The Private Competition Enforcement Review

Fifth Edition

Editor

Ilene Knable Gotts

Law Business Research

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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. The US 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.The process imposes high litigation costs (both 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. 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 future, particularly involving intellectual property rights and cartels.

The United States has not been alone, however, in having a long established private litigation history. Brazil, for example, has had private litigation arise involving non-compete clauses since the beginning of the twentieth century, and monopoly/market closure claims since the 1950s. Nonetheless, Brazil – as well as many of the other jurisdictions discussed in this book – has seen an increasing role for private antitrust litigation in the past few years. In addition, other jurisdictions have more recently initiated private litigation regimes (for instance, Israel and Poland) as a complement to increased public antitrust enforcement. In some jurisdictions (e.g., Lithuania, Switzerland and Venezuela), however, private actions remain very rare and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. In some of these jurisdictions, legislation is pending that would potentially provide a greater role for private enforcement (e.g., Norway and Switzerland). Many jurisdictions still have very rigid requirements for 'standing', which limits the types of

cases that can be initiated (e.g., Switzerland). Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; 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. In other jurisdictions, the interface between leniency programmes (and cartel investigations) and private litigation is still evolving; in these jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable. Some jurisdictions seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants (e.g., Hungary).

The European Union remains in a state of flux. 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 included 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 entered into a new round of consultations and may combine the initiative with forthcoming legislation on consumer protection. Both proposals will likely contain some form of collective redress, a mechanism that is highly controversial in Europe. It is not clear whether the policy review being undertaken will conclude any time soon. The EU has also issued a report regarding quantifying damages.

Even in the absence of the issuance of final EU guidelines, the Member States throughout the European Union 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 jurisdictions 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 awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages.

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.

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., Austria, Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement. Still 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 permitting the enforcement officials to participate in the case (e.g., in Brazil, as well in Germany, where the competition authorities 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., Chile, Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take 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, as does Turkey). 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. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and 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 some jurisdictions (e.g., China, Korea and Switzerland) several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions are not available except to organisations formed to represent consumer members. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition

Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Korea, the Netherlands, Switzerland and Spain), also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; 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 and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland).

The culture in some jurisdictions, 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.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction appears to be to acknowledge that private antitrust enforcement has a role to play. In Japan, for example, over a decade passed from adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; also only recently has a derivative shareholder action been filed. In other jurisdictions, the transformation has been more rapid. During the past year in Korea, for example, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In the past year alone, some jurisdictions have had decisions that clarified the availability of the pass-on defence (e.g., France and Korea) as well as indirect purchaser claims (e.g., Korea).

Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain 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 across all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
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Chapter 22

ROMANIA

Silviu Stoica and Mihaela Ion[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The basis for private enforcement of competition law in Romania is Act No. 21/1996 ('the Competition Act'). Currently the Competition Act is primarily enforced by the Romanian Competition Council ('the Council'). Even after the major amendments to the competition legal framework in 2011 and the attempts of the Council and other public authorities to increase awareness among consumers, there is not in actuality much private antitrust litigation activity in Romania, mainly because consumers harmed by anti-competitive practices are still reluctant to file such actions.

The Competition Act has not been amended since the last edition, but there are a few developments regarding the secondary legislation worth mentioning:

a the amendments to the Council Guidelines applicable to the setting of sanctions in a particular matter include: (1) new mitigating circumstances mainly: the implementation of a competition compliance programme and the fact that the turnover realised by the undertaking on the market affected by the infringement represents less than 20 per cent of the undertaking's aggregate turnover;[2] (2) the admission of guilt qualifies as mitigating circumstance (according to the new provisions, in order for the Council to consider such mitigating circumstance, the admission of guilt has to be direct and unequivocal and with regard to the facts described in the investigation file); and (3) the fines applicable to newly incorporated companies that have not generated turnover in the fiscal year preceding the issuing date of the Council decision (i.e., fine between 15,000 lei and 2.5 million lei);

1 Silviu Stoica is a partner and Mihaela Ion is a managing associate at Popovici Nițu & Asociații.

2 Such circumstances can bring along a reduction of maximum 25 per cent of the basic amount of the fine.

b the Romanian government issued the Regulation regarding the organisation and the functioning of the Competition Council Advisory Board. Among the latter's attributions, there are: drafting recommendations and non-binding opinions regarding the competition policy in Romania, issuing opinions about the competition and the investigation reports of the Council or about any other relevant aspects for competition, putting forward nominees for the Competition Council Plenum;

c the Council Regulation regarding the economic concentrations was amended and according to the provisions of the Competition Act a special procedure was adopted which implies the involvement of the Romanian government and the Supreme Council of National Defence in those cases where economic concentrations may represent a national security risk. Thus, while the Council assesses whether the envisaged economic concentration may present competition concerns, the Supreme Council of National Defence must examine whether such economic concentration may incur national security risks.

With respect to the private enforcement of competition, the legal framework provides a special term during which natural and legal persons may initiate legal proceedings to seek compensation for damages incurred by anti-competitive practices prohibited by the provisions of the Competition Act or of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

According to this provision, any natural or legal person that claim to have incurred damages as a result of an anti-competitive practice prohibited by the Competition Act may file a subsidiary claim for damages within two years as of the date when the Competition Council decision, under which the subsidiary claim for damages is filed was retained as final or was maintained, entirely or partially, under a final and irrevocable court decision.

Thus, the follow-on action may be filed within two years, a term that starts not with the issuing date of the Council's sanctioning decision but with the date on which the Council's sanctioning decision is final and irrevocable.

The follow-on action may be filed as a collective action by legally registered consumer protection associations, as well as by professional or employers' associations for their members affected by an anti-competitive practice, based on their attributions and powers received, when appropriate.

A very important aspect is the legislative provision that undertakings enjoying immunity from fines cannot be held jointly and severally liable for their participation in anti-competitive practices prohibited by Article 5 of the Competition Act or by Article 101 of the TFEU.

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 public enforcement

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.

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.[3]

The basis for private competition law litigation is represented by the Competition Act and the Council Regulation on the analysis of and solving complaints regarding the breach of Articles 5, 6 and 9 of the Competition Act and Articles 101 and 102 of the TFEU ('the Regulation').

Article 61 provides the general framework for the private enforcement of the Competition Act, explicitly stating that the persons (both legal and private persons) harmed as a result of anti-competitive practices are entitled to seek relief in court. This principle is further developed in Article 5 of the Regulation,[4] which includes provisions regarding the complementary role of the courts and of the Council, the persons that might file a claim for remedies as well as the advantages of a legal action brought in court.

According to the Regulation, claims for damages may be filed both by the persons directly affected by an anti-competitive behaviour and by the persons who are indirectly affected (for instance, persons who purchase goods and services from the directly affected persons).

Regarding the date on which these claims may be filed, according to the Regulation claims may be filed both before (the so-called stand-alone actions) and after the issuance of a sanctioning decision by the Council (the so-called follow-on actions). Regarding the latter, to the extent that the Council's decisions under which the fines are applied

3 In accordance with the provisions of Article 6(3) of the Competition Act, it is presumed, until proven otherwise, that one or several undertakings are in a dominant position if the accumulated market share on the relevant market, registered for the analysed period, is over 40 per cent.

4 The courts also are competent to defend the rights of natural and legal persons regarding complaints resulting from the violation of Articles 5 and 6 of the Competition Act and Articles 101 and 102 of the TFEU. Considering European Commission recommendations, the Competition Council encourages claims filed by persons affected by anti-competitive actions and behaviours, in view of rectifying the suffered damages. The courts may decide upon the validity or nullity of the concluded agreements and solely may grant compensations to natural and legal persons if Articles 5 and 6 of the Competition Act and Articles 101 and 102 of the TFEU are infringed. In order to ensure the complete effectiveness of the rules in competition matters, any person may request compensations for the prejudices caused by an agreement or behaviour likely to distort the competition.

are final and irrevocable, the Competition Act imposes an absolute legal assumption regarding the existence of the illegal anti-competitive deed causing prejudice.

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 and Articles 101 and 102 of the TFEU.

The courts can award damages for losses caused by the infringement of Articles 5 and 6 of the Competition Act and Articles 101 and 102 of the TFEU, and can order protective actions and award costs of private competition 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 and Article 101 of the TFEU.

The competition legal framework also establishes the deadline for filing claims for follow-on actions, the removal of the joint and several liability of companies that enjoyed an immunity from fines and the courts' right to request the Council to provide the investigation file based on which the sanctioning decision 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')[5] and the Romanian Civil Procedural Code ('the 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 courts (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. Moreover, we must consider also the provisions of Regulation (EC) No. 44/2001 (regarding the legal competence, acknowledgement and enforcement of decisions in civil and commercial law). Under this Regulation, with respect to tort claims, claimants have the choice of bringing an action in the courts of the state where the defendants are domiciled or in the courts of the state where the harmful event occurred.

Private competition law actions have the nature of tort actions. The applicable regime is detailed in particular in Chapter IV – Civil Liability of the Civil Code currently in force, 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

5 The current Civil Code entered into force on 1 October 2011.

c the losses caused by the infringement are to be recovered in full; this includes both the effective loss (*damnum emergens*) lost profits (*lucrum cessans*) and the expenses incurred for avoiding or limiting the prejudice.

In order to be compensated for the damage, the victim of an illegal conduct (including herein anti-competitive practices) will have to prove that all of the following 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; and
d the link between the infringement and the damage caused to the claimant.

According to the general limitation rules (those applicable to tortious claims) damage claims must be brought within three years. The limitation period of the right to file a damage claim starts when the plaintiff knew or should have known of both the damage and the person responsible for it. For follow-on actions, there is a different statute of limitation, according to which such actions must be brought within two years 'as of the date when the Council sanctioning decision becomes final and irrevocable'.

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. Thus, the Competition Act is applicable to acts committed on or outside the Romanian territory as long as their effects are noticeable 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 and Article 5 of the Regulation. According to these Articles, both the persons directly affected by an anti-competitive behaviour and the persons who are indirectly affected (for instance, persons who purchase goods and services from the persons directly affected) 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 Articles 101 or 102 of the TFEU. This is in line with the general principle according to which 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.

The New Civil Procedure Code[6] also contains provisions regarding under what conditions, persons, organisations, institutions or authorities may file actions or put forward defences, without the need to prove a personal interest when acting to defend the rights and the legitimate interests of persons in special situations or, as the case may be, to protect a group's interests or the general interest.

According to the CPC, 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. Pursuant to the draft of the new CPC, the judge may decide whether 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.

The New Civil Procedure Code provides for special situations where certain documents can be consulted outside a court of law. Thus, if a document necessary to the proceeding is with one of the parties and cannot be brought before the court because it is too costly, there are too many documents or they too sizeable, a judge, who shall assist the parties while examining the documents, can be delegated at the scene. Furthermore, the judge, bearing in mind specific circumstances, can order that only excerpts or copies of the documents (certified by the person holding them) should be brought before the court.

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 a *prima facie* infringement case.

The task of providing evidence of the damages incurred is difficult considering the substantial lack of investigative powers of the Romanian courts. Among the relevant discovery means are: the appointment of experts or specialists; interrogatory; witnesses; requests for information to the public authorities (including the Council) in order to obtain official documents and information related to the case; and other written documents submitted by the involved parties.

6 According to Law No. 76/2012 of 24 May 2012 for the implementation of Law No. 134/2010 regarding the Civil Procedure Code, the latter shall enter into force on 1 September 2012. Note that certain provisions shall enter into force on 1 January 2013.

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 that are 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. The CPC provides that written evidence legally protected by secrecy or confidentiality may not be brought before the court. Therefore, documents and information that were 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 reputation.

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, 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 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 the 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 that may be used in order to establish in the courts the existence of the anti-competitive practices. 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. Also, all the parties may produce experts' reports or opinions in order to support their allegations in

court. In domains that are strictly specialised, and where there are no authorised *ex officio* experts or experts requested by any of the parties, the judge may request the point of view of one or more personalities or specialists in such field.

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. In addition, the court also has the right to refer a case to the Council in order to obtain a specific opinion on competition aspects (e.g., relevant market definition).

VII CLASS ACTIONS

Since 2011, the Competition Act expressly regulates the rights of specified bodies (i.e., registered consumer protection associations and professional or employers' associations having these powers within their statutes or being mandated in this respect by their members) to bring representative damages actions on behalf of consumers. The regulator seems to have chosen the opt-in system for collective damages claims based on the Competition Act. According to the Stamp Duty Law,[7] these class actions are exempted from the obligation to pay stamp duty.

Before the entry into force of the 2011 amendments, there was only a general provision in the Consumers' Law,[8] allowing consumers' associations to file legal actions to defend consumers' rights and legitimate interests against undertakings, still in force. The legal provision does not expressly clarify whether such actions are limited to protecting the general rights recognised under the Consumers' Law only or whether it also permits collective damages legal actions based on antitrust practices or other illicit deeds. The Consumers' Law is also silent on whether such claims could be brought as representative actions at large or on behalf of named consumers.

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) so as 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*), any lost profits (*lucrum cessans*) and the expenses incurred for avoiding or limiting the prejudice.

Punitive damages are not allowed under Romanian law. The CPC 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. In

7 Article 15(j) of the Law No. 146/1997 with its further amendments.

8 Government Ordinance No. 21/1992 regarding the consumers' protection – Article 37(h).

all cases, however, 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 be 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.

The Council proposed that in the case of class actions, a representative consumer should be found who can be applied to a broader range of plaintiffs, including undertakings subject to exclusionary practices. Thus, the damage incurred by this consumer shall be used as a reference when computing compensation for a whole class of plaintiffs. In this manner, plaintiffs shall have to show that they incurred damages, without being required to quantify the exact value of the damages, which most of the time implies a costly analysis.[9]

IX PASS-ON DEFENCES

The new Romanian legal system includes specific provisions on passing on overcharges. According to Article 61, Paragraph 2 of the Competition Act: '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.

At first view, Article 61 prevents the defendants from arguing that the claimant did not suffer a loss because the products or the services were sold. The courts have not yet ruled on this issue. It is to be further clarified whether the law has or has not introduced a total ban on the defendants' invoking of the passing-on defence.

X FOLLOW-UP LITIGATION

Private actions do not need to rely on a prior finding of an infringement by the Council. The Competition Act establishes a special regime regarding follow-on actions. In such cases, since liability arises from the prior infringement decision, the burden on the claimant in such cases is to establish that they have suffered loss as a result of the infringement. The two-year term in which interested persons may introduce court action starts from

9 The Council's Standpoint on quantification of harm suffered because of an infringement of Article 101 and/or Article 102 of the TFEU.

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.

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 can be filed even against defendants having benefited from leniency actions applied by the Council, but according to the current competition law, the successful leniency applicants cannot be held jointly and severally liable for their participation in anti-competitive practices prohibited by Article 5 of the Competition Act or by Article 101 of the TFEU. Therefore they can be held liable only for the damages incurred as a consequence of their own actions, and not of the actions of the other participants to the anti-competitive practice.

XI PRIVILEGE

When ruling on follow-on claims for damages, the courts may request the Council to 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 the client. Thus, according to Article 36(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.*

In addition, according to the lawyers' special law, 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 partly 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 2267 to 2278) dealing with settlement options, while the CPC contains procedural rules governing settlement in front of the court. Under the CPC, such settlement negotiations are allowed (before or during the court actions), but not mandatory.

The parties may agree upon the value of the damages and methods of reparation. If the parties settle their dispute, the court cannot be called to rule on such legal action; the court accepts as such the settlement without analysing the merits. 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. If the settlement agreement does not include any references with respect to the litigation costs the court shall divide them equally.

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 been yet developed with regard to the private enforcement of competition, neither by the ordinary courts nor by 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, except the successful applicants for leniency, which, according to an explicit provision of the Competition Act, cannot be held jointly and severally liable for their participation in anti-competitive practices prohibited by Article 5 of the Competition Act or by Article 101 of the TFEU. 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 harmonisation with the material aspects of EU competition law and encouraged private competition enforcement. Despite the improvement of the legal framework and the Council's sustained efforts to increase awareness among consumers, the courts have not yet been called to rule on any antitrust private claims (not even on follow-on actions), as the only role exercised has been that of reviewing decisions issued by the Council or to suspend the execution of the Council Decision.

However, mention should be made that the Council recently issued several fining decisions and is still conducting a significant number of investigations in specific areas, where it is very likely that fines and other penalties will be applied. Therefore, it 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.

Appendix 1

ABOUT THE AUTHORS

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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 a 'very client-oriented', 'focused on solutions' and 'open-minded' lawyer. Established clients of Silviu Stoica include Philip Morris, Cargill, ArcelorMittal, Innova Capital and Oresa Ventures, whom he has advised on a whole array of competition matters and investment issues.

Mr Stoica has been with the firm since its inception, pursuing all career stages from associate to senior associate and head of practice group. Silviu Stoica holds a degree in law from the University of Bucharest Faculty of Law and is a member of the Bucharest Bar Association. Mr Stoica attended US Legal Methods – Introduction to US Law, Institute for US Law in Washington, DC and the International Development Law Organization Development Lawyers Course (DLC-20E) in Rome.

MIHAELA ION

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Mihaela Ion is a managing associate within the competition practice group of Popovici Nițu & Asociații. Her area of expertise covers in particular antitrust litigation, unfair trade practices, consumer law, merger control proceedings and state aid. She also assists clients in structuring and implementing compliance programmes, providing regular training as external legal counsel on all relevant aspects of competition law.

Chambers Europe reported Ms Ion as being appreciated for her focus on clients' need and proactive approach.

Ms Ion holds a degree from 'Lucian Blaga' University of Sibiu and is a member of the Romanian Bar Association. Mihaela Ion also holds a Masters degree in Competition from the Bucharest Academy for Economic Studies and a Masters degree in International Relations and European Integration from the Romanian Diplomatic Institute.

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