

**Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE****Annual Report on Competition Policy Developments in Romania****-- 2019 --****10-12 June 2019**

This report is submitted by Romania to the Competition Committee FOR INFORMATION.

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Table of Contents

Romania	3
1. Executive Summary	3
2. Enforcement of competition laws and policies.....	5
2.1. Actions against anticompetitive practices, including agreements and abuses of dominant positions.....	5
2.2. Judicial review of RCC’s decisions in 2019	21
3. The role of RCC in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies	24
4. Resources of competition authorities.....	25
4.1. Annual budget.....	25
4.2. Human resources.....	25

Figures

Figure 1. Number of opened investigations (2010-2019).....	6
Figure 2. Structure of investigations on alleged breach of competition legislation opened in 2019, depending on the investigated practice.....	7
Figure 3. Number of completed investigations depending on the anticompetitive offence	8
Figure 4. Proportion of concluded investigations depending on the anticompetitive offence	8
Figure 5. Duration of concluded investigations on alleged breach of competition law	9
Figure 6. The value of the sanctions applied and of the number of sanctioned companies	9

Romania

1. Executive Summary

1. The activities of the Romanian Competition Council (hereinafter referred as *RCC*)'s in 2019 were dominated by the Romania's EU Council Presidency, for the first time in its history. Two major components can be highlighted therein: the EU legislative approval activities and the organization of substantive meetings. Under the first component, the *RCC* coordinated the ECN Plus Directive file and actively contributed, as a member of various dedicated working groups, to the adoption of two other European regulations, namely the (EU) Regulation on the creation of the framework for the evaluation of foreign direct investments in the European Union and the (EU) Regulation regarding the promotion of transparency and fair conditions for the users of online intermediation services ("Platform to Business"). At the same time, the *RCC*, as national coordinator, closely cooperated with the Ministry of Justice on its proposal for a Directive on Whistleblowers, which is currently in the process of legislative approval. Further, *RCC* started the integration of the ECN Plus Directive into the national legislation.

2. Under the umbrella of Romania's Presidency of EU Council in the first semester of 2019, *RCC* successfully hosted three international events namely ECN Cartels Workshop, Competition and Consumer Day, in cooperation with National Authority for Consumer Protection, and a conference under the State Aid Monitorization initiative. Speakers in the Competition and Consumer Day event included high level representatives from the European Commission (Ms. Margrethe Vestager, European Commissioner for Competition and Ms. Věra Jourová, European Commissioner for Justice, Consumers and Gender Equality), the Romanian Parliament and Government, the competition authorities of other EU Member States, the business community and consumer organizations.

3. Moreover, in addition to the efforts invested in the success of the Romania's Presidency of the EU Council, *RCC* continued its regular work. It authorized 75 economic concentrations, which is a record for the last decade, without increasing the timeframe for the duration of the operations' analysis.

4. The number of investigations and sanctions applied in 2019 is similar to the previous year, the 14 investigations completed targeting key areas, such as pharmaceuticals, services related to gas installations, access to essential infrastructure.

5. It is noteworthy that 2019 was the year when *RCC* applied the most sanctions for abuse of a dominant position, respectively in half of the investigations completed and in a percentage of 91% of the total fines.

6. Thus, *RCC* sanctioned the company Netcity Telecom SRL for imposing unfair conditions of access to its network, as well as certain undertakings that manage gas networks (Distrigaz Sud Rețele SRL and Premier Energy SRL, as legal successor of Gaz Sud SA) for the way they connected consumers to the network, as the related prices reached unjustifiably high levels.

7. *RCC* also sanctioned a pharmaceutical company (Roche Romania) for implementing commercial strategies designed to eliminate competition and to block the market entry of similar, cheaper drugs. At the same time, cases have been completed involving public procurement, an "area" in which *RCC* constantly intervened and

sanctioned companies that collude to increase the prices paid by the State for certain goods and services. In this respect, it is worth mentioning the investigation on the bid rigging for the purchase of road maintenance services during the winter (snow removal) and the one related to the purchase of road signs and/or road marking works.

8. The value of the sanctions applied in 2019 was 96 million lei, while the institution's budget for the same year was 65.19 million lei. At the same time, the most important interventions completed in 2019 led to consumer savings of approximately 265 million lei, generated by the control of economic concentrations and the prevention of anticompetitive practices. These figures were obtained using a methodology developed by the European Commission.

9. The nine sector inquiries, studies or analyzes that were completed in 2019 or submitted to public consultation focused on areas with a direct impact on consumers: fuels, water supply, public lighting, cement, public parking, salt for snow removal.

10. In 2019, RCC maintained the trend of the recent years in respect to the remarkable results achieved in the legal courts. The percentage of decisions favorable to the RCC, pronounced by the first instance, the Bucharest Court of Appeal, was 98%. As regards the High Court of Cassation and Justice, it irrevocably resolved, in favor of the competition authority, 94% of the pending cases, while maintaining 99% of the total amount of the contested fines.

11. One of the important achievements of 2019 was the launch of the "Price Monitor" - the online platform through which consumers can check both food and fuel prices, without having to travel to the physical locations of stores and gas stations. The efforts made by all the actors involved were significant, but they resulted in a successful project, which proved its usefulness, and which we will further develop.

12. The challenge for 2020 is to protect competition and, consequently, consumers in the context of the crisis caused by the Coronavirus pandemic, and, at the same time, to provide the Government with strong arguments for taking the necessary measures to maintain the level of economic activity.

13. In this context, one of the priorities is to develop a set of recommendations on the most efficient ways of crisis management, so as to ensure the proper functioning of the market. The sectors envisaged by these recommendations are the online commerce, pharmaceuticals and the food commerce.

14. RCC intends to complete important investigations, such as those on the timber market, financial services, and access to the gas network. RCC will also complete two major studies: (i) the collaborative economy, which analyzes the effects of new business models on the competitive environment and on the economy in general, and (ii) a better understanding of how companies are using Big Data technologies and their respective algorithms, and the impact on consumers.

15. At the legislative level, in 2020 RCC intends to complete the competition law - by implementing the ECN + Directive, which establishes a set of measures by which the EU competition authorities would become even more efficient in their activity, as well as in the field of State aid and unfair competition.

16. RCC also intends to transpose into national law several European directives and regulations, including the Directive on unfair commercial practices between companies in the agricultural and food supply chain, the Regulation on promoting fairness and transparency for the companies using online intermediation services (Platform to Business)

and the Regulation establishing a framework for the screening of foreign direct investments into the European Union. In 2020, RCC also intends to resume discussions with the other authorities involved and to consult the market players on completing the rethinking of the legislation on Compulsory Third Party - CTP Insurance for vehicles.

17. As in the previous years, in 2020, RCC will make all the efforts to fulfill its mission of generating welfare for consumers, by ensuring free competition in a non-discriminatory environment.

2. Enforcement of competition laws and policies

2.1. Actions against anticompetitive practices, including agreements and abuses of dominant positions

2.1.1. Summary of activities

18. In 2019, the RCC had a very intense activity, especially in respect to the regulating field. At the same time, the dynamic economic activity of Romania had a growing trend, which resulted in a larger number of economic concentrations examined by the RCC. Similar with the previous years, the majority of the new investigations envisaged possible horizontal agreements, considered to be, in general, the most harmful anticompetitive practices. The majority of the 9 new investigations were opened *ex-officio* which could denote that the institution is closely monitoring the key economic sectors. More problematic was the fact that 33% of the investigations launched targeted anti-competitive actions of the public administration.

19. 14 investigations were concluded in 2019, out of which half confirmed the existence of infringements of abuse of a dominant position. The breach of the competition law was confirmed in 10 of the 14 completed cases. Three investigations were concluded by commitments, and one investigation was closed without finding any infringement of the competition law. Thus, 93% of the concluded investigations confirmed the infringement of the competition law or were completed with commitments, thus reflecting a high level of expertise of the investigation teams.

20. The total value of the fines amounted to 96 million lei, approximately 20 million euro, more than 90% of these sanctions being applied for abuses of a dominant position. For comparison, the 2019 budget of the institution financed from public funds and non-reimbursable European funds was 60.9 million lei (approximately 12.62 million euro), which was completed with own revenues of 4.2 million lei (0.87 million euro).

21. In the field of fighting bid rigging in public procurement, the RCC completed 3 investigations in 2019, confirming the infringement of the competition law within various tender procedures. Fines totaling about 8.7 million lei (approximately 1.8 million euro) were applied in these instances to a number of 10 companies, out of which 3 recognized the anticompetitive practices.

22. The RCC completed 5 sector inquiries and made recommendations (some already accepted) to improve the competition in the analyzed fields and, at the same time, two sector inquiries were initiated, so that the RCC had 5 ongoing sector inquiries at the end of 2019.

23. The number of the economic concentrations authorized in 2019 increased sharply, reaching 75, compared to 57, in 2018. When certain transactions raised suspicions of

possible harm to competition in certain markets, the authority has imposed conditions and accepted commitments to ensure the maintenance of a normal competitive environment. The most eloquent example in this regard was the acquisition of sole direct control by OMV Petrom Marketing SRL (OPM) over 8 fuel distribution stations owned by ART Petrol Service SRL (Art Petrol) in Bucharest and in the counties of Ilfov, Ialomița, Dâmbovița, Teleorman, Giurgiu and Argeș. Furthermore, the RCC managed to maintain a downward trend of the number of ongoing investigations. Thus, their number decreased from 38 to 32, most of them targeting possible horizontal anticompetitive agreements (68.8% of all investigations).

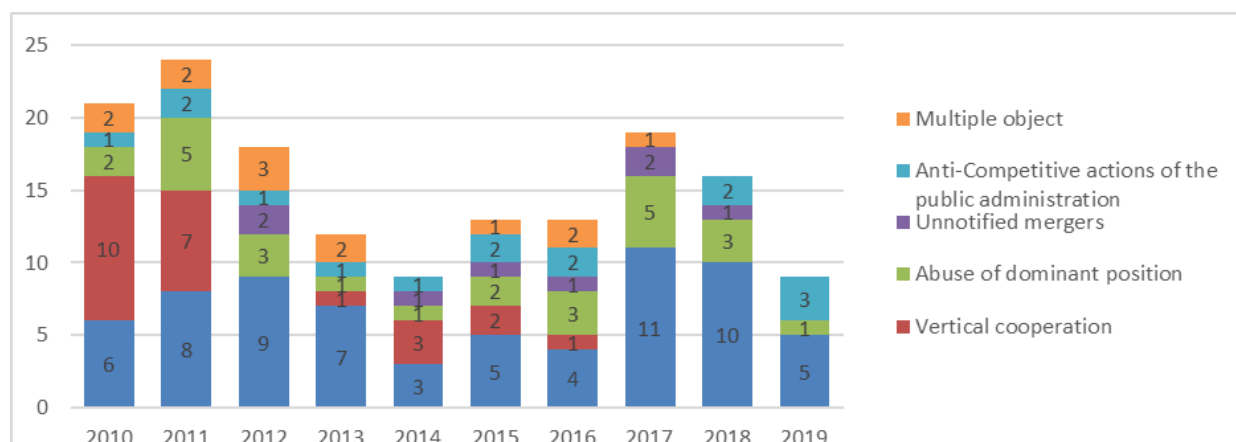
24. To sum up, consumer benefits ranging between 214.77 and 314.55 million lei were generated by:

- 9 new investigations on the possible infringement of the competition law
- 14 completed investigations on the possible infringement of the competition law
- 2 new sector inquiries
- 5 concluded sector inquiries
- 75 economic concentrations cleared following their notification
- 96 million lei – applied fines
- 44 headquarters inspected
- 98% decisions favorable to the RCC, pronounced by the Bucharest Court of Appeal and 94% pronounced by the High Court of Cassation and Justice
- 95% of the level of the fines applied was maintained by the Bucharest Court of Appeal and 99% by the High Court of Cassation and Justice

Opened investigations

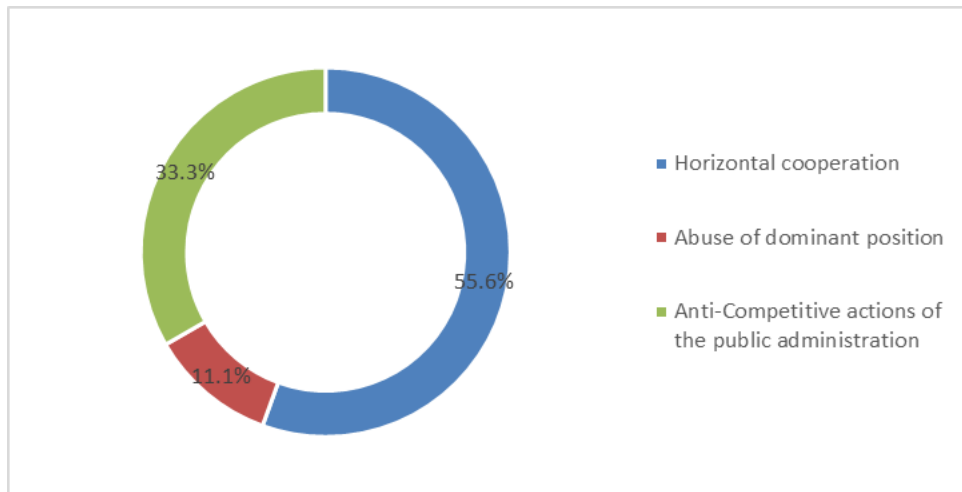
25. In 2019, 9 investigations on alleged breaches of competition law have been opened out of which 5 of them represented ex-officio investigations and the remaining 4 investigations have been opened following some complaints.

Figure 1. Number of opened investigations (2010-2019)



26. The most part of the investigations on alleged breach of competition law opened in 2019 envisages horizontal anticompetitive agreements. 8 of 9 investigations opened targeted the breach of the national competition legislation and 1 investigation envisaged the breach of both community and national competition legislation.

Figure 2. Structure of investigations on alleged breach of competition legislation opened in 2019, depending on the investigated practice

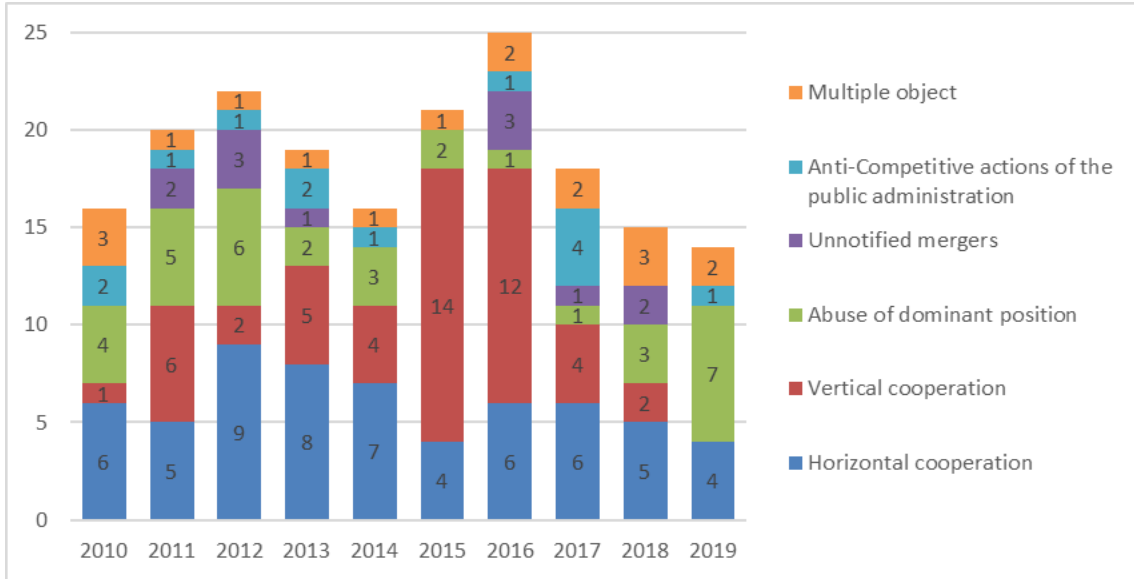


Completed investigations

27. In 2019, competition authority finalized 14 investigations on alleged breach of competition law.

Figure 3. Number of completed investigations depending on the anticompetitive offence

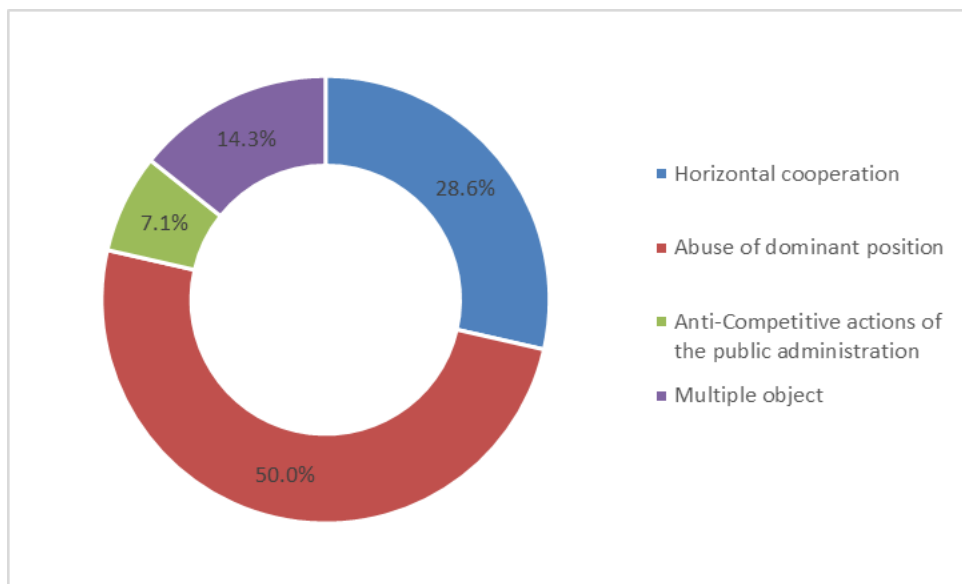
(2010-2019)



28. Even if over the last three years, most opened investigations envisaged alleged breaches of competition law in the form of horizontal agreements, 2019 was the year with most part of finalized investigations represented by abuses of dominant position (7 out of 14 concluded investigations).

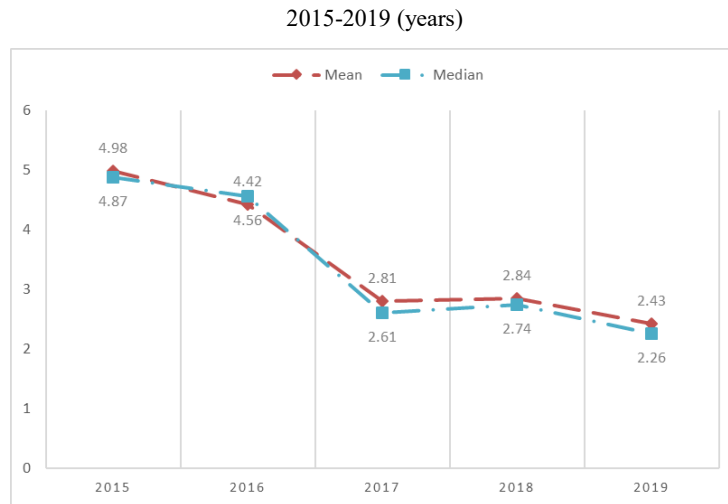
Figure 4. Proportion of concluded investigations depending on the anticompetitive offence

(2019)



29. In 2019, 9, respectively 64.3% of total number of finalized investigations envisaged practices regarding the breach of national competition legislation and the remaining represented breaches of both national and community legislation.

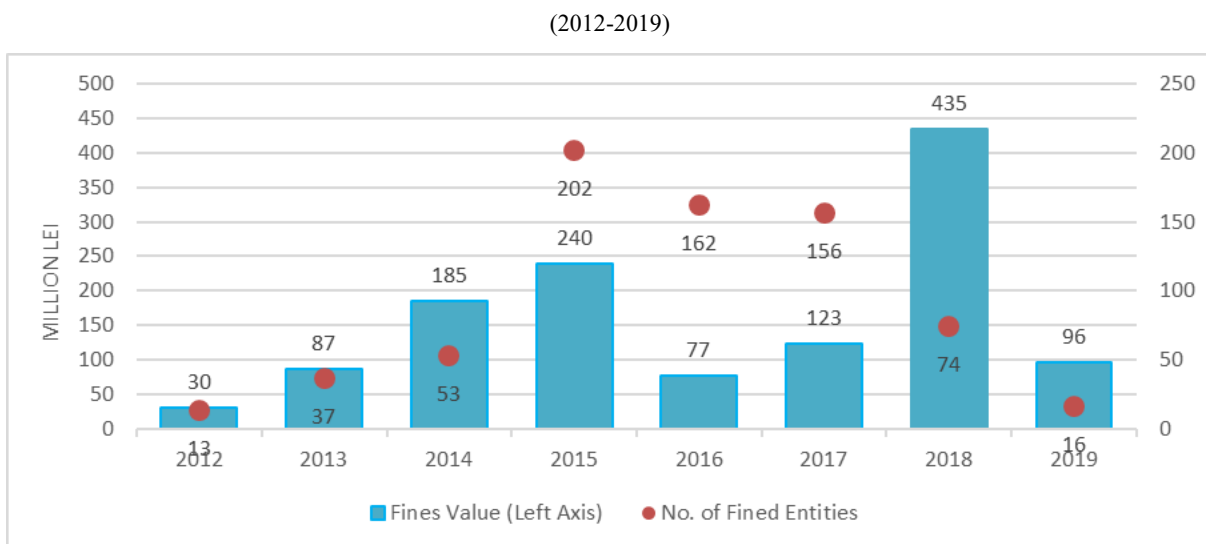
Figure 5. Duration of concluded investigations on alleged breach of competition law



30. The year 2019 brought a substantial improvement of the reduction of the timespan of an investigation (on average, a reduction by approximatively 5 months).

Fines

Figure 6. The value of the sanctions applied and of the number of sanctioned companies



31. In 2019, most sanctions (91%) were imposed for abuse of dominant position infringements while the remaining of 9% represented cartel-type anticompetitive offences.

32. The total value of the fines amounted to 96 million lei, approximately 20 million euro.
33. The number of companies sanctioned decreased from 74, in 2019 to 16, in the previous year. Actually, the number of companies sanctioned features a descending trend starting with the year 2015, meaning also that the companies are more careful to possible breaches of competition legislation.
34. Out of the 16 companies sanctioned in 2019, 6 acknowledged the anticompetitive deed benefiting thus from fine reduction.
35. The biggest impact on consumers was generated by the RCC's intervention on the market for services provided in the field of natural gas installations, followed by the sanctioning and cessation of the anticompetitive sharing of the market of road markings and of snow removal.
36. This result corresponds to one of the objectives set out in the RCC's Strategy 2017-2020, according to which the annual impact of actions in the form of financial benefits to consumers through actions to combat anticompetitive practices and the control of concentrations is at least 3 times higher than the institution's annual budget. Thus, the estimated total effect of the RCC's interventions in 2019 was around 4 times higher than the allocated budget.

Ongoing investigations

37. In 2019, RCC continued to decrease the number of ongoing investigations at the end of year respectively from 38 to 32. The majority part of ongoing investigations envisage possible horizontal agreement-type infringements (68.8% of total investigations).

2.1.2. Description of significant cases, including those with international implications

The Roche Romania cases¹ - abuse of a dominant position – delaying the entering on the market of biosimilars

38. In 2017, the RCC launched an investigation envisaging the possible infringement of national and Community competition rules by Roche Romania SRL, on the market of oncological products included in the ATC4 - L01XC class (other antineoplastic monoclonal antibodies).
39. The investigation was initiated following the complaint filed by Mediplus. The alleged issues regarded certain actions of Roche regarding the marketing of the oncological drugs Mabthera, Herceptin and Avastin, in the context of the public procurement procedures organized by the Ministry of Health, as well as by hospitals.
40. A total of 10 relevant markets were identified for the 3 medicines mentioned above. Roche's market shares were higher than 95% in the analyzed period, respectively during 2015-2018. Moreover, in 8 of the 10 markets analyzed, Roche molecules were

¹ After publication, the decisions will be available in Romanian at: www.consiliulconcurentei.ro/documente_oficiale/concurentă/decizii/bunuri_de_consum.

the only ones included in the relevant markets. Market shares of the size of those held by Roche are considered an evidence of a dominant position.

41. Following the analysis carried out in the present case, based on the evidence gathered in the case file, it was found that Roche had implemented anticompetitive conducts, consisting of two forms of abuse of a dominant position, as follows:

1. It abused its dominant position by delaying the manifestation of competition for biosimilars in the case of the rituximab and trastuzumab molecules. The conduct materialized by applying a commercial strategy designed to ensure Roche's winning position within the public procurement procedures for acquiring drugs with Rituximab and Trastuzumab active substances, in order to eliminate the risk of opening the market for biosimilars.

In order to eliminate any risk of losing its market share in favor of biosimilar products, Roche's strategy has resulted in its participation within public procurement procedures for acquiring drugs with Rituximab and Trastuzumab active substances at a lower price than the one Roche used to sell the products to its distributors, which were its competitors within the tender procedures. Thus, by eliminating the real possibility for distributors to compete for Rituximab and Trastuzumab molecules, Roche eliminated the chances of opening the market for the marketing of biosimilar products, either by accepting the substitution by the contracting authority or by restarting the tender procedure. If the winning supplier is a producer who cannot have an interest in distributing competing brands, the manifestation of the supplier's commercial motivation is excluded and, implicitly, the possibility of resuming the competition, as well as any possibility for the biosimilar products to be included in the area of interest of the Ministry of Health or of the acquiring hospital.

Roche's behaviour is not commercially reasonable in the absence of the anticipated benefits of protecting its market shares by preventing the development of competition from biosimilar products. Thus, in the absence of an objective justification, Roche's commercial strategy implemented in the context of the 2017 tenders for acquiring drugs containing the rituximab and trastuzumab active substances is not a form of a merit-based competition.

2. It abused its dominant position by eliminating the intra-brand competition for Mabthera, Herceptin and Avastin. The conduct materialized through Roche's participation in public procurement procedures for acquiring drugs with the Rituximab, Trastuzumab and Bevacizumab active substances. Roche applied a margin squeeze pricing strategy in relation to its partner distributors, given the obligation to provide imposed by the Health Law.

42. In the context of the public procurement procedures mention above, the implementation of a margin squeeze price strategy has eliminated the possibility of intra-brand competition for hospital supply, under the national oncology program. In the specific circumstances of Roche's distribution system within the hospital channel, the absence of intra-brand competition created the conditions for higher costs with the settlement of the relevant medicines, in particular by doubling certain logistical cost elements. In addition, by eliminating any form of intra-brand competition regarding the supply of hospitals under the national oncology program, the margin squeeze practice makes inefficient the obligation to provide, imposed by the Health Law to any drug provider. This is an obligation based on considerations of public interest for avoiding the monopolizing of the distribution market of drugs, to the detriment of patients.

43. Therefore, it was established that Roche's conduct, implemented by applying a commercial strategy designed to ensure the winning position within the public procurement procedures for drugs with the Rituximab and Trastuzumab active substances, in order to eliminate the risk of market opening for biosimilar, is an abuse of a dominant position incident to the national and Community competition provisions.

44. The sanction applied in this case by the RCC to Roche Romania SRL was 44,168,105 lei (9.47 million euro).

Abuse of a dominant position - artificial preservation of market share

45. In 2017, the RCC opened an investigation on the possible infringement of the national and Community competition provisions by Roche Romania SRL on the market of drugs containing the Erlotinib active substance.

46. This was an ex officio investigation, based on the data held by the RCC regarding certain behaviours of Roche Romania SRL, able to affect the competitive environment, by implementing a strategy aiming to exclude from the market the generic version of the innovative drug Tarceva (Erlotinib).

47. The anticompetitive behaviour of Roche Romania SRL involved the implementation of a strategy through which the patient is directed towards the acquisition of Tarceva products, to the detriment of generic alternatives. The strategy aimed at two intertwining components that outline a unitary strategy:

- directing the patients to Tarceva products by using Roche Patient Card (distributed to them by their prescribing doctors), and by launching the patient's Tarceva orders through the Roche Call Center;
- Roche's support for the patient's financial contribution for the acquisition of Tarceva.

48. Roche informed the prescriber that it was necessary for the patient to receive the Roche prescription together with the patient card. Or, after the market entry of generic drug variants, handing over the prescription together with the Roche patient card is equivalent to the clear recommendation to purchase the Roche product. The patient card specified "*Your doctor has prescribed you a Roche medicine. In order to obtain the Roche medicine prescribed by your doctor, please contact the Roche Call Center.*" Thus, Roche used the patient card as a tool to direct the patient to Tarceva, the patient being determined to call the Call Center number on the card to request the Roche medicine containing the active Erlotinib substance. This created a context in which the patient considered that the doctor has recommended him Tarceva.

49. Thus, the patient cards delivered by the doctors resulted in the purchase of the Roche-Tarceva drug, for which Roche provided the co-payment that should have been borne by the patient. This was to the detriment of generic options, thus limiting the chances of MAH² to grow sales by the generic products containing the Erlotinib active substance. Thus, Roche ensured that the patient would purchase his product and not that of its direct competitors - the generic alternatives.

² Marketing Authorization Holder.

50. According to the legal regulations³ on drug advertising, the only legal form by which prescription drugs obtain visibility in front of the patient is by the pharmacist presenting the existing commercial options. However, this is a step prior to the decision to purchase a specific trade name, and in this case, the patient has already exercised his option, being directed by the Patient Card and requesting through the Roche Call Center the delivery of the Tarceva product to the pharmacy. Thus, at the time the patient went to the pharmacy, his choice was already made and, moreover, the requested Roche product was in the pharmacy, following the patient's order through the Call Center. This made the presentation of an alternative by the pharmacist to become useless in the context of acquisition.

51. Using this strategy, Roche Romania SRL limited the range of options for Romanian patients regarding the products containing the Erlotinib active substance and, implicitly, the possibility of patient choice, preventing its direct competitors MAH/MAH representatives of generic variants of Tarceva to develop their sales in normal competitive conditions.

52. The analysis in this case revealed that the strategy of Roche Romania SRL generated the artificial preservation of Tarceva's market share and the limitation of the normal penetration of generic drugs on the Romanian market. It was established that the degree of the penetration of generic Tarceva 100 mg, respectively Tarceva 150 mg, could have been in 2017 by up to 400%, respectively 600% higher than in fact, while in 2018, it could have been up to 168%, respectively 240% higher than in the real situation. Moreover, the value of the monetary impact can reach 2,996,699 lei for the period 2017 - 2018, representing 7.3% of the total amounts settled by the State for the medicines with the Erlotinibum active substance.

53. The RCC established that Roche Romania SRL abused its dominant position, thus infringing the national and Community competition provisions. The competition authority decided to sanction the undertaking and to order the conclusion of the behavior of Roche Romania SRL, manifested by implementing a strategy aiming to limit the sales of generic alternatives containing the Erlotinib active substance.

54. The sanction applied to Roche Romania SRL by the RCC, in this case was 15,799,839 lei (3,387,688 euro).

Packaging waste collection and transport services⁴ – Anticompetitive actions of public administration

55. Following a complaint filed by Total Waste Management SRL, the RCC initiated in 2017 an investigation concerning possible anticompetitive actions of the public administration of Ploiești (in this case, the Local Council of Ploiești and the Mayor of Ploiești).

56. The public administration of Ploiești has adopted certain normative administrative acts impeding the freedom of action of the undertakings that carry out or could carry out their activity on the market of collection and transport services of

³ Prescription drugs cannot be promoted to the general public.

⁴ After publication, the decision will be available in Romanian at:

www.consiliulconcurentei.ro/documente_oficiale/concurentă/decizii/directia_teritorială.

packaging waste from the Ploiești Municipality. Specifically, those administrative acts ensured the exclusivity of the provision of these services by the sanitation operator entrusted with the management of the sanitation services in its area of territorial competence.

57. Following the investigation, the RCC established that the Competition Law was infringed by the public administration of Ploiești, by excluding the authorized collectors from the relevant market of packaging waste collection and transport services in Ploiești. These anticompetitive actions consisted of:

- issuing administrative acts that have as purpose or effect the restriction or even the elimination of competition on the market, by impeding the freedom of action of the undertakings authorized by the environmental authority, which carry out or could carry out their activity on this market, respectively by ensuring the exclusive provision of these services by the sanitation operator entrusted with the management of sanitation services in its area of territorial competence;
- the refusal of the public administration of the Ploiești Municipality to issue authorizations, manifested by the suspension of the authorization activity in 2017;
- the dilatory actions of the public administration of the Ploiești Municipality, consisting in the unjustified delay of issuing the 2018 authorization of the company Total Waste Management SRL;
- the refusal of the public administration from the Ploiești Municipality, during 18.02.2019 - 22.05.2019, to register the authorized collectors for the economic activity of taking over by purchasing packaging waste from the population from the place of their generation.

58. The RCC considers that the activity of collecting packaging waste from the population can be carried out by several authorized economic operators, not only by sanitation operators, in order to improve competition in this market. In this sense, by Decision no. 73/2019, the competition authority recommended to the Ministry of Environment the modification and completion of certain regulations in the field.

Services provided in the field of natural gas installations⁵ - Abuse of dominant position

59. The investigation was opened *ex officio* in 2017 and concerned the abuse of a dominant position of Dstrigaz Sud Rețele SRL (DGSR), on the market of technical project approval services, reception and commissioning of natural gas installations, within the geographical areas covered by the distribution license held by the undertaking.

60. In the natural gas distribution sector, a large number of activities can be considered secondary in relation to the main activity. Secondary activities can be classified into two categories:

⁵ After publication, the decision will be available in Romanian at:

www.consiliulconcurentei.ro/documente_oficiale/concurentă/decizii/directia_teritorială.

- activities that can be carried out only by the undertakings holding a license granted to provide a main activity - these secondary activities are covered by the license granted for the main activity, and their performance represents not only a right, but also an obligation for the licensee;
 - activities that can be carried out by any person authorized for this purpose according to specific regulations;
61. The investigation focused on the activities of the DGSR regarding:
- i. services for the technical approval of projects for the execution of natural gas installations (IUGN);
 - ii. IUGN reception services;
 - iii. commissioning of IUGN, in the geographical areas for which DGSR holds a distribution license (Bucharest and localities from the counties of Braşov, Covasna, Ilfov, Dâmboviţa, Ialomiţa, Giurgiu, Buzău, Călăraşi, Olt, Dolj, Brăila, Galaţi, Tulcea, Vrancea, Teleorman, Argeş, Prahova, Vâlcea, Constanţa).
62. The three activities include the category of activities that can only be carried out by undertakings holding a license for providing a main activity.
63. The investigation identified three relevant product markets, namely:
- the services market for approving IUGN execution projects, where DGSR held a monopoly position between 2008 and 2012;
 - the market of IUGN reception services, where DGSR held a monopoly position between 2008 and 2012;
 - the market for IUGN commissioning services, where DGSR has held a monopoly position since 2008 and until the present time.
64. With regard to the DGSR tariffs applied on the markets for technical approval services of IUGN execution projects and reception works, the unfairness of the tariffs was assessed in the light of the following analyzes:
- comparison of the DGSR tariffs with the ones charged by a comparable natural gas distributor;
 - comparison of the DGSR tariffs from the period when it held the monopoly on the markets of technical approval services of the execution and reception projects, with the tariffs practiced by other economic operators, in conditions of competition, after the market liberalization;
 - price-cost analysis at the DGSR level.
65. With regard to the tariffs charged on the market for the commissioning of natural gas installations, the unfairness was assessed in the light of the following analyzes:
- comparison of the DGSR tariffs with the tariffs charged by a comparable natural gas distributor;
 - price-cost analysis at DGSR level.
66. The analysis showed that, between 2011 and 2019, the natural gas distributor (DGSR) abusively used its monopoly position in the markets for technical approval

services for IUGN execution projects, for reception of IUGN works, and for the commissioning of IUGN in the geographic areas covered by its distribution license. This was to the detriment of consumers, because the respective tariffs have had an unfair nature.

67. Thus, DGSR practiced unfair tariffs in the following three markets:

- between January 2011 and September 2012, DGSR practiced unfair tariffs on the market for technical approval of IUGN execution projects;
- between January 2011 and September 2012, DGSR practiced unfair tariffs on the IUGN technical reception market;
- during February 2013 - present, DGSR practiced unfair tariffs on the IUGN commissioning market.

68. At the time when DGSR imposed these tariffs, there were no competing companies and the consumer did not have the possibility to choose the service provider. DGSR acted on the markets as a monopolist, which is all the more restrictive for its clients, since if they did not agree to pay the fees charged by DGSR they had no other alternative provider on the market. This would have resulted in the impossibility to carry out technical project approval operations, reception and commissioning of IUGN.

69. Thus, the monopoly position of DGSR on the natural gas distribution market gave the company, according to the legislation in force, the exclusive right to approve the technical projects, to receive and to put into operation IUGN execution works, respectively to establish and collect tariffs for these services.

70. The RCC found that Distrigaz Sud Rețele SRL infringed the Competition Law and applied a fine of about 17.7 million lei (approximately 3.7 million euros). It should be noted that the company admitted the anticompetitive deed, thus benefiting from a reduction of the sanction.

*Access services for communications networks – Abuse of dominant position and anticompetitive actions of the public administration*⁶

71. The investigation was launched in 2016 and had as object the behavior of Netcity Telecom SRL regarding the imposition of the conditions under which it granted the beneficiaries access to Netcity infrastructure, as well as the behavior of Bucharest City Hall (PMP) - inaction to take all the necessary steps to modifying, harmonizing and complying with the conditions for access to that infrastructure.

72. The investigation was opened following a complaint from Ines (a Netcity customer). Subsequently, another investigation initiated by the competition authority in 2019, following a complaint from Interlan (Netcity customer and competitor on the same relevant market with Ines) was connected to this investigation, having the same object and against the same parties involved.

⁶ After publication, the decision will be available in Romanian at:

www.consiliulconcurentei.ro/documente_oficiale/concurentă/decizii/servicii.

73. Netcity is a concessionaire of the *Netcity network*, based on the *Concession Contract* (public works concession⁷), having as main responsibilities the design, construction, technical and commercial service of the *Netcity infrastructure/underground network* in Bucharest. The main purpose of the network is to host the electronic communications networks installed mainly on the pillars of the capital. Through the Concession Agreement, PMB granted the concessionaire the exclusive and unrestricted right to manage the Netcity network, which primarily involves the right to operate it commercially (by leasing the infrastructure). Therefore, Netcity holds a monopoly position.

74. *Netcity underground infrastructure* is also a support for subsequent communications networks, and must be made available in an equal, transparent and non-discriminatory manner to all telecom operators wishing to provide services in Bucharest, ie to provide support pipeline for operators' networks, as well as unoperated/ optical fiber (dark-fiber), made available to operators on the routes requested by them.

75. The beneficiaries of Netcity's infrastructure are mainly telecommunications operators, which, prior to the advent of the Netcity network, used above-ground infrastructure to provide services to their customers (and for self-supply).

76. The competition authority found that during 2010-2019, the concessionaire of the Netcity network abused its dominant position by imposing unfair conditions on:

- pricing methods depending on the degree of occupation of a functional loop (operators paid inversely in proportion to the length of the contracted tube);
- obliging customers to contract minimum lengths of infrastructure-support;
- imposition of FTTB connections (pre-equipped piping by Netcity Telecom with fiber optics), given that they are optional for customers;
- limiting the option for operators to install, in clear and transparent conditions, an underground transmission line for communications (they could not install cables other than fiber optics);
- longer contract terms than the final customers wanted (5 years even if they wanted 1-2 years) and the payment of the rent related to the 5-year contract.

77. In this case, the RCC applied to Netcity Telecom SRL (formerly Netcity Telecom SA) a fine of about 2.2 million lei (approximately 460,000 euros) for abuse of a dominant position, which infringed the national and Community competition law. It should be noted that the company admitted its anticompetitive act, thus benefiting from a reduction of the sanction.

78. At the same time, the competition authority established that the Municipality of Bucharest, through the General Mayor and the General Council of the Municipality of Bucharest, infringed the Competition Law between 26.11.2013 - 26.10.2016 - inaction to carry out the necessary steps in the complex process of regulating the conditions of access to the Netcity infrastructure, thus distorting competition in the markets downstream of the market for the Netcity infrastructure access service.

⁷ PMB granted the concessionaire, for a period of 49 years, the exclusive and unrestricted right to manage the *Netcity public network*.

Road signs and markings⁸ - bid-rigging cartel

79. Following the complaint of Girod Semnalizare Rutieră SRL, in 2017, the Competition Council launched an investigation on the possible infringement of the national and Community competition law by Vesta Investment SRL, Helvespid SRL, Loial Impex SRL, IPA SA and Dual Man SRL on the market for the supply of vertical road signaling and road safety products, by rigging the public procurement procedures organized by CNADNR⁹/CNAIR¹⁰, during 2014 - 2016.

80. The investigation was subsequently extended with regard to the procedures for public and private procurement of road signs, as well as regarding the possible anticompetitive behavior adopted by Girod Semnalizare Rutieră SRL in the context of its participation in public and/or private procurement procedures of road signs.

81. In the case, the following relevant markets were defined, both of a national dimension:

- the market for the supply of vertical road signs, which includes road signs and other means of road signs, hereinafter referred to as the market for the supply of road signs;
- the market for the supply of horizontal road signs comprising road markings, hereinafter referred to as the market for the supply of road marking works.

82. The evidences proving the two infringements of the law consisted of:

- documents collected during the unannounced inspections carried out at the premises of the investigated companies;
- documents collected during the Forensic inspections carried out at the headquarters of the Competition Council;
- documents contained in the applications submitted by Vesta Investment SRL and Loial Impex SRL regarding the application of the leniency policy, including the annexes and subsequent completions;
- documents and information provided by the companies involved, CNADNR/CNAIR and third parties, at the request of the investigation team;
- behavioral analysis of the investigated enterprises.

83. The undertakings Vesta Investment SRL, Helvespid SRL and Loial Impex SRL have developed a unique and continuous concerted agreement and/or practice of sharing the market for the supply of road signs and/or the market for the supply of road marking works, during 2010-2017. The three undertakings had the same anticompetitive purpose of market sharing, aiming not to compete with each other within public and/or private procurement procedures, either as individual bidders or as members of a business associations.

⁸ After publication, the decision will be available in Romanian at:

www.consiliulconcurentei.ro/documente_oficiale/concurență/decizii/licitații_și_petiții.

⁹ Romanian National Company of Highways and National Roads.

¹⁰ National Company for Road Infrastructure Management.

84. By exchanging competitively sensitive information, the three companies, Vesta Investment SRL, Helvespid SRL and Loial Impex SRL adapted their behavior, either in the sense of submitting bids, so as not to compete with each other, or in the sense of requesting and supplying of courtesy offers or abstention from bidding in the case of requests for tenders from contractors for rehabilitation/modernization/construction of public roads. This led to the conclusion of contracts in less competitive conditions, having as duration of execution, at the latest, on 31. 12. 2017.

85. The undertakings Girod Semnalizare Rutieră SRL and Loial Impex SRL have reached an agreement and/or a concerted practice of sharing the market for the supply of road signs, during 2009-2016. The two companies had the same anticompetitive purpose of market sharing, aiming not to compete with each other within public and/or private procurement procedures for road signs. The two companies participated in the infringement between 2009 and 2016. During this time, by exchanging competitively sensitive information, they adapted their behavior, either in the sense of submitting tenders so as not to compete with each other or in the sense of solicitation. and the provision of courtesy offers or the abstention from bidding in the case of requests for tenders from contractors for rehabilitation/modernization/construction of public roads, which led to the conclusion of contracts in less competitive conditions, having as duration of execution, at the latest, on 31. 12. 2016.

86. The participation of Loial Impex SRL in committing the two anticompetitive acts of market sharing, mentioned above, is a unique and continuous law infringement, during 2009 - 2017, resulting from the overlap of the periods in which the two infringements were committed.

87. The total amount of fines applied in this case was of 3.2 million lei (approx. 667,000 euros).

88. The undertakings Vesta and Loial requested the application of the leniency policy, providing documents and information that represented a significant contribution in proving the anticompetitive practices, thus benefiting from the conditional reduction of the fine.

89. The undertakings Vesta Investment SRL, Helvespid SRL and Loial Impex SRL expressly admitted the responsibility for committing the anticompetitive act, thus benefiting from the reduction of fines.

90. As no sufficient evidence was found regarding the infringement of the competition law, which would justify the imposition of measures or sanctions, the RCC ordered the closure of the investigation in the case of the undertakings IPA SA and Dual Man SRL.

Retail sale of fuels¹¹- economic concentration with commitments

91. The economic concentration aimed at acquiring sole direct control by OMV Petrom Marketing SRL (OPM) over 8 fuel distribution stations owned by ART Petrol

¹¹ Decision no.85/2019 is available in Romanian at:

www.consiliulconcurentei.ro/documente_oficiale/concurentă/decizii/industrie_si_energie.

Service SRL (Art Petrol) in Bucharest and in the counties of Ilfov, Ialomița, Dâmbovița, Teleorman, Giurgiu and Argeș.

92. The analyzed economic concentration led to horizontal overlaps on 8 relevant local markets for the retail sale of fuels (petrol and diesel), defined at a distance of 5/10 minutes by car around the purchased ART gas stations. Regarding the LPG car product, the overlap was made on 6 relevant local markets, defined in the same way.

93. Given that the acquiring party was engaged in wholesale trade of upstream fuels (ex-refinery sales of petroleum products - petrol/diesel/LPG for cars) and wholesale of petrol/diesel) compared to the activities of ART gas stations, the analysis undertaken also took into account the vertical relations between the wholesale market of petroleum products (petrol/diesel LPG), on the one hand, and the retail market of fuels (petrol and diesel) and LPG, on the other hand. The analysis highlighted the fact that, following the analyzed operation, it is unlikely that the effects of blocking access to sources of supply and of blocking access to customers will occur.

94. The merger raised concerns in respect to the retail fuel market (petrol and diesel) in the isochronous areas of 5 car driving around the ART Bucharest gas station and 10 minutes driving around the ART Potlogi gas station, ART Slobozia and ART Alexandria, as well as on the car LPG retail market in the area delimited by an isochronous 10-minute drive around the ART Slobozia gas station. The main competitive concern was the high probability that the new merged entity would substantially and profitably increase the prices of the fuels traded.

95. Competitive concerns were determined, depending on the specific situation of each local market, by one or more of the following factors:

- at the level of cumulative sales (B2B and B2C) as well as at the level of B2C sales, the analyzed concentration had the effect of consolidating the leading position previously held by OPM in these areas, at a value of market share well above the threshold of 40% of which a dominant position is presumed to be held;
- the values of the Herfindahl-Hirschman Index (IHH), as well as of the delta (Δ) were high/very high, suggesting, on the one hand, the existence of highly concentrated markets, but also the high probability of competition problems in the case of the analyzed concentration, on the other hand;
- the number of active competitors in each of the analyzed areas was reduced as a result of the analyzed operation, which determines the elimination of the competitive pressure previously manifested on OPM by ART gas stations, especially since, in some cases, OPM gas stations were located at the short distance (expressed in km) from those operated by ART Petrol, and the parties involved mutually monitored their changes in fuel prices in order to adjust their prices according to the local competitive environment;
- the other competitors active in the affected markets did not have sufficiently strong market positions to counteract the actions of the resulting new entity.
- the analysis of the Competition Council (including the GUPPI tests) on the possible unilateral effects of the notified economic concentration showed that there is the possibility of manifesting a unilateral behavior of the entity resulting from the concentration.

96. In order to remove the concerns of the Competition Council, OPM made structural commitments: the sale of three gas stations operated by Art Petrol (ART Bucharest, ART Slobozia and ART Potlogi) and one gas station operated by OPM in the Alexandria area (Petrom 2 Alexandria). The latter has a market share approximately equal to that held by ART Alexandria gas station.

97. Through the proposed commitments, the realization of the economic concentration no longer raised significant obstacles to effective competition, in particular as a result of the creation or consolidation of a dominant position on the identified relevant markets.

2.2. Judicial review of RCC's decisions in 2019

98. In 2019, there were 207 cases in which the RCC had a procedural quality and which concerned the field of competition. These files accounted for 86% of the total number of files handled in court by the institution.

99. The percentage of favorable judgments handed down by the first court of instance, the Bucharest Court, was 98%, the Court maintaining 95% of the amount of the sanctions contested in the files resolved in 2019.

100. The proportion of judgments favorable to the RCC given in appeal by the High Court of Cassation and Justice is 94%. At the same time, the Supreme Court maintained 99% of the total amount of fines appealed.

101. We present below two irrevocably settled cases in 2019 by the High Court of Cassation and Justice.

2.2.1. ROREC case - Arctic

Cartel – control of trading the products within the buy-back campaigns

102. By Decision no. 10/2014, the RCC found and sanctioned the violation of the Competition Law, by concluding agreements aimed at fixing prices and controlling the marketing of products in buy-back campaigns initiated by the ROREC Association in 2008-2010, by eight member companies of the Board of Directors of ROREC, including Arctic SA (hereinafter Arctic).

103. For the violation found, the RCC sanctioned the Arctic enterprise with a fine in the amount of 24,014,881 lei.

104. The competition authority decided that the sanctioned companies concluded between 2008 and 2010:

- an anti-competitive price-fixing agreement, by setting a 15% discount for large appliances and a 20% discount for small appliances when selling them in buy-back campaign
- and
- an anti-competitive agreement of mutual control of the marketing of their products in the context of the buy-back actions carried out. Its materialization was possible in the context of:

- the allocation of the budget to 20% - by establishing a firm link between the contribution of an undertaking to the budget of the association as a result of the revenues from the green stamp and the participation or the level of participation of the undertaking concerned in the buy-back campaigns

and

- set-up of a mechanism (through the allocation of the budget to the buy-back campaigns at 20% for a company) through which the eight companies could predict with a high degree of certainty the size of their participation in the buy-back campaigns.

105. Against the Decision of the Competition Council, all the eight sanctioned companies filed an action for annulment at the Bucharest Court of Appeal.

106. In the Arctic case, the court of first instance rejected the petition made by the plaintiff, upholding in full the contested decision, both in terms of the existence of the anti-competitive deed and the individualisation of the sanction applied.

107. The Bucharest Court of Appeal held that Arctic's violation of the competition rules was proved to the necessary standard of proof, the documents in the file proving the agreement of will of the sanctioned companies, in the sense of concluding the price fixing agreement and the one regarding the control of products marketing within the buy-back type campaigns carried out between 2008 and 2010, thus aiming at forecasting the number of products sold in the buy-back shares by the competing companies.

108. The Court also held that the infringement of the rights of the defense could not be sustained by failure to disclose the parts of the investigation report and the underlying documents which did not contain proposals and conclusions on the conduct of the undertaking requesting access to those documents.

109. The court of first instance also rejected Arctic's arguments alleging the infringement of the principle of equal treatment, concluding that the competition authority, as the sanctioning body, is the one called upon to assess, in the light of existing evidence, which companies participated in the anti-competitive deeds. In the same vein, the court held that an undertaking cannot challenge any competition findings of the Competition Council in respect of one or more of the unsanctioned companies, as that illegality does not concern the plaintiff, the latter not proving a personal and legitimate interest.

110. With regard to the individualisation of the sanction applied, the Court considered that the RCC had correctly established that the two anti-competitive agreements fell within the category of facts of high gravity, having a short duration.

111. Arctic appealed against the decision of the Bucharest Court of Appeal. The High Court of Cassation and Justice dismissed the company's appeal, with the consequence that the Decision of the Competition Council was upheld as legal and sound, both regarding the deed and guilt of the company, as well as the fine applied.

112. The appellate court held that the facts sanctioned by the Decision of the Competition Council had been proved to the standard of proof required, proving that there were two agreements between the 8 competing undertakings, which adopted a common behavior, by fixing prices and controlling each other the marketing of the products in the buy-back campaigns at which the companies participated.

113. The High Court of Cassation and Justice concluded that the relevant market is the market for the sale of electrical and electronic equipment, which is the framework for competition between the eight sanctioned companies, given their ability to compete in terms of product portfolio, which allowed both Arctic and the other seven companies to participate in buy-back campaigns with all products in their portfolio. The Supreme Court held, in line with the case law of the CJEU, that even potential competition is limited to Community competition provisions (Article 101 TFEU).

114. The court of judicial review confirmed the classification of the two agreements as restrictive of competition by object, the court's findings being in the absence of any doubt as to the standard of proof in competition law.

115. With regard to the Arctic fine, the High Court of Cassation and Justice ruled that the competition authority correctly individualized the sanction, without requiring a reduction in the amount of the fine imposed.

116. The Supreme Court upheld the Competition Council Decision no. 10/2014 as legal and substantive compared to five other companies among those sanctioned, respectively Philips Romania SRL, Whirlpool Romania SRL, Gorenje Romania SRL, BSH Electronice SRL, Candy Hoover Romania SRL.

2.2.2. Dafora case – cartel – bid-rigging

117. By Decision no. 7/2015, the Competition Council found a violation of the Competition Law, holding that, between 02.06.2008-12.10.2009, the companies Dafora, Foraj Sonde Craiova, Foraj Sonde Târgu Mureş, Aquafor (for whose deeds its legal successor Upetrom 1 Mai is responsible) and Foserco participated in a single and continuous concerted agreement and / or practice of sharing the oil and gas drilling market, in which the mentioned companies met, discussed and agreed the division of the drilling works for which Romgaz, as contracting authority, was to organize tenders.

118. For the violation found, the Competition Council sanctioned the companies involved, the company Dafora SA receiving a fine in the amount of 3,970,208 lei.

119. Against the decision of the Competition Council, the Dafora company filed an action for annulment at the Bucharest Court of Appeal. The court of first instance rejected the plaintiff's request, upholding in full the contested decision, both in terms of the existence of the anti-competitive deed and the individualization of the sanction applied.

120. Challenging the collection of information on the subject matter of the investigation, the Court of Appeal ruled that the only legal requirement for carrying on an effective inspection by competition inspectors is that of existence of indications that documents may be found or information deemed necessary for the performance of their duties may be obtained and that the unannounced inspection carried out at the headquarters of RCI Grup Consultancy, which had the capacity of a possible facilitator of the cartel, was carried out under legal conditions.

121. At the same time, the Court held that Dafora's infringement of the competition rules had been proved to the necessary standard of proof, establishing that the competition authority had the right to a free assessment of the evidence, the only relevant criterion being its credibility. It was held that the evidence should be assessed as a whole, corroborated and the existence of an anti-competitive practice or

agreement can be established from a number of coincidences and indications which, when considered together, may constitute, in the absence of other coherent explanations, evidence of an infringement of the competition rules.

122. With regard to the individualisation of the sanction applied, the Court considered that the competition authority had correctly established that the anti-competitive agreement fell within the category of serious facts, since the agreement in which Dafora took part had as its object the distortion of the horizontal competitive process. and affected the entire national territory.

123. Regarding the duration of the infringement, the Court of Appeal upheld the conclusions of the Competition Council and stated that the non-conduct of tenders within a certain period is not likely to terminate the effects of the anti-competitive agreement, as it was not a consequence of the will of the companies involved to no longer divide the tenders, but it was determined by the decision of the contracting authority not to carry out any further proceedings.

124. Dafora appealed against the judgment of the Court of Appeal, but the High Court of Cassation and Justice dismissed the appeal as unfounded, upholding the decision of the Court of Appeal and consequently upholding Decision no. 7/2015 of the RCC.

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

125. In 2019, the RCC issued 116 opinions, 2 points of view and 30 advisory opinions and it launched consultation procedures and technical support to the Government, Parliament and other authorities and bodies with regulatory role.

126. In order to carry out the activity of monitoring the normative endorsement process at the level of the Competition Council, the advocacy unit prepared a Normative Monitoring Report/a detailed evaluation of the way in which the observations/recommendations made by the RCC in its opinions/points of view/advisory opinions were taken over/endorsed by the initiators in the draft normative acts promoted, monitoring that was carried out in relation to the final form of the projects, published in the Official Monitor.

127. In 2019, the series of inter-institutional meetings with other public authorities, institutions and ministries with responsibilities in the food processing, construction and freight transport sectors continued to be organized at both expert and senior management level in order to implement the sectoral Recommendations stemming from the Project on Competition Assessment concluded between RCC, Romanian Government and the OECD entitled “The analysis of the impact of legislation in force in key sectors of Romanian economy”. As a result, 34 recommendations were implemented and 26 normative acts were modified/repealed.

128. In 2019, RCC launched the Project “Comprehensive redesign of the licensing system in Romania” which aims at supporting Romania in modernising its licensing system, strengthening the capacity of its licensing institutions and aligning the licensing system with best international practices. The project, implemented by the OECD and with the financial support of the Structural Reform Support Service (SRSS), will address key bottlenecks and systemic issues of the current licensing system. It will play a critical role

in creating a regulatory environment that is conducive to doing business, creating jobs and attracting investment.

4. Resources of competition authorities

4.1. Annual budget

129. In 2019, the RCC's budget was 65,190 thousand lei, i.e. an increase by about 20% compared to the previous year. The general budget execution for 2019 was 98.8%.

4.2. Human resources

130. In 2019, the staff of the Romanian competition authority represented 357 employees, divided in directions, services and compartments. The staff of Romanian competition authority consists of civil servants, public managers and contractual staff. The competition inspectors represent 68 % of the total number of staff. As regards the professional background of the competition inspectors, most of them are economists (46.5%), followed by legal experts (29%).

131. In 2019, the RCC recruited on an undetermined period 19 people as competition inspectors and recorded 12 departures of competition inspectors from the institution. Continuous training is a core concern of the Competition Council. In 2019, 295 employees, as compared to 204 employees in 2018, participated in 28 training courses.