Competition Law in Central and Eastern Europe
A Practical Guide

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Romania

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§12.01 STATE OF THE LAW AND PRACTICE

[A] Brief Overview of the Existing Legislation

[1] Applicable Laws and Regulations

Since its accession to the European Union (EU), Romania has harmonized and adapted its legislation in the competition field to the EU legislation. Today, the existing legislation in the competition field only slightly diverges (in the sense of particularities and not contradictions) from the rules and regulations at Community level, making it easier to identify potential risks from a competition law standpoint in case of cross border transactions within the EU. In some specific fields, such as state aid, the national legislation is more focused on the practical implementation of the Community state aid legal framework.

The Romanian competition legal framework is represented by laws, regulations and guidelines issued by the national competition authority, namely the Romanian Competition Council (RCC) and the EU regulations which apply directly in Romania as part of the acquis communautaire (when dealing with transactions affecting trade between Member States) or as incorporated in the Romanian legislation by direct references within the Romanian competition legislation.

The most important legal deed applicable in the competition field in Romania is the Competition Law No. 21/1996 (hereinafter “Romanian Competition Law”), having as purpose the protection, maintaining and stimulation of competition and of a normal competitive environment, in order to promote consumers’ interest.

2. Published in the Official Gazette of Romania, Part I No. 742 of August 16, 2005.
RCC has issued relevant regulations and guidelines for the enforcement of the Romanian Competition Law concerning mainly economic concentrations (concept, concerned undertakings, turnover, notification procedure, direct related and necessary restrictions for the implementation of economic concentrations), contraventions and sanctions (including methods of individualization of sanctions), tariffs and taxes applied by RCC and their computation manner, analysis and settlement of complaints concerning infringements, procedure for carrying out hearings, making decisions and taking interim measures, block exemptions, rules on obtaining guidance letters from RCC, commitments procedure, leniency policy, rules on determining the relevant market.

[2] Soft Law and Its Role in the System

As opposed to the guidelines issued at EU level which, in principle, are not mandatory but have to be taken into account by national courts, RCC’s Guidelines, issued for the purpose of interpreting or applying the Romanian competition legislation, are mandatory in their entirety.

Besides the guidelines issued for the aforementioned purpose, RCC is also entitled to make recommendations on best practices in various economic sectors and to provide guidance regarding general aspects related to the application of the competition legislation, by taking into account the case law of national and EU courts, as well as the European Commission’s precedents. These recommendations and general guidance are not mandatory but could be taken into account by national courts. The most recent recommendation issued by RCC refers to Best Practices in the Petitioning Activity3 and it covers the petitioning activity performed jointly by competitors or by associations of undertakings.

[B] Process of “Criminalization” of Competition Law

As a rule, the sanctions provided by the Romanian Competition Law for the undertakings or association of undertakings that breach the Romanian competition rules consist of fines computed as percentage from the turnovers of such undertakings or associations (except for the fines applied to public authorities and institutions, which are represented by fixed amounts). In addition, it is expressly provided that any agreements or decisions prohibited under the Romanian Competition Law and through Articles 101 and 102 of Treaty on the Functioning of the European Union (TFEU), namely any commitments, conventions or contractual clauses relating to an anticompetitive practice are null and void.

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The Romanian Competition Law also provides for the criminal liability of individuals breaching the competition rules, namely in the situation where such individuals fraudulently participate to the initiation, organization or realization of anticompetitive practices or agreements, namely agreements between undertakings, decisions of the associations of undertakings and concerted practices which have as object or effect the prevention, restriction or distortion of the competition on the Romanian market or a part thereof.

Moreover, the persons that use or disclose, for other purposes than the ones provided by the Romanian Competition Law, documents or information deemed as professional secret, received or acknowledged during the performance of their duties or in relation to their duties might be subject to criminal sanctions. Their criminal liability is held in accordance with the provisions of the Romanian Criminal Code regulating the relevant criminal offenses.

[C] Private Enforcement

Regardless of the sanctions applied in accordance with the Romanian Competition Law, the right to bring an action for claims of the individuals and/or legal entities for the full recovery of the damage they suffer as a result of an anticompetitive prohibited practice is not prejudiced. The right to action can be exercised both in the situation where the anticompetitive prohibited agreement or practice has been ascertained or sanctioned by RCC (follow-on actions filed under the Romanian Competition Law) and even when no decision has been issued by RCC in relation to the respective anticompetitive agreement or practice (stand-alone actions filed under the civil liability general legal provisions of the Romanian Civil Code).

The right to claim for damages in court is recognized to any harmed person or legal entity, including indirect purchasers, both when there is no prior administrative decision ascertaining or sanctioning the infringement of the Romanian Competition Law as well as when there is a prior final decision of RCC ascertaining or sanctioning such infringement.

In determining whether the claimant is entitled to damages, the court of law will analyze the general conditions for tort or non-contractual civil liability to be proven by the claimant, respectively: the existence of the prejudice, the illicit act (i.e., breach of the competition law provisions), causality link between the prejudice and the illicit act, and the fault of the infringer (including slight negligence). In case of follow-on actions, where a decision of RCC establishing the violation has already been issued, the illicit act and the fault of the infringer result from RCC’s decision ascertaining the breach of the competition law.

A claim for damages may be brought into the court of law within three years as of the date the claimant had knowledge or should have had knowledge of the damages and the infringer (in case of stand-alone actions), or within two years as of the date RCC’s decision has become final or was maintained by a final and irrevocable court decision (in case of follow-on actions).
Claimants are entitled to full compensation for actual loss (i.e., *damnum emergens*) and loss of profit (i.e., *lucrum cessans*), including loss of the opportunity to obtain an advantage.

Although private enforcement has been explicitly regulated in the Romanian competition legislation, on the one hand, and it is also possible based on the civil liability general legal provisions of the Romanian Civil Code, on the other hand, it is not effectively exploited in practice due to the fact that there is a high uncertainty as regards the outcome of claims. This uncertainty derives from the lack of precedence and the limited experience of the courts of law. Moreover, the uncertainty is further intensified by the following: it is difficult to prove the causality link between the prejudice and the illicit act; there are no national regulations on computing the damages, which gives rise to difficulties in proving the claimed damages and thus, there is a risk that damages are under- or over-compensated; the actions involve high litigation costs which are difficult to estimate up front (additionally, courts of law often adjust lawyers’ fees deeming them as inadequate) and the proceedings before courts of law are very lengthy due to extremely high volume of cases.

**[D] Relationship between National Competition Law Regime and EU Rules**

The relation between EU and Romanian competition legislation is governed by Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (hereinafter “Council Regulation 1/2003”) and thus, this relation is defined by the following principles: parallel application, convergence, cooperation and consistency in applying competition rules.

The parallel application implies that when a Romanian court of law applies the Romanian Competition Law to agreements, decisions or practices which may affect trade between EU Member States within the meaning of Article 101(1) of the TFEU or to any abuse prohibited by Article 102 of TFEU, it shall also have to apply the Community competition rules to those agreements. Under the convergence principle, there is a duty to arrive at a consistent result under the Romanian Competition Law, whereas under the consistency principle there is a duty not to take decisions running counter to those of the European Commission, when applying Articles 101 and 102 of TFEU. The cooperation principle entails that, in applying competition rules, RCC and the Romanian courts of law cooperate with the European Commission.

According to the Romanian Competition Law, RCC and the Romanian courts of law have all rights and obligations provided by Council Regulation 1/2003. In particular, the Romanian Competition Law provides that RCC applies the provisions of Articles 101 and 102 of TFEU according to the provisions of the Council Regulation 1/2003 in case the acts or actions of the undertakings or the associations of undertakings may affect trade between EU Member States.

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Moreover, the Romanian Competition Law provides expressly that the regulations of the EU Council or of the European Commission regarding the application of Article 101 paragraph (3) of TFEU to certain categories of agreements, decisions of associations of undertakings or concerted practices, apply directly to the categories of agreements, decisions of associations of undertakings and concerted practices having as object or effect the prevention, restriction or distortion of the competition on the Romanian market or a part thereof as per Article 5 of the Romanian Competition Law. Thus, the EU block exemption regulations have a direct applicability in the Romanian legislation, by way of reference in the Romanian Competition Law.

So far, no violation of the principles governing the relation between the EU and Romanian competition legislation has been established in practice.

§12.02 COMPETITION AUTHORITY

[A] Structure, Human Resources & Budget

The organization and functioning of RCC is governed mainly by the Romanian Competition Law and by the RCC Regulation on the organization, functioning and procedure of the Competition Council, approved by Order of RCC’s president No. 101/2012.

RCC performs its activity through the following structures: directions, services and departments. In terms of personnel, RCC can employ competition inspectors, managers and other contractual personnel and may cooperate with specialists in various fields of activity.

RCC performs its activity, deliberates and makes decisions in plenum and in commissions. RCC’s plenum is composed of seven members: a president (whose position is assimilated to that of a government minister), two vice-presidents (whose positions are assimilated to those of state secretaries) and four competition counselors (whose positions are assimilated to those of state sub-secretaries). The members of the RCC’s plenum are appointed by the President of Romania, at the proposal of RCC’s Consultative Council, with the approval of the Romanian Government, after the candidates have been listened to in the hearings of the special committees of the Parliament. The duration of mandates of RCC’s plenum members is of five years each, and may be prolonged only once. The Romanian Competition Law expressly provides that the members of RCC’s plenum do not represent the authority that appointed them and are independent in making their decisions.

The commissions within RCC are composed of two competition counselors each, in the structure established by RCC’s president, being led by a RCC vice-president.

RCC prepares its own budget project, which is provided distinctly in the Romanian State’s budget. The amounts representing tariffs, taxes and fines or other sanctions applied by RCC represent incomes to the State budget.

5. Published in the Official Gazette of Romania, Part I No. 113 of February 14, 2012.
Starting with March 2, 2011, the Railway Supervision Council has been moved from the Ministry of Transportation and Infrastructure to RCC. The Railway Supervision Council is organized and functions as a structure without legal personality within RCC, having the duty of monitoring the competition on the railway transportation services market, including the rail freight market.

[B] Place in the Public Administration

RCC is an autonomous administrative authority in the competition field, having legal personality.

RCC is assigned with the administration and implementation of the provisions of the Romanian Competition Law (covering antitrust and merger control policy areas) of Law No. 11/1991 on unfair competition,6 as amended7 (hereinafter “Unfair Competition Law”), and of Government Emergency Ordinance No. 117/2006 regarding national procedures in the state aid field,8 as amended (hereinafter “State Aid Law”).

[C] Scope of Powers

RCC has the prerogatives provided by the Romanian Competition Law, the Unfair Competition Law and the State Aid Law. Thus, RCC’s scope of powers includes prerogatives in the antitrust, merger control, unfair competition and state aid fields.

In terms of finding and sanctioning infringements of the Romanian Competition Law and Articles 101 and 102 of TFEU, RCC is entitled to: (i) perform investigations, including preliminary investigations/inquiries; (ii) decide the sanctioning of the undertakings that breach the Romanian Competition Law and Articles 101 and 102 of TFEU; (iii) accept binding commitments from undertakings and impose temporary measures to undertakings; (iv) make decisions concerning economic concentrations; and (v) carry out the effective enforcement of all its decisions.

In terms of monitoring the market and improving the legal framework, RCC is entitled to (i) carry out, at its own initiative, investigations/inquiries aimed at a better understanding of the market; (ii) supervise the enforcement of competition related legal provisions and norms; (iii) inform the Romanian Government about monopoly situations and propose the measures it deems necessary to remedy the ascertained dysfunctions; (iv) give advisory opinion on the draft normative acts that may have anticompetitive impact; (v) recommend to the Romanian Government the adoption of measures facilitating the market and competition development; and (vi) draw up studies and reports on its field of activity and inform the Romanian Government, the public and specialized international organizations about this activity.

Moreover, RCC has the prerogatives to represent Romania and promote information and experience exchanges in the relationships with specialized international

7. Law No. 11/1991 on unfair competition is likely to be replaced by a new Law on unfair competition which draft is currently under public debate.
organizations and institutions and to cooperate with foreign and community competition authorities.

RCC also has duties and prerogatives in the state aid field, being entitled to: issue opinions for projects of state aid schemes and individual state aid notifications and for the reports regarding state aid measures which are subject to block exemptions from the notification obligation; communicate to the European Commission the notices, notifications and reports prepared in accordance with the State Aid Law; monitor state aids; organize the state aid registry and prepare the state aid annual report.

[D] Statistics on Activities for the Last Year

According to latest report of RCC regarding its activity in 20119 (hereinafter “RCC Report”), RCC has initiated twenty-seven investigations in 2011, out of which twenty-four related to potential breaches of the competition legislation and three related to economic sectors (sector investigations/inquiries). From the twenty-four investigations regarding potential breaches of the competition legislation, approximately 60% have been initiated ex officio by RCC. 30% of the total number of investigations initiated in 2011 related to the energy/natural gas sector.

In 2011, RCC finalized twenty-two investigations, out of which twenty related to breaches of the competition legislation and two related to sector investigations/inquiries (representing approximately 22% of the cases under analysis). According to RCC’s Report, the number of investigations finalized in 2011 increased four times compared with 2009 and by 25% compared with 2010.

The value of the fines applied by RCC in 2011 as a result of sanctioning anticompetitive practices amounted to RON 1,246,641,324 (approx. USD 371,024,20410), out of which 72% applied to cartels. Compared with 2010, the value of fines increased 9.3 times.

As regards economic concentrations, according to RCC’s Report, 35 transactions have been authorized in 2011 and the value of the related authorization taxes amounted to RON 2,956,103 (approx. USD 879,79311).

RCC has recently published on its website the information on the top 20 highest fines applied12 since it was established in 1996. According to this document, the highest fine ever applied by RCC amounted to RON 891,729,966 (approx. USD 265,395,82313).

This fine was applied in 2011 to six oil companies that were involved in an agreement to eliminate from the market a range of gasoline.

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10. For the purpose of this approximation, the exchange rate considered was the one communicated by the National Bank of Romania on March 15, 2013, namely USD 1 = RON 3.36.
11. See footnote 10 supra.
13. See footnote 10 supra.
Of the first 10 highest fines applied by RCC, five of them were applied for sanctioning abuse of dominant position. Amongst these, we note the fines applied in 2011 to Orange Romania SA (RON 147,975,967 – approx. USD 44,040,466\(^{14}\)), Vodafone Romania SA (RON 120,347,142 – approx. USD 35,817,602\(^{15}\) and the Romanian Post (RON 103,373,320 – approx. USD 30,765,869\(^{16}\)).

The highest fines applied by RCC also concerned the sanctioning of: (i) cartels (a fine of RON 98,050,045.29 – approx. USD 29,181,561\(^{17}\) was applied in 2005 to three Romanian cement producers); (ii) market allocation (four companies active on the insulin market have been sanctioned in 2008 with a fine of RON 83,698,729.61 – approx. USD 24,910,336\(^{18}\)); (iii) bid rigging (four companies were sanctioned in 2012 with a fine of RON 25,464,865 – approx. USD 7,578,829\(^{19}\) for exchanging sensitive and confidential information that allowed some of the companies to be declared winners of certain public procurement procedures).

[E] Other Regulatory Bodies that Enforce Competition Rules

In the economic sectors or on the markets where the competition is excluded or substantially limited by effect of a law or due to the existence of a monopoly position, the Romanian Government may decide to establish appropriate forms of control of the prices for a period of maximum three years, which can be successively prolonged by utmost one year, if the circumstances which justified the adoption of such decision continue to exist.

The Romanian Government’s intervention in this case is performed with the approval of RCC.

§12.03 MERGER REVIEW

[A] Forms of Concentrations

The Romanian Competition Law defines two categories of economic concentrations: those deriving from merger of previously independent undertakings and those deriving from the acquisition of control.

In particular, a concentration shall be deemed to arise under the Romanian Competition Law in case the change of control results from any of the following: (i) a merger of two or more undertakings, previously independent, or of parts of certain

\(^{14}\) See footnote 10 supra.
\(^{15}\) See footnote 10 supra.
\(^{16}\) See footnote 10 supra.
\(^{17}\) See footnote 10 supra.
\(^{18}\) See footnote 10 supra.
\(^{19}\) See footnote 10 supra.
undertakings; (ii) an acquisition, by one or several persons that control at least one
undertaking or by one or several undertakings, of direct or indirect control over one or
several undertakings or parts thereof, either by acquiring transferable securities or
assets, or by agreement or any other means; (iii) the establishing of a joint venture (JV)
which fulfills on a lasting basis all functions of an autonomous economic entity (full-
function JV).

As regards the acquisition of control, the Romanian Competition Law provides
that such control derives from rights, agreements or any other elements which,
individually or all together and considering the circumstances (de facto and de jure),
confer the possibility to exercise a decisive influence over an undertaking, in particular
through ownership or usage rights over all or part of the assets of an undertaking or
rights or agreements conferring a decisive influence over the undertaking’s structure,
the vote or the decisions of the management bodies of an undertaking.

Thus, the acquisition of control that leads to an economic concentration presents
certain particularities which have to be analyzed based on specific elements of the
transaction, such as: means of control, object and duration of the control, number of
parties involved, other interdependent transactions, according to the Guidelines
regarding the concepts of economic concentration, concerned undertaking, full func-
tioning and turnover, as approved by Order of RCC’s president No. 386/2010. These
particularities derive from the fact that the economic concentrations defined under the
Romanian Competition Law imply transactions that lead to a change of control of
undertakings on a lasting basis and as a consequence thereof a change of control in the
market structure. However, this change of control on a lasting basis does not
necessarily take place at once, but it might be accompanied (preceded) by another
transaction implying a temporary change of control (which is not in itself subject to the
legal provisions on the control of economic concentrations). The aforementioned
Guidelines clarify the meaning of change of control on a lasting basis, providing
guidance to parties to an economic concentration as regards the assessment that shall
be performed by RCC when dealing with a series of transactions.

For example, in case of a “warehousing/parking structure” when an undertaking
is “entrusted” to an intermediary buyer, usually a bank, based on an agreement
regarding the future sale of the business to a final buyer, RCC shall examine the
acquisition of control by the final buyer, according to the agreements between the
parties, and shall deem the transaction by which the intermediary buyer acquires
the control in such circumstances as the first step of an economic concentration that
comprises the lasting acquiring of control by the final buyer.

In case of outsourcing transactions involving a transfer of assets and/or employ-
ees to an external provider, certain specific aspects have to be considered as well.
According to RCC’s Guidelines, in case the external provider acquires the assets and/or

20. Published in the Official Gazette of Romania, Part I No. 553bis of August 5, 2010.
related employees from the outsourcing company in addition to the outsourced activity, an economic concentration shall be deemed to be realized provided that the assets represent the whole or a part of the outsourcing company, having a market presence (i.e., to which a market turnover can be attributed). Additionally, the assets transferred to the external provider under the outsourcing transaction have to allow the external provider to supply services not only to the outsourcing company, but also to third parties, either immediately or shortly after the transfer. Even in case the transferred assets do not have a market presence, it might suffice for the purpose of deeming the transaction as an economic concentration that the assets include at least those core elements which would allow the external provider to develop a market presence within a timeframe which, in principle, should not exceed three years. However, in case the transferred assets do not even allow the external provider to at least develop a market presence, it is likely that the assets shall be used only for providing services to the outsourcing company. In this case, the outsourcing transaction shall not lead to a change of the market structure on a lasting basis and thus, the transaction shall not be deemed as an economic concentration.

The rules on merger control provided by the Romanian Competition Law apply to any undertaking, namely any economic operator involved in an activity of offering goods or services on a given market, regardless of its legal status or manner of incorporation, as defined in the EU case law.

[E] Events Triggering the Notification Obligation and Relevant Notification Thresholds

Economic concentrations which would raise significant impediments for the effective competition on the Romanian market or a substantial part thereof, especially by creating or consolidating a dominant position, are prohibited under the Romanian Competition Law.

The economic concentrations transactions which are subject to Romanian merger control are those that have a “national dimension,” namely those that meet the following cumulative requirements: (i) the combined worldwide turnover of the undertakings involved in the transaction exceeds the equivalent in RON of EUR 10,000,000\(^{21}\) (approx. USD 12,857,143\(^{22}\)); and (ii) at least two of the concerned undertakings have each achieved on the Romanian territory an individual turnover\(^{23}\) exceeding the equivalent in RON of EUR 4,000,000\(^{24}\) (approx. USD 5,142,857\(^{25}\)).

\(^{21}\) The RON equivalent is computed by considering the exchange rate communicated by the National Bank of Romania (NBR) valid on the last day of the previous financial exercise.

\(^{22}\) For the purpose of this approximation, the following exchange rates communicated by NBR have been considered: the exchange rate EUR/RON of December 30, 2011, namely EUR 1 = RON 4.32, and the exchange rate USD/RON of March 15, 2013, namely USD 1 = RON 3.36.

\(^{23}\) The turnover on the Romanian territory shall include the products and services supplied to the undertakings and consumers on the Romanian market.

\(^{24}\) See footnote 21 supra.

\(^{25}\) See footnote 22 supra.
As a rule, the turnover is computed as difference between the revenue from the sale of goods and/or the performance of services during the financial exercise prior to the transaction, less the amounts owed as fiscal liabilities (e.g., excise duties) and the accounting value of exports, performed directly or through a proxy, including intra-community supplies and intra-group supplies. Depending on the nature of the goods/services supplied/performed, specific computation rules may apply. Currently, under the Romanian competition legislation specific computation rules are available in the banking and financing and insurance sectors.

According to the RCC Regulation regarding economic concentrations, approved by Order of RCC’s president No. 385/2010,26 as amended (hereinafter “Economic Concentrations Regulation”), in the situations where, considering the specific elements of an economic concentration transaction, it is not clear whether the transaction is subject to the notification obligation, the parties shall have to notify the transaction to RCC, in order for RCC to issue a decision.

[C] Exemptions from the Filing Obligation

Economic concentration transactions which do not exceed the thresholds mentioned under section §12.03[B] do not have to be notified to RCC.

Moreover, the Romanian Competition Law provides for specific situations where the related transactions cannot be deemed as economic concentration transactions and thus, the parties to such transactions are exempted from the filing obligation.

No economic concentration shall arise in the situation where the control is acquired and exercised by a liquidator appointed by court decision or by another person empowered by the public authority for the fulfillment of a procedure of insolvency, recovery, preventive concordat, judicial liquidation, legal seizure or other similar procedures.

The situation where credit institutions or other financial institutions or insurance companies, whose usual activities include the trading and negotiation of transferable securities on their account or on others account, temporary hold transferable securities of an undertaking, which they acquired for resale purposes, shall not be deemed as economic concentration transactions provided that such institutions/companies do no exercise the voting rights conferred by the respective transferable securities in order to determine the competitive behavior of the undertaking in question or provided that they exercise such voting rights only for preparing the whole or partial transfer of the undertaking in question or its assets or the transfer of the securities in question and the transfer takes place within one year from the acquisition date (RCC may extend this term, upon request, and provided that the institutions or companies can prove that the transfer was not possible, under reasonable conditions, within the established term).

No economic concentration shall arise either in the situation where the control is acquired by an undertaking whose sole scope of activity is to purchase participations

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to other undertakings, to manage and capitalize the respective participations, without involving itself directly or indirectly in the management of the undertakings in question, without limiting however the rights held by the undertaking in the capacity as shareholder, provided that the voting rights related to the participations held to be exercised, in particular as regards the appointment of the members of the management and supervisory bodies of the undertakings to which the participations are held, only for maintaining the entire value of the investments in questions and not for determining, directly or indirectly, the competitive behavior of those undertakings.

The situation where the undertakings, including those pertaining to economic groups, are undergoing restructuring or reorganization procedures of their own activities cannot be deemed as an economic concentration for the purpose of the Romanian Competition Law.

[D] Scope of Information Required for the Filing

The scope of RCC’s control over economic concentrations is to prevent the occurrence of significant impediments in the way of effective competition of the Romanian market or a substantial part thereof, in particular as a result of creating or consolidating a dominant position. In this respect, RCC assesses the compatibility of economic concentrations with a normal competitive environment.

In order to assess such compatibility, RCC requires the parties to submit various information, such as: (i) description of the concentration, (ii) information regarding the parties, (iii) details on the concentration (such as: the nature of the economic concentration, the value of the transaction, turnovers, economic motivation of the concentration), (iv) whether the transaction has been notified to other competition authorities, (v) information on property and control, including a list of companies pertaining to the same group, (vi) copies of agreements, incorporation deeds, offer, accounting documents, analysis, reports, studies, as the case may be, (vii) definition of the relevant markets, i.e., products and geographical markets, affected markets and their general conditions, (viii) structure of the supply and demand on the affected markets, (ix) possibilities to entry on the affected markets, (x) information on research and development, cooperation agreements and professional associations on the affected markets, (xi) overview of the markets and efficiency increases, (xii) cooperative dimension of a JV.

Depending on the type of notification procedure that has to be fulfilled (regular or simplified notification procedure27), the notifying party/parties has/have to provide more detailed or summarized information.

The information has to be made available to RCC by using the templates provided by the Economic Concentrations Regulation.

27. See section §12.03[E] infra.
Economic concentrations exceeding the thresholds provided by the Romanian Competition Law have to be notified to RCC prior to their implementation, but after the conclusion of the agreement, or the announcement of the public bid (in case of economic concentrations which are foreseen to be achieved as a result of launching a public bid or a public notice on the intent to make such bid), or the taking over of the control package.

The notification may be performed also prior to the conclusion of the agreement or the announcement of the public bid, in the situation where the concerned undertakings prove to RCC their good faith intention of concluding an agreement or, in case of a public bid, they have announced publicly their intention to make such bid, provided that the agreement or the planned bid has as result a concentration having a national dimension. In order to prove the intention to conclude an agreement, the parties have to present a pre-agreement or any other preliminary agreement (such as: Memorandum of Understanding, Letter of Intent) proving without a doubt the intention to achieve the economic concentration.

Economic concentrations achieved by merger between two or several undertakings or by acquisition of joint control, have to be notified by the parties to the merger or those acquiring joint control, whereas economic concentrations which are foreseen to be achieved as a result of launching a public bid or a public notice on the intent to make such bid, have to be notified by the offeror. In all other situations, economic concentrations have to be notified by the person, undertaking or undertakings acquiring control.

The Romanian Competition Law provides for a regular notification procedure and a simplified notification procedure. As a rule, economic concentrations have to be notified under the regular notification procedure. By exception, certain categories of economic concentrations may be notified under a simplified notification procedure. According to the Economic Concentrations Regulation RCC shall apply the simplified notification procedure in case two or several undertakings acquire the joint control over a company (JV), provided that the JV does not perform effective or potential activities or these activities are not significant on the Romanian territory. This situation arises when the following cumulative conditions are met: (i) the turnover of the JV and/or the turnover of the transferred activities does not exceed the equivalent in RON of EUR 4,000,000 (approx. USD 5,142,85728) on the Romanian territory; and (ii) the total value of assets transferred to the JV does not exceed the equivalent in RON of EUR 4,000,000 (approx. USD 5,142,85729) on the Romanian territory.

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28. See footnotes 21 and 22, supra.
29. See footnotes 21 and 22, supra.
RCC shall apply the simplified notification procedure also in case two or several undertakings merge or one or several undertakings acquire the sole control or the joint control over another undertaking, provided that neither involved party performs commercial activities on the same product market and on the same geographic market or on the upstream or downstream product markets on which another party involved in the economic concentration is active.

The simplified notification procedure shall also apply in case two or several undertakings merge or one or several undertakings acquire the sole control or the joint control over another undertaking and either (i) two or more parties to the concentration perform commercial activities on the same product and geographic market (horizontal relations), provided that their combined market segment is less than 15%; or (ii) one or several parties to the concentration performs commercial activities on an upstream or downstream product market than the product market on which any other party to the concentration is active (vertical relations), provided that neither of their individual or combined market shares exceeds 25%.

In case one of the parties shall acquire the sole control over an undertaking where it already holds joint control, such transaction shall be subject to the simplified notification procedure.

In the interest of the notifying parties that wish to undertake the simplified notification procedure, it is necessary that they initiate contact with RCC prior to the actual notification. The prior contacts with RCC have to be initiated with at least two weeks before the date the parties intend to submit the simplified notification form.

Even when the parties notify the concentration under the simplified notification procedure, RCC is entitled to decide that the economic concentration shall be analyzed under the regular notification procedure, in consideration of the information received from the parties through the simplified notification form. Moreover, RCC is entitled to decide also that an economic concentration can be analyzed based on the simplified procedure, even if the parties have submitted a regular notification form.

RCC reviews the economic concentration and issues a decision within 30 days to five months from the receipt of a complete notification, depending on the findings during such review. Failure of RCC to issue a decision within the aforementioned legal terms provided under the Romanian Competition Law entitles the parties to implement the notified economic concentration.

The notification of an economic concentration is complete and becomes effective on the date it was registered with the RCC, unless the information included in the notification is inaccurate or incomplete, under any aspect. Incorrect or misleading information are deemed as incomplete information.

In case the notification includes inaccurate or incomplete information, RCC shall request the supplement and/or confirmation of such information, within twenty days from the submission of the notification. The additional information/confirmations shall have to be provided to RCC within fifteen days from RCC’s request. This term may
be prolonged by five days. If the additional information/clarifications do not suffice, RCC is entitled to apply fines which may vary from 0.1% to 1% from the aggregate turnover of the company obtained in the financial year prior to the sanctioning. The individualization of the fine is made by considering the gravity and the duration of the offense, determined based on precise criteria provided by the Romanian legislation.

In the situation where RCC requires additional information/clarifications, the notification of the economic concentration shall be complete and become effective on the date communicated by RCC.

In order for a notification to be complete, it is necessary that the notifying party/parties submit(s), along with the duly filled in notification template, a cover letter and the proof of the payment of the filing fee.

The notification of any economic concentration is subject to a filing fee which is established by RCC regulations, and may be updated from time to time.

According to the current regulation, as approved by Order of RCC’s president No. 426/2011 on the application of the Regulation regarding the establishing and perceiving of tariffs for the procedures and services provided by the Romanian Competition Law and the regulation issued for the application of the latter, as amended, the fee charged by RCC for the notification of economic concentrations is of RON 4,775 (approx. USD 1,421).

The notifying parties shall also have to pay an authorization tax if RCC issues a non-objection decision or an authorization decision (whether subject to conditions or not) regarding the concentration, which varies from EUR 10,000 to EUR 25,000 – payable in RON and determined based on the exchange rate communicated by the National Bank of Romania on the last day of the financial exercise previous to the issuance of the decision – (approx. USD 12,857 to USD 32,143), depending on the turnovers obtained by the involved undertakings in Romania in the previous financial exercise. The manner of computing the authorization tax is expressly regulated by the Guidelines for the application of the provisions of Article 32 of the Romanian Competition Law regarding the manner of computing the authorization tax of economic concentrations, approved by Order of RCC’s president No. 400/2010, as amended.

The steps of a notification procedure under the Romanian law are summarized in the Figure 12.1.

30. Published in the Official Gazette of Romania, Part I No. 186 of March 17, 2011.
31. See footnote 10 supra.
32. See footnotes 21 and 22 supra.
33. The turnover considered for the computation of the authorization tax of an economic concentration is determined based on specific rules. Amongst others, this turnover does not include discounts or value added tax, other taxes directly related to the turnover or exports, including intra-community supplies.
34. Published in the Official Gazette of Romania, Part I No. 591 of August 20, 2010.
**Figure 12.1 Overview of the Merger Control Assessment Procedure**

1. **Is there an economic concentration as defined in the Romanian Competition Law?**
   - No

2. **Is the combined worldwide turnover of all undertakings concerned more than EUR 10,000,000 (approx. USD 12,272,727)?**
   - Yes

3. **Is the turnover of each of at least two undertakings concerned more than EUR 4,000,000 (approx. USD 4,909,010)?**
   - Yes

4. **The concentration has to be notified to RCC.**
   - Yes

5. **If the information included in the notification is inaccurate or incomplete, RCC may request additional information within 20 days as of the notification, setting a maximum of 15 days for the supply of this information.**
   - Yes

6. **Does RCC consider that the merger raises serious doubts as regards its compatibility with a normal competitive environment?**
   - No

7. **Have the parties proposed commitments for removing such serious doubts which have been accepted by RCC?**
   - No

8. **RCC opens an investigation to analyse the compatibility of the concentration with the competitive environment. The investigation has to be completed within 5 months after the notification became effective.**
   - Yes

9. **Does the concentration raise significant impediments as to effective competition?**
   - Yes

10. **Have the parties proposed commitments which were accepted by RCC?**
    - No

11. **RCC issues a decision that prohibits the notified concentration.**
    - Yes

**RCC:***
- Issues a non-objection decision (subject to conditions, if applicable).
- Does not issue a decision within the 45 days legal term, in which case the concentration is deemed authorized.

- Issues an authorization decision (subject to conditions, if applicable).
- Does not issue a decision within the 5 months legal term, in which case the concentration is deemed authorized.
[F] Substantive Test for the Assessment of a Concentration

Economic concentrations subject to Romanian Competition Law are evaluated for the purpose of determining their compatibility with a normal competitive environment. In this respect, RCC evaluates whether an economic concentration raises significant impediments as to effective competition (i.e., substantive appraisal test), in particular by creating or consolidating a dominant position on the Romanian market or a substantial part thereof. In performing this evaluation, RCC applies, in particular, the criteria recognized also by the EU competition legislation. Thus, RCC evaluates the necessity to protect, maintain and develop effective competition on the Romanian market or a substantial part thereof, considering, amongst others, the structure of the markets in question and the actual or potential competition, the position on the market of the parties to the concentration and their economical and financial power, the alternatives available for suppliers and users, their access to supply sources or markets and any other legal barriers or of other nature to entry the market, the trends of the supply and demand for the relevant goods and services, the interests of the intermediary and final consumers, the evolution of technical and economical progress, provided that this is in the consumer’s benefit and does not impede competition.

[G] Decisions Issued in the Course of the Review

In case RCC establishes that the notified economic concentration is not subject to the provisions of the Romanian Competition Law, it shall respond to the notifying parties in writing within 30 days from the receipt of a complete notification.

Otherwise, in case the notified economic concentration is subject to the provisions of the Romanian Competition Law, depending on its findings RCC shall either issue a non-objection decision or shall initiate an investigation, within 45 days from the receipt of a complete notification.

RCC shall issue a non-objection decision when it establishes that the notified economic concentration which is subject to merger control under the Romanian Competition Law does not raise serious doubts as regards its compatibility with a normal competitive environment or such serious doubts have been removed through commitments proposed by the involved parties and accepted by RCC. RCC may establish, through its decision, conditions and obligations for the concerned parties ensuring the observance of such commitments.

RCC shall initiate an investigation when it establishes that the notified economic concentration falls under the provisions of the Romanian Competition Law, presents serious doubts as to the compatibility with the normal competitive environment and such doubts cannot be removed though the proposed commitments. Within five months from receiving the complete notification in relation to which it decided to initiate an investigation, RCC has to issue a decision.

In case during the investigation RCC determines that the economic concentration transaction raises significant impediments as to the effective competition on the
Romanian market or a substantial part thereof, in particular by creating or consolidating a dominant position, RCC shall issue a decision by which it shall declare the economic concentration transaction incompatible with the normal competitive environment.

If during the investigation RCC determines that the economic concentration transaction does not raise significant impediments as to the effective competition on the Romanian market or a substantial part thereof, in particular by creating or consolidating a dominant position, RCC shall issue an authorization decision of the economic concentration transaction.

Should the parties submit commitments during the investigation procedure and such commitments are deemed acceptable by RCC, then RCC shall issue a decision by which it shall conditionally authorize the economic concentration transaction, establishing the obligations and/or conditions meant to ensure the observance by the involved parties of the commitments assumed for the purpose of achieving the compatibility of the economic concentration with the normal competitive environment.

According to the RCC Guidelines regarding commitments in case of economic concentrations, approved by Order of RCC’s president No. 688/2010, the commitments mostly preferred by RCC which may be assumed for the purpose of achieving the compatibility of the economic concentration with the normal competitive environment are the following: transfers of businesses which are more likely to behave anti-competitively and elimination of the connections with competitors.

The following commitments could also be deemed acceptable by RCC: commitments by which third parties are granted access to infrastructure, networks and important technologies and to production factors and amendments of long-term exclusivity agreements.

In case there is a risk that an economic concentration raises significant impediments in the way of effective competition, the most efficient way to maintain effective competition (save as to declare the concentration incompatible with a normal competitive environment) is to create the conditions for establishing a new competing entity or to consolidate the existing competitors, by performing a business transfer by the parties to the concentration.

A distinction is made between structural commitments (such as: transfer of businesses, granting access to infrastructure or to production factors in non-discriminatory conditions) and behavioral commitments (such as: commitment not to increase prices, not to reduce the scale of products, not to eliminate trademarks). Structural commitments are preferable to behavioral commitments, which can be accepted by RCC, only exceptionally. Behavioral commitments may be accepted provided that their viability is fully guaranteed by their implementation and effective monitoring, as well as provided that there is no risk that they distort competition.

35. Published in the Official Gazette of Romania, Part I No. 1 of January 3, 2011.
[H] Appeal Process

Parties to the concentration or third parties that prove a legal interest can appeal a merger control decision of RCC before the Bucharest Court of Appeal, within 30 days from the communication of the decision.

For third parties, decisions are deemed to be communicated on the date they are published on RCC’s website or in the Official Gazette of Romania. Generally, the decisions are published on RCC’s website.

The court may order, upon request, the suspension of the execution of the challenged decision. In case of fines applied by RCC, the suspension is ordered subject to the payment of a bond, as established by the court. The maximum amount of the bond is of 20% of the amount of the fine.

In case a third party proving a legal interest to appeal RCC’s decision requests in court also the suspension of RCC’s clearance decision with respect to a notified economic concentration, the respective third party shall have to prove the existence of a well justified case and the imminence of a damage. According to the case law, the existence of a well justified case could be held in court if, considering the circumstances of the case, there is a strong and obvious doubt as regards the legality of the decision at issue. The imminent damages implies, according to the case law, the existence of certain provisions in the decision at issue that, if implemented/applied, would cause damages to the third party that would be difficult or impossible to be removed in case the decision is annulled. As a rule, the suspension of RCC’s clearance decision, would lead to the suspension of the implementation of the economic concentration. Depending on the implementation status of the timely notified economic concentration and the type of economic concentration, the suspension of RCC’s decision might have various effects. In case the economic concentration has already been implemented, we deem that a request to suspend RCC’s decision might be dismissed as devoid of purpose.

[I] Consequences of the Breach of the Filing Obligation

Failure to notify an economic concentration subject to notification entitles RCC to apply a fine between 0.5% and 10% of the aggregate turnover of the relevant party computed for the last financial year prior to the sanctioning. The individualization of the fine is made by considering the gravity and the duration of the offense, determined based on precise criteria provided by the Romanian legislation.

Moreover, economic concentrations may not be implemented prior to their notification to RCC and prior to being declared compatible with a normal competitive environment, by decision of RCC. In case an economic concentration is implemented prior to being notified and declared compatible with a normal competitive environment by decision of RCC, its validity shall depend on a notification subsequently being made and on RCC’s decision with regard to the respective economic concentration.

36. Decision No. 507 of January 26, 2007 of the Supreme Court of Cassation and Justice of Romania.
37. Decision No. 3316 of June 29, 2007 of the Supreme Court of Cassation and Justice of Romania.
In case RCC decides that the economic concentration that was implemented prior to being notified is incompatible with the normal competitive environment, it may: (i) request the involved undertakings to dissolve the entity resulting from the concentration, in particular by dissolving the merger or by transferring all shares or acquired assets, in order to re-establish the situation existing prior to the implementation of the concentration; (ii) order any other adequate measure in order to ensure that the involved undertakings dissolve the concentration or take measures for re-establishing the situation provided in its decision.

Moreover, the parties shall be liable for a fine between 0.5% and 10% of their aggregate turnovers computed for the last financial year prior to the sanctioning. By exception, public offers or other types of series of transactions with transferable securities may be implemented prior to their notification, provided that they meet certain specific requirements.

Additionally, RCC may grant, upon request, derogation from the rule according to which economic concentrations may not be implemented prior to their notification to RCC and prior to being declared compatible with a normal competitive environment, by decision of RCC. In issuing the decision for granting the derogation, RCC shall take into account the effects that the suspending of the economic concentration has over one or several concerned undertakings or over third parties, and the threat of the concentration over the competition. The derogation is subject to the fulfillment of certain conditions and obligations meant to ensure effective competition and may be granted either prior or after the notification.

Special Rules

The Romanian Competition Law provides specific rules for economic transactions involving assets transfer. Thus, in case two or several economic concentration transactions involving assets transfer take place within a period of two years between the same natural and/or legal entities, such transactions shall be deemed as a single economic concentration transaction accomplished on the date of the last transaction. Therefore, in this case, the notification could be performed prior to the implementation of the last transaction.

Whether or not other types of economic concentrations involving multiple phases could be notified prior to the final phase depends on the actual structure of the concentration and the implications of the related phases. In principle, economic concentrations involving multiple phases could be notified just prior to the initiation of the final phase, provided however that the intermediary phases are not deemed by RCC as separate economic concentration transactions, as defined under the Romanian Competition Law.38

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38. See section §12.03[A] supra.
§12.04 ANTICOMPETITIVE AGREEMENTS

[A] Definition of the “Agreement”

The concept of “agreement” or “concerted practice”\(^{39}\) is not defined expressly under the Romanian competition legislation. Therefore, in defining this concept, the case law of RCC and of the Court of Justice of the European Union (CJEU) shall be considered.

In joined cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP Dresdner Bank v. Commission (2006), CJEU stated that:

in order for there to be an agreement within the meaning of Article 81(1) EC [Art. 101(1) of TFEU], it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way.

As regards the form in which that common intention is expressed, it is sufficient for a stipulation to be the expression of the parties’ intention to behave on the market in accordance with its terms.

The concept of an agreement within the meaning of Article 81(1) EC [Art. 101(1) of TFEU] … centres round the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties’ intention.

According to the case law of RCC,\(^{40}\) the concept of “agreement”:

represents any written or verbal, public or secret agreement, regardless of the way it is entitled.

The interdiction under art. 5 para. 1 [of the Romanian Competition Law] operates in case of any agreement, not being necessary that the expression of the parties’ intention to be a valid or mandatory contract according to the national law.

Therefore, the concept of agreement shall be understood in its broadest sense, essentially being that the undertakings express a joint intention to conduct themselves in a specific way on the market.

[B] Rules Applicable to Cartels and Other Horizontal Agreements

Under the Romanian Competition Law the agreements between undertakings, the decisions of the associations of undertakings and the concerted practices which have as object or effect the prevention, restriction or distortion of the competition on the Romanian market or a part thereof are prohibited, regardless of whether the undertakings at issue are competitors or not. From a Romanian Competition Law perspective,

\(^{39}\) Under the Romanian competition legislation, the concepts of ‘agreement’ and ‘concerted practice’ overlap.

\(^{40}\) Decision No. 35/2009 regarding the breach of Article 5 para. 1 letter a) of Competition Law No. 21/1996 as republished, by thirty two economic agents through an anticompetitive horizontal agreement of increasing the tariff for drivers license classes services for category B driving licenses starting with February 1, 2008 and of fixing a minimum level of the tariff for this category. This decision is available in Romanian language on RCC’s website: http://www.consiliulconcurentei.ro/uploads/docs/items/id2900/decizie_scoli.pdf.
there is no difference between agreements that have as object the prevention, restriction or distortion of the competition and agreements that have as effect the prevention, restriction or distortion of the competition, both types of agreements being equally prohibited.

The Romanian Competition Law expressly provides that the following types of agreements, decisions of associations of undertakings or concerted practice, shall be, in particular, prohibited: (i) those establishing, directly or indirectly, purchase or sale prices or any other trade conditions; (ii) those limiting or controlling production, trade, technical progress and investments; (iii) those dividing markets or supply sources; (iv) those applying, in relation with commercial partners, dissimilar conditions to equivalent transactions, placing them at a competitive disadvantage; (v) those conditioning the conclusion of contract by the acceptance by the partners of additional obligations which, by their nature or in accordance with commercial practices, are not related to the scope of such contracts; (vi) those consisting in the participation, in a concerted manner, with rigged bids to auctions or any other type of contest for offers; (vii) those eliminating from the market other competitors, limiting or impeding the access on the market and the freedom to exercise competition by other undertakings, as well as (viii) those not to buy from or not to sell to certain undertakings without a reasonable justification.

Explicit references to the concepts of “cartels” and “horizontal agreements” are made under Romanian law in the context of defining hard-core agreements and in the context of horizontal cooperation agreements.

According to the RCC Guidelines regarding the requirements and criteria for the application of leniency according to the provisions of Article 51 paragraph (2) of the Romanian Competition Law approved by Order of RCC’s president No. 300/2009:

Horizontal agreements and/or concerted practices, between two or more competitors, aimed at or having as effect the coordination of the competitive behaviour on the market and/or the influencing of the relevant parameters, by adopting certain practices such as fixing sale or purchase prices or certain commercial conditions, the allocation of production or sales quotas, the allocation of markets or clients, including bid rigging, the limitation of imports or exports and/or other anticompetitive acts aimed against certain competitors – cartels – are deemed as hard-core agreements which are generally recognised as illegal.

Cartels are strictly prohibited and may not benefit from exemptions from the general prohibition.

Horizontal agreements, provided that they are not deemed hard-core agreements, may benefit in certain conditions of the exemptions provided under section §12.04[D] infra.

Horizontal cooperation agreements benefit of specific assessment under RCC Guidelines regarding the application of Article 5 of Competition Law No. 21/1996, as

41. The list provided by the Romanian Competition Law is not limitative.
42. Published in the Official Gazette of Romania, Part I No. 610 of September 7, 2009.
43. See section §12.04[D] infra.
Further amended and supplemented, horizontal cooperation agreements, approved by Order of RCC’s president No. 76/2004. The said Guidelines refer mainly to the assessment, from a competition law perspective, of research and development agreements, production agreements, joint acquisition agreements, commercialization agreements, agreements regarding standards and environment, placing emphasis on those that determine an increase in efficiency.

According to the Romanian Competition Law, in particular, the following horizontal agreements concluded between competitors may not benefit from exemptions, being deemed as hard-core restrictions and thus, generally recognized as illegal: (i) fixing the prices for the sale of products to third parties; (ii) limiting the production or the sales; (iii) allocating markets or clients.

[C] Rules Applicable to Vertical Agreements

The concept of “vertical agreements” benefits of specific regulation in the secondary legislation.

Vertical agreements benefit of specific regulations provided by RCC Guidelines regarding the application of Article 5 of the Romanian Competition Law to vertical agreements, approved by Order of RCC’s president No. 77/2004 (hereinafter “Guidelines on Vertical Agreements”).

According to the Guidelines on Vertical Agreements, vertical agreements between undertakings that belong to the same group and standard agency agreements are not subject to the general prohibition under the Romanian Competition Law. Other types of agency agreements, in which most of the commercial and/or financial risks are borne by the agent, might fall under the general prohibition.

The Guidelines on Vertical Agreements provide also the general rules used by RCC in assessing vertical restraints, as well as specific rules for assessment of certain types of vertical restraints (e.g., single branding, exclusive distribution, exclusive customer allocation, selective distribution, franchising, exclusive supply, tying, resale price maintenance).

Vertical agreements, within the meaning of agreements between non-competitors acting on different levels of the production or distribution chain, may benefit of exemptions from the general prohibition, provided that they are not deemed as hard-core restrictions.

According to the Leniency Guidelines:

Vertical agreements and/or concerted practices between economic operators, referring to the conditions in which the parties may purchase, sell or resell certain products or services, which have as object the limitation of the buyer’s freedom to determine the sale price and/or limiting the territory or clients, conferring absolute

44. Published in the Official Gazette of Romania, Part I No. 437 of May 17, 2004.
45. The list is not limitative.
47. See section §12.04[D] infra.
territorial protection are deemed as hard-core restrictions, generally recognized as illegal.

According to the Romanian Competition Law, in particular, the following vertical agreements concluded between non-competitors or competitors may not benefit from exemptions, being deemed as hard-core restrictions\(^{48}\) and thus, generally recognized as illegal: (i) resale price maintenance; (ii) restrictions as to the territory or clients to which the buyer may sell goods or services (except under certain circumstances); (iii) restrictions of active or passive sales to end users performed by members of a selective distribution system operating as retailers, without prejudice to the possibility of prohibiting a member of the system to perform the activities from an unauthorized secondary office; (iv) restricting cross-supplies between distributors within a selective distribution system; (v) restricting the direct selling of components by a supplier of such components, as per the agreement with the buyer incorporating these components, as spare parts to end users, to repair services providers or to other services providers not entrusted by the buyer with the repair or servicing of its goods. The following vertical agreements concluded between competitors are also deemed hard-core restrictions: fixing the prices for the sale of products to third parties, limiting the production or the sales and allocating markets or clients.

[D] Exemptions from the General Prohibition (Individual Exemptions, Block Exemptions)

The agreements between undertakings, the decisions of the associations of undertakings and the concerted practices having as object or effect the prevention, restriction or distortion of competition on the Romanian market or a part thereof are not prohibited under the Romanian Competition Law provided that they cumulatively meet the following requirements: (i) they contribute to the improvement of production or distribution of merchandise or to the promotion of technical or economical progress, by ensuring, at the same time, a fair share to consumers of the resulting benefits achieved by the parties to the respective agreement, decision or concerted practice; (ii) they impose to the concerned undertakings only those restrictions that are indispensable to the attainment of those objectives; (iii) they do not offer to the undertakings the possibility to eliminate competition in respect of a substantial part of the respective products.

Concerned undertakings are compelled to perform a self assessment in order to determine whether or not the aforementioned requirements are met.

The categories of agreements, decisions and concerted practices, exempted as a result of meeting the aforementioned requirements, as well as the conditions and criteria for falling into a certain category are those established through the regulations of the EU Council or European Commission for the application of Article 101(3) of TFEU to certain types of agreements, decision of associations of undertakings and concerted practices – the block exemption regulations –. The agreements exempted

\(^{48}\) The list is not limitative.
individually or by category as per the legal provisions mentioned above, shall be deemed legal (based on the self assessment performed by the concerned undertakings), without being necessary to notify them to RCC and without being necessary that RCC issues a decision in this respect.

Moreover, the Romanian Competition Law provides that in certain specific situations, the agreements, decisions or concerted practices that do have as object or effect the prevention, restriction or distortion of competition, shall nevertheless not be prohibited – *de minimis* rule.

Thus, the general prohibition shall not apply in case the aggregate market share of the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement, when the agreement is concluded between undertakings which are actual or potential competitors on any of these markets.

The general prohibition shall not apply either in case the market share held by each of the parties to an agreement does not exceed 15% on any of the relevant markets affected by the agreement, when the agreement is concluded between undertakings which are not competitors, neither actual or potential, on any of these markets.

In case it is difficult to establish whether the agreement is concluded between competitors or non-competitors, the threshold of 10% shall apply for excluding the application of the general prohibition.

When on a relevant market the competition is limited by the cumulative effect of certain agreements to sell goods or services concluded with different suppliers or distributors, the aforementioned thresholds are diminished by 5% both for agreements between competitors and for agreements between non-competitors.

The Romanian Competition Law provides also for a margin of tolerance, stating that the agreements are not restrictive of competition in case the market shares do not exceed the threshold of 10%, 15% and respectively 5%, by no more than two percentage points in any two successive calendar years.

None of the aforementioned exemptions shall apply in case of hard-core restrictions, regardless of whether such restrictions are agreed by cartels, other horizontal agreements or vertical agreements.

### Investigation and Procedure

RCC is the only authority entitled to initiate investigations relating to potential breaches of Romanian Competition Law against private undertakings or public authorities. For the purpose of the investigations, RCC acts through its competition inspectors.

RCC orders investigations, if sufficient legal and factual grounds are available, either ex officio or following the complaint of an individual or a legal entity actually and directly affected by the breach of the provisions of Romanian Competition Law. RCC’s investigations are initiated based on relevant orders issued by RCC in this respect – investigations orders –.

Investigations usually imply the performance of inspections which can be either notified by RCC in advance or performed without prior notification (dawn raids).
In order to perform an inspection, RCC’s president issues an inspection order, including information on the object and scope of the inspection, the starting date of the inspection, the sanctions provided by the Romanian Competition Law and the right to challenge the order before the Bucharest Court of Appeal within fifteen days from the communication. A copy of the investigation order, together with a certified copy of the inspection order of the RCC’s president and, if the case, of the court authorization shall be provided by the inspectors to the investigated undertaking or to the individual whose domicile is inspected prior to the beginning of the inspection (including in case of a dawn raid). A court authorization must be obtained and presented by the inspectors whenever they intend to perform inspections in the premises, including the domicile, land and transportation means of managers, administrators, directors and other employees of the investigated undertaking.

In case the inspectors fail to provide the investigated undertaking or individual with the relevant orders and/or authorizations the investigated undertaking or individual is entitled to refuse to allow the performance of the inspection. In case the inspectors perform the inspection without providing these documents or without observing the object or the scope of the inspection order, the investigated undertaking or individual is entitled to challenge in court the decision grounded on evidence illegally collected during such inspection.

As far as RCC’s recent activity is concerned, eleven dawn raids took place simultaneously in February 2012, as part of an investigation concerning a possible bid rigging case on the market of rehabilitation of streets. Within a similar investigation on the gas market, seventeen dawn raids have been organized in October 2011.

In order to investigate a potential breach of the Romanian Competition Law, the competition inspectors (except for junior inspectors), have the following inspection prerogatives: (i) to request all necessary information and documents; (ii) to enter the premises, land and transportation means which the undertakings or the associations of undertakings legally hold; (iii) to examine any documents, registry, accounting-financial and commercial acts or other records relating to the activity of the undertaking or the association of undertakings, regardless of the place where or the support on which they are kept; (iv) to request from any representative or member of the personnel of the undertaking or the association of undertakings explanations regarding the facts and documents in relation to the object and scope of the inspection and to record or register their answers; (v) to take or to obtain copies or excerpts of any documents, registries, accounting-financial and commercial act or from other records relating to the activity of the undertaking or the association of undertakings; (vi) to seal any location designated for the activities of the undertaking or the association of undertakings and any documents, registries, financial-accounting and commercial acts or other records relating to the activity of the undertaking or the association of undertakings, during the period and to the extent required by the inspection.

49. As per the information available on the RCC’s website.
Competition inspectors may perform dawn raids and may request any type of information or proofs for the fulfillment of the investigation mission, both on site and by convening the concerned parties to RCC’s headquarters.

Competition inspectors may also inspect premises (other than the undertaking’s premises), including the domicile, land and means of transport of the managers, administrators, directors and other employees of the undertakings or the associations of undertakings, subject to an order being issued by the president of RCC and with the court authorization granted by a judge. Such inspection can be performed only between 08:00 and 18:00 and has to be performed only in the presence of the holder of the premises or its representative.

RCC’s president may assign experts and may allow the hearing of the complainant, at the latter’s request, as well as of any natural or legal entity declaring that they hold data and information relevant for establishing the truth in the investigated case.

When carrying out investigation procedures, competition inspectors may request any necessary information and documents from public authorities and institutions, by indicating the legal ground, the purpose, the terms as well as the sanctions related to such request.

The information thus collected can be used only for the purpose of applying Romanian Competition Law. RCC may however inform other public authorities or institutions when it discovers aspects in relation to which these authorities or institutions have competency.

The aforementioned information and documents may be requested by RCC also following a request addressed in this respect by the European Commission or the competition authorities in EU Member States. RCC may perform inspections at the request of the European Commission or of competition authorities of EU Member State.

During inspections/dawn raids, undertakings are compelled to supply completely and in due time all necessary information and documents, limited to the dawn raid purpose. Undertakings may refuse to supply the information and documents requested by the inspectors in case such request is out of the scope of the inspection order.

Undertakings are also compelled to allow the access of the competition inspectors and to allow the performance of the inspection.

Failure to observe the aforementioned obligations, in particular by providing incomplete, incorrect and/or misleading information and/or documents or by refusing or not complying with the inspection, shall trigger the application of fines by RCC, which vary from 0.1% to 1% of the total turnover of the concerned undertaking for the last year prior to the sanctioning.

The public authorities might be also sanctioned by RCC if they do not provide the requested information or documents or if they provide incomplete, incorrect and/or misleading information and/or documents by fine from RON 1,000 to RON 20,000 (approx. USD 298 to USD 5,95250).

50. See footnote 10 supra.

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Moreover, for each day of delay in providing information/documents or in ending an infringement, RCC may compel the non-complying undertaking to the payment of a comminatory fine of up to 5% of the daily average turnover of the company for the last financial year prior to the sanctioning.

Undertakings are allowed to request the confidentiality of communications and can mark as such the confidential information. RCC’s competition inspectors have the obligation not to disclose information acquired in the course of investigations, especially information representing state secret or business secret; otherwise, the inspectors could be subject to criminal sanctions.

The Romanian Competition Law regulates also the legal professional privilege stipulating that the communications between the investigated undertaking or association of undertakings and their (outside) lawyer, performed during and for the exclusive purpose of exercising the undertaking’s right to defense, namely after the initiation of investigation or prior to the initiation of the investigation, provided that the communications relates to the investigation’s scope, cannot be removed or used as evidence, during the procedures carried out by RCC. Preparatory documents prepared by the investigated undertaking or the association of undertakings for the exclusive purpose of exercising the right to defense cannot be removed or used as evidence. The investigated undertaking has the burden of proof as regards the documents covered by the legal professional privilege.

The access to file of the investigated undertakings is also ensured, the latter being entitled to consult the RCC file concerning the investigation and to obtain, at cost, copies and excerpts of the investigation procedure acts.

Except for the situation where RCC acknowledges that the investigation has not led to the discovery of sufficient proof attesting to a violation of the law – which would justify measures or sanctions being imposed by RCC – RCC grants the undertakings the opportunity to express in writing their observations regarding the investigation report. In preparing the written observations, the recipients of the investigation report may request the organization of hearings by RCC.

During the investigation procedure referring to an anticompetitive practice, the undertakings against which the investigation was initiated are entitled to propose commitments with the scope of removing the situation that led to the initiation of the investigation. In order for the commitments to be deemed acceptable by RCC they have to meet specific conditions. Amongst others, in accordance with the RCC Guidelines regarding the requirements, terms and procedure for accepting and assessing commitments, in case of anticompetitive practices, approved by Order of RCC’s president No. 724/2010, as amended, it is necessary that the commitments remove the situation that led to the initiation of the investigation, and contribute, additionally, to the protection of competition. The commitments have to entirely remove the competition

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51. The last proposal for the amendment of the Romanian Competition Law tried to extend the legal professional privilege to in-house lawyer; however, the proposal has not been taken into consideration.

52. Published in the Official Gazette of Romania, Part I No. 11 of January 5, 2011.
concerns and have to be complete, efficient from all standpoints and effectively implemented, in a short period of time.

The burden of proof in case of investigating anticompetitive agreements lies with RCC.

In case the undertakings or associations of undertakings invoke an exemption, they shall have to prove that they meet the conditions required for such exemption.

In case the investigation has not led to the discovery of sufficient proof attesting a violation of the law, which would justify measures or sanctions being imposed by RCC, the investigation shall be closed either by order of RCC’s president, in case the investigation has been initiated ex officio or by decision of RCC’s Plenum, in case the investigation has been initiated following a complaint, after the hearing of the concerned parties, if the complainant requests so.

In case the investigation led to the discovery of sufficient proof attesting a violation of the law, RCC may decide, on a case by case basis: (i) to order the ceasing of the anticompetitive practices acknowledges during the investigation (in this case, RCC may order any behavior or structural corrective measures which are proportional to the breach and necessary for effectively ceasing the breach); (ii) to order interim measures; (iii) to accept commitments; (iv) to apply fines to the undertakings or the associations of undertakings; (v) to formulate recommendations, to impose conditions or other obligations to the parties; (vi) to decide that there is no reasons to intervene in case, based on the available information, the requirements for an agreement, decision or concerted practice to be prohibited are not met; (vii) to withdraw the exemption benefit for agreements, decisions or concerted practices subject to a block exemption regulation when, in a certain situation, the respective agreements, decisions or concerted practices produce effects which are incompatible with Article 101(3) of TFEU on the Romanian territory or part thereof which presents all characteristics of a distinct geographic market.

RCC’s decisions issued for the situations where the investigation led to the discovery of sufficient proof attesting a violation of the law, may be challenged by the concerned parties or by third parties that prove a legal interest before the Bucharest Court of Appeal, within 30 days from the communication of the decision.

For third parties, decisions are deemed to be communicated on the date they are published on RCC’s website or in the Official Gazette of Romania. Generally, the decisions are published only on RCC’s website.

In case of anticompetitive agreements, a third party with a legitimate interest may be an undertaking excluded from the relevant market as an effect of the respective agreement, aiming at maintaining the decision by which its competitors were sanctioned. According to the relevant case law,53 the legitimate interest can be justified by the third parties’ interest to maintain a decision of RCC ascertaining the nullity of an anticompetitive agreement, when the parties to such agreement challenge RCC’s decision.

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According to the relevant provisions related to Romanian civil procedure, if the request to intervene is approved in principle by the court of law, the third parties shall have all the procedural rights and guarantees of the initial parties. However, in case of a request to intervene in the interest of one of the initial parties, the intervener’s right to appeal the decision of the Court of First Instance is conditional on the appeal of the initial party in the interest of which the intervention was made.

The court may order, upon request, the suspension of the execution of the challenged decision. In case of fines applied by RCC, the suspension is ordered subject to the payment of a bond, as established by the court. The maximum amount of the bond is of 20% of the amount of the fine.

Sanctions and Remedies

In case of breaching the Romanian Competition Law by entering into anticompetitive agreements, the concerned parties shall be subject to a fine which varies from 0.5% to 10% of the aggregate turnover of the undertaking computed for the last financial year prior to the sanctioning.54 In case of associations of undertakings, in case the breach refers to the activity of the association’s members, the fine may not exceed 10% of the amount of the total turnovers of each member active on the market affected by such breach. By exception, newly incorporated undertakings or association of undertakings, which have not registered a turnover in the last year prior to the sanctioning, shall be sanctioned by fine from RON 15,000 to RON 2,500,000 (approx. USD 4,464 to USD 744,04855).

For example, the highest fine applied by RCC was of RON 891,729,966 (approx. USD 265,395,823 56) sanctioning an agreement between oil companies to eliminate from the market a range of gasoline. Another relevant precedent case57 is the one sanctioning anticompetitive agreements with distributors, including clauses on limiting exports, leading to the isolation of the Romanian market of medicine products. In this case, the total fine applied by RCC amounted to RON 51,522,130 (approx. USD 15,333,96758).

Apart from imposing fines, RCC is empowered to order the cessation of the anticompetitive practices, to make recommendations or to impose special conditions or other obligations. By such measures, RCC aims at restoring the competition on the market affected by an anticompetitive practice and the prevention of such a practice recurrence.

54. Under the Romanian Competition Law, the sanction for entering into anticompetitive agreements shall apply by considering only the turnovers of the concerned undertakings. Exceptionally, in case it can be proven that the decision for the concerned undertaking to enter into the anticompetitive agreement was made by one or several group companies, which had a decisive influence on the concerned undertaking’s actions, the sanction could be extended to the respective group company/companies.

55. See footnote 10 supra.

56. See footnote 10 supra.

57. The decision is available in Romanian language on RCC’s website: http://www.consiliulconcurentei.ro/uploads/docs/items/id7390/decizie_site.pdf.

58. See footnote 10 supra.
In the above mentioned case of infringement of the Romanian Competition Law by prohibited vertical agreements on the market of medicine products, RCC also ordered elimination of the clauses prohibiting exports from the distribution contracts between the involved parties, whereas in a decision concerning a cartel on the cement market, RCC ordered dissolution of the Cement Committee of the Association of Employers and imposed to the concerned undertakings the obligation to monthly issue to RCC relevant documents proving the prices Ex works (this obligation was in force for a period of two years, starting from the issuance of the RCC’s decision, i.e., May 26, 2005).59

Further on, individuals responsible for the infringement of the competition rules may be subject to criminal sanctions.

According to the Romanian Competition Law, the participation, by fraudulent intent and in a determined manner, of a natural person to the conceiving, organization or achievement of the anticompetitive practices prohibited by the Romanian Competition Law (i.e., anticompetitive practices consisting of agreements between undertakings, decisions of the associations of undertakings and concerted practices which have as object or effect the prevention, restriction or distortion of the competition on the Romanian market or a part thereof) and which are not exempted as a result of meeting certain requirements (legal exemption under the Romanian Competition Law), is deemed as criminal offense and is sanctioned by imprisonment from six months to three years, or by fine along with the interdiction of certain rights.

This criminal liability does not apply, however, in case of agreements referring to bid rigging between participants in order to distort the awarding price, as in this case the specific regulations for this domain shall apply. Bid rigging can constitute either fraud or abuse of office, under the Romanian Criminal Code.

Moreover, the undertakings entering into a prohibited anticompetitive agreement may be subject to private enforcement claims60 by which private entities seek the recovery of the prejudice suffered as a result of such anticompetitive practice.

The undertaking benefiting from immunity to fine, as detailed under section §12.04[G] infra, will not be held jointly liable for the damages caused by participating to an anticompetitive practice under Article 5 of the Competition Law and Article 101 of TFEU sanctioned by the competition authority, although an individual private enforcement claim can be brought against such undertaking.

### [G] Leniency Program

The economic operators involved in hard-core agreements61 that affected the Romanian market or a part thereof may benefit from the leniency program regulated by the

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59. The decision is available in Romanian language, on RCC’s website: http://www.consiliulconcurentei.ro/uploads/docs/items/id7390/decizie_site.pdf.
60. See section §12.01[C] supra.
61. For the purpose of the leniency program, hard-core agreements are defined separately. It is not clear whether the concept of ‘hard-core agreements’ defined for the purpose of the leniency program and the concept of ‘hard-core restrictions’ under the Romanian Competition Law overlap in full.
Leniency Guidelines, namely they shall be rewarded by RCC for their cooperation in allowing RCC to acknowledge, discover and sanction the prohibited agreements.

Horizontal agreements and/or concerted practices, between two or more competitors, aimed at or having as effect the coordination or the competitive behavior on the market and/or the influencing of the relevant parameters, by adopting certain practices such as fixing sale or purchase prices or certain commercial conditions, the allocation of production or sales quotas, the allocation of markets or clients, including bid rigging, the limitation of imports or exports and/or other anticompetitive acts aimed against certain competitors – cartels – are deemed as hard-core agreements under the Leniency Guidelines.

Moreover, under the Leniency Guidelines, vertical agreements and/or concerted practices between economic operators, referring to the conditions in which the parties may purchase, sell or resell certain products or services, which have as object the limitation of the buyer’s freedom to determine the sale price and/or limiting the territory or clients, conferring absolute territorial protection are also deemed as hard-core agreements, for the purpose of applying for leniency.

Under the leniency program governed by the Leniency Guidelines, economic operators may benefit from full immunity from fines (two types of immunity are provided by the Leniency Guidelines) or from the reduction of fines, which would otherwise be imposed by RCC.

In order to qualify for leniency, an undertaking has to cumulatively meet the following general requirements: (i) to cooperate genuinely, fully, on a continuous basis and expeditiously with RCC, during the entire investigation procedure; (ii) to end its involvement in the alleged hard-core agreement, upon request of RCC; (iii) not have disclosed its intention to file a leniency request or elements of such request, except in front of other competition authorities.

In order to qualify for immunity from fine, an undertaking has to meet all of the aforementioned general requirements and be the first one to provide either evidence enabling RCC to initiate an investigation procedure or to perform dawn raids (Type A immunity) or evidence enabling RCC to establish the infringement, provided however that Type A immunity has not been obtained (Type B immunity).

The economic operator that has initiated the agreement and/or the economic operator that undertook the measures to force others to participate to the alleged agreement or to remain a part of it cannot benefit from immunity from fine, but may however obtain a reduction of fine, if it meets the specific requirements for such leniency to apply, as detailed infra.

In order to qualify for a reduction of fine, the economic operator has to provide RCC with evidence regarding the alleged infringement, which brings significant added value to the evidence already in RCC’s possession and to meet the general requirements for qualifying for leniency.

The following reductions of fines may be granted by RCC: (i) 30% to 50% for the first economic operator that provides significant added value evidence; (ii) 20% to 30% for the second economic operator that provides significant added value evidence; (iii) up to 20% for the other economic operators that provide significant added value evidence.
Undertakings qualifying for immunity from fine or benefiting from the reduction of the fines may still, however, be subject to private enforcement.

[H] Precedent Cases

A summary of three relevant decisions on anticompetitive agreements issued by RCC, including details on sanctions applied by RCC can be found below.

In its Decision No. 98/27.12.2011, RCC sanctioned two producers of medicine products and some of their distributors for entering into vertical agreements including clauses on limiting exports leading to the isolation of the Romanian market.

The concerned undertakings were the producer of medicine products, Bayer SRL (“Bayer”), and its distributors: Mediplus Exim SRL (“Mediplus”); Polisano SRL (“Polisano”); Relad International SRL (“Relad”); Farmexim SA (“Farmexim”); Farmexpert DCI SA (“Farmexpert”); Fildas Trading SRL (“Fildas”) and the producer of medicine products, Sintofarm SA (“Sintofarm”), along with its distributors: Farmexim; Farmexpert; Fildas; Mediplus; Montero SA (“Montero”); Polisano; ADM Farm SRL (“ADM”); Dita Import Export SRL (“Dita”); Pharmafarm SA (“Pharmafarm”).

RCC’s analysis focused on the contracts concluded between the producers of medicine products and their distributors. Thus, RCC found that Bayer concluded contracts for non-exclusive distribution of its products on the Romanian territory with six of its distributors (Farmexim, Farmexpert, Fildas, Medipuls, Polisano and Relad) which included clauses that prohibited the acquisition of Bayer products from other sources than Bayer located outside Romania, and also the export of Bayer products outside Romania. The contracts included clauses on monitoring acquisitions, stocks and sales of Bayer products and provided sanctions for not complying with the imposed obligations. As regards Sintofarm, RCC found that Sintofarm concluded distribution agreements with ten distributors which included clauses on limiting exports, restricting both active and passive sales of the distributors, and clauses on monitoring acquisitions.

In performing its assessment, RCC considered certain medicine products markets traded by the producers as relevant product markets, and the Romanian market as the relevant geographic market.

Following analysis of the relevant requirements for benefiting from individual or block exemptions, RCC decided that the agreements do not qualify for such exemptions.

RCC established that Bayer and its six distributors, respectively Sintofarm and its ten distributors, breached the provisions of the Romanian Competition Law by concluding anticompetitive agreements having as object and effect the restriction of competition by isolating the Romanian market and limiting parallel trade with Bayer and Sintofarm products in the common market.

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62. The decision is available in Romanian language, on RCC’s website: http://www.consiliulconcurentei.ro/uploads/docs/items/id7390/decizie_site.pdf.
RCC ordered the ceasing of the breach by eliminating the clauses regarding the exports prohibition, as passive sales, of Bayer/Sintofarm products.

Following the individualization of sanctions, RCC applied the following sanctions to the concerned undertakings: (i) Bayer: RON 7,252,589; (ii) Mediplus: RON 11,744,327; (iii) Polisano: RON 3,757,511; (iv) Relad: RON 1,589,498; (v) Farmexim: RON 4,851,282; (vi) Farmexpert: RON 10,997,366; (vii) Fildas: RON 5,826,587; (viii) Sintofarm: RON 63,249; (ix) Montero: RON 75,545; (x) ADM: RON 3,976,202; (xi) Dita (absorbed by Pharmapharm); and (xii) Pharmafarm: RON 1,387,974. The sanctions applied by RCC amounted to RON 54,522,130 (approx. USD 16,226,824).

Bayer, Mediplus, Farmexim, Farmexpert, Fildas, Sintofarm, Montero and ADM challenged RCC’s decision, requesting its annulment before the Bucharest Court of Appeal or before the Supreme Court of Cassation and Justice of Romania (as regards appeals against the decisions already issued by the Bucharest Court of Appeal). The Bucharest Court of Appeal approved ADM’s and Farmexpert’s challenges. The decisions of the Bucharest Court of Appeal are not final.

As per its decision No. 39/07.09.2010, RCC sanctioned an anticompetitive agreement on clients allocation between administrators of pensions funds.

The potential anticompetitive agreement concerned fourteen companies administering private pensions fund(s), namely: AEGON Societate de Administrare a unui Fond de Pensii Privat SA (“AEGON”); Alico Societate de Administrare a unui Fond de Pensii Administrat Privat SA (“Alico”); Allianz Tăriac Pensii Privat Socieate de Administrare a Fondurilor de Pensii Private SA (“Allianz”); Aviva Societate de Administrare a unui Fond de Pensii Privat SA (“Aviva”); Bancpost Fond de Pensii SA (IMO Property Investments București SA) (“IMO”); BCR Pensii Societate de Administrare a Fondurilor de Pensii Private SA (“BCR”); BRD Societate de Administrare a Fondurilor de Pensii Privat SA (“BRD”); Eureko Societate de Administrare a Fondurilor de Pensii Privat SA (“Eureko”); Generali Societate de Administrare a Fondurilor de Pensii Privat SA (“Generali”); ING Pensii de Administrare a unui Fond de Pensii Administrat Privat SA (“ING”); KD Fond de Pensii SA (KD Real Management Solution SRL) (“KD”); Omnisig Pensii Societate de Administrare a unui Fond de Pensii Administrat Privat SA (THIB Management Services SRL) (“THIB”); OTP Fond de Pensii SA (Omega Interconsult SRL) (“Omega”); and Prima Pensie Fond de Pensii SA (PRVA Management SRL) (“PRVA”).

The relevant product market considered by RCC for the purpose of the assessment was the market of privately administrating mandatory pensions funds (Second Pillar), whereas the relevant geographic market considered by RCC was the Romanian market.

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63. See footnote 10 supra.
64. The Bucharest Court of Appeal decision are not yet available.
65. The decision is available in Romanian language, on RCC’s website: http://www.consiliulconcurentei.ro/uploads/docs/items/id2917/decizia_nr_39_site.pdf.
RCC analyzed the relevant legislation in order to determine whether such legislation could have imposed the concerned undertakings the anticompetitive behavior. The conclusion was that the legislation did not impose such behavior.

RCC also analyzed the emails and correspondence between the concerned undertakings and between them and the Romanian Pensions Authority, and determined that the concerned undertakings decided to share the participants to the private pensions’ funds which were registered twice in the records of the privately administered pensions funds (due to the mechanism of adhering to the Second Pillar) and tried to eliminate the negative effects of such practice by proposing the Romanian Pensions Authority a change in legislation covering their practice. RCC determined that the concerned undertakings’ practice to share the doubled registered participants between them represents an agreement having as object the restriction of competition which cannot be individually exempted as it does not meet the requirements for such exemption.

Following the individualization of sanctions, RCC applied the following sanctions to the concerned undertakings: (i) AEGON: RON 150,301; (ii) Alico: RON 293,443; (iii) Allianz: RON 1,259,273; (iv) Aviva: RON 422,868; (v) IMO: RON 1,815; (vi) BCR: RON 391,809; (vii) BRD: RON 165,911; (viii) Eureko: RON 382,215; (ix) Generali: RON 474,333; (x) ING: RON 1,573,524; (xi) KD: RON 21,839; (xii) THIB: RON 4,748; (xiii) Omega: RON 58,699; and (xiv) PRVA: RON 13,713. The sanctions applied by RCC amounted to RON 5,214,488 (approx. USD 1,551,931).

RCC’s decision has been challenged by AEGON, Alico, Allianz, Aviva, BCR, BRD, Eureko, Generali and ING to the Supreme Court of Cassation and Justice of Romania (as regards the appeals against the decisions already issued by the Bucharest Court of Appeal with respect to the aforementioned parties). RCC’s decision as regards AEGON, Alico and Eureko has been annulled in court.67

In its decision No. 94/01.07.2004,68 RCC sanctioned three companies from the cement sector for taking part to a price fixing cartel. The three companies participating in the cartel were: Lafarge Romcim SA (“Lafarge”); Holcim (Romania) SA (“Holcim”) and Carpatcement Holding SA (“Carpatcement”).

In performing its assessment RCC considered the grey cement market as relevant product market and the Romanian territory as relevant geographic market. RCC established that the activities of Lafarge, Holcim and Carpatcement had as object and as effect the restriction, prevention and distortion of competition. The parties to the cartel exchanged information on price list and business strategies and they agreed on discounts policies.

Following such assessment, RCC applied the following sanctions: (i) Lafarge: 6.5% of its turnover in 2004; (ii) Holcim: 5.5% of its turnover in 2004; and (iii) Carpatcement: 6.0% of its turnover in 2004.

66. See footnote 10 supra.
67. See footnote 64 supra.
The sanctions applied by RCC amounted to RON 98,050,045.29 (approx. USD 29,181,561). RCC’s decision was challenged by Lafarge and Carpatcement. Lafarge has renounced to the challenge, whereas Carpatcement’s challenge against RCC’s decision has been admitted by the Supreme Court of Cassation and Justice of Romania and RCC’s decision has been declared null and void as regards Carpatcement, for the reason that RCC did not bring sufficient proof for the participation of Carpatcement to a concerted practice of price fixing and taking into account the price increase timing differing by about four months compared to the timing of the price increase performed by its competitors, which it was deemed to eliminate the conclusion of parallelism of behavior.

§12.05 UNILATERAL CONDUCT

[A] Assessment of Dominance

[1] Relevant Market Definition

The concept of relevant market is defined within the RCC Guidelines defining the relevant market, approved by Order of RCC’s president No. 388/2010 (hereinafter “Relevant Market Guidelines”).

The relevant area in which a competition issue has to be evaluated is determined by analyzing both the relevant product market and the relevant geographic market.

According to Relevant Market Guidelines the relevant product market comprises all products and/or services which the consumer deems interchangeable or substitutable, due to their characteristics, prices and their use.

The relevant geographic market, on the other hand, includes the area where the undertakings concerned are involved in the supply and demand of products or services, in which the competition conditions are sufficiently homogenous and which can be distinguished from neighboring geographic areas, due to the fact that the competition conditions are appreciably different in the respective areas.

According to the Relevant Market Guidelines, the fundamental principles in defining the relevant market are the following: competition constraints, demand-side substitution, supply-side substitution, potential competition.

In defining the relevant market, the following factual elements may be considered: the process of defining the relevant market, the relevant product market, the relevant geographic market, the process of collecting necessary data and information.

The Relevant Market Guidelines expressly provides that the principles for defining the relevant market have to be used with caution in certain domains, giving as example the situation where the behavior of an undertaking has to be analyzed for assessing the dominance. Although the method of defining the markets is the same,
namely it is necessary to evaluate clients’ reactions, based on their decision to purchase, when the prices fluctuate, it is also necessary to take into account potential constraints over the substitute imposed by the conditions in connected markets.


There is a legal rebuttable presumption of dominance explicitly provided under the Romanian Competition Law, were the market share of an undertaking or the aggregate market shares of several undertakings on the relevant market, registered in the period subject to analysis, exceeds 40%.

Thus, the presumption under the Romanian Competition Law is different from the EU dominance presumption resulting from the case law of CJEU, according to which a market share below 40% in a correctly defined market would not be evidence of a dominant position save in wholly exceptional circumstances. From this perspective, under the Romanian law, the burden of proof is reversed, the concerned undertaking having a market share exceeding 40% (implying a presumption of dominance) being compelled to prove that it does not hold a dominant position.

A market share below 40% does not guarantee however that an undertaking does not hold a dominant position on the relevant market. Nevertheless, in this case, RCC shall have to prove the dominant position held by the undertaking having a market share of less than 40%. Due to the fact that the current presumption of dominance under the Romanian Competition Law has been introduced in July 2011, there is no available case law as regards the establishing of dominance in case of undertakings having a market share of less than 40%.

[B] Abuse of a Dominant Position

Under the Romanian law, the abusive use by one or several undertakings of a dominant position held on the Romanian market or a substantial part thereof is prohibited.

The Romanian Competition Law provides an open catalogue of abusive behavior, stating that the following practices shall be deemed, in particular, as abusive: (i) directly or indirectly imposing inequitable sale or purchase prices or other inequitable trade conditions and the refusal to deal with certain suppliers or beneficiaries; (ii) limiting production, trade or technical progress in the detriment of consumers; (iii) applying in the relations with commercial partners dissimilar conditions to equivalent transactions, placing them at a competitive disadvantage; (iv) conditioning the conclusion of agreements by the acceptance by the partners of additional obligations which, by their nature or in accordance with commercial practices, are not related

71. The current presumption of dominance under the Romanian Competition Law has been introduced following the entering into force of Law No. 149/2011 regarding the approval of Government Emergency Ordinance No. 75/2010 regarding the amendment and completion of the Romanian Competition Law (i.e., July 14, 2011). Prior to this moment, the presumption of dominance was similar to that applicable at EU level, namely undertakings were presumed not to hold a dominant position in case their market shares did not exceed 40%.
to the object of such contracts; (v) practicing excessive or predatory prices, for the purpose of eliminating competitors, or the export sale under the production cost, and covering the differences by imposing increased prices to internal consumers; (vi) exploiting the dependency state of an undertaking which does not have available an alternative solution in equivalent conditions, as well as terminating contractual relations due solely to the fact that the partner refuses to be subject to unreasonable commercial conditions.

RCC has also sanctioned in the past the following abusive behaviors: unjustified prices increase, predatory prices, indirect price fixing, imposing selling prices, clients’ discrimination, refusal to deal with certain clients, elimination of certain clients from the market.

[C] Investigation and Procedure

As a rule, the investigation of an alleged abuse of dominant position is performed in a similar way to the investigations of alleged anticompetitive agreements. Please see section §12.04[E] supra.

[D] Sanctions and Remedies

The sanctions applied for abuse of dominant position are identical to the sanctions applied by RCC for anticompetitive agreements. In this respect, please refer to section §12.04[F] supra. However, no criminal liability is provided by the Romanian Competition Law for individuals involved in the abusive practices of the dominant undertaking.

[E] Precedent Cases

A summary of three relevant decisions on abuse of dominant position issued by RCC, including details on sanctions applied by RCC can be found below.

In its decisions No. 1/14.02.201172 and No. 2/14.02.201173 RCC sanctioned the abuse of dominant position of two of the largest mobile telecommunication companies, Vodafone Romania SA (“Vodafone”) and Orange Romania SA (“Orange”).

RCC found that Vodafone and Orange infringed Article 6 paragraph (1) letter a) of the Romanian Competition Law for refusing to grant access for calls termination and traffic limitation.

The investigations were initiated following complaint of Netmaster Communications SRL against Vodafone and Orange for: refuse of granting access to the service of

terminating calls originated at international level and in the networks of other suppliers from Romania; limitation of traffic by failure to finish calls during certain periods; asymmetric tariffs for supply of call termination service at mobile points in Vodafone/Orange networks compared to the tariff applied by Netmaster for terminating calls at fixed points within its network; and imposing the supply of a letter of bank guarantee in view of granting access to the networks for calls termination.

In performing the relevant assessment, RCC considered as relevant product market the market of the services of calls termination at mobile points within the public network operated by Vodafone/Orange including all termination services at mobile points of such network irrespective of the used transmission technology or environment or of the national or international origin of the calls. In terms of relevant geographic market, the Romanian national market was considered, due to the geographic covering of Vodafone/Orange network. The relevant market is a monopoly market by definition.

Following its analysis, RCC concluded that Vodafone/Orange refused to supply access to their networks in view of calls termination irrespective of their origin by refuse to conclude an interconnection agreement and artificially limited the access of Netmaster to their mobile networks by failing to terminate all the calls from the Netmaster network. RCC determined that competition was affected by foreclosure of the market of calls commuted transit in the public phone networks influencing its structure and its development on competitive basis.

The factors considered by RCC were the following: the calls termination service is an input used on the market of calls commuted transit in public networks; the general and constant parallel behavior of Vodafone and Orange represent a significant barrier to entering the market; the concentration level on the relevant market was extremely high during the assessed period; Vodafone/Orange had an obligation to supply imposed by the regulatory authority due to their monopoly on the relevant market; the final consumer was seriously affected by higher prices and impossibility to perform appeals.

RCC sanctioned the concerned undertakings as follows: (i) Vodafone: RON 120,300,000 (approx. USD 35,803,57174), representing 3.45% of Vodafone’s turnover for 2010; (ii) Orange: RON 147,900,000 (approx. USD 44,017,857 75), representing 3.60% of Orange’s turnover for 2010.

Both Vodafone and Orange appealed RCC’s related decisions to the Bucharest Court of Appeal. Orange’s appeal was approved by the Bucharest Court of Appeal. The decision of the court is not however final.

As per its decision No. 52/16.12.2010,76 RCC sanctioned the abuse of dominant position of the Romanian Post – in Romanian: Compania Națională Poșta Română – (RP). RP is a joint stock company held 74.99% by the Romanian State and 25% by the Property Fund SA. RCC ascertained the infringement by RP of Article 6 of the Romanian

74. See footnote 10 supra.
75. See footnote 10 supra.
76. The decision is available in Romanian language, on RCC’s website: http://www.consiliulconcurentei.ro/uploads/docs/items/id2940/decizia_nr52_din_16122010_publicare.pdf.
Competition Law (between April 18, 2005 and December 31, 2009) and Article 102 of TFEU (between January 1, 2007 and December 31, 2009) by unilateral increase of the tariffs for standard postal service of addressed advertising mail delivery at national level (Infadres services), national postal order services and standard Ramburs service; by preferential treatment to Infopress SA compared to other intermediaries on the Infadres services market; and by discriminatory tariff practice on the Infadres services market and the market of standard postal service of non-priority mail delivery at the access point for undertakings at national level (commercial correspondence market).

RCC identified and analyzed the following markets: (i) services markets: the Infadres service market, excluding services supplied by alternative operators, where RP’s share was of 98%–99%; (ii) the commercial correspondence service market were RP’s share was supposed around 91%; (iii) the market of Ramburs service associated to the standard postal delivery service (the standard Ramburs service market) where RP’s share was 100%, but decreasing; (iv) the market of national postal order services supplied independent of the postal services, where RP’s share was 100%. RCC identified the market of postal deliveries preparation service as affected services market, and considered the Romanian national market as geographic market.

Following assessment of the case, RCC concluded that (i) RP holds a dominant position on each of the relevant markets; (ii) on the relevant markets of delivery services RP holds the monopoly, based on the convergence of the analyzed factors, RP’s statement that such market represented the most important volume market segment generating over 50% of the total postal traffic, the legally reserved right concerns delivery services; (iii) on the relevant markets of national postal order service and Ramburs standard service RP holds the monopoly, based on the convergence of the analyzed factors.

RCC applied to RP a fine of RON 103,300,000 (approx. USD 30,744,048), i.e., 7.2% of RP’s turnover in 2009.

In addition, RCC imposed corrective measures to RP. In this respect RP had to comply with two obligations: obligation of non-discrimination and obligation of transparency. The obligation of non-discrimination implied that: the tariffs discounts and associated conditions had to be applied in equivalent conditions between third parties and between RP and third parties; tariffs discounts had to be granted only in consideration of the volumes at the access points to the postal network of RP; the more favorable conditions granted to RP’s branches/subsidiaries or other undertaking had to be granted also to the undertaking requiring RP’s services on the relevant markets. The obligation of transparency implied that all offers of RP on the postal services relevant markets had to be published on RP’s website.

RCC’s decision has been challenged by RP to the Bucharest Court of Appeal.

77. See footnote 10 supra.