

# Private Antitrust Litigation

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# Romania

**Bernhard Kofler-Senoner, Marius Magureanu and Paula Bourdenet**

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## Legislation and jurisdiction

**1** How would you summarise the development of private antitrust litigation?

Private antitrust litigation is still at an early stage of development in Romania. The Competition Law No. 21/1996 as amended (the Competition Law) only regulates private actions for damages on an abstract level, referring to the general principles of tort law, which can be found in the Romanian Civil Code. At present, there is no relevant case law on private antitrust litigation. Taking into account the rapid development of the Romanian legal framework over the past 10 years, it is likely that private antitrust litigation will become increasingly important.

**2** Are private antitrust actions mandated by statute? If not, on what basis are they possible?

The competition law provides any prejudiced party with the possibility of using general tort law, aside from other means of protection granted by the Competition Law itself. Consequently, such claims are being grounded on the general principles of tort provided by articles 998 to 999 of the Romanian Civil Code.

In the case of a breach of antitrust law, claimants are entitled to compensation exclusively before the ordinary courts (the competent Romanian competition authority, the Competition Council, serves only as an autonomous administrative body in respect of cease and desist orders).

It has been discussed in the literature whether a decision of the Competition Council ascertaining the fact that the respective act or omission has indeed breached competition laws is a precondition for damages to be awarded by ordinary courts. In the light of the principle of the direct applicability of European cartel law (article 82 of the EC Treaty) in member states, however, it is doubtful whether the civil courts could deny direct actions for damages arising from cartel law infringements subsequent to Romania's accession to the European Union. A recent Romanian court's decision in relation to unfair competition proceedings acknowledged the fact that a decision from the competition authority is not required as a prerequisite to filing a lawsuit for damages caused by antitrust infringements.

**3** If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

For the relevant legislation, please see question 2.

- With regard to civil law suits:
  - from district courts (claims of up to 500,000 lei), appeal goes to the regional courts; and
  - from regional courts (claims above 500,000 lei), appeal goes to the higher regional courts.
- With regard to commercial cases (trials arising from acts and deeds carried out by commercial companies):

- from commercial district courts (claims of up to 100,000 lei), appeal goes to the commercial section of the regional courts; and
- from commercial regional courts (claims above 100,000 lei); appeals go to the Appellate Court.

**4** In what types of antitrust matters are private actions available?

In the course of administrative proceedings (cease and desist orders, potential fines) the Competition Council may decide on cartel cases, abuse of a dominant position or merger control cases.

Private antitrust actions may be initiated in all cases relating to infringements of the competition law.

**5** What nexus with the jurisdiction is required to found a private action?

In general, private antitrust actions should be filed with the relevant court from the jurisdiction in which the defendant resides or has its registered office, or where the damage occurred.

Romania is not yet a member of the Lugano Convention (16 September 1988/30 September 2007). Council Regulation 44/2001 became effective subsequent to the accession of Romania to the EU; however, its enforcement is not consistent throughout the territory of Romania. As a result, some courts still require the procedure of recognition and enforcement of foreign court decisions to be performed based on Romanian law, which should have been abrogated once Romania acceded to the EU.

**6** Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Yes, private actions can be brought against natural persons and legal entities, including those from other jurisdictions in the circumstances described in question 5.

**7** If the country is divided into multiple jurisdictions, can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

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## Private action procedure

**8** May litigation be funded by third parties? Are contingency fees available?

Romanian lawyers are only entitled to earn a type of contingency fee defined as a 'success fee' in addition to agreed hourly rates or a flat fee.

Pure contingency fee agreements are regarded as *quota litis* pacts, which are expressly forbidden by the Statute of the Lawyers Profession, published in the Official Gazette No. 45 of 13 January 2005.

It is however possible that third parties (eg, specialised companies), who are not attorneys, offer process financing, eventually for a participation in the profit in return.

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**9** Are jury trials available?

No, Romanian law does not provide for jury trials with respect to civil and commercial law matters.

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**10** What pre-trial discovery procedures are available?

The Romanian Civil Procedure Code does provide for pre-trial discovery procedures with regard to commercial proceedings where damages are claimed. In these cases, the plaintiff is obliged, before submitting a claim before the competent court, to invite the defendant in writing to participate in a conciliation procedure. The written invitation must include a short presentation of the case and the respective legal basis and must be sent 15 days or more before the conciliation meeting itself takes place.

There is also a procedure for the preservation of proof, which is considered to be a kind of *in futurum* enquiry and is either granted by a judge and then carried out by a judicial executor, or performed directly by the judicial executor if the preservation of proof is not subject to a litigation (if it takes place before an actual claim has been lodged in front of the court). By means of this procedure, one prospective party might, for instance, ask for the ascertaining of the testimony from a person, for documents to be recognised or for a state of facts to be ascertained if there is a threat that such proof may disappear at a later stage.

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**11** What evidence is admissible?

The general provisions of the Civil Procedure Code do not provide for limitations with respect to the form of evidence admissible in proceedings for damages. In particular, the following evidence is admissible: statements of the parties, testimonies of witnesses, inspections or parties', independent experts' opinions and, as a general rule, written documents.

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**12** What evidence is protected by legal privilege?

Any type of evidence, including correspondence, is protected by legal privilege between client and attorney, while not even the client itself or any authority may release the attorney from such – temporally unlimited – obligation of confidentiality. Oral or written advice from in-house counsel to its employer is privileged in the same fashion as an attorney's counsel to his or her client.

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**13** Are private actions available where there has been a criminal conviction in respect of the same matter?

Private actions for damages are available separately even where there has been a criminal conviction in respect of the same matter (see also question 14).

Romanian competition law provides for several criminal offences, such as the price-fixing of sale or purchase prices, the limitation or control of production, abuse of a dominant position, etc, provided that the offender participates with fraudulent intent and in a decisive way in the conception, organisation or realisation of the above-mentioned anti-competitive practices.

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**14** Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation?

According to article 16 of the Criminal Procedure Code, the civil courts are generally bound by the findings of the criminal courts,

but only with regard to the existence of a punishable act (action or omission), the identity of an offender and the form of guilt.

Furthermore, as a general principle, any kind of evidence must be directly presented in front of every court, irrespective of whether such evidence has already been implemented in other criminal or civil proceedings. Leniency procedure is only applicable in front of the Competition Council; therefore, leniency applicants are not protected from civil follow-on litigation.

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**15** What is the applicable standard of proof for claimants and defendants?

The Romanian Civil Procedure Code does not provide a definition of the applicable standard of proof. The evaluation of evidence is conducted by a judge based on his or her free assessment of evidence at his or her own discretion. To properly assess the case, the judge may order any evidence to be brought forward that he or she deems appropriate.

Romanian legislation reflects the Latin principle *actori incumbit probatio*; therefore it is the plaintiff who bears the burden of proof. In the case that the defendant raises counterclaims, it is the defendant who carries the burden of proof in respect of such counterclaims.

The question of passing-on defence is not specifically treated in Romanian civil law or in the court practice and therefore underlies the standard evaluation of proof by the court.

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**16** What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

A term for class or non-class proceedings is not expressly stipulated by law. Thus, the term of proceedings generally depends on the specific fact pattern of the case.

Regarding measures to accelerate proceedings, the Civil Procedure Code only provides that commercial lawsuits (actions for damages) are to be conducted without delay. Consequently, the term of commercial proceedings tends to be shorter in practice than the term of non-commercial proceedings. Further, if a case for urgency is put forward during the proceedings, one or both parties may file a request to shorten specific procedural deadlines. Granting of such shortage of terms is subject to the court's decision, whereas the court is not bound by any guiding legal framework in this respect and shall decide at its own discretion.

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**17** What are the relevant limitation periods?

Damage claims generally become time-barred three years after the damage and the time that the author of the damage become known to the plaintiff. Furthermore, with respect to fines being imposed on the basis of competition law, the law provides for limitation periods of between three and five years depending on the provisions of the law that has been breached. The respective limitation period starts to run after termination of the anti-competitive behaviour. For continuous breaches, the limitation period starts from the date of the last act of anti-competitive behaviour.

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**18** What appeals are available? Is appeal available on the facts or on the law?

Appeals against decisions of the district courts (as court of first instance) in proceedings for damages are heard by the regional courts (as courts of second and last instance). Appeals against decisions of the regional courts (as court of first instance) in proceedings for damages are heard by the higher regional courts. Appeals against decisions of first instance courts are, in general, available on the facts and on the law (third instance is available and ruled by the High Court of Cassation and Justice, in which case appeal is available on the law only). In commercial cases (as described in question 3), the courts of

second instance are regional courts for appeals against decisions of the commercial district courts, and the Appellate Court hears appeals against decisions of the commercial regional courts.

Decisions of the Competition Council (for example, cease-and-desist orders) are subject to appeal which is heard by the Appellate Court. Such appeals are available on the facts and on the law. Decisions of the Appellate Court may be revised by the High Court of Cassation and Justice, as court of third and final instance. In such case, appeal is available on the law only.

### Collective actions

**19** Are collective proceedings available in respect of antitrust claims?

Romanian law expressly provides for collective class proceedings. It is therefore possible for individual natural persons or legal entities, each suffering individual damages, to act together as plaintiffs or defendants, combining their claims into one single claim, provided that the matter of controversy is a common right or obligation or that their rights and obligations derive from the same cause. Such cases are defined under Romanian law as *litis consortium*. In such cases, each of the parties will be awarded damages individually on the basis of actual losses incurred.

With respect to the above-mentioned cases, the Romanian Civil Procedure Code stipulates that no acts, defences or conclusions of one of the plaintiffs or defendants in the course of the proceedings may affect the other parties to the proceedings in any way.

**20** Are collective proceedings mandated by legislation?

Yes, such collective proceedings are regulated by the Romanian Civil procedure Code. Please see question 19.

**21** If collective proceedings are allowed, is there a certification process? What is the test?

Collective proceedings are certified as such by law, provided that the matter of controversy is a common right or common obligation or that the collective claimants' rights and obligations derive from the same cause.

**22** Have courts certified collective proceedings in antitrust matters?

To our knowledge, there is no case law yet.

**23** Are 'indirect claims' permissible in collective and single party proceedings?

Article 1086 of the Romanian Civil Code provides that any compensation shall cover only the direct consequences of any breach of an obligation or statute. Thus, indirect claims are generally not permissible under Romanian tort law (see question 28).

**24** Can plaintiffs opt out or opt in?

Not applicable.

**25** Do collective settlements require judicial authorisation?

Romanian law on civil procedure regulates that settlements shall be concluded either in front of the court or by submission of the relevant documents to the court (additionally requiring a notarial act if the forwarder is a natural person). However, collective settlements are not provided for in Romanian law as such.

**26** If the country is divided into multiple jurisdictions, is a national collective proceeding possible?

Not applicable.

**27** Has a plaintiffs' collective-proceeding bar developed?

No plaintiffs' collective-proceeding bar has developed in Romania so far.

### Remedies

**28** What forms of compensation are available and on what basis are they allowed?

Romanian tort law is governed by the principle of full compensation, covering not only the actual loss (*damnum emergens*) but also the unearned benefit (*lucrum cessans*). As a matter of principle, in matters of tort law, the author of the anti-competitive behaviour is liable both for the foreseen and unforeseen consequences. In principle, compensation must be effected by natural restitution. Where natural restitution is not possible because of an objective reason, compensation shall be made by pecuniary compensation. If natural restitution is objectively possible, the plaintiff may be authorised by the court to perform the obligation instead of the defendant, whereas such authorisation shall not exclude the right of compensation of the plaintiff towards the defendant.

**29** What other forms of remedy are available?

The Romanian Civil Procedure Code provides courts with the possibility of granting injunctions in urgent cases for the preservation of a claim that might otherwise be jeopardised or to prevent damage occurring that would otherwise be irrecoverable. A further requirement is that the behaviour of the undertaking represents a prima facie breach of the (competition) legislation.

**30** Are punitive or exemplary damages available?

Punitive or exemplary damages are not available under Romanian law.

**31** Is there provision for interest on damages awards?

The statutory interest applicable to commercial matters amounts to 80 per cent of the reference rate published by the National Bank of Romania once a semester. A higher interest rate may be agreed upon between the parties in commercial matters. There are no cap limitations in respect of the amount of the interest rate applicable in commercial cases.

In civil matters, conventional interest may not exceed 150 per cent of the legal interest per year. Conventional interest must be stipulated in a written document or otherwise proved; otherwise legal interest shall apply automatically.

Finally, Romanian law provides for a special interest rate amounting to 6 per cent per year with regard to foreign trade matters provided that Romanian law applies and payment is to be carried out in foreign currency.

**32** Are the fines imposed by competition authorities taken into account when settling damages?

Courts in Romania do not take into account fines imposed by competition authorities when settling damages.

**Update and trends**

Private antitrust litigation will be indirectly affected by the entry into force of the new Civil Code as of 24 July 2010. The new Civil Code will introduce new or amended sets of regulations in respect of tort law, regarding, for instance, forms and limitations of liability, extent and proof of damages. It is expected that the Civil Code will provide more clarifications regarding several disputed aspects of law.

**33** Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

According to the Romanian Civil Procedure Code, legal costs are incumbent on the losing party upon request of the winning party. The court may assess the amount of the lawyers' fees and ascertain whether the entire amount must be borne by the losing party, or only a partial amount where the fees charged by the lawyer and claimed from the losing party are disproportionately high in relation to the substance of the case. However, this right is seldom used by the courts.

If the claims of one party are granted only partially, legal costs are shared on a pro rata basis. If a defendant acknowledges the claims of the plaintiff at or until the first court hearing, under the condition that the parties are legally summoned, and he or she has not previously been in delay with the execution, such defendant will not be obliged to pay the plaintiff's legal costs.

**34** Is liability imposed on a joint and several basis?

Where several individuals or legal persons have caused damage by way of joint and intentional action, these individuals or legal persons are generally jointly liable for the whole damage claimed. If the authors of the damage did not act jointly or intentionally (minor or

major negligence) and specific parts of the damage can be allocated to each of the authors of the damage, such authors may only be held liable for the part of the damage caused by each of them.

**35** Is there a possibility for contribution and indemnity among defendants?

In the case of joint and severable liability, the party that paid the whole indemnification to the prejudiced party may claim a refund of an appropriate share from all other (potential) defendants in line with their actual contribution to the damages caused.

**36** Is the 'passing-on' defence allowed?

The possibility of a 'passing-on' defence is not regulated per se under Romanian law. Since there has been no case law on this issue to date, it is difficult to say whether this defence would be successful.

**37** Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

No specific defences are provided for by Romanian competition law.

**38** Is alternative dispute resolution available?

Alternatives to ordinary dispute resolution are: arbitration proceedings and mediation (regulated in Romania by Law No. 192/2006). Private antitrust enforcement is, however, generally not conducted through alternative means of dispute resolution.

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