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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Working Party No. 3 on Co-operation and Enforcement**

**The Future of Effective Leniency Programmes – Note by Romania**

13 June 2023

This document reproduces a written contribution from Romania submitted for Item 5 of the 137th meeting of Working Party 3 on 13 June 2023.

More documents related to this discussion can be found at  
<https://www.oecd.org/competition/the-future-of-effective-leniency-programmes-advancing-detection-and-deterrence-of-cartels.htm>

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## *Romania*

### 1. Romanian experience with the Leniency Program

1. Romanian legislation sets the framework for our leniency program since 2009 and is convergent to the European model of leniency policy. Following the experience gained, in an effort to boost the leniency program, the Romanian Competition Council (RCC) amended in 2019 the legislation and brought more clarity to basic concepts such as the notion of undertaking and the registration of the marker, introduced a simplified procedure in relation with the RCC (e.g. the confirmation of receipt of documents only upon request, not automatically) and also extended the sphere of the infringements including horizontal and vertical agreements, prohibited by object or by effect.

2. Yet, although considered lower than in other jurisdictions, the number of leniency applications submitted to RCC raised constantly over the years; most were type B applications (submitted after a formal investigation was opened and dawn raids performed) and only a few applications were type A. For example, in 2020 RCC registered 2 leniency applications, in 2021- 5 applications for leniency and in 2022 – 9 applications for leniency. We consider this evolution to be a natural result of the deterrence effect created by the RCC's proactive approach related to the discovery of cartels and the fines applied to the companies involved.

3. To incentivize companies to use the leniency program, RCC accepted immunity from fines including in cases of type B applications, if the undertakings offered supplementary evidence that allowed RCC to prove the infringement against a larger number of companies involved in the infringement or to extend the duration of the infringement (ex. the case against electric meter producers and distributors - RCC Decision no. 77/2017 or the case against travel agencies - RCC Decision no.76/2018)

4. As a result of this limited practical experience with leniency, RCC shifted part of its efforts towards improving other instruments that can have as result an efficient detection of cartels and those that can offer comparable economy of procedure such as the settlement procedure.

5. As such, the settlement procedure is considered to have a bigger success than leniency in Romania, since the companies prefer to wait for some preliminary results of the RCC analysis. For example, in 2022 approx. 90% of the companies that were fined for antitrust infringements entered in settlements agreements with RCC.

6. **Future steps** include an envisaged change of legislation in the process of transposing Directive (EU) 1/2019 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. The new framework amends the provisions that impact the leniency program:

- the possibility of submitting leniency requests in Romanian or in another official EU language mutually agreed upon between RCC and the leniency applicant and
- granting protection from criminal sanctions imposed against natural persons/individuals, current and former directors, administrators and other staff members of enterprises that apply for immunity to the RCC.

7. As previously described, RCC invested in alternative instruments in order to boost the detection ex officio of possible cartels.

## 2. Whistleblower Platform

8. Starting from 2015, one of the main instruments used by RCC in order to collect information voluntarily provided by individuals about anticompetitive behaviors of undertakings is the Whistleblower Platform<sup>1</sup>.

9. Using this channel of communication, the individuals can inform RCC about possible anticompetitive infringements and upload, if needed, documents to support the allegations, yet remain anonymous, unless they wish to communicate their identification data. The Romanian legislation doesn't allow the possibility to remunerate the whistleblower.

10. The web-based technical solution guarantees the confidentiality of those who use the system. The web server of the platform uses HTTPS - an encrypted connection to the internet - to assure the user of the system that no one can collect the data sent via this platform, except for the persons authorized. RCC is not able to track the user's IP or detect his identity. The IT solution allows the deletion of the data sent by the whistleblower, which is done by the RCC-authorized representative.

11. Through the online platform, a wide range of issues was reported in various sectors, such as the energy market, the insurance market, e-commerce, the operation of online platforms, medical services, ride-sharing services, the labor market, the wood market, possible acts of unfair competition and others.

12. RCC's main challenge related to the Whistleblower Platform is to continuously promote the instrument in order to create awareness among potential informants and to improve the quality of the information received in terms of relevance for the authority.

13. Since 2015 the notifications raised constantly both in numbers (e.g. in 2015-109 messages, 2022-160 messages) and in quality.

14. The range of individuals who address topics through the Platform is wide: they can be consumers who observe through their personal experience coordinated behaviors of companies in different sectors, individuals who are former or actual employees of undertakings involved in anti-competitive practices (cartels, RPM etc) or individuals that represent companies that are clients or consultants for undertakings involved in cartels. The purpose of the RCC is to obtain relevant information and, if possible, documents that could offer solid evidence about the infringement (ex. e-mails, WhatsApp conversations, contracts etc).

15. Some of these pieces of information obtained through the platform proved to be especially valuable, helping RCC to open 5 formal investigations.

16. For example, one of these 5 investigations, namely the one regarding a price-fixing agreement between companies active in the production and distribution of agricultural machinery market, began with using the information offered through the platform by individuals working in the consultancy sector for EU funds dedicated to farmers. The information signaled the anticompetitive coordinated behavior of some companies active in the sector to charge farmers differentiated prices, depending on the source of the finance. There were higher prices charged (by more than 40%) when selling agricultural machinery financed by EU Funds versus other sources of funding (eg. banking loans, cash etc). After investigating, the RCC decided that these arrangements between companies constituted a complex cartel operating between 2014 and 2018. The cartel members jointly designated a unique undertaking to register the agricultural equipment of a particular brand (ex.

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<sup>1</sup> <https://report.whistleb.com/en/consiliulconcurentei>

Amazone, Claas) in a specific database (AFIR -National Agency for Funding Rural Investments) with an agreed reference price, functioning as a minimum price. In addition, the competition was thus curtailed by jointly defining a common set of characteristics that excluded other market participants. The total fine applied by RCC was approximately €26.5 million for price fixing in the agricultural equipment market.

17. Another recent example is the information provided by several actual or former engineers in the automotive sector that was successfully used by RCC to open a formal investigation concerning a possible cartel in the market of specialized labor for the automotive sector, in December 2021. The Platform was used to obtain also documents from those individuals, such as labor contracts, emails, and internal memos of the companies involved, indicating an agreement between competitors to refrain from hiring each other's employees. The instrument was considered safe for the persons who wanted to keep their names anonymous since they were afraid of possible retaliation from their employer. The investigation is still ongoing.

### 3. Screening public procurement procedures – the Big Data project

18. In order to fight abuse in public procurement, Romania put the introduction and implementation of e-procurement on the top of its list of priority reforms. As a result, since January 2007, all public procurement announcements of the Romanian government have to be published on the national portal “e-Licitatie” ([www.e-licitatie.ro](http://www.e-licitatie.ro)) and are transferred to the EU Official Journal. It has hence become easier and faster for companies in Romania to participate in public procurement by simplifying access to information and to the bidding process, which is especially important for SMEs.

19. With the emergence of Big Data technologies, given that RCC has access to the data stored in the national portal, RCC saw new opportunities of analysis, which required new methods to identify, collect, structure, and analyse data.

20. After some preliminary attempts at designing a simpler system for creating bid rigging alerts based on e-procurement data, in 2018 RCC started implementing a Big Data project. The Big Data platform is intended to create faster, better, proactive decision-making, by making use of screening tools in bid-rigging screening, cartel screening and advanced analytics, and merger control with a focus on properly identifying control holders or previously un-notified transactions, sector inquiries for the structural assessment of industry sectors to flag industries which are more prone to collusive practices, networks of firms for the use of social networks to identify structures or connections between firms that may go undetected by traditional analytic tools (with considerably fewer resources).

21. Based on the preliminary work done at the start of the project, which included a collaboration with a team of academics and a review of the initial list of algorithms developed internally, the Big Data system is designed to signal three main categories of red flags for the bid-rigging analysis (depending on quality and availability of data):

- Price based - If bid prices are available, bid price distribution can flag high-risk tenders. For example, constant price differences between the lowest bids, and extremely small, or extremely high bid price ranges can signal coordinated prices.
- Bidding patterns - Bidding patterns can flag some of the most elementary rigging techniques, like withheld bids. For example, an increased share of single-bidder contracts in a given region, or a sudden drop in the number of bids received in a market from one year to another are indicators that are calculable and traceable over time in an automated way.

- Market structure - Data on public contracts contain key market characteristics such as product or regional codes. While both have inaccuracies (for example, buyers often fail to categorize their tenders to the corresponding codes, and categories are also not accurate enough), they allow categorizing tenders into markets. High or increasing market concentration or overly stable market structures can flag coordinated bidding - especially if they are associated with increased contract-level risks.
22. Many of the statistics and indicators (especially the automatically calculated ones) are based on public procurement data. The variables that are useful to filter the relevant subsets of contracts are the following:
- CPV code
  - Geographical area - based on NUTS-codes, buyer city, or postal code
  - Contract size - based on the final contract size or estimated contract size
  - Tender date - call for tender publication date or contract award publication date
  - Companies - based on company IDs
  - Buyer name - based on company IDs
  - Procedure type
  - Bid status: winning/losing bid
  - Tender/contract ID
23. Further dimensions that are useful filters include, among others:
- Company financial statistics
  - Company management (e.g. filter companies that are linked to the same managers)
  - Company ownership (e.g. filter companies that have explicit cross-ownership links)

#### **4. Strengthened cooperation with other authorities - working close with contracting authorities for early warnings of bid rigging**

24. In order to detect possible infringements of competition rules related to public procurement procedures, the competition authority cooperates with other public authorities and, for this purpose, founded the Bid-Rigging Module (MLT) in 2010. Under this structure, RCC experts cooperate and exchange information with representatives of the national regulator on public procurement (ANAP), the National Council for Solving Complaints, the Prime Minister's Control Body, the Romanian Court of Accounts, the Prosecutor's Office attached to the High Court of Cassation and Justice (Romanian Supreme Court), and the Antifraud Division.

25. Within the cooperation with ANAP, RCC contributed to the reform of the Public Procurement Law; the new law entered into force in 2016. In its current form, the law has a series of provisions that have contributed to the advocacy and enforcement efforts of RCC.

26. One specific form of cooperation between RCC and the public contracting authorities (central or local) is represented by ex-ante assessment of possible anticompetitive behaviors of the undertakings during the public procurement procedures. The RCC issues a formal opinion, within a period of 15 days, every time there is a request

from contracting authorities concerning the existence of indicators of possible infringement of the competition rules and the possibility to exclude bidders<sup>2</sup>.

27. The RCC opinion is not mandatory, so the decision to act upon our advice stays with the contracting authority. On the other hand, RCC retains the discretion to open an investigation if new elements of the case arise later on.

28. This legal provision proved to yield benefits for both contracting authorities and the competition authority since experience showed that what is obvious for one authority might not be the same for the other. It provided better awareness for contracting authorities while bringing a lot of insight into the public procurement cases for the RCC, which gained access to a lot of specific aspects, documents and data for further screening. Some of these opinions later led to bid rigging investigations. For example, in 2022 out of 33 requests of opinion from local/regional contracting authorities, in 4 instances RCC opened investigations concerning potential bid rigging.

29. Another initiative aimed to support public contracting authorities was the joint guidance provided by RCC and ANAP related to the interpretation of exclusion grounds for undertakings that were already fined for breaching the competition law.

30. The public procurement law regulates a series of mandatory grounds for exclusion from public procurement procedures of companies whose performance in previous tenders/contracts was suboptimal or whose actions may raise suspicions about their integrity. Among these cases are situations in which companies have committed severe professional misconduct that casts doubt on their integrity, i.e. violations of competition law. The legislation mandates that these violations be acknowledged by adequate means of proof, such as a decision of a court or administrative authority. Exclusion based on this ground operates for a three-year term with important consequences on the activity of the companies concerned. To ensure the proportionality of the exclusion measure in relation to each company, the law establishes the possibility of "self-cleaning" through concrete/specific measures taken in order to prove credibility.

31. The guidance to contracting authorities concerns mainly the ways in which companies may prove rehabilitation (such as application for settlement procedure, for leniency, improved compliance programs etc). In order to avoid any disproportionate exclusion from tenders, the contracting authorities have also the possibility to seek specific guidance from RCC on the case at hand.

## 5. Conclusion

32. RCC's recent experience highlighted the need for diversifying its enforcement methods and instruments, as a correspondent for the current dynamics of markets. This strategy allows RCC to respond to the actual challenges represented by the use of digital information across sectors and the enhanced transparency of information accessible with minimum effort for the companies. This digital revolution allows companies to easily coordinate their commercial strategies and to monitor any deviation from an antitrust agreement they are part of.

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<sup>2</sup> Art. 167 of Law 98/2016 regarding public acquisitions (transposing Directive 2014/24 EU) stipulates that *Prior to the exclusion of an economic operator pursuant to par. (1) lit. d), the contracting authority requests in writing to the Competition Council its point of view regarding the identified suspicions that aim to distort the competition within or in connection with the award procedure in question, which it will submit within a maximum of 15 days.*

33. Yet, we consider that the efforts dedicated to any new instruments should function in parallel with the constant promotion of already established instruments, such as the leniency program, since their efficiency in terms of detection, instrumenting, and proofing of cartels has already been proven.