The Private Competition Enforcement Review

Eighth Edition

Editor
Ilene Knable Gotts

Law Business Research

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EDITOR'S PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. For example, 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, but 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 create 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 levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Brazil provided another, albeit more limited, example: Brazil has had private litigation arise involving non-compete clauses since the beginning of the 20th century, and monopoly or market closure claims since the 1950s. In the last decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on') to public enforcement. In some jurisdictions (e.g., Lithuania, Romania, 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. Also, other jurisdictions (e.g., Switzerland) still have very rigid requirements for 'standing', which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation pending in many jurisdictions throughout the world to provide a greater role for private enforcement and courts beginning to act in such cases. 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 it is only recently that a derivative shareholder action has been filed. In other jurisdictions, the transformation has been more rapid. 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 few years, 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). Moreover, we are at a critical turning point in the EU: by 2016, EU Member States are required to implement the EU's directive on private enforcement into their national laws. Even without this directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights. Indeed, private enforcement developments in some jurisdictions have supplanted the EU's initiatives. The English and German courts, for instance, 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 have also taken steps to facilitate collective action/class action legislation. Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must 'opt out' of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must 'opt in' to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. 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. 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, Canada and Switzerland, although Switzerland has legislation pending to toll the period) or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority acts that a private action will be decided by the court.

The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions; and in some 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 (see, for example, Germany and Sweden). Some jurisdictions, such as Hungary, seek to

provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: 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. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, 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 respective 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, with some (e.g., Russia) focusing on the potential for 'unjust enrichment' by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low as compared with the estimated size and gravity of the antitrust violation. 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*). Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and 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). In Venezuela, however, the plaintiff can get unforeseen damages if the defendant has engaged is gross negligence or wilful conduct. 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.

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 have not been available except to organisations formed to represent consumer members; a new class action law will come into effect by 2016. 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, Japan, 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 that '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 pretrial 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 is favourable to the recognition that private antitrust enforcement has a role to play. 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 change both through proposed legislative changes as well as court determinations. 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.

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Wachtell, Lipton, Rosen & Katz
New York
August 2015

Chapter 23

ROMANIA

Silviu Stoica, Mihaela Ion and Laura Bercaru[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 continuous attempts of the Council and other public authorities to increase awareness among consumers, there is still not much private antitrust litigation activity in Romania, mainly because consumers harmed by anti-competitive practices are still reluctant to file such actions.

In fact,[2] the national courts have dealt with only two private litigation cases on antitrust matters (i.e., stand-alone actions). Currently, the cases are pending before the appeal courts. However, in both cases the first instance court stated that the claimants did not prove the breaches of the Competition Act and therefore one of the conditions of the tort liability was not met and the actions were dismissed for being ungrounded.

The past year has not brought any amendments to domestic legislation on private enforcement of competition. Nevertheless, the new Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the Directive)[3] is expected

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2 According to OECD's Working Party No. 3 on Co-operation and Enforcement – 'Relationship between public and private antitrust enforcement' – Romania, 15 June 2015.

3 The Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European

to substantially amend our national legal framework. Even if the domestic legislation observes the main guidelines regulated by the Directive, we envisage further important developments. The new Directive is expected to substantially amend our legislation, especially with regard to:

a documents that may be requested in court and the possibility of the person submitting the documents to be examined prior to the document's disclosure, as well as the impact and the proportionality of such disclosure;

b the document categories that are excepted from disclosure before the courts;

c the fact that a definitive decision of the competition authority is considered irrefutably established for the purposes of an action for damages brought before their national courts;

d limitation periods, which ought to be at least five years and the way they can be suspended; and

e the fact that cartels are presumed to cause damage.

We believe that such developments will encourage the customers to file, at least, follow-on actions and will help overcome the current deadlock of private enforcement in Romania. As is mentioned in the Directive, Romania must transpose and implement in the domestic legislation the provisions set therein by 27 December 2016. To date, no actions have been taken in this regard. However, the Council stated that the Directive shall be transposed in dedicated law to private enforcement of competition law and not by reviewing the private enforcement provisions already laid down in competition law provisions.[4]

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.[5]

Union Text with EEA relevance as it was published in Official Journal No. L 349 of 5 December 2014.

4 According to the OECD's Working Party mentioned in footnote 2.

5 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.

The national 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[6] (the Regulation).

Article 64 provides the general framework for the private enforcement of the Competition Act, explicitly stating that the persons (both legal and natural persons) harmed as a result of anti-competitive practices are entitled to seek relief in court. This principle is further developed in Article 10 of the Regulation,[7] 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 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 (stand-alone actions) and after the issuance of a sanctioning decision by the Council (follow-on actions). Regarding the latter, to the extent that the Council's decisions under which the fines are applied are final, the Competition Act imposes an absolute legal assumption regarding the existence of the illegal anti-competitive deed causing prejudice. The Competition Act does not expressly provide that the follow-on actions may be based on a European Commission decision.

As regards jurisdiction, while the Council is guided by the priority principle (meaning that the Council may decide which of the matters submitted is more urgent and important), 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

6 Approved by Council's President Order No. 499/2010.

7 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 Treaty on the Functioning of the European Union (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.

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)[8] and the Romanian Civil Procedural Code (CPC).[9]

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).

According to CPC if the value of the claim exceeds 200,000 lei, the district court is competent to judge the case in first instance. Claims not exceeding 200,000 lei will be judged by local courts.

As regards territorial jurisdiction, lawsuits should be filed with the local courts corresponding 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 Council Regulation (EC) No. 44/2001 (on jurisdiction, the recognition and enforcement of judgments 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, 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 (*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.

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

9 The current Civil Procedural Code entered into force on 15 February 2013.

In case of stand-alone actions, the burden of proof for demonstrating that there has been an infringement of the competition legislation and a person was harmed lies with the plaintiff. On the other hand, with respect to follow-on actions, the infringement of the competition legislation which has been established by a definitive decision of the competition authority no longer needs to be proved. This distinction has also been adopted by the new Directive, which establishes that finding of an infringement by a competition authority or court should not be subject to litigation in a subsequent damages action. Moreover, where the claim is brought in the same Member State as the authority or court that made the finding, that finding will be full proof of an infringement. Therefore, where there is a definitive decision of the competition authority stating that there has been an infringement, the first liability condition is met, and the claimant only has to demonstrate points (b) to (d) above.

According to the general limitation rules (those applicable to tortious claims) damage claims must be brought within three years in case of stand-alone actions. 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's sanctioning decision becomes final'. Given that the Council commonly sanctions a series of undertakings through one decision, an issue arises regarding whether the starting point of the limitation period commences at different times for each depending on the undertaking from which the plaintiff claims relief. The Council's decision may become final for each undertaking at different times depending on whether the undertaking challenges the decision in court or files for appeal and according to the duration of each court proceeding corresponding to each undertaking. Nevertheless, upcoming modifications related to the Directive's implementation are expected to prolong the limitation period as the Directive's provisions establish a five-year term for damage claim actions.

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 in 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. Based on the aforementioned principles, the Council has issued a series of decisions sanctioning foreign undertakings for having breached the provisions of the Competition Act and of the TFEU.[10] In all cases, the Council imposed the fine directly on the foreign undertakings.

10 Council's Decision No. 51/2011, Council's Decision No. 99/2011, Council's Decision No. 44/2013, Council's Decision No. 58/2013.

In practice, although the Council has the power to apply the Romanian competition law to foreign undertakings, obtaining evidence from them was a challenge. The Council's efforts to obtain cooperation[11] from the competition authorities from the countries where the parties originated were thwarted because the cooperation conditions are not met when the infringements affect only Romania. The Council, therefore, must seek information from the defendants through diplomatic channels, sending them requests for information through the Romanian Foreign Ministry and the Ministry's foreign counterparts. There remains a serious question as to whether the sanctioned foreign undertakings can eventually be forced to pay the fine imposed on them.[12] These same issues are likely to cause uncertainty in connection with private enforcement of competition law involving a foreign undertaking.

IV STANDING

The claim of relief in courts is governed by Article 64 of the Competition Act and Article 10 of the Regulation. According to these Articles, both the persons directly affected by an anti-competitive behaviour and the persons 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.

In 2010 and 2011, the amendments brought to the Competition Act provided the Council the role of *amicus curiae*, giving it the power to issue observations to courts in particular in cases where national and European competition rules are applied. These observations may be issued by the Council *ex officio* or at the courts' requests.

The *amicus curiae* role of public institutions was also implemented by the CPC, which 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. Furthermore, according to the same CPC,

11 The OECD Peer-Review on Competition law and policy in Romania issued in 2014 expressly mentions only the Council's gathering of evidence in the investigations finalised through Council's Decision No. 99/2011 and Council's Decision No. 44/2013.

12 According to OECD Peer-Review on Competition Law and Policy in Romania issued in 2014.

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 – provision that did not exist in the previous Civil Procedural Code.

The Competition Act expressly provides the Council's right to intervene in competition cases before national courts. Nevertheless, the Council lacks the tools to gather information about pending cases. Oddly, domestic legislation obliges national courts to report cases involving European competition law to the Council (which forwards the information to the European Commission), but it does not provide for an equivalent obligation to inform the Council about cases involving Romanian competition law.[13]

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, including legal counsels, 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 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 in a party's possession 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 (however, this is a very rare practice). 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 and has to prove the future risk of losing that evidence.

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.

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

13 According to OECD Peer-Review on Competition Law and Policy in Romania issued in 2014.

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, its spouse or its relatives/in-laws until third degree. According to the Competition Act and the relevant secondary national legislation, the court vested with a follow-on action may ask the Council to grant access to the documents that the latter relied on when issuing the sanctioning decision. Of course, the court shall be bound to ensure that the confidentiality of business secrets and other confidential information contained in such documents is not breached. In fact, such documents are kept by the competent court in the so called 'value box'. The reasons based on which the Council granted confidentiality for certain documents or information may not subsist in the litigation phase (i.e., financial data, information regarding costs or prices) if they are qualified by the court as historical data the Council may be bound to disclose the documents or information in question.

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.[14]

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 current 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. We are unaware, however, of any public disclosure of internal court regulations for observing this obligation. Nevertheless, we expect further procedural developments together with the implementation of the Directive.

14 The current Criminal Code entered into force on 1 February 2014.

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 Competition Council Plenum 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 and specific legal provisions, it should be determined how and what type of experts will be used in private competition law litigation. The CPC provides general principles that allow judges to request the opinion of one or more experts in the relevant field and one or all of the parties to produce experts' reports or opinions in order to support their allegations in court. Nevertheless, to date, there have been no certified experts officially acknowledged in the competition field who may be used to establish in court the existence of the anti-competitive practices. Therefore, we have to rely once again on general principles provided by the CPC that state that, 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. The new Stamp Duty Law exempts class actions from the obligation to pay stamp duty.[15]

Before the entry into force of the 2011 amendments, there was only a general provision in the Consumers' Law,[16] allowing consumers' associations to file legal actions to defend consumers' rights and legitimate interests against undertakings, which is still in force.

15 Article 29(f) of the Government Emergency Ordinance No. 80/2013 that replaced Article 15(j) of the Law No. 146/1997 with its further amendments.

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

VIII CALCULATING DAMAGES

The Competition Act does not contain any specific provisions on how damages caused by infringing competition laws are to be determined. It is hoped that the legislator will clarify the matter when implementing the Directive. Note, however, that the fines imposed by the competition authorities do not represent a criterion for settling damages in private enforcement claims.

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. Moreover, the Civil Code contains a provision according to which if the illegal deed caused the loss of an opportunity to obtain an advantage or to avoid damage, the victim shall be entitled to recover the incurred damages. Thus the victim of an anti-competitive practice is entitled to obtain an indemnification provided that it proves that it has lost the opportunity to obtain an advantage or to avoid damage. In such cases the indemnification shall be established proportionally with the likelihood to obtain the advantage or to avoid the damage, bearing in mind the circumstances and the actual situation of the victim. The Directive sets out the same principle of full reparation of damage, with minor differences in respect to recovery of loss. Therefore, a person may request both the reparation of the actual damages incurred, any lost profits, as well as interest. Hopefully this aspect will be clarified when implementing the Directive, as the Civil Code does not mention interest as a way of compensating the damage occurred.

Punitive damages are not allowed under Romanian law. The CPC provides for the general possibility of recovering attorneys' fees. In general, legal costs are incumbent on the losing party upon the request of the winning party. The CPC details what legal costs are included (judicial stamp fees, attorneys' and experts' fees, amounts due to witnesses and, if the case may be, transport and accommodation expenses for witnesses and experts, as well as any other costs necessary for the process). 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 and the principles applying to him should apply 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.[17]

IX PASS-ON DEFENCES

The Competition Act includes specific provisions on passing on overcharges, which may be altered with the implementation of the Directive. Now, according to Article 64, 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 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 64 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-ON LITIGATION

Private actions do not need to rely on a prior finding of an infringement by the Council or the European Commission.[18] 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. As previously mentioned, the two-year term in which interested persons may introduce court action starts from the date when the Council's sanctioning decision becomes final. The decision of the Council becomes final if: (1) the term during which the Council decision may be challenged expires and no interested party challenged it; or (2) after being challenged, the decision is upheld and declared by the court as being final. It is worth mentioning that our national legislation does not make a distinction between the court actions through which one challenges: (1) the existence of the anti-competitive deed itself; and (2) the imposition of a penalty and the amount thereof. In case no appeal is filed against the decision or in case the decision is upheld by the courts, the Council 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,

17 The Council's standpoint on quantification of harm suffered because of an infringement of Article 101 or Article 102 of the TFEU.

18 For further information regarding this issue please refer to Section II, *supra*.

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 PRIVILEGES

The Competition Act, amended and supplemented in 2010 and 2011 took over most of the recommendations made by the European Commission in its White Paper on Damages actions for breach of the EC antitrust rules.[19] As such, 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, even if it is not clear by what means.

Article 36(8) of the Competition Act expressly acknowledges the privilege of confidentiality between the lawyer and the client, as follows:

> *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.*

Therefore, according to the Competition Act, the following two categories of documents may not be collected or used as evidence during the investigation procedure carried out by the Council:

a communications between the undertaking or association and their lawyers (who belong to a bar association, and not legal counsel) made exclusively for the purpose of exercising the right of defence (before or after the initiation of investigation); and

b preparatory documents drafted by the undertaking or association exclusively for the purpose of exercising the right of defence.

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.

19 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0165&from=EN.

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 2,267 to 2,278) 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 are not mandatory. These provisions implement the majority of Chapter VI of the Directive on consensual dispute resolution, however it is possible that other conditions will be imposed.

According to current provisions, 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, 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. In such cases, legally the parties are bound to prove that they have participated in the informative meeting regarding the mediation's advantages. In 2014, the Romanian Constitutional Court ruled that the sanction is unconstitutional and its application has been suspended starting 25 June 2014. We are expecting amendments that clarify the legal regime of the mediation procedure.

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, who may initiate legal proceedings against any of them for the full amount of the damages. Excepted are 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. In a strict interpretation of the law, only the defendants having benefited from full leniency are exempted from joint and several liability, not the defendants who only benefited from a reduction of the fine according to the leniency procedure or the mitigating circumstance of recognising the deed. 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 is in line with the material aspects of EU competition law and encourages private competition enforcement. Despite the improvement of the legal framework in the past few years and the Council's sustained efforts to increase awareness among consumers, as results from the available public data, so far the courts have not 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. This information is also ascertained in the OECD Peer Review on Competition Law and Policy in Romania issued in 2014.

In the light of approval of the new Directive, it is expected that the normative Act which will further transpose it will elaborate on the legal grounds for private enforcement in Romania and also clarify several aspects that were biased in the previous regulation.

Appendix 1

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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.

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