some advantages in that they can award damages for losses caused by the infringement of Articles 5 and 6 of the Competition Act and can order protective actions and award costs of litigation; they can also rule on matters concerning payment or the fulfilment of contractual obligations on the basis of an agreement reviewed under Article 5 of the Competition Act.

The competition legal framework also confirms the deadline for filing claims for damages, the removal of the joint and several liability of companies that enjoyed an immunity from fines and the courts' right to request that the Council provide the file documents based on which the decision to apply a sanction for the respective anti-competitive practice was issued.

The specific validity conditions of the relevant legal actions and applicable procedural rules are found in the Romanian Civil Code ('the Civil Code') and the Romanian CPC.

In the absence of specific details regarding subject matter jurisdiction over private competition law actions, the general rules of the CPC apply. Therefore, jurisdiction will belong, depending on the value of the claimed damages, either to first-tier courts (local courts) or second-tier court (district courts).

As regards territorial jurisdiction, lawsuits should be filed with the courts local to the defendant's address or main place of business, or the place where the damage was caused or where the anti-competitive practice took place.

Private competition law legal actions have the nature of tort actions. The applicable regime is detailed in particular in Articles 998 to 1003 of the Civil Code, where the following principles are set out:

a any person responsible for any conduct (practice, act or deed) that caused damage to another person has the obligation to repair the damage;

b if the damage was caused by more than one person, they will be held jointly liable; legal persons may also be held liable for their representatives' infringements; and

c the losses caused by the infringement are to be recovered in full; this includes both the effective loss and lost profits and may also imply that any offender, including a leniency applicant, may be held responsible for the full loss.

In order to be compensated for the damage, the victim of an infringement (including the breach of competition rules) will have to prove all the conditions triggering tort liability are met:

a an infringement has occurred (which could also be an act or practice prohibited by the national or EU competition rules);
b the defendant's fault, regardless of its form (negligence, wilfulness);
c the damage caused to the claimant;
d the link between the infringement and the damage caused to the claimant.

The new legislation introduced a new statute of limitation, which is two years as of the date when the sanctioning decision becomes final and irrevocable. This provision implies that there is an indirect requirement of previous or current administrative adjudication in front of the Council.

III EXTRATERRITORIALITY

The Competition Act is clear on its extraterritoriality effects, applying to anti-competitive acts and practices committed by Romanian or foreign undertakings in Romania, or committed abroad but having effects in Romania; therefore, nationality or location has no relevance as long as the infringement has effects in Romania. The tort law regime confirms this approach, as national laws apply whenever a tortious deed is committed in Romania or, if committed abroad, all or part of its damaging effects occurred in Romania. There are no express exemptions from the aforementioned rules.

IV STANDING

The claim of relief in courts is governed by Article 61 of the Competition Act. According to this article, any person harmed by an anti-competitive practice may bring a private antitrust action in order to seek compensation for any damages incurred due to such practice if it is prohibited according to the provisions of the Competition Act or of Article 101 or 102 of the TFEU.

The general principle is that any affected person, either natural or legal, may file a claim on such basis, provided it can justify a personal and certain interest in the outcome of the case. If there are more actions filed separately by different claimants, the court may decide upon request or *ex officio* to enjoin all such claims in a single litigation if there is a strong link between the subject matter, cause and parties.

Third parties, either natural or legal persons, may intervene in a case in accordance with the CPC if they can prove an interest. Interestingly, pursuant to the draft of the new CPC, the judge may decide if it is necessary to involve third parties in the case, either as claimants or defendants, even if the parties are opposed to such action.

V THE PROCESS OF DISCOVERY

Under the Romanian legal system, unless otherwise provided by law, evidence is submitted by the parties in courts under strict judicial control. The evidence may be also produced by lawyers, if agreed by the parties, in a fast-track procedure within a fixed legal time limit of six months, depending on the complexity of the case.

As a rule, all evidence must be submitted before the facts of the case are discussed. By way of exception, evidence can also be produced before the trial if there is the risk of its loss or if future difficulties might arise in relation to its submission. The party requesting such precautionary actions has to present reasonable evidence supporting *prima facie* infringement case.

The CPC contains relevant provisions dealing with the compulsory disclosure in court of information or documents intended to be used as evidence by one of the parties and which is in the possession of the opposing party, an authority or third party. The need for disclosure will be assessed and decided by the court on a case-by-case basis. If the court decides that disclosure is necessary, it must also consider the confidential nature of certain documents. Article 173 of the CPC provides that written evidence legally protected by secrecy may not be brought before the court. Therefore, documents and information that was granted a confidential nature during the administrative procedure should also be considered as such by the court when ruling on a claim for damages. Moreover, the disclosing party is entitled to refuse such disclosure if the documents could expose personal issues or if their disclosure could trigger criminal prosecution against the party or other persons or could damage its reputations.

If the opposing party refuses to disclose the requested document without justification, or it can be proved that the respective party has destroyed it, the court may consider the facts and allegations for which such document was requested as proven.

Moreover, Article 108 of the CPC sets out, *inter alia*, that fines may be applied for the refusal to disclose or omission to communicate a requested document or data within the set deadline. The act of retaining or damaging a document required for use in a pending case may also trigger criminal liability under Article 272 of the Romanian Criminal Code.

Upon request by one of the parties to the proceeding, the court may order a third party to produce documents on condition that the relevant documents are in the third party's possession. Any third party may be nominated as a witness. The third party may refuse to produce documents on the same grounds that would entitle a witness to refuse to make a witness statement (the grounds stated in CPC with respect to specific personal reasons, risk of self-incrimination, the risk of incriminating a close relative and the risk of subsequent public prosecution, etc.).

Under the new legal framework, the courts have the legal obligation to impose conditions on discovery when the information sought includes confidential business information or trade secrets, or to prevent discovery of communications protected from disclosure by the attorney–client privilege.

VI USE OF EXPERTS

During the hearings at the administrative stage, the President of the Council may appoint experts whenever the presence of such is deemed necessary in the case under investigation. The Competition Act sets out, however, that the members of the Council's plenary meeting may not be appointed as experts or arbitrators by the parties, the court or any other institution.

In court actions, in the absence of relevant case law, it should be determined how and what type of experts will be used in private competition law litigation. Mention should be made that there are no certified experts officially acknowledged in the field of competition. However, there is a general principle in the CPC that allows a judge to request the opinion of one or more experts in the relevant field. There is no obvious legal impediment to using members of the Council as experts, and the parties are also entitled to ask questions of the experts.

As per the general rules, the court may also order an appraisal of the damages, in which experts appointed by the parties may also participate. Experts or specialists' opinions are not mandatory for the court, which will consider them together with all other available evidence.

VII CLASS ACTIONS

Class actions as such with respect to private competition law litigation are not regulated. There is only a general principle in the CPC, which is not necessarily related to a typical class action case, providing for the possibility of more persons to act together as claimants or defendants if the subject matter of the cause is a common right or an obligation or if their rights or obligations have the same source. However, in these situations, the procedural acts, defences and conclusions of one of the parties cannot cause benefits or damages to the others except when, by virtue of the relationship nature or a legal provision, the effects of the judgment will be extended to all claimants or defendants.

The national legal framework on consumer protection does not contain specific provisions regarding consumers' rights to claim reparation for damages incurred as a result of infringements of competition rules. The consumer code only regulates the general possibility of consumer associations bringing actions aimed at protecting consumers' interests and rights. There are no details as to the limits or specific actions envisaged to be imposed or obtained through such actions.

The draft of the new CPC includes express provisions allowing persons, institutions and authorities to bring actions or raise defences that, without justifying a personal interest, aim at protecting the legitimate rights and interests of persons in special situations or in view of protecting a group or the public interest.

VIII CALCULATING DAMAGES

The Competition Act does not contain any specific provisions on how damages caused by infringing competition laws are to be determined. Based on the foregoing, the general rules governing the tort regime and provided under the Civil Code apply. One of the main principles of tort law is the full reparation of damage by removing all damaging consequences of the illegal conduct (practice) in order to put the victim in the situation prior to the infringement. In line with this principle, the victim is entitled to recover both the effective damage incurred (*damnum emergens*) and any lost profits (*lucrum cessans*).

Punitive damages are not allowed under Romanian law. The LPC provides for the general possibility of recovering attorneys' fees. Procedurally, such fees can be claimed either during the pending trial or by way of a separate legal action based on tort law.

However, in all cases, the judge maintains the right to reduce the amount of the fees to an appropriate level by taking into account the complexity of the case and the potential volume of attorneys' work.

To qualify for recovery, damages have to able to be proven and they should not have been already recovered (e.g., based on an insurance policy). Future damages, if certain to occur, can also give rise to compensation. Moreover, the victim may also request penalties for delay calculated as from the date when the judgment became final up to the date of the actual payment of the damages.

In practice, the reference date for calculating the value of damages is still uncertain. Some court decisions take into consideration the value available when the actual damage was caused, while others consider the prices applicable at the time of the court decision awarding damages.

IX PASS-ON DEFENCES

The new Romanian legal system includes specific provisions on passing on overcharges. Article 61, Paragraph 2 of the Competition Act expressly sets out that: 'If an asset or a service is purchased at an excessive price, it cannot be considered that no damage was caused due to the fact that the respective good or asset was resold.'

Based on this new legal provision, it appears that there is no legal impediment preventing an indirect buyer from filing a claim for damages on grounds that the overcharges were passed on down the distribution chain, thus damaging the buyer.

X FOLLOW-UP LITIGATION

According to the new legislation framework, filing a claim for damages on grounds of infringement of competition law is subject to a sanctioning decision being issued in advance by the Council. The two-year term in which interested persons may introduce court action starts as from the date when the Council's sanctioning decision becomes final and irrevocable. The decision of the Council becomes final and irrevocable if it is upheld, even after being challenged, and declared by the court as being final. As such, the decision will enjoy all the effects of a court judgment, including the *res judicata* effect.

Pursuant to Article 1200, Paragraph 4 of the CPC, the *res judicata* effect establishes a legal presumption that is twofold: on the one hand, the losing party will not be able to re-examine the right in another dispute and, on the other, the winning party can avail itself of the recognised right in another dispute.

Claims for damages may not be filed against defendants having benefited from leniency actions applied by the Council.

XI PRIVILEGE

When ruling on claims for damages, the courts may request that the Council provide the documents upon whose basis the decision was issued. To this end, after receiving such documents, the courts must ensure that any information considered a trade secret, as well as other information qualifying as sensitive, is kept confidential.

The new legal provisions amending the Competition Act expressly acknowledge the privilege of confidentiality between the lawyer and his or her client. Thus, according to Article 38(8) of the Competition Act:

> *The communications between the investigated undertaking or association of undertakings and its/their lawyer performed while and with the sole purpose of exercising the undertaking's right of defence, respectively after the initiation of the administrative proceedings under such act or prior to the initiation of the administrative proceedings, on condition that such communications are related to the subject matter of the proceedings, may not be obtained or used as evidence during the proceedings conducted by the Competition Council. The preparatory documents drafted by the investigated undertaking or association of undertakings with the sole purpose of exercising the right of defence, may not be obtained or used as evidence even though they have not been sent to the lawyer or even though they have not been prepared with the purpose of being sent in a material form to a lawyer.*

Also, according to the lawyers' guidelines, the general rule is that any professional attorney–client communication or correspondence, regardless of its form, is confidential.

They cannot be used as evidence in court and cannot be stripped of their confidential nature. This privilege is acknowledged by civil as well as by criminal and administrative courts.

The information and documents contained in the Council's investigation file are also protected by the Council's confidentiality obligation. The following are deemed confidential:

a trade secrets (technical or financial information relating to the know-how of a certain undertaking, methods of evaluating costs, production processes and secrets, supply sources, manufactured and sold quantities, market shares, lists of customers and distributors, marketing plans, cost and price structures, sale strategy); and

b other confidential information (such as information communicated by third parties about the respective undertakings that could exert a significant economic and commercial pressure on competitors or commercial partners, customers or suppliers) that may cause the access to the file to be totally or partially restricted.

XII SETTLEMENT PROCEDURES

Given the nature of claims for damages, parties are allowed to use settlement negotiations either before or even during litigation proceedings. The Civil Code contains substantial provisions (Articles 1704 to 1717) dealing with settlement options, while the CPC contains procedural rules governing the settlement in front of the court. Under the CPC, such settlement negotiations are allowed, but not mandatory.

The parties may agree the value of damages and methods of reparation. If the parties settle their dispute, the court cannot be called to rule on such legal action.

Furthermore, the parties are able, at any time during the trial, even without being summoned, to go to court and request a judgment acknowledging their settlement. Such settlement must be submitted in writing to the court, which will include it in the operative part of the judgment.

XIII ARBITRATION

As a rule, patrimonial civil and commercial disputes may be referred to arbitration. The parties may agree for arbitration to be conducted by a permanent arbitration institution or even by a third party. However, as previously noted, no practice has yet developed with regard to the private enforcement of competition, either by the ordinary courts or arbitration tribunals.

Act No. 192/2006 ('the ADR Act') has introduced mediation as an alternative dispute resolution method. The parties, be they natural or legal persons, may voluntarily refer their dispute to mediation, including after filing a lawsuit in court. They can agree to settle any disputes of a civil, commercial, family or even criminal nature in this way, as well as other disputes, subject to the conditions of the ADR Act.

The ADR Act also applies to disputes pertaining to consumer protection. Consumers may claim damages as a result of the acquisition of defective products or services, failure to observe contractual clauses or warranties granted, the existence of abusive clauses in contracts with undertakings or violation of other rights provided by the national or EU laws in the field of consumers' protection.

XIV INDEMNIFICATION AND CONTRIBUTION

The rule established by the Civil Code is that the defaulting party must repair any damages caused to another party. Where an infringing act may be attributed to more than one party, they should be held jointly liable towards the victim, which may initiate legal proceedings against any of them for the full amount of the damages. As regards the infringing parties, the division of liability should be made on a *pro rata* basis according to the seriousness of each party's fault.

XV FUTURE DEVELOPMENTS AND OUTLOOK

The Competition Act led to a near-complete harmonisation with the material aspects of EU competition law and encouraged private competition enforcement.

However, mention should be made that the Council is conducting a significant number of investigations, where it is very likely that fines and other penalties will be applied. There may also be room for aggrieved parties to follow up on the Council's sanctioning decisions and file claims for damages in court. The current economic downturn may force undertakings to resort to legal action that would not have been considered in the past.

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Silviu Stoica is a partner with Popovici Nițu & Asociații and head of the competition practice group. His practice focuses on a broad range of contentious and non-contentious competition matters, with an emphasis on cartel investigations and industry inquiries, abuses of dominant position and antitrust disputes. Mr Stoica also advises clients on restrictive agreements and works closely with in-house corporate counsels in sensitive internal compliance reviews.

Mr Stoica has been commended in *Chambers Europe* as impressing clients 'with his deep knowledge of the Romanian business environment'. Established clients include Philip Morris, Cargill, ArcelorMittal and Oresa Ventures whom he has advised on a whole array of competition matters and investment issues.

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