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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN ROMANIA**

-- 2011 --

*This report is submitted by Romania to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 13-14 June 2012.*

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## Executive Summary

1. This report addresses the activities undertaken by the Romanian RCC (hereinafter referred to as “RCC”) and the competition law and policy developments in Romania from January 1, 2011 to December 31, 2011. Where appropriate, later developments have been included and reported on.

2. For RCC, 2011 was a period of intense activity, marked by numerous challenges. We intensified our activity and created mechanisms so as to be more dynamic and rapid in identifying and sanctioning anticompetitive practices. A proof in this respect is the increase in the number of on-going investigations at the end of 2011 (73), with 22% more if compared to 2010 and with 43% more if compared to 2009. At the same time, last year 22 investigations were finalised, out of which 32% were older than three years, which was also proof of determination, considering that in 2010 20 investigations were finalised, and in 2009 only 9.

3. 2011 was also the year RCC applied the largest sanctions in the history of RCC, of around EUR 300 million, which represents double the amount of fines applied from the establishment of the competition authority until the end of 2010. Following the conclusion of the investigation on the concerted practice concerning the withdrawal of Eco Premium gasoline from the market, record fines of over EUR 200 million were applied. Important sanctions, of over EUR 63 million, were applied for the abuses of dominant position of Orange and Vodafone, thereby restricting access to the market for a smaller competitor.

4. A new version of the Competition Law entered into force in 2011. It was necessary to amend the legislation and the procedures so as to adapt them to the new economic realities, but also to be able to act consistently with the other EU Member States competition authorities. The new law offers additional tools for intervening more rapidly and with efficiency when RCC receives market signals on possible anticompetitive practices. These mechanisms already started to produce effects. For example, for the first time RCC concluded an investigation by accepting commitments, which helped in more rapidly re-establishing the competitive environment rather than by imposing fines and/or corrective measures. Another example is the first application of the settlement procedure in the case of an investigation on the drug distribution market, where two of the undertakings admitted their deeds, thus benefiting from a reduction of the fine. By applying this procedure, RCC is offering the companies the possibility to reduce fines as a result of admission of guilt and, at the same time, is reducing the number of case files under judicial review.

5. In 2011, RCC succeeded in identifying a first series of market monitoring indicators, which allow competition assessment in certain strategic economic sectors. By this new monitoring system, that will be further developed, the institution will focus its efforts towards markets presenting suspicions on possible anticompetitive acts and deeds.

6. The Railway Supervision Council and the application of the Law on unfair competition are two new attributions acquired by RCC in 2011, determining the authority to make additional efforts for adapting the institution to the new regulatory fields.

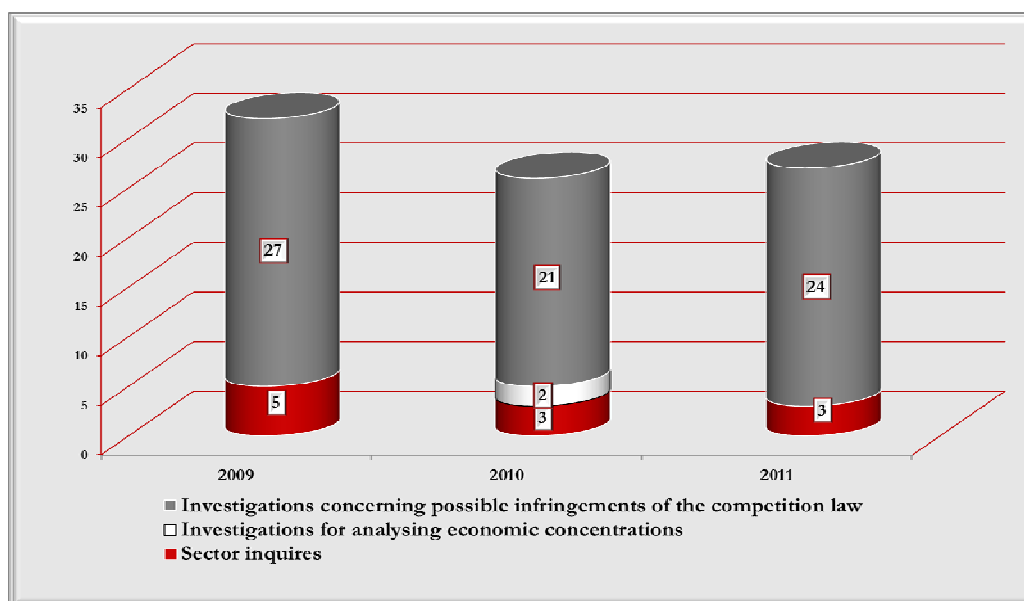
7. At international level, it is worth mentioning that Romania – represented by RCC -renewed for two years its Observer status with OECD’s Competition Committee. This confirms the results recorded lately by the competition authority. Moreover, starting with March 2011, RCC as project leader, together with the competition authorities of Austria and Latvia, grants technical assistance on competition, state aid and for strengthening administrative capacity to the National Agency on the Protection of Competition of the Republic of Moldova.

## 1. Enforcement of competition laws and policies

### 1.1 New investigations

8. In 2011, RCC initiated 27 investigations, out of which 24 investigations concern possible infringements of Competition Law and 3 concerned certain economic sectors (sector inquiries).

**New investigations (no.), 2009-2011**

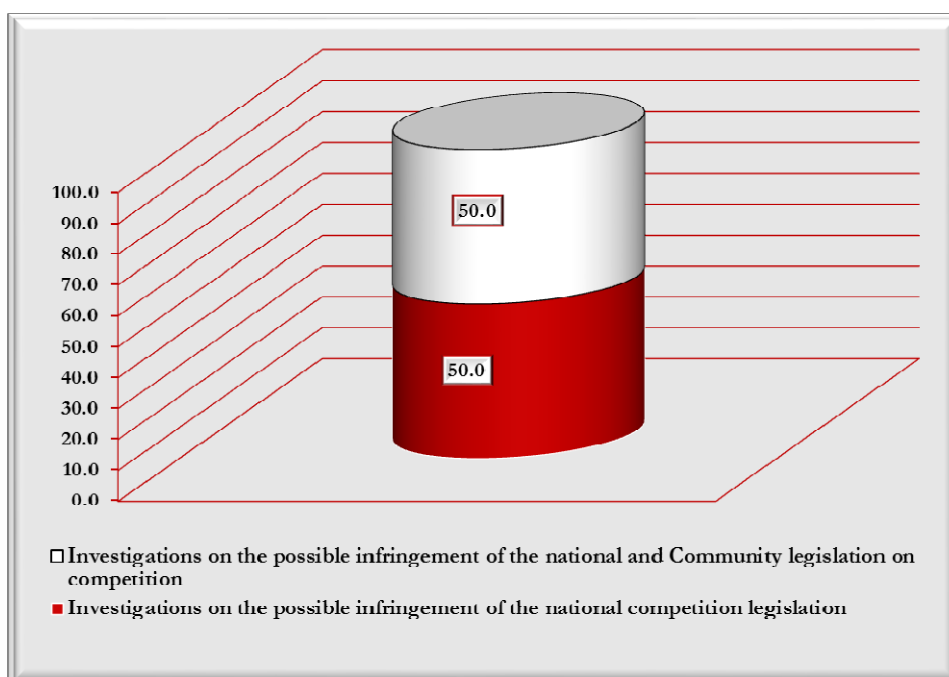


9. In 2010 and 2011, the number of new investigations decreased by 10% compared to 2009, respectively by 16%. This development is due to the fact that RCC oriented its efforts towards finalising on-going cases.

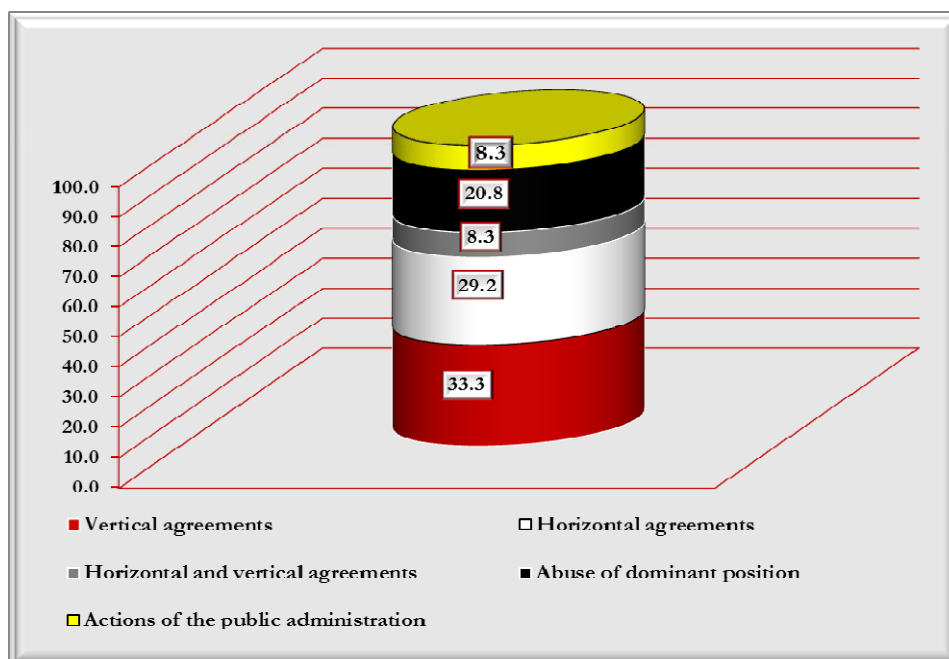
10. As regards the 24 investigations concerning possible competition law infringements opened in 2011, almost 60% of the investigations were ex-officio procedures. The economic sectors analysed within these investigations are important from an economic perspective, as well as in terms of the direct effects of the possible anticompetitive practices on consumers. The main sector concerned was energy/natural gas (30% of the total number of new investigations). One of the investigations initiated in this sector was a result of the collaboration between RCC and the Directorate for Investigating Organized Crime and Terrorism within the Public Ministry – Prosecutor’s Office attached to the High Court of Cassation and Justice.

11. The structure of these investigations, depending on the incident competition legislation and on the investigated practice is presented below.

The structure of the investigations on the possible infringement of the competition law initiated in 2011, depending on the incident legislation (%)



The structure of the investigations on the possible infringement of the competition law initiated in 2011, depending on the investigated practice (%)



12. It is worth mentioning that 71% of the investigations concerning possible horizontal anticompetitive agreements are analysing bid riggings.

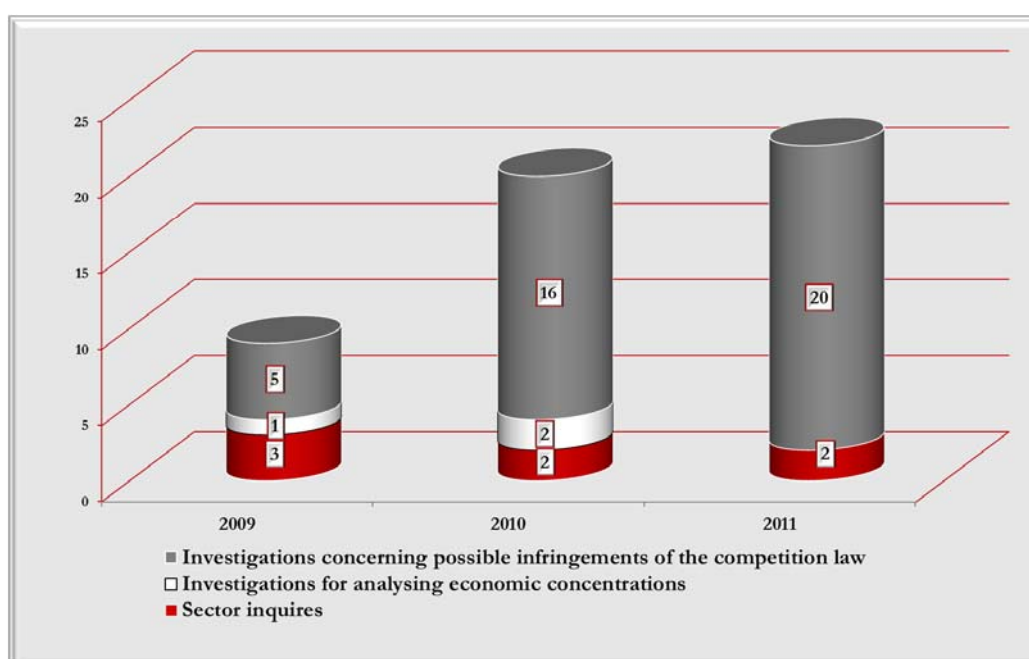
13. The 3 sector inquiries initiated in 2011 are analysing:

- banking payment services;
- large consumption good (beer);
- distribution of household products and confections through virtual stores.

### 1.2 *Concluded investigations*

14. 22 investigations were concluded, out of which 20 are concerning possible infringements of the competition legislation and 2 are sector inquiries. 7 of these procedures were older than three years.

**Concluded investigations (no.), 2009-2011**



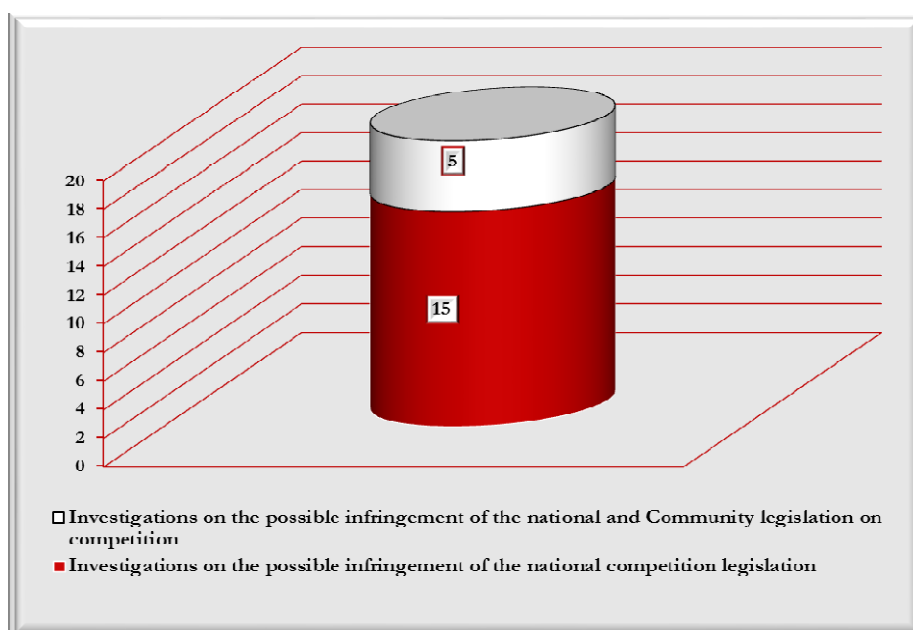
15. A record number of investigations on the possible infringement of the competition law were completed in 2011. If compared to 2009, their number increased by 4 times, and by 25% compared to 2010.

16. As regards the sector inquiries completed during the period of analysis, their number was relatively similar, which demonstrates that during this period RCC focused its resources mainly on the completion of the competition law infringement cases.

17. Taking into account the total number of on-going investigations at the beginning of 2011, and those initiated during the year (excluding disjointed and connected procedures), it results that RCC completed 22% of the cases under analysis in 2011.

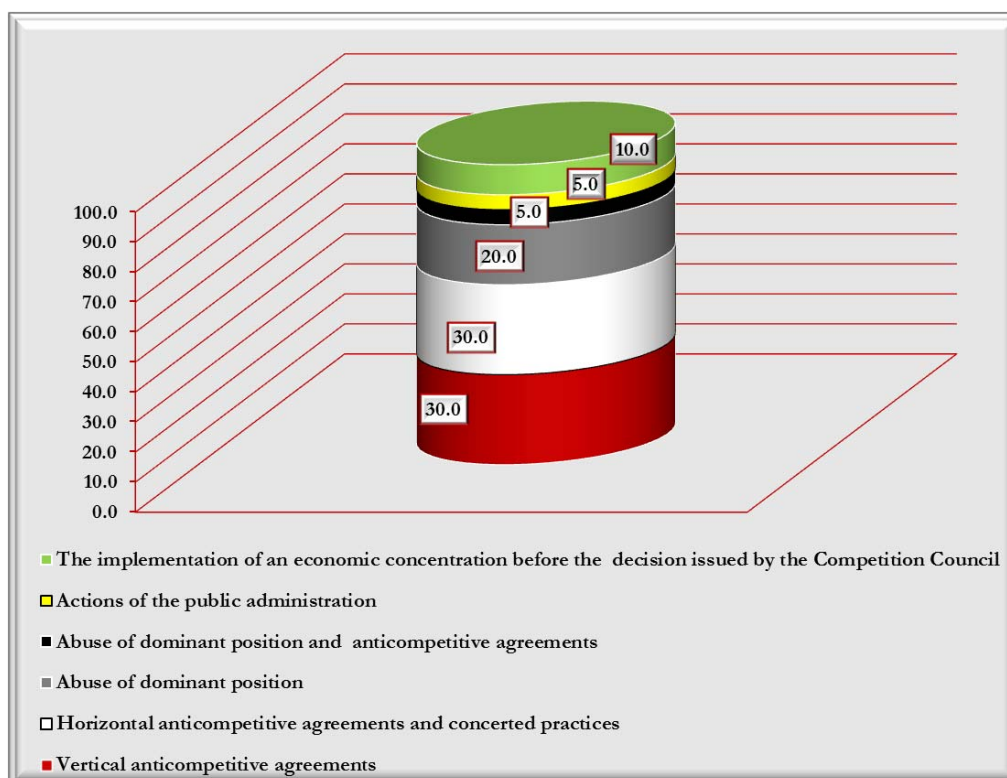
18. The situation of the investigations on the possible infringement of the competition law completed in 2011, depending on the incident competition legislation and on the investigated practice is presented below.

**The structure of the investigations on the possible infringement of the competition rules completed in 2011, depending on the incident competition legislation (no.)**



19. About 25% of the completed investigations concerning possible infringements of the competition rules targeted both national and Community legislation.

**The structure of the investigations on the possible infringement of the competition rules completed in 2011, depending on the investigated practice (%)**



20. 13 of these investigations (65%) were completed by imposing fines. Six procedures envisaged anticompetitive vertical arrangements, three horizontal anticompetitive agreements and concerted practices and two for each of the following competition law infringements: abuse of dominant position and the implementation of an economic concentration prior to a decision of RCC. In the other cases, the evidences identified were insufficient for proving an infringement of the law, so as to justify the imposition of fines or of certain measures.

21. The average duration of the investigations on possible infringement of competition legislation concluded in 2011 was of around 3 years, and of 1.6 years in case of sector inquiries. The comparative situation with 2009 and 2010 is presented in the following graph.

22. In 2011, the average duration for concluding cases on infringement of competition rules decreased by 33% compared to 2010, respectively by 1.4 years (16.8 months), which shows that the Romanian competition authority significantly focused its efforts in this regard. Compared to 2009 however, the duration remains high, and this state of affairs may be explained by the large number of cases under analysis in 2011 (taking into account on-going investigations at the beginning of the year and investigations opened during the year, RCC evaluated with 50% more cases in 2011 compared to 2009). Many of the cases completed in 2011 were old cases, with a high complexity.

23. Statistically, depending on the nature of the infringements, the investigations concluded in 2011 lasted on average as follows: 6 years – anticompetitive agreements and abuse of dominant position, 5.3 years – abuse of dominant position, 3 years - cartel, 2 years - vertical anticompetitive agreements, 1.6 years - implementation of an economic concentration prior to a decision issued by RCC, 1.1 years – anticompetitive actions of the public administration.

24. As regards the sectors covered by these investigations, most procedures were conducted in the health sector (25%) and in telecommunications (15%).

25. In respect to sector inquiries, the 2011 average duration of this type of procedures is superior to the one recorded in 2010, and lower than the 2009 average duration by 0.2 years (2.4 months). This fluctuation may be the result of the nature of sectors analysed during the previous two years (e.g. marketing of the food products, drugs wholesale sector), which required the use of a broader research

### ***1.3 Investigations in progress at the end of 2011***

26. 73 investigations on the possible infringement of competition law, out of which 16 older than 3 years, and 7 sector inquiries were in progress at the end of 2011.

27. The number of investigations concerning possible infringements of competition legislation which were in progress at the end of 2011 increased by 22% compared with the on-going investigations at the end of 2010, and by 43% compared with the end of 2009. Mainly, this is explained by the fact that the number of investigations opened during these years was larger than that the one of concluded investigations; it may also be due to the several procedures disjointed and to the partial conclusion of certain investigations, the rest of the practices remaining under analysis.

28. At the end of 2011, the average duration of the on-going investigations was of 1.9 years. As regards the possible infringements of the competition law, their duration recorded the following values: 6.4 years – abuse of dominant position and anticompetitive actions of the public administration; 6.3 years – horizontal anticompetitive agreements and abuse of dominant position; 2.5 years - anticompetitive agreements and horizontal anticompetitive agreements and actions of the public administration; 2.2 years - possible infringement of the rules in the field of economic concentrations; 2.1 year – abuse of dominant position; 1,9 years – vertical anticompetitive agreements; 1.6 years – horizontal anticompetitive agreements;

0.5 years – anticompetitive actions of the public administration, and 0.2 years – horizontal and vertical anticompetitive agreements.

#### **1.4 Dawn raids**

29. 136 headquarters/working points owned by 127 undertakings were inspected within 19 investigations carried out during 2011.

#### **1.5 Fines**

30. In 2011, the fines applied were of RON 1,246,641,324 (EUR 294,164,875), as follows: 64 undertakings for anticompetitive practices, 39 for failing to submit the information requested within sector inquiries, and two for the implementation of certain economic concentration prior to a decision issued by RCC. Compared to 2010, the fines applied in 2011 increased by 9.3 times. The fines applied in 2011 were more than 36 times the RCC budget.

31. Statistically, in terms of the nature of the infringements, in 2011 72 % of the total fines were applied for cartels, 22% for abuse of dominant position, 6 % for anticompetitive vertical arrangements, 0.3% for the implementation of an economic concentration prior to a decision issued by RCC and 0.2 % for failing to submit the information requested within sector inquiries.

32. As regards the average fine for the proven cases, the values were the following ones: for cartel – RON 297.6 million (EUR 70.2 million), abuse of dominant position – RON 134.2 million (EUR 31.7 million), anticompetitive vertical agreements – RON 13.3 million (EUR 3.1 million), the implementation of an economic concentration prior to a decision issued by RCC – RON 1.8 million (EUR 431.2 thousands), failing to submit the information requested within sector inquiries – RON 1.2 million (EUR 291.5 thousand). Per sanctioned undertaking, the average fines were the following ones: for cartel – about RON 47 million (EUR 24 million), for abuse of dominant position – RON 134.2 million (EUR 31.7 million), for anticompetitive vertical agreements – RON 1.9 million (EUR 436.1 thousands) and for failing to submit the information requested within sector inquiries – RON 63.4 thousand lei (about EUR 15 thousands).

#### **1.6 Economic concentrations**

33. 35 economic concentrations were approved, the amount of authorisation taxes being of RON 2,956,103. This amount represents less than half of the value recorded in the previous year, due to the change in the system for calculating the authorising tax in the benefit of the undertakings performing such operations, as well as due to a decrease in the number of economic concentrations analysed by RCC. All the economic concentrations were authorised without conducting an investigation.

34. The average duration of the economic concentration cases concluded in 2011 was around 2.7 months, rising insignificantly compared to 2010 and 2009 (by 3 days, respectively by 6 days).

#### **1.7 Decisions**

35. 99 decisions were issued, the largest part of them (53.5%) being sanctioning decisions. Their number rose evidently compared to 2010 and 2009.

36. In 2011, the number of merger decisions continued their descending trend. This can be explained by the economic and financial context, which reduced the mergers and acquisitions process, resulting in a reduction of the number of the cases analysed by RCC, as well as by the amendment of the Competition

Law occurred in the summer of 2010, which eliminated the negative clearance decisions (decisions that were issued when the analysed operations did not fall under the scope of the Law).

## **2. Description of significant cases**

### **2.1 *Forbidden agreements between competitors***

#### **2.1.1 *Cartel on the fuels market –withdrawal of Eco Premium gasoline from the market***

37. In December 2011, RCC completed the investigation on the possible infringement of Competition Law and of the Treaty on the functioning of the European Union by companies active on the retail and wholesale market of fuels by limiting or controlling production, marketing, technical development or investments.

38. Following hearings of the undertakings concerned, the competition authority has found that OMV Petrom, OMV Petrom Marketing, Lukoil, Rompetrol Downstream, MOL and ENI infringed competition rules by participating within a concerted practice and/or agreement aimed at withdrawing Eco Premium gasoline from the market.

39. In this case, the relevant market was defined as the retail market of Eco Premium gasoline on the Romanian territory. Eco Premium gasoline was a fuel assortment designed for a specific demand. Its specific characteristics met the special needs of certain types of passenger cars, especially those that were not equipped with catalytic converter. It should be noted that, in accordance with the legal provisions concerning the conditions for marketing gasoline, with effect from the 1<sup>st</sup> of January 2005, operators were allowed to market only unleaded gasoline, thus being prohibited to sell gasoline containing lead tetraethyl. At that time, all undertakings concerned freely chose to sell Eco Premium gasoline, promoting it among consumers as a replacement for the previously leaded gasoline. During 2005-2007, demand for Eco Premium gasoline was between 18%-28% of the total gasoline sales made by the concerned parties.

40. From May 2007 to March 2008, OMV Petrom, OMV Petrom Marketing, Rompetrol Downstream, MOL, Lukoil and ENI carried out discussions in order to agree on the cessation in selling Eco Premium gasoline. The exchange of information on Eco Premium gasoline had a strategic character, sensitive from a commercial point of view, knowing such information significantly reducing uncertainty on the future market behaviour of the competing undertakings.

41. Moreover, during the discussions on this topic, a preliminary written form of the agreement to stop selling Eco Premium by all the parties was drafted. The text of the draft agreement provided even the use of certain coercive measures (penalties, fines) sanctioning potential deviations of non-complying undertakings.

42. During the discussions carried out by the undertakings concerned on this matter, a preliminary form of a written agreement was reached between all the undertakings concerned in respect to the cessation to trade Eco Premium gasoline. The draft text of the convention provided the cessation date of marketing Eco Premium gasoline (1<sup>st</sup> of April, 2008) and the use of coercion methods (penalties) in order to sanction companies that would have not respected the understanding. Although no evidence of concluding a written form of this convention was found, put into practice their common plan of stopping the retail sales of Eco Premium and starting with April 1, 2008 they gradually eliminated this product from the product range offered to customers at filling stations.

43. The activities of the undertakings concerned during May 2007 - April 2008 were part of an overall plan to restrict competition between parties and limiting thus their individual commercial conduct by determining the lines of their mutual actions regarding the sales of Eco Premium. This action

contradicts the procompetitive concepts according to which each economic operator must determine independently the policy intended to be adopted on the market. The competition legislation prohibits any form of coordination deliberately substituting competitive risks with practical cooperation between parties.

44. In the present case, the parties jointly decided to stop selling Eco Premium, which was an assortment previously traded freely by the involved undertakings.

45. During the proceedings, the parties invoked the existence of a legal obligation to withdraw the Eco Premium gasoline from the market as of the 1<sup>st</sup> of January 2009. In fact, there was no legal prohibition to continue marketing this type of gasoline after the 1<sup>st</sup> of January 2009. According to the existing legislation, any type of gasoline could have been sold on the Romanian market, subject to the obligation to reduce its sulphur content from a maximum of 50 mg/kg to a maximum of 10 mg/kg. That adjustment was required for all gasoline types. On the 31<sup>st</sup> of December 2008, Eco Premium gasoline, as well as the other two existing types of gasoline (unleaded gasoline COR 95 and COR 98) had a maximum sulphur content of 50 mg/kg. From the 1<sup>st</sup> of January 2009, the undertakings concerned had taken all necessary measures so as to continue selling unleaded gasoline COR 95 and COR 98 with sulphur content of maximum 10 mg/kg. These measures have not been taken for Eco Premium gasoline, because the involved undertakings had decided to eliminate it from the market.

46. Thus, the discussions that took place over approximately one year timespan and, subsequently, the agreement to stop selling a certain product provided a guarantee for the parties that neither of them will be selling Eco Premium in the future and implicitly neither will satisfy the demand of consumers for this type of gasoline. Such a guarantee was important for the parties, since it allowed them to eliminate any risks and uncertainties that normal competition between them would entail, by replacing them with practical cooperation. If prior to the agreement the parties competed on three types of gasoline, the agreement allowed parties to stop competing on one of these types of gasoline.

47. This agreement has been considered by RCC as an infringement of the Competition Law and of the Treaty on the Functioning of the European Union. The duration of the infringement committed by OMV Petrom, OMV Petrom Marketing, MOL, Lukoil and ENI was from May 10<sup>th</sup>, 2007 until April 1<sup>st</sup>, 2008 and for Rompetrol Downstream, from November 1<sup>st</sup>, 2007 until April 1<sup>st</sup>, 2008.

48. The fines applied through Decision 97/27.12.2011 were the following: OMV Petrom – RON 366,530,965, OMV Petrom Marketing RON 137,288,031, Lukoil – RON 136,894,846, Rompetrol Downstream – RON 159,553,612, MOL – RON 80,267,746 and ENI – RON 11,194,766.

49. The decision can be accessed at: [www.competition.ro/official\\_documents/competition/decisions](http://www.competition.ro/official_documents/competition/decisions).

## **2.2 Vertical anticompetitive agreements**

### **2.2.1 Retail price fixing on the fruits and vegetables market**

50. The ex-officio investigation was initiated in October 2009 and had as object the possible anticompetitive agreement concluded between Interfruct, Albinuța Shops and Profi Rom Food on the market of the commercialisation of fruits and vegetables in Bucharest. RCC found that the three companies have concluded a number of contracts, whereby the supplier Interfruct set shelf retail prices for the vegetables and fruit sold through the Profi chain of shops in Bucharest belonging to the retailers Albinuța Shops and Profi Rom Food. The agreement between Interfruct and Profi was carried out for a year, and the one between Interfruct and Albinuța over a period of two years.

51. Considering that the agreements in question envisaged the fixing of the retail prices of products delivered to third parties, they fall within the category of serious competition restrictions, prohibited *per se* by the specific legislation.

52. Through the anticompetitive agreement, the parties mutually ensured the benefits resulting from the sale of fruits and vegetables, while consumers did not benefit from potentially lower shelf prices or from the alternative of purchasing substitutable products.

53. As a result, by Decision no.18/31.05.2011, RCC applied sanctions to the involved parties, as follows: Interfruct - RON 1.8 million (around EUR 400,000), Albinuța Shops - RON 2.6 million (around EUR 600,000) and Profi Rom Food - RON 12.3 million (around EUR 3 million).

54. The decision can be accessed at: <http://www.consiliulconcurentei.ro/en/official-documents/competition/decisions.html>.

### 2.2.2 *Interdiction of exports on the drug distribution market*

55. In 2011, RCC completed 3 investigations on possible infringements of the Community and national competition legislation on the drug distribution market. These investigations were initiated ex-officio in 2009 (initially there were 4 investigations, however two of them were later connected) and envisaged certain possible vertical anticompetitive agreements concluded between Belupo Croatia, Bayer, Baxter, Sintofarm Switzerland and each of their distributors. Below, we present the Baxter case.

56. The contracts concluded between Baxter and its sole distributors in Romania (Actavis, Farmaceutica Remedia and Sofmedica), and the subsequent additional acts contained an export prohibiting clause, a monitoring clause (the obligation of the distributors to report to Baxter information on their activity) and a non-compete clause (the distributors were forbidden to promote and commercialize products competing with Baxter products).

57. The effect of applying the three types of clauses was that distributors did not export Baxter products and did not trade products competing with Baxter products. Thus, these acts constitute anticompetitive agreements which isolated the Romanian market and prevented the trade of these products on other markets, including within the common market.

58. By Decision no.52/28.10.2011, RCC concluded on the violation of the Competition Law and of the Treaty on the Functioning of the European Union by the investigated companies. Baxter and Farmaceutica Remedia admitted committing the deed and, therefore benefited from a 20% reduction of the fine. This reduction was possible as a result of the amendment of the Competition Law in 2010 and 2011 (the ability to reduce the amount of the fine with percentages ranging between 10 and 30%, when the undertakings expressly admit committing the anticompetitive acts which are the subject of investigations in progress – the settlement procedure).

59. The fines applied by RCC's decision were the following ones: Baxter – RON 1.362 million (EUR 315,000 euro), Actavis – RON 2.981 million lei (EUR 691,011), Farmaceutica Remedia – RON 1.051 million (EUR 243,720) and Sofmedica – RON 0.598 million (EUR 139,080). The fines represented 3.36%, 0.72%, 0.57%, respectively 0.96% of the individual turnovers recorded by the undertakings in the year prior to the sanction.

60. The decision can be accessed at [www.competition.ro/official\\_documents/competition/decisions](http://www.competition.ro/official_documents/competition/decisions).

## 2.3 *Abuse of dominant position*

### 2.3.1 *Abusive behaviours on the telecommunications market – Orange and Vodafone*

61. In July 2006, as a result of two complaints submitted by Netmaster, RCC initiated an investigation concerning the possible anticompetitive practices of Orange, Vodafone and Romtelecom, having as object the elimination of Netmaster from the market. The investigation was disjoined in 2010 into four investigations, according to the possible anticompetitive practices investigated and to the party concerned.

62. Three of these investigations were completed in 2011, envisaging: the possible abuse of dominant position of Orange, the possible abuse of dominant position of Vodafone and a possible anticompetitive agreement concluded between Orange, Vodafone and Romtelecom. In the latter case, no evidence of competition infringement has been identified, justifying the imposition of measures or sanctions.

63. As regards the first two investigations, the competition authority has found that Orange and Vodafone refused the access of Netmaster to their telephone networks, access that was necessary for terminating the national and international calls transited by this operator. Previously, Netmaster requested interconnection at the tariff level regulated by the National Authority for Administration and Regulation in Communications, which was lower than those charged by the two phone companies.

64. The interconnection of the operators' networks and, implicitly, their acquisition of the termination services offer subscribers of the different networks the possibility to make calls between them. Thus, the development of these services involves the takeover of calls from or transited through the networks of other operators (Netmaster, in this case) and their delivery to the final destination (the final users of Orange and Vodafone networks). For alternative phone operators (of Netmaster's type), these services are essential facilities for entering and preserving their presence on the market.

65. The abuses of Vodafone and Orange were manifested on the markets for call termination services in their own telephone networks, markets where each of these operators has a monopoly position. According to the legislation in the field of competition, in the absence of an objective justification, a refusal constitutes an abuse of dominant position on the market.

66. Orange and Vodafone had not only the obligation to grant Netmaster access to their networks so as to terminate the calls, but also the obligation to observe the rules of the regulatory authority in the field, including to practice a maximum fee for their services (regardless of their place of initiation, outside or inside Romania).

67. From the analysis carried out by RCC resulted that until 01.01.2007, Vodafone and Orange set higher tariffs for international call termination services, without taking into account the rules in the field establishing a mandatory maximum tariff. If Vodafone and Orange would have granted Netmaster access at the maximum regulated tariff, in accordance with the non-discrimination obligation, they would have had to apply the same tariff to all operators requesting this service, including to those they had concluded contracts with.

68. A company holding a dominant position has the obligation to provide access, so that the goods and services offered to downstream companies are provided on terms no less favourable than those granted to other parties, including the conditions imposed on their own downstream operations.

69. The two companies have not granted Netmaster access to their telephone networks - for a period of one and a half years in the Vodafone network, and of two years and four months in the Orange network - so as to terminate the international calls and the ones originated in the networks of other Romanian

suppliers. Furthermore, for a short period of time, the two companies limited the termination of the national calls from the Netmaster network.

70. After concluding on the abusive behaviours of the two companies in relation with Netmaster, by Decisions no.1 and 2/14.02.2011, RCC fined Orange with RON 147.9 million (EUR 34.8 million), and Vodafone with RON 120.3 million (EUR 28.3 million). The sanctions represented 3.60%, respectively 3.45% of the individual turnover of the undertakings recorded in the year prior to the sanction.

71. The decisions can be accessed at: [www.competition.ro/official\\_documents/competition/decisions](http://www.competition.ro/official_documents/competition/decisions).

## **2.4 Competition harm generated by actions of public undertakings**

### *2.4.1 Anticompetitive actions of the Cluj Emergency Clinical Hospital*

72. The investigation was initiated after Romdiamed submitted a complaint in November 2010 envisaging the public procurement procedure conducted in 2010 by the Cluj Emergency Clinical Hospital for the award of a public supply contract of medical devices and consumables, valid for two years.

73. Romdiamed participated in the tender as a bidder. The Cluj Emergency Clinical Hospital disqualified its offer on the grounds that it did not submit, in accordance with the award documentation, the authorization issued by the producer certifying the supply of the products for 2010. Romdiamed mentioned that it holds in stock all the product quantity required to be supplied throughout the period of the contract. In addition, in the documentation submitted, the company presented an authorization in respect to 2009.

74. The request made by a contracting authority to present an authorisation from the producer on the delivery of the tendered products is, in fact, an artificial market entry barrier because it allows the producer to choose which of its distributors is to participate in the auction. In addition, according to the relevant legislation in the field of public procurement, the documents requested by a contracting authority for demonstrating that the qualification and the selection criteria are met must not limit the possibility of the tenderer to prove this by other means. In addition, tenderers must submit only documents issued by independent bodies which cannot influence the free manifestation of the competition.

75. The action of the County Emergency Clinical Hospital of requesting tenderers an authorization from the producer certifying the supply of the tendered products, and the disqualification of Romdiamed for failing to submit its bid in the form requested, without leaving it the possibility to prove its potential to meet the contractual conditions by other means, led to the restriction of the competition which would have manifested within the tendering procedure and which could have had the effect of lowering the acquisition prices of the tendered products.

76. Therefore, by Decision 93/8.12.2011, RCC concluded that the County Emergency Clinical Hospital - an institution belonging to the local administration in the health services field - infringed Competition Law. In addition, RCC decided to submit a recommendation to the Ministry of Health to take the necessary measures so that its subordinated institutions organising public procurement procedures should be aware that the request of authorizations from the producer certifying the supply of the tendered products/dealer authorisations constitutes a breach of the Competition Law.

77. The decision can be accessed at: [www.competition.ro/official\\_documents/competition/decisions](http://www.competition.ro/official_documents/competition/decisions).

## **2.5 *Infringement of merger rules***

### **2.5.1 *Implementation of an economic concentration on the IT products market prior to the notification of the operation and the decision issued by RCC***

78. In December 2009, RCC initiated an ex-officio investigation concerning a possible infringement of the Competition Law by Asesoft Distribution, through implementing an economic concentration before notifying it and prior to a decision issued by RCC.

79. In March 2009, Asesoft Distribution and Flamingo International concluded a contract with the aim of facilitating Asesoft Distribution to acquire the IT products distribution and the warranty service developed by Flamingo. Through this transaction, Asesoft Distribution gained the control over the IT product distribution developed by Flamingo. The transaction in question constitutes an economic concentration within the meaning of the Competition Law. Therefore, Asesoft Distribution had the obligation to notify the operation to RCC prior to its implementation, in order for the authority to examine its compatibility with a normal competitive environment on the Romanian market.

80. The notification of the economic concentration concerned was transmitted to RCC on 25.02.2010, becoming effective on 22.11.2010. In December 2010, RCC issued the non-objection Decision no.53/16.12.2010, stating that although the operation falls within the scope of the law, there are no serious doubts on its compatibility with a normal competitive environment. From the analysis of the information and documents in the case file, it was found that, prior to merger notification and the issuance of the non-objection decision by RCC, Asesoft Distribution took a series of decisions for implementing the concentration operation. This constitutes a breach of the Competition Law.

81. As a result, by Decision no.14/27.04.2011, Asesoft Distribution was sanctioned with RON 3.2 million (around EUR 775,000), representing 0.5% of the total turnover of the undertaking recorded in the year prior to the sanction.

82. The decision can be accessed at: [www.competition.ro/official\\_documents/competition/decisions](http://www.competition.ro/official_documents/competition/decisions).

## **2.6 *Application of the commitments procedure - the first case of RCC***

83. The commitments procedure was introduced in the competition legislation through the 2011 amendment of the Competition Law. The specific secondary legislation was adopted in 2011.

84. The commitments procedure enables the undertakings under investigation for possible anticompetitive practices to voluntarily assume a number of obligations so as to address certain issues that might constitute violations of the national and Community legislation in the field of competition. The initiative of presenting the commitments belongs exclusively to the undertakings investigated by RCC for the possible violation of the law. The closure of an investigation by a decision accepting commitments is an exceptional situation, limited to those cases whereby this procedure the competitive environment is restored more rapidly and efficiently than it would be achieved by imposing fines and/or corrective measures through a decision asserting an infringement of the law. The decision for accepting commitments has a compulsory legal force. If the undertakings fail to comply with the commitments made, RCC will apply penalties, comminatory fines when the implementation of the compulsory obligations is delayed or it may reopen the procedure, ex-officio or upon request.

85. In the present case, the investigation was initiated ex-officio by the competition authority in April 2009 and envisaged the possible infringement of the Competition Law and of the EU competition rules by the Professional Football League (PFL) and its members, as well as by the Romanian Football Federation (RFF) and its members in the field of selling broadcasting rights for football events.

86. The investigation revealed that certain documents adopted by the parties contain provisions that may fall under competition rules. Thus, the RFF statute contains provisions that are the result of the decision of the RFF members to sell jointly, through the federation, publicity and advertising rights and the rights to broadcast by television and/or by radio the competitions where they participate on their behalf. This document also stipulates that RFF is the rightful owner of all the rights arising from the competitions and other events organised under RFF jurisdiction. In fact, the goal of the football clubs was to sell those rights collectively. In addition, RFF members competing in the 1<sup>st</sup> League decided, through the PFL statute, to sell jointly the television and radio rights, namely the live broadcasting, recordings and full or summary retransmissions by radio-television, or by any audio-visual means, of the football events organised by PFL. They also decided that the advertising and publicity rights within properties and, in general, within locations relating to professional sports competitions to be exploited individually by each club.

87. In respect to the implementation of the centralized sale, both RFF and PFL were actively involved in the adoption of the secondary regulations, in the conclusion and management of the contracts for the sale of those rights, as well as in monitoring compliance with the centralized sale established by the football clubs.

88. Centralized sales can lead to market closure for operators interested in the transmission of sport events and, finally, can result in limiting the coverage area of the transmission of football matches to the detriment of consumers. Furthermore, the joint sales of commercial rights prevent price competition between sport clubs. It was established that the investigated practice affects the Romanian geographical market, as well as the intra-Community trade, falling under national and Community competition law.

89. In November 2010, RFF and PFL submitted their commitments proposals. These were later supplemented so as to remove the competition concerns regarding the subject of the investigation. These commitments proposals were subjected also to a public consultation. The final version of the proposed commitments was presented by RFF and PFL in March 2011.

90. According to these commitments, the two bodies self-assumed that they will change their market behaviour, ensuring:

- the improvement of the competitive environment (rights will be sold by tender procedures, rights put up for sale will be presented in packages, which will increase competition for their acquisition);
- the availability on the market for all the rights, contributing to market development and meeting consumers' needs;
- improvement in accessibility of content for television, radio, internet and mobile telephony operators;
- that the validity of the packaged rights is limited to three years, so that the operators concerned are able to compete regularly and frequently for their purchase;
- that all the contracts concluded after the tender will not contain any automatic renewal clause or the "first option" clause; this will neutralize the risk of removing competition for a particular right, as well as the possibility of strengthening the market position of the operator owning and operating the right in question;
- the fact that the rights related to matches from the national football championships – the 1<sup>st</sup> League and the Romanian Cup - will not be purchased by the same buyer, allowing the existence of competition on the markets where these rights are exploited.

91. Considering the assumed commitments, which were considered adequate for the protection of the competition and for overcoming the situation that started the investigation, by Decision no.13/19.04.2011, RCC considered that it has no more grounds for further investigating this case and decided to close the procedure. RFF and PFL commitments shall be valid for the competition seasons 2011-2012, 2012-2013, and 2013-2014. As regards the packaging of the radio broadcasting rights of sports competitions, the decision will also apply for the competitive season 2014-2015.

92. The decision can be accessed at: [www.competition.ro/official\\_documents/competition/decisions](http://www.competition.ro/official_documents/competition/decisions).

## **2.7 *Estimations of effects on consumers***

### **2.7.1 *Improved legislation on consumer credit contracts***

93. In 2011, RCC elaborated an analysis on the impact of the revision of the early reimbursement fee, according to the Emergency Government Ordinance no.50/2010(hereinafter the Ordinance), on consumer credit contracts.

94. The aim of introducing the provisions on the elimination/reduction of the early reimbursement fee for all consumer credits (natural persons) has been to fairly increase competition between banks, as a result of better inter-bank client mobility. An important indicator for assessing the achievement of this objective was concretised in the evolution of the refinancing activity within the Romanian banking system.

95. After the adoption of the Ordinance (June 2010 – May 2011), the total number of the refinanced credits doubled compared to the previous period (June 2009 – May 2010). In this period, around 160,000 refinancing credits were granted, compared to 85.5 thousand refinancing credits granted during June 2009 – May 2010. As a result, at least 160,000 clients directly benefited from the elimination/reduction of the early reimbursement fee. The clients which early reimbursed their credits partially (229,000 clients) or totally (other than the refinancing credits), also benefited from these conditions, together with those which have renegotiated their contracts so as to benefit from more favourable conditions.

96. The cumulated volume of the refinancing credits granted in RON during June 2009 – May 2010 is of RON 1,027 million, and the one granted during June 2010 – May 2011 is of RON 2,169 million. By comparison, the volume of consumer credits remaining to be reimbursed at the moment May 2011 was of RON 35,402 million. Consequently, during the 12 months after the adoption of the Ordinance, the total volume of the refinancing credits doubled compared to the corresponding previous period. At the same time, this volume is 6% of the volume of consumer credits still to be reimbursed.

97. During June 2010 – May 2011, the volume of the refinanced credits in foreign currency was of EUR 338 million. Considering an average reduction of 3% to the early reimbursement fee paid by bank clients in the period after the adoption of the Ordinance, it led to savings of approx. RON 65 million, respectively of EUR 10 million.

98. Moreover, the provisions of the Ordinance influenced directly around 229,000 early reimbursements of credits granted in RON and in foreign currency, and the volume of the early reimbursements was of RON 542.2 million and of EUR 261.9 million. At the same time, applying an average reduction of 3% to the early reimbursement fee paid by bank clients which reimbursed part of their credits results in savings of around RON 16 million and EUR 7.85 million after the adoption of the Ordinance.

99. The detailed analysis is presented within the report on the state of competition elaborated by RCC in 2011, *Romanian competition environment - developments in essential sectors*, which can be accessed at: [www.competition.ro/publication/annual\\_reports](http://www.competition.ro/publication/annual_reports).

### 2.7.2 *The dominant position cases of Orange and Vodafone*

100. The total fines applied in 2011 by RCC in these two cases were of RON 268.3 million. The competition authority found that, in the period between late 2004 - early 2007, Orange Romania SA and Vodafone Romania SA refused to give access to Netmaster Communications Company SRL to their individual mobile network for the provision of call termination services.

101. The practices of Orange and Vodafone affected the activity of Netmaster, because it could not operate efficiently on the market of call transit services, and also affected consumers, namely the customers of fixed telephone services because, over the period considered, the reduction of expenditure of the fixed telephony operators could have been reflected in lower retail prices.

## 3. **Judicial review of RCC decisions in 2011**

102. Aspects held by courts in certain cases analysed during 2011 are succinctly presented below. The findings of the courts relate to competition law offences, including procedural issues – supply of inaccurate information and refusal to submit to an inspection.

### 3.1 *UPC vs. RCC*

103. By Decision no.237/2006, RCC demonstrated two distinct conducts of UPC infringing Competition Law. Firstly, UPC was sanctioned because, together with Quadral Hi-Fi (whose legal successor is RCS&RDS), concluded and put into practice a market sharing agreement concerning cable retransmission services of TV programs in Timișoara. Secondly, UPC, as legal successor of Astral Telecom, was sanctioned for abusing its dominant position in Bucharest, by imposing increased tariffs not justified by higher costs.

104. UPC contested the competition authority's decision to the Court of Appeal, which admitted the request and annulled RCC's decision.

105. In respect to the market sharing agreement, the court established that RCC's right to apply sanctions expired. With regard to the abuse of dominant position, the court considered the definition of the relevant market (geographical and product market) related to the UPC's practice was incorrect, and that the competition authority did not determine unequivocally that UPC had imposed unfair tariffs.

106. RCC appealed the sentence and the appeal was accepted by the High Court of Cassation and Justice, which amended the contested sentence.

107. Thus, the court maintained the solution in terms of the right of RCC to sanction UPC's market sharing agreement by taking into account its previous jurisprudence – in 2009, the High Court of Cassation and Justice decided that the right of the competition authority to impose penalties for RCS&RDS (as the legal successor of Hi-Fi), the other party to the market sharing agreement conducted by UPC, expired. As regards UPC's abuse of dominant position, the court found that the competition authority correctly defined the relevant market and that the sanctioned undertaking imposed unfair selling tariffs, as it was originally decided by RCC.

### 3.2 *SC Raiffeisen Bank SA vs. RCC*

108. In 2010, SC Raiffeisen Bank SA (hereinafter Raiffeisen) was sanctioned by RCC with an administrative fine for supplying inaccurate information in response to a request made by the competition authority. The request was made within an investigation launched in 2008 on the possible infringement of national and Community competition law on the Romanian market of banking and interbank services

(anticompetitive agreements). The competition authority found that the information submitted by Raiffeisen, based on documents drafted at different moments in time, is contradictory, thereby sanctioning the infringement..

109. Raiffeisen challenged in court the fine imposing minute, claiming that its right to defence was affected and that the privilege against self-incrimination was violated. The privilege against self-incrimination is the right of undertakings to not respond to those questions which might involve an admission of anticompetitive acts, but not an absolute right to silence.

110. With regard to Raiffeisen's claim relating to the violation of its right to defence, the court stated that this claim cannot be held, since the company understood that it is the subject of an investigation and determined that there is a link between the information requested by RCC and the subject of the investigation, thus being able to delimit the obligation to collaborate with the competition authority. The first instance court found that there is no breach of the privilege against self-incrimination, since the company responded to the questions of RCC, without indicating those questions as being self-incriminating at the time the request for information was received. At the same time, the court established that the presumption of innocence in respect to Raiffeisen was respected, the competition authority sanctioning the company on the basis of thorough evidence.

111. The court rejected the complaint of Raiffeisen and, as a consequence, maintained the fine imposing minute issued by RCC. Raiffeisen appealed the decision of the court, which is currently judged by the Bucharest Court.

### **3.3 SC TCE 3 Brazi SRL vs. RCC**

112. In 2008, SC TCE 3 Brazi SRL (hereinafter TCE) was sanctioned for refusing to submit to an unannounced inspection carried out by RCC's inspectors at its premises.

113. TCE challenged the fine imposing minute at the first instance court, namely the Piatra Neamț Court.

114. The first instance court established that TCE's invoked motivation concerning the absence of the judicial authorization of RCC is unfounded, since such an authorization is not required as long as the legal basis for this type of inspection is provided by Competition Law. Considering that it was a dawn raid conferring to competition inspectors the right to enter in all premises, lands and means of transport belonging to the investigated undertaking, the first instance court did not accept the reasons presented by TCE relating to the objective impossibility of putting the documents of the company at the disposal of the competition inspectors, as they were not specifically named and identified by them. The express indication of such documents would have deprived the operation of efficiency and would have given the investigated party the possibility to take precautions, namely to destroy certain documents. In addition, competition inspectors may also have had only generic information on the possible results of the inspection and thus could not have been able to precisely identify documents (date, number, type) .

115. For these reasons, Piatra Neamț Court rejected the complaint of TCE. The undertaking appealed the decision of the court.

116. Regarding the lack of prior judicial authorization, the appeal court noted that the authorization is compulsory only when the inspection is carried out at any other premises, including homes, lands or means of transportation belonging to managers and/or other employees of undertakings or of associations of undertakings subject to investigation. As regards the fine imposing minute, the appeal court maintained the conclusion of the first instance court, noting that the company refused to comply with the request of the competition inspectors - giving access to the documents from the undertaking's archive, as well as to the

electronic documents. TCE admitted the refusal to submit to the inspection, on the grounds that competition inspectors did not specify which documents they wished to consult and did not clearly enumerate their suspicions concerning the existence of a certain anticompetitive practice.

117. The court stated that these grounds cannot justify the refusal to submit to an inspection, since, according to Competition Law, during the inspection, the competition inspectors can verify any documents, under any form, concerning the activity of the undertaking in the location under investigation, and if irrelevant, documents are to be returned. The appeal court also rejected the TCE statement according to which it did not submit the documents because they were stored at other headquarters, outside the city, since TCE did not prove the truth of that statement. In addition, nothing would have prevented the representatives of the company to allow competition inspectors to access documents from the archive, giving them the possibility to assess the real situation and confirm TCE statements, and therefore clear TCE.

118. For these reasons, the appeal court rejected the action of TCE.

#### **4. Sector inquiries**

##### ***4.1 Sector inquiry on the drug distribution market***

119. The sector inquiry was initiated in 2009 and it analysed the functioning of the Romanian drug distribution system operated by wholesalers, and the possible changes on the short and medium term. The conclusions and the proposals of RCC envisaged:

###### ***4.1.1 The incident legislation over the drug distribution market***

120. As regards the organisation of the National Health Programmes, the contracting authorities must analyse the characteristics of each programme and, based on their findings, to choose one of the available procedures, namely the national tender, county tenders, the drug distribution through open circuit pharmacies and the sole source negotiation. For each of the four options, RCC identified both the advantages and the disadvantages in terms of the competition, and what measures can be taken so as to ensure that they generate the best value for money.

121. Considering the significant growth of the drug expenditure as a result of the drug distribution through open circuit pharmacies, and if this procedure will continue to be used, a system of prices referencing it is necessary to be introduced, at least in the cases where there are several drugs with the same INN (international non-proprietary name). The introduction of this system leads to the reduction of the drug expenditure, to the enhancement of the price competition, from the producers' level up to the pharmacies' level and, finally, to lower prices.

122. In respect to the List of INNs of which are benefiting the health insured patients treated outside hospitals, the existing legislation must be amended by:

- introducing the criteria used for the inclusion of the drugs on one of the three sub-lists and of their subsequent compensation levels;
- defining the effective time deadline for the automatically compensation of a certain drug after it was included on the List by the Ministry of Health, and
- regulating certain adequate ways available for undertakings to challenge a negative decision of the Ministry of Health regarding the inclusion of an INN on the List, under the management of an independent judiciary body.

123. Furthermore, for increasing the transparency of the whole process of including an INN on the List, RCC proposed to the Ministry of Health to publish on its website individual decisions concerning the inclusion of the drugs on the List, as well as the draft of this document, in accordance with the legislation in force in the field of decision-making transparency.

124. As regards the purchase of drugs of which are benefiting the insured persons treated in hospitals, it is necessary to renounce at requesting the dealer authorization, because the document does not comply with the provisions of the public procurement legislation, and to use instead the instruments with the same purpose provided for by the regulations, namely the participation guarantee and the good performance guarantee. In addition, for demonstrating the distribution capacity, a non-confidential version of the contract based on which the dealer has access to the drugs being the subject of the tender could be requested.

#### *4.1.2 The analysis of the competition on the drug distribution market*

125. As regards the findings on the exclusive distribution relationships, RCC considered necessary the re-evaluation of the distribution systems used for the products with a market share of more than 30% and with a duration of more than five years, as well as for those where the distribution is made by a limited number of distributors - which could lead to an undue restriction of competition on the relevant markets - and for the markets where the distribution is restricted as a result of parallel networks of constraints covering more than 50% of the market.

126. In respect to the rapport between innovative and generic drugs, the legal framework was improved as a result of the reintroduction of the doctors' obligation to prescribe INNs compensated drugs and of the introduction of the pharmacists' obligation to release the drug giving the reference price. However, the same legal framework should be applicable for the drugs which are granted within the National Health Programmes, at least in the case of the INNs having several substitutable drugs on the market, in order to reduce the costs of these drugs and to promote the use of generics, as they enter on the market. Considering that public budgets, including those allocated to cover the health expenses, are subject to significant constraints, the competition exerted by the generic drugs is essential to maintain under control the public budgets and to allow further widespread access to drugs for the patients.

127. In addition, it is appropriate to better regulate the framework concerning the promotion of drug. In order to avoid influencing the prescription of certain drugs in the detriment of others depending on the "gifts" received from the companies, by Decision no. 43/27.09.2010, RCC already recommended to the Ministry of Health to provide in the secondary legislation the rules defining the terms gifts, benefits in cash which have a "symbolic value" and which "are not expensive", general terms mentioned by Law no. 95/2006 on healthcare reform.

128. Considering the importance of the generic drugs, they should enter on the market without undue or unjustified delays. Therefore, RCC will pay a particular attention to this issue in the future in order to ensure that the generics' market entry is not affected in any way by possible anticompetitive practices.

129. The report of the sector inquiry can be accessed at: [www.competition.ro/publications/miscellaneous reports](http://www.competition.ro/publications/miscellaneous%20reports).

#### *4.1.3 Sector inquiry on the market of heating energy production, transportation, distribution and supply in Bucharest*

130. The sector inquiry was initiated in 2010 and had as objective to provide to the competition authority and to any other institution or person concerned a real and general set of data and information on the Bucharest heating energy market, in terms of its organisation, technical and functional characteristics,

and on the specific regulatory framework. This inquiry provides an image of the market segments of heating energy generation, transmission, distribution and supply in Bucharest and seeks to identify any disruptions relating to anticompetitive behaviours, as well as the measures to be taken.

131. The main conclusions and proposals of RCC were as follows:

132. The current technical and administrative configuration does not guarantee a normal competitive framework in respect to the heating energy production market (ELCEN-S.E.B. has a market share of 90%), as well as regarding its distribution market (R.A.D.E.T. is the sole distributor of ELCEN-S.E.B.).

133. The involved markets are regulated, their opening and liberalization not being allowed. Both markets have unused production, transmission and distribution capacities. Thus, in the absence of certain guarantees or financial incentives, it becomes impossible for a new heating energy producer to invest in this area, in the present organisation and functioning system. Any new investment involves high costs which are reflected in the production price of the heating energy thus becoming non-competitive.

134. The separation of the consolidated transmission and distribution network in Bucharest, which is an objective of the Bucharest Energy Strategy, raises a number of problems, such as: technical issues, related costs, property rights concerning networks' routes, legislation etc. Separation into several distribution areas requires concrete privatization measures. Consequently, although it can bring benefits to operators, the network separation might generate, in terms of competition, the preservation of the local monopoly, divided at the level of each operator.

135. The technical conditions of the Bucharest heating network are precarious and are a real impediment to any competition opening measure. The transmission and distribution networks present certain issues too, requiring investments of billions of euro.

136. The regulatory measures proposed to be adopted in the future by the Bucharest General Council and by the National Regulatory Authority for the Community Services of Public Utilities are designed to regulate the heating energy market, in terms of contractual and operational discipline, and this may create a favourable effect over the competition too.

137. In the absence of a free market mechanism, in many countries another form of competition is being introduced, based on the activity performance measurement. In Bucharest, the application of this system would be unrealistic at the moment, since performance depends on the type, age, and operating system of the production plants, and production plants and transmission networks are technically outdated.

138. Looking ahead, the Bucharest heating energy market must be designed as a competitive market that would not require a monopoly or dominant companies to increase the economic efficiency of the heating energy production, transport and distribution. In order to be able to compete on both segments of the market, the Bucharest Energy Strategy mentions, among others, privatization and public-private partnerships. Until the implementation of at least one of these solutions, the application of the Bonus Support Scheme should be expedited. This scheme provides a single price for producers using the same fuel, and this could remove one of the existing inequalities between them in relation to R.A.D.E.T. and would stimulate the return on the market of the affected producers, or the market entry of new producers.

139. The normal competitive environment must arise from the adoption of a uniform strategy in Bucharest, dealing with the two market segments and correlating their mode of operation. The ultimate goal of the strategy is to ensure the security and the continuity of the service supplied to residents, in terms of quality, as well as affordable heating energy provided in free competition conditions.

140. The report of the sector inquiry can be accessed at: [www.competition.ro/publications/miscellaneous\\_reports](http://www.competition.ro/publications/miscellaneous_reports).

## 5. The role of RCC in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

141. RCC continued in 2011 to supervise the legal framework in order to identify and eliminate any anticompetitive provisions. Its action envisaged draft normative acts, on which the Romanian competition authority delivered opinions and points of view, as well as normative acts already in force, where RCC intervened so as to make them compatible with competition rules.

142. In this context, this year a particularly important role was played by the participation of an RCC specialist at the preparatory reunions of the Government's meetings, which allowed the analysis of all the draft regulations proposed for adoption. For the same purpose, the Romanian competition authority maintained a continuous cooperation with the representatives of the specialized commissions of the two parliamentary chambers.

143. The list of the binding opinions, points of view, opinions/interventions for amending the draft regulations or the ones already in force, as well as their current implementation phase are presented in the *statistics* section of the RCC Annual Report 2011, which will be available at: <http://www.consiliulconcurentei.ro/en/publications/annual-reports.html>

144. Some of the results of RCC in this segment of activity are presented below.

### 5.1 The pharmaceutical field

145. RCC continued to have an intense activity in this field in terms of harmonisation of the legal framework with competition rules.

146. Thus, the Romanian competition authority issued several points of view addressed to the National Health Insurance House on the draft Government decision concerning the 2011 supply framework contract according to which the introduction of the indicative value of the contract is not a viable alternative because the draft legislation did not contain provisions concerning the correct approach in cases where this value is exceeded.

147. The competition authority has also expressed its point of view on the proposed amendment of Health Reform Law no.95/2006. It provided certain changes of the additional financing system of the public health system, known as the *claw-back* system. In summary, this system, used under various forms in other countries too, requires the holders of the drug marketing authorisations or their legal representatives to contribute with a certain percentage of the turnover resulted from marketing the drugs which are disbursed from the Health Insurance National Fund, as well as from the Ministry of Health's budget.

148. The amendments mainly relate to the percentage applied for determining the contribution level and to the situations when it is applied (only for the drugs reimbursed when the market increase exceeds a certain level, and which can no longer be financed from the health insurance budget). According to the old form of the system, the contribution was calculated based on the turnover resulted from total sales of all the drugs marketed in Romania, settled or not from the public budget.

149. RCC stressed that the proposal did not lead to a decrease in the State's drug expenditures, because it covers 80% of the market growth and that the system disadvantages the drugs newly entered on market. Later, the competition authority issued a favourable binding opinion on the draft normative act, recommending the periodic review of the measures' impact on the market.

150. As regards the claw-back system, RCC presented several points of view on a draft legislation providing for the implementation of the system. RCC welcomed the proposal on the differentiated taxation of the innovative drugs and of the generic ones and the use of the same calculation base for all taxpayers' contribution. At the same time, the competition authority underlined certain issues, such as the taxation amount, which could have a deterrent effect for producers to sell on the Romanian territory drugs which fall within the scope of the contribution. They might choose to renounce selling those drugs for which there have no longer acceptable profit margins.

151. One of the RCC proposals following the completion of the sector inquiry on the drug distribution market, namely the introduction of a price reference system, at least where there are several drugs with the same INN, was accepted by the Ministry of Health and included in the Order of the Minister of Health no.1275/2011. The introduction of this system will lead to the reduction of the drug expenditure and to the stimulation of price competition, in the benefit of consumers.

152. RCC also expressed its point of view on a proposal of the Ministry of Health concerning the calculation method of the settlement prices for the drugs used by the patients included in the National Health Programmes so as to create savings in the health budget.

153. Thus, the wholesale price would have been the producer price decreased by 15%, which would have been supplemented by the distribution mark-up. RCC underlined that this calculation method could have the effect of increasing the export attractiveness of such drugs. Therefore, the measure could have led to a shortage of drugs on the market, with possible consequences on the health of the chronically ill patients treated within the National Health Programs. In addition, considering impact on the drug availability, the producer price decreased by 15% could have influenced producers' commercial strategies, by getting them to diminish/renounce marketing drugs whose reduced price generated low profit margins. As an alternative solution, RCC recommended the application of the 15% reduction to the settlement price

## **5.2 Retail**

154. RCC recommended to the Government to repeal and amend certain articles of the normative act regulating the construction of large commercial spaces. The Romanian competition authority considers that regulating the conditions on the establishment of commercial structures so as to ensure a balanced competitive environment over the framework established by the Competition Law may lead to an unjustified protectionism of the undertakings already existing on the market, contrary to the market economy and to the free competition principles.

155. At the same time, the provisions of the normative act are contrary to the European Services Directive and to the Romanian legislation transposing this directive, because the authorization for large commercial spaces may only be granted upon proving the existence of an economic need or of a market demand, upon an assessment of the economic effects over the other competitors; the normative acts mentioned above provide for the intervention of the other competing undertakings in the individual decision-making process of the competent authorities. Such provisions restrict the freedom of establishment within the European Union, therefore the above-mentioned Directive requires Member States to eliminate such requirements from their legal system.

156. The recommendations of RCC are supported by the provisions of the Memorandum of Understanding concluded between European Union and Romania, which states that restrictions on the establishment of retail stores should be eliminated. In this context, RCC cooperates with the Ministry of Economy, Trade and Business Environment in order to remove restrictions on the opening of large retail chains.

157. In 2011, the Romanian competition authority also focused on a proposal for modifying the normative act regulating the marketing of products and services. The proposal envisaged the requirement imposed to commercial centres to exhibit traditional food and non-food products in at least 10% of their commercial area. The proposal contained certain provisions that contravened to the national and European competition rules on and to the freedom of movement of goods and services, its anticipated effects being able to affect consumers. Such a measure is discriminatory in relation to other economic operators (e.g. those with small selling areas, cash & carry etc.) and constitutes a form of discrimination between traditional products and other products manufactured in Romania. The fact that traditional products would thus have a guaranteed potential market does not provide final consumers with quality products at lower prices; in this way, producers would not have the incentive to increase their efficiency and to compete through prices.

158. The proposed action may fall under the provisions of the Treaty on the Functioning of the European Union, according to which the internal market comprises an area without internal frontiers where the free movement of goods, persons, services and capital is ensured. The legislative proposal also may come under the incidence of the European Services Directive because it imposes discriminatory conditions for having access to a service or to exercise it. As regards the affectation of consumers, the legislative proposal may constitute a restriction to the freedom of the commercial operators, leading to increased costs and administrative burdens, and the existing competition on the market could be restricted or distorted, at least in areas where production or demand of retail traders is limited. The Commission for Industries and Services of the Chamber of Deputies rejected the legislative proposal.

159. RCC also expressed its point of view on another legislative proposal imposing a requirement to the economic operators (producers and traders) to market their products or services accompanied by documents stating their production costs.

160. RCC considers that displaying the production costs of a product constitutes a form of disclosing strategic information between the economic operators, thus revealing their trade policies. Competition would be replaced with tacit cooperation between competing companies, for the purpose of aligning and standardising their business practices and, consequently, the final prices. On the other hand, this legislative proposal could artificially create market entry barriers or affect the trade with goods and services. Also, this requirement to provide production costs cannot be implemented for products manufactured outside the country. In these circumstances, products manufactured in Romania would suffer artificial price increases.

161. On a distribution chain that includes several undertakings, the production cost and the commercial mark-up applied by the last vendor does not provide the final consumer with all the information concerning the final price formation. Thus, the final consumer would be able to identify only the product's production cost, the difference up to the retail price being perceived as the mark-up added by the trader. This perception would be inaccurate, since the difference includes numerous other categories of expenditures recorded by the manufacturer, the distributor and the trader.

162. The Government Project "The Solidarity Basket - Governmental support programme for retirees" was also analysed by the Romanian competition authority. Through this program, the Government intended to acquire, via local councils, basic food products so as to provide reduced prices for retired citizens. RCC's proposals underlined the need for a tendering procedure in order to ensure a competitive process for selecting suppliers and to guarantee their equal and non-discriminatory treatment. At the same time, it was stressed out that any public resource must be used in exchange for a price which corresponds to the market price. In this way, the programme would not fall under the State aid legislation.

### 5.3 *Telecommunications*

163. In 2011, RCC issued a binding opinion on the draft Government Emergency Ordinance for the establishment of the “State Common Electronic Communications Infrastructure” (SCECI), submitted by the Ministry of Communication and Information Society. On this occasion, a range of possible competition distortions on the markets for electronic communications services were identified, through the allocation of a market segment to the Special Telecommunications Service (STS), in its quality as sole operator and integrator of SCECI, and on wholesale services markets for accessing the infrastructure’s components and/or of other network access services, as well as of the associated services, by compelling STS to use only the network infrastructure elements and electronic communications services provided by specialized companies.

164. Furthermore, by creating SCECI, an economic concentration operation could have been achieved, assuming that STS would have behaved as a market operator. Additionally, the coordination of competitive behaviour of the specialized companies and possibly of STS (assuming that this authority would operate as private undertaking on the market) could have been possible, including through the actions of the Inter-Ministry Coordination Council of the SCECI. The project could have presented State aid issues.

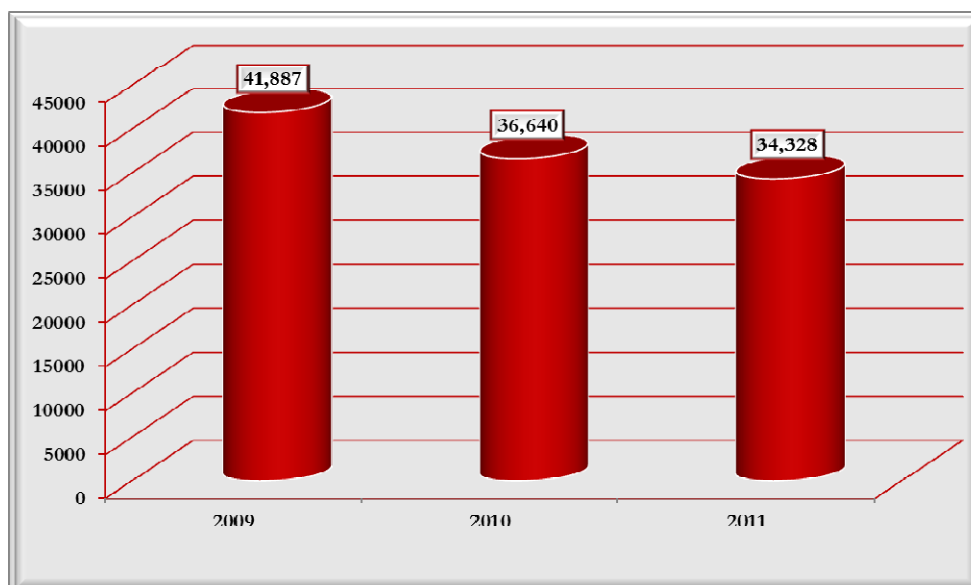
165. RCC proposed the amendment of the draft legislation by introducing certain provisions not allowing the undertakings concerned to use the SCECI for supporting their economic activities (the services provided by the SCECI cannot have a commercial nature, because the infrastructure is aiming at exercising the State authority – the e-Government application). Moreover, the number of the enterprises (majority or wholly owned by the State) benefiting from SCECI should be restricted to those that have a strategic importance from the national security standpoint, to those providing services of national interest, or to those which are *de facto* part of the public administration, and their establishment/development, operation and use of SCECI must be made in compliance with the principle of separating the regulatory function from the operational one. Under the conditions specified by RCC, the project would fall under State aid rules.

166. The Ministry of Communications and Information Society accepted the conditions imposed by RCC, thus receiving a favourable binding opinion of the competition authority. However, there is still a risk of competition concerns related to the allocation of a market segment to STS as a result of subsequent regulations to be issued in the future.

## 6. **Resources**

167. In 2011, the budget of RCC was of RON 34,328 thousand. A comparative situation with 2010 and 2009 is presented in the graph below.

RCC budget (thousand RON), 2009-2011



168. In the analysed period, the budget of RCC recorded a decreasing trend, with 6.3% lower than the one received in 2010, and with 18% lower compared to 2009. The decrease of the institution's budget during the last three years is a result of the economic and financial crisis affecting the Romanian public sector too. The most important expenses (84% of the budget) were related to staff, the situation being similar to 2010 and 2009.

169. In 2011, RCC organized a part of its activity based on 19 projects. The budget spent in this regard was of around RON 1,960,000 lei, representing around 38% of the budget of the institution, except staff expenses. The projects were 90% fulfilled (budgetary execution and fulfilment of qualitative indicators), project execution being higher by 10 percentage points compared to 2010 and at a similar level with the one recorded in 2009.

### 6.1 *Human resources*

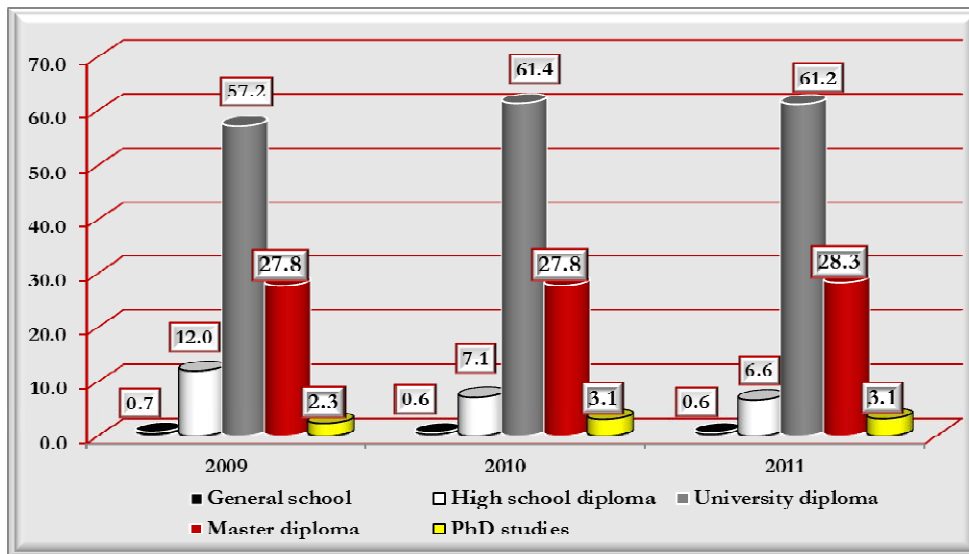
170. Exempting the members of the Plenum of RCC, in 2011, the personnel of the Romanian competition authority was made up from 286 employees, lower by 3% than in 2010 and by 4% compared to 2009.

171. In 2011, the recruitments for a non-determined period observed the rule applicable to the entire Romanian public system, namely one new employee for seven departing employees. In addition, a number of personnel were hired for determined periods and by detachment.

172. As regards the age of the employees, for all personnel categories, the most of them are included in the 30-40 years category. Women represented 54.9% of the total personnel compared to 45.1% percentage of the men. This structure is similar also for the period 2009-2010.

173. The majority of RCC employees (around 60%) have at least one university diploma, being followed by those which graduated master courses (approximately 28%). The evolution of the level of education during 2009-2011, recorded at the level of the entire personnel of the Romanian competition authority, is presented in the graph below.

The structure of the personnel based on the level of education (%), 2009-2011



174. Detailed information on the human and financial resources of RCC are presented in the statistics section of RCC Annual Report 2011, which will be available at: <http://www.consiliulconcurrentei.ro/en/publications/annual-reports.html>