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SANCTIONS IN ANTITRUST CASES

Contribution by Romania

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Ms Lynn Robertson, Global Relations Co-ordinator, OECD Competition Division,
Tel: +33 1 45 24 18 77, Email: Lynn.Robertson@oecd.org.

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SANCTIONS IN ANTITRUST CASES

-- Romania --

1. Introduction

1. This paper deals with rules of setting fines for antitrust regulation infringements in Romania and the experience of the Romanian Competition Council (hereinafter referred to as "RCC") on this issue.

2. RCC may impose, by decision, administrative fines on undertakings and associations of undertakings for breaches of the competition rules (either on legal or natural persons performing economic activities).

3. Under the Romanian Competition Law (Article 65):

- any person acting as administrator, legal representative or exercising in any other way a management position in a company who intentionally conceives or organises a cartel or a vertical agreement that cannot be exempted may be subject to criminal sanctions. These sanctions consist of imprisonment from six months up to five years or of a criminal fine and the prohibition of certain rights (Article 63 of the Competition Law);
- individuals may be exempted from criminal liability, or at least obtain a reduction of the sanction, if they denounce the criminal offence. The exemption from punishment is granted to the person which, before the criminal prosecution is initiated, confesses to the criminal prosecution bodies its participation in the criminal offence, thus enabling the identification and prosecution of the other participants. Notwithstanding, if the confession is made during the criminal prosecution, the punishment will only be reduced by half of the limits provided by law.

4. Criminal cases must be brought by the public prosecutor. The investigative and enforcement procedures in these cases are regulated in the Criminal Code and the Code of Criminal Procedure.

5. Administrative proceedings against undertakings and criminal investigations against individuals can proceed in parallel. Although there are no legal barriers against exchanging information between RCC and the prosecutor, evidence obtained by a prosecutor through criminal enforcement powers that go beyond RCC's investigatory powers cannot be used as evidence in RCC decisions.

2. Determination of the basic amount of fine

6. The Romanian Competition Law provides the legal basis for RCC to impose fines.

7. Pursuant to Article 55 of the Competition Law, RCC may by decision impose fines between 0.5% and 10% of the aggregate turnover from the financial year prior to the sanctioning on undertakings and associations of undertakings where, either intentionally or negligently, they infringe the provisions of Article 5(1) of the Competition Law (prohibiting cartels and other restrictive agreements) and of Article 6 (abuse of dominance).

8. In cases where the infringement by an association of undertakings concerns the activity of its members, the fine imposed cannot exceed 10% of the aggregate turnover of every member active on the market affected by the violation.

9. Article 57 par. (1) of the Romanian Competition Law provides that in order to determine the amount of the fine, RCC takes into account both the gravity and the duration of the infringement. The gravity and the duration of an infringement, taken together, determine the basic amount of the fine.

10. The basic amount is adjusted further by considering aggravating and mitigating circumstances. According to the Competition Law, sanctions shall be set taking into account the scales defined in guidelines adopted by RCC, establishing the mitigating and aggravating circumstances that can be taken into account. Thus, when determining the amount of the fine RCC also applies its *Guidelines on the method of setting fines*. These *Guidelines* were first adopted in 2004, then amended in 2010 to reflect the European guidelines and in 2016 to comply with the settlement provisions of the law.

11. According to these *Guidelines*, when assessing the gravity, RCC takes into account a set of factors, including, amongst others, the nature of the incriminating conduct, the dimension and importance of the relevant market, the market shares held by all the companies involved, and the actual impact of the infringement on the market. Following the assessment of these elements, the *Guidelines* distinguish between three categories:

- **Very serious infringements** which are determined at a basic level of 4%-8% of the total turnover in the previous year (e.g. cartels, abuse of dominant position by firms in monopoly or equivalent situations or abuse of dominant position which led to exclusion of at least one undertaking from the market).
- **Serious infringements** which are determined at a basic level of 2%-4% of the total turnover in the previous year (e.g. other horizontal agreements, vertical restraints which are more complex and rigorous than those of low gravity and have a greater impact on the market, exclusionary abuses -refusal to supply, discrimination, exclusion, loyalty discounts given by companies taking advantage of a dominant position to exclude competitors from the market),
- **Minor infringements** which are determined at a basic level of 0,6% -2% of the total turnover in the previous year (e.g. vertical restrictions with little impact on the relevant market or affecting a limited part of it).

12. The basic level of the fine is also directly influenced by the duration of the alleged anti-competitive practices, which divides them into short, medium or long duration infringements. Whereas in the case of short duration infringements (less than one year) no increase of the basic level determined for gravity is possible, medium duration infringements (between one and five years) may result in an increase of up to 50% of the amount determined for gravity, while for long duration infringements (more than five years) the increase may go up to 10% per year.

13. When applying a fine, RCC will also take into account the general principles of law such as principle of proportionality, equality of treatment, duty to reason the decision, principle of personal liability. The principle of proportionality is a general principle of Romanian administrative law which has to be considered by RCC in the calculation of competition law fines. Thus, when assessing the gravity of the infringement, the corresponding percentage may be increased/decreased, taking into account considerations regarding optimal deterrence and this would influence the level of basic amount. It is also possible to increase/decrease the basic amount at the individualization stage, when RCC shall take into

account the need to increase the fine so that it exceeds the amount of illegal gains made as a result of the infringement, whenever it is objectively possible to estimate this amount.

3. Adjustment of the basic fine

14. The basic amount determined by reference to gravity and duration may then be adjusted, depending on the applicable aggravating/mitigating circumstances.

15. As a rule, according to the Guidelines, the basic level can be increased or decreased by 5% to 10% for each aggravating or mitigating circumstance retained.

16. RCC can increase the basic amount of the fine for aggravating circumstances, such as:

- committing an identical or similar infringement to an infringement assessed by a previous RCC decision (an increase between 10% and 25%);
- continuing the infringement after RCC has initiated the proceedings (an increase between 5% and 10%),
- refusing to co-operate with or obstructing RCC in carrying out its investigations (an increase between 5% and 10%),
- taking the role of leader or instigator in relation to the infringement (an increase between 5% and 10%). RCC shall also give particular attention to any steps taken in order to constrain other undertakings to participate in the infringements and/or to repressive measures taken against other undertakings in order to implement anti-competitive practices.

17. The basic amount of the fine will be reduced for mitigating circumstances. The *Guidelines* list the mitigating circumstances that RCC will take into account:

- the undertaking provides evidence that it terminated the infringement as soon as RCC intervened,
- the undertaking provides evidence that its involvement in the infringement is substantially limited and that during the period in which it was party to the alleged infringement it actually avoided applying it by adopting a competitive conduct in the market;
- the turnover on the market in which the infringement occurred is relatively low, up to 20% of the company's total turnover, provided that this can be established without doubt. For companies active in a number of markets and with considerable financial resources, RCC will apply this circumstance only if estimated deterrent / preventive effect can be achieved in this way. The basic amount can be reduced by up to 25% for this circumstance;
- the undertaking effectively co-operated with RCC outside the scope of the Leniency Notice and beyond its legal obligation to do so;
- the anti-competitive conduct was authorized or encouraged by public authorities or by legislation.

18. Furthermore, the existence and effective implementation within the undertaking of a competition law compliance programme is also considered to represent a mitigating circumstance.

19. The Competition Law does not contain explicit provisions in relation to the parental liability principle.

20. According to the general administrative law, when applying a fine RCC has to respect the principle of personal liability. Nevertheless, a parent company can be held liable for an antitrust infringement committed by a subsidiary when the parent company participates by itself at the same infringement or if the parent company exercised a decisive influence over the direct participant (a current or former subsidiary).

21. Inability to pay (“ITP”) is not referred to specifically in the Competition Law but can be taken into account when calculating the fine, since the Competition Law and the Guidelines provide for the possibility to consider a company’s financial situation when adjusting the basic fine.

22. This provision may be applied in exceptional cases and upon request of an undertaking submitted before imposition of the fine. The request has to be based on objective data showing that the imposition of the fine would irretrievably jeopardise the economic viability of that undertaking.

23. Reference to a negative financial situation or one generating losses does not justify a reduction in fine. Reducing the fine on this basis can only take place if the company proves beyond any doubt that it is insolvent or in an extremely difficult financial situation, which makes its exit from the market imminent.

24. In order to have the request for fine reduction taken into account by RCC, the undertaking must:

- provide at least the following financial and economic situations of the undertaking: the balance sheet, profit and loss account, trial synthetic and analytical balance;
- demonstrate, based on financial and economic indicators (solvency, leverage, etc.), the negative effects caused by an amount of the fine corresponding to the level proposed in the statement of objections.

25. These claims are analyzed by the investigation team in collaboration with staff specialized in economic analysis. So far no ITP request was accepted.

4. Leniency and settlements reductions

26. The amount of the fine may be further reduced if the leniency programme or the settlement procedure applies.

4.1 Leniency

27. According to the provisions of the Competition Law, as well as the Leniency rules, the leniency programme offers full immunity (or fine reduction in certain cases) to the first applicant, and reductions of fines for subsequent applicants. The Leniency programme covers cartels and very serious restrictions in vertical agreements (price fixing, market sharing).

28. The leniency programme distinguishes between full immunity and reduction of fines. Full immunity is available to the first undertaking to submit evidence which will enable RCC to carry out targeted inspections in connection with an alleged cartel or is the first to submit information and evidence which enables establishing that there indeed was a cartel. Fine reduction (30% - 50% for the first applicant, 20% - 50% for the second and up to 20% for others) is available to an undertaking that provides RCC with

evidence of the alleged cartel which represents significant added value, relative to the evidence already in RCC's possession at the time of the application.

4.2 Settlement

29. According to the Competition Law (article 57), a company's express acknowledgment of having participated in an anti-competitive practice will allow for a 10- 30% reduction of the level of the fine.

30. Under Romanian legislation, a settlement is not limited to cartel cases. Article 57 of Competition Law refers to all competition law infringements such as antitrust breaches, abuses of dominant position, failure to notify of mergers and putting a merger into effect prior to clearance from RCC.

31. Settlement proceedings can only be launched at the explicit request of an undertaking. In order to be admissible, such a request should contain a clear acknowledgement expressed in unequivocal terms of the party's liability, as well as the maximum amount of the fine to which the party is willing to commit to in order to settle the case.

32. If the parties admit to the breach before communication of the investigation report, a simplified procedure will apply. The party admitting the breach will benefit from a 10 to 30% fine, applied to the base level, but in any event no less than 0.2% of the total turnover obtained in the preceding year. If, in the end, a settlement is not reached between RCC and the undertaking, RCC cannot use any admission within the settlement procedure as evidence of the breach. According to the Competition Law (Article 57), where one of the companies participating in the anticompetitive practice benefits from leniency, the reduction applied in the leniency programme cumulated with the reduction for acknowledgement of the anticompetitive practice cannot exceed 60% of the basic amount of the fine.

33. The acknowledgement must be direct and unequivocal and must refer to the anti-competitive practice described in the statement of objections.

34. The undertakings may appeal the decision adopted by RCC following a settlement procedure. In such a case, according to the Competition Law, the plaintiff will lose the benefit of the settlement's fine reduction and RCC will be able to use the undertaking's acknowledgement in order to support its arguments in the Court.

35. Until now, the companies which used the settlement procedure established in 2015 did not appeal the infringement decision adopted by the RCC.

5. Court review

36. RCC decisions can be appealed in administrative procedure before Bucharest Court of Appeal within 30 days since notification. The Court may impose, upon request, the suspension of execution of the appealed decision. In case of fines, the suspension will be applied solely provided that a bail is paid according to provisions laid down by the Fiscal Procedure Code.

37. The Competition Law does not provide expressly for the type of jurisdiction that court enjoys regarding the fines imposed by RCC. The Romanian courts cannot aggravate the situation of the appellant, so if it finds the decision founded, the Court can maintain the fine imposed by RCC or reduce it. When the Court finds that there is no offence or the standard on proof was not met, the fine can be annulled.

38. In principle, the judge takes into account the factual situation at the time when competition authority issues the decision.

39. Once issued, RCC decisions may be subject to review by the Bucharest Court of Appeal (first appeal court) and subsequently the Bucharest Court of Appeal's decision may be appealed before the High Court of Cassation and Justice (second appeal court).

40. The term within which the parties may challenge the RCC decision, by submitting a request for annulment before the Bucharest Court of Appeal, is of 30 days from the communication of the decision. The mere challenge of an RCC decision does not stay its enforcement and therefore, the fine needs to be paid within 30 days from the communication of the RCC decision imposing it, irrespective of requesting its annulment in court.

41. However, as mentioned above, the addressee of the decision can obtain the suspension of RCC decision, until the court decides on the merits, provided that they pay a bail according to provisions laid down by the Fiscal Procedure Code.

42. In order to obtain the suspension, the undertakings must prove the fulfilment of two cumulative conditions: the existence of a well-grounded case (*prima facie* illegality, without requiring an analysis on the merits of the case) and the occurrence of imminent damage in case the fine was paid.

5.1 Extent of review

43. Depending on the instance of appeal, the review of RCC's decisions may be more extensive or, on the contrary, more limited.

44. The first instance appeal court (Bucharest Court of Appeal) is empowered to review the RCC decisions from the perspective of their legality in all aspects, including the alleged deeds and their legal assessment, the evidence and also the proportionality of the sanctioning measures imposed.

45. As the court will perform its own assessment both on points of facts and law, it may quash, in whole or in part, the RCC decision. As regards the review of the level of fines, the Bucharest Court of Appeal has jurisdiction to cancel or reduce the fine. Moreover, the principle of "*non reformatio in peius*" (the appellant cannot be put in a worse position than if he had not appealed the decision) is applicable, preventing the court from imposing more severe fines than those applied by RCC.

46. In contrast, the review performed by the High Court of Cassation and Justice during the second appeal proceedings is only possible on points of law (e.g. the Bucharest Court of Appeal's decision does not comprise the reasoning for the solution or comprises contradictory arguments). As regards the review of the amount of fines, taking into account the principle of "*non reformatio in peius*," the High Court will not be allowed to increase the amount of the fine established by the Bucharest Court of Appeal in cases where the second appeal is filed by the party.

47. The national Courts may alter the amounts of fine imposed by RCC for a wide variety of reasons, such as annulment of the prohibition decision for lack of evidence, procedural shortcomings and non-compliance with the sanctioning Guidelines.

6. Collection of fines

48. The Competition Law does not provide for special rules regarding legal or economic succession. A successor can be held liable, in principle, based on legal succession which derives from the law on trading companies. The economic succession is the exception. In practice, RCC applies European jurisprudence on the matter.

49. The Competition Law provides that the administrative fines applied by the RCC shall be paid to the public budget within 30 days after receiving the sanctioning decision. If the company does not appeal the decision, RCC will send the sanctioning decision to the National Agency for Fiscal Administration (ANAF), which is responsible for collection of the budgetary incomes.

50. The Court may impose, upon request, the suspension of execution of the appealed decision. Regarding the fines, the suspension will be applied solely provided that a bail is paid according to provisions laid down by the Fiscal Procedure Code.

51. So far, ANAF encountered problems with collection of fines imposed on companies outside the national territory.

7. Private enforcement

52. Private enforcement is still very rare in Romania, although the Competition Law provides that, apart from the sanctions enforced in keeping with the provisions of this law, individuals and/or legal entities reserve the right to sue for the complete remedy of the damage caused by the anticompetitive practices prohibited under this law or articles 101 and 102 of the Treaty on the Functioning of the European Union.

53. So far there has been only one case when a company requested and also obtained damages (approx. 1 million EUR) from an undertaking that abused its dominant position. This was a follow-on case and the decision dealing with private enforcement is not final yet.

54. It should be noted that pursuant to the Competition Law, joint and several liability does not apply to the undertaking granted immunity from fine. It must be added that this provisions will be replaced by the new legislative act implementing the Damages Directive 2014/104/EU in the national legislation. The implementation will result in the adoption of a specific law on competition damages as well as modifications to the existing provisions included in the Competition Law. These legislative changes will enter into force on December 27, 2016.