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Cartels

in Romania



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Trends and climate

Trends

Have there been any recent changes to the cartel regime? If so, have they had a significant impact on enforcement activity?

Government Emergency Ordinance 39/2017 of 31 May 2017 transposed the EU Directive on Antitrust Damages Actions (2014/104/EU) into national law and made a number of other amendments to the Competition Law (21/1996), including as follows:

- The definition of an undertaking has been modified.
- Undertakings that engage in the modern trade of foodstuffs and non-foodstuffs must submit the prices of their traded goods to the Competition Council on request. Failure to comply may result in fines of up to Lei50,000 (approximately €10,890).
- The Competition Council can make recommendations to the competent authorities to modify legal enactments that adversely affect competition.
- Express provisions have been added to the effect that, during a dawn raid, information stored or archived in electronic format can be copied and collected. Sampling of the relevant information must take place at the Competition Council's premises in the presence of the concerned undertaking.

In 2017 the Competition Council also amended the rules concerning the calculation of fines. As such, the fines which apply to new undertakings involved in cartels have been reduced by up to 25%.

Overall, the abovementioned changes are likely to have a moderate impact on existing enforcement activity.

Are there any proposals to reform or amend the existing cartel regime?

The Competition Council has opened up to public debate a project to amend and supplement the Instructions on the conditions, terms and procedure for the acceptance and evaluation of commitments in the case of anti-competitive practice. The project aims at excluding horizontal agreements from the application of the Instructions. To date, such amendments have not been adopted by the Competition Council.

Have there been any recent key cases?

By Resolution 77/2017 (published in 2018) the Competition Council punished a bid-rigging and market-sharing cartel by undertakings delivering remote meter reading systems and electronic meters to Electrica SA, one of the largest Romanian electricity suppliers. The council's investigation uncovered a cartel between suppliers of software and electricity meters, wherein they agreed on a tender participation pattern and draft tender specifications were circulated by Electrica. As a novelty, the role of a facilitator was assessed and a full immunity leniency programme was implemented.

In addition, by Resolution 80/2017 (published in 2018) the council punished a minimum prices cartel implemented by three associations of private security services providers and their members by publishing and abiding by minimum prices for working hours. Apart from implementing an acknowledgement of guilt programme, the council made several recommendations to the institutions charged with regulating the sector of private security services.

By Resolution 50/2017 (published in 2018) the council punished the three main suppliers of heat allocators, which had created a cartel aimed at sharing the market and fixing prices for exploitation services. In this case the council fined both a horizontal collusion (the cartel) and a network of parallel vertical understandings between such suppliers and their distributors.

Legal framework

Legislation

Which legislation applies to cartels and what are the relevant substantive provisions?

Cartels affecting the Romanian market may be subject to both Romanian and EU legislation. Likewise, the Competition Council may enforce both Romanian and EU legislation on cartels.

The main Romanian legislation applicable to cartels is the Competition Law, which forbids:

“any agreements between undertakings, decisions of associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition on the Romanian market or part thereof, in particular those which:

- a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- b) limit or control production, markets, technical development or investments;
- c) share markets or sources of supply;
- d) apply unequal conditions to equivalent transactions in their relations with trading partners, thereby creating a competitive disadvantage;
- e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

The Competition Council has enacted further rules regarding cartels.

Institutions

Which bodies are the relevant regulatory and prosecutory authorities and what are their specific roles?

The competition-related enactments with the highest level of enforcement are those issued by Parliament and the government (acting on Parliament's delegation). However, the Competition Council is the specialised body responsible for regulation and prosecution in the competition field.

The Competition Council is entitled to adopt secondary enactments, which:

- regulate the antitrust legal framework in more depth; and
- make recommendations and draft reports necessary for the enforcement of the relevant competition rules.

As regards prosecution, the Competition Council mainly:

- conducts sector and individual investigations (including dawn raids);
- grants leniency measures;
- monitors infringements of the Competition Law, as well as Articles 101 and 102 of the Treaty on the Functioning of the European Union; and
- imposes the corresponding administrative penalties following such investigations.

Apart from the abovementioned powers that are relevant to cartels (and anti-competitive agreements and practices in general), the Competition Council exercises virtually all relevant executive and regulatory powers in the other competition law fields, including:

- merger control;
- the abuse of a dominant position;
- unfair competition; and
- state aid.

Are there any sectoral regulators with concurrent powers?

No sectoral regulators have powers concurrent to those of the Competition Council.

Application

Does the legislation apply to both formal agreements and informal practices?

The Competition Law and related secondary enactments encompass formal agreements and informal practices.

Does the legislation apply to individuals, companies or both?

Antitrust legislation applies to undertakings and associations of undertakings. Both individuals and companies that meet the required conditions to be considered an undertaking may fall under the scope of antitrust legislation.

Does the legislation subject companies to civil liability, criminal liability or both?

Companies are subject to administrative liability (fines applied by the Competition Council) and civil liability (compensation due to persons prejudiced by Competition Law infringements). Companies are not criminally liable

for Competition Law infringements.

Does the legislation subject individuals to civil liability, criminal liability or both?

Individuals deemed to be undertakings within the meaning of the Competition Law may be subject to administrative and civil liability in the same manner as companies (see above).

Individuals that hold the position of director or legal representative or any other management position within an undertaking may be subject to criminal liability if they intentionally conceive or organise an anti-competitive agreement or practice as defined by Article 5(1) of the Competition Law.

Where cartel conduct is punishable by both civil and criminal penalties, can the enforcement authority pursue both types of penalty? How does the authority decide which penalties to seek?

Cartels are punished solely with administrative fines imposed by the Competition Council. In addition to administrative fines, the undertaking at fault may, on request of the aggrieved person, be compelled by the relevant civil court to pay civil compensation for any damages incurred.

Individuals that may be criminally liable for conceiving or organising a cartel perpetrated by an undertaking are prosecuted by criminal prosecution bodies, rather than the Competition Council.

Are there any sector-specific offences or exemptions?

There are no sector-specific offences or exemptions.

To what extent, if any, does the legislation apply to extraterritorial conduct?

Romanian competition legislation applies to extraterritorial conduct that affects competition in Romania.

Investigations

Initiating an investigation

Who can initiate an investigation of potential cartel conduct?

Investigations of potential cartel conduct are initiated by the Competition Council president on his or her own initiative or following complaints filed by third parties directly affected by the cartel.

If an investigation is initiated by complainants or third parties, what rights (if any) do they have?

If the Competition Council finds a complaint to be ungrounded, it will inform the complainant of its resolution not to start an investigation, whereupon the complainant will have the right to present its views on this matter. The complainant may also request access to the documents on which the Competition Council intends to ground its preliminary assessment. If the complaint is eventually rejected, the complainant may contest the Competition Council's resolution in court. If an investigation is initiated pursuant to the complaint, the complainant may request a hearing to present its views on the case without confronting the undertaking under investigation. The complainant may also request a copy of the investigation report and may be granted such copy if the president of the Competition Council considers this to be useful for the purposes of the investigation. Any documents to which the complainant may be granted access can be used only for the purposes of legal or administrative procedures concerning the enforcement of competition rules. Further, the complainant cannot be granted access to business secrets or any other confidential information that the Competition Council obtains during the investigation.

Parties other than complainants may have access to the case file in accordance with Government Emergency Ordinance 39/2017 of 31 May 2017 – namely, if they are prejudiced further to a breach of the Competition Law.

What obligations does a company have on learning that an investigation has commenced?

An undertaking subject to an investigation must:

- provide exact and complete information and documents following the request of the competition inspectors; and
- duly cooperate with competition inspectors on dawn raids.

Although not expressly provided for by law, based on existing EU and national court practice, an undertaking subject to investigation should, in principle, have the right not to incriminate itself (i.e., not to provide proof of a breach of the Competition Law). However, in practice, it is difficult to draw a clear line between information that is exempted based on a self-incrimination principle and information that must be provided.

What obligations does a company have if it believes that an investigation is likely?

A company which believes that an investigation is likely has no formal obligations before the investigation is formally brought to its attention.

Nonetheless, should the undertaking wish to benefit from the Competition Council's leniency policy on cartels (which may lead to reduced or even complete relief from fines), it should be one of the first parties to submit on its own initiative information that may enable the council to initiate an investigation and establish whether a cartel exists.

In such a case, the undertaking must meet several other obligations before the formal investigation commences, including:

- cooperating fully and promptly with the Competition Council;
- not destroying, falsifying or hiding information relevant to the object of the investigation;
- keeping the leniency request secret; and
- ceasing any involvement in the concerned cartel.

What are the potential consequences of failing to act or delaying action?

Failure to observe obligations that arise after an investigation is formally commenced may trigger administrative fines of up to 1% of the undertaking's annual turnover.

If the company fails to observe obligations pertaining to the leniency policy before the investigation formally commences, it may no longer be eligible for leniency.

Under certain circumstances, criminal liability may also occur (e.g., for the obstruction of justice if evidence in the Competition Council's possession is destroyed or forged documents are provided).

Formal stages of investigation

What are the formal stages of and approximate timeframe for investigations?

Investigations mainly consist of:

- preliminary examinations, during which the Competition Council decides whether a complaint filed by a third party or a leniency application filed by a potential offender are sufficient grounds to start a formal investigation;
- the formal investigation phase;
- the debates phase, during which the Competition Council issues a draft resolution on which it consults with the concerned parties; and
- the final resolution phase.

The timeframe for an investigation depends on the case's complexity and the Competition Council's workload. In practice, they may take from several months to five years (but in recent practice the council has striven to keep durations below three years). However, the overall duration of an investigation cannot exceed 10 years, whereas the administrative offences for breaches of the Competition Law become time barred within five years from the cessation of the breach. Certain Competition Council actions interrupt the statute of limitations, in which case a new five-year term starts. Notwithstanding that, if the investigation exceeds 10 years, fines can no longer be applied.

Investigative powers

What investigative powers do the authorities have?

If there are indications that documents or information deemed necessary for the accomplishment of their tasks exist, competition inspectors with investigative powers may:

- enter the premises, land plots or means of transport legally owned or used by the undertaking subject to investigation or the directors, managers or employees thereof;
- examine any documents, registers or financial, accounting and commercial deeds, as well as other records

relating to the business of the undertaking subject to investigation, irrespective of the place where they are stored or their physical or electronic format;

- request explanations from the undertaking's representatives or staff members subject to investigation concerning the subject matter and purpose of the investigation and record their answers;
- collect or obtain in any form copies or excerpts from documents (including financial and accounting documents), registers and other records concerning the activity of the undertaking subject to investigation;
- collect electronic information on sealed electronic support; sampling of the relevant information will take place at the Competition Council's headquarters in the undertaking's presence; and
- seal any premises where the activity of the undertaking subject to investigation is performed, as well as any documents, registers, financial, accounting and commercial deeds and other records relating to the undertaking's activity.

What is the geographic reach of public enforcement actions?

Enforcement actions can be conducted only in Romania. However, within the European Competition Network framework, the Competition Council may request the cooperation and assistance of the European Commission and the national competition authorities of any other member state. It has effectively done so in two recent pending cartel cases concerning the insurance market and the pharmaceuticals' market, where Competition Council inspectors dawn-raided premises of companies in Belgium, Italy and the United Kingdom.

Apart from similar mechanisms of cooperation with national competition authorities of non-EU member states may also exist, based on multilateral or bilateral treaties concluded by the European Union. There is also a move for greater empowerment of national competition authorities under the proposed ECN+ Directive.

In case of an undertaking's failure to pay fines, the Competition Council will inform the relevant tax authority, which may start recovery procedures in Romania or abroad.

When is court approval required to invoke these powers?

Court approval is required for competition inspectors to undertake dawn raids on the premises, land plots or means of transport of:

- an undertaking subject to an investigation; or
- the directors, managers or employees thereof.

Are searches of business and personal premises authorised? If so, which bodies carry out searches and will they wait for legal advisers to arrive?

The Competition Council president authorises searches of business and personal premises, but court approval is also necessary. Inspections are conducted by competition inspectors. While undertakings have the right to be assisted by legal advisers during a search, competition inspectors have no obligation to wait for them to arrive.

What level of cooperation with the authorities is required and what are the consequences for failing to cooperate?

Undertakings subject to investigations must provide all relevant information requested by the Competition Council in a full and timely manner.

Providing incorrect or misleading information or refusing to be subject to an investigation is punishable with fines of between 0.1% and 1% of the undertaking's annual turnover in the preceding year.

Given that the burden of proof lies with the Competition Council, the undertaking subject to investigation has, in principle, the right not to incriminate itself and therefore cannot be forced to provide proof of its default. Nonetheless, in practice, it is difficult to draw a clear separation between information that an undertaking is entitled to withhold and that which the Competition Council is entitled to request.

Is in-house legal advice or attorney work product protected by the law of privilege? Does this extend to the advice of in-house counsel?

Communications carried out between an undertaking subject to investigation and its attorney solely for the purpose of the undertaking exercising its right to a defence (before or after the opening of the investigation) cannot be taken

or used as evidence in the course of the Competition Council's proceedings. Such communications must concern the object of the investigation. This does not extend to the advice of in-house counsel.

Are any other limitations imposed on investigatory powers in order to safeguard the rights of those under investigation?

Competition inspectors may perform a search only if:

- it is based on a formal investigation order issued by the Competition Council president;
- there are indications that documents or information deemed necessary for the accomplishment of the inspectors' tasks exist; and
- it is performed within the limits set out in the court order approving the search.

What is the process for objecting to an authority's exercise of its claimed powers?

An investigation order can be challenged before the Bucharest Court of Appeal within 15 days from its receipt.

Court approval of an on-premises investigation can be challenged before the Supreme Court within 72 hours of its receipt.

Publicity and confidentiality

What information about investigations will be made publicly available and at which stage(s) of the process?

As a matter of practice, the resolution to initiate a formal investigation is publicly announced on the Competition Council's website. Usually such announcement comes after dawn-raids have already taken place.

Resolutions issued by the Competition Council at the finalisation of an investigation are sent to the parties involved and are to be published in the Official Gazette (although this form of publication fell into disuse) and always on the Competition Council's website. Before publishing a resolution, the Competition Council must consider the rights of the concerned undertakings regarding the protection of trade secrets and other types of confidential information which would significantly damage the undertaking if disclosed. However, only certain sections of a resolution can be made confidential.

Is any information automatically confidential and is confidentiality available on request?

Under Romanian law, confidentiality is not automatically conferred on any category of information. Rather, confidentiality is available for parts of a file on the basis of a duly grounded request from the undertaking concerned. To date, the Competition Council has been open to such requests.

International cooperation

Do the authorities in your jurisdiction cooperate with authorities in other jurisdictions?

The Competition Council cooperates with the European Commission and the national competition authorities of other EU member states within the European Competition Network framework, established pursuant to the EU Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty on the Functioning of the European Union (1/2003).

The European Competition Network is a framework for:

- cooperation, assistance and the allocation of competences between the European Commission and the national competition authorities of EU member states regarding the enforcement of EU competition rules; and
- discussion and exchanges aimed at the development of competition culture within the European Union.

The Competition Council is also a member of the International Competition Network, an informal group that allows discussions between national competition authorities from across the globe, but has no rulemaking function.

Formal mechanisms of cooperation with competition authorities outside the European Union may exist based on international treaties concluded by the European Union and the member state concerned, such as treaties between the European Union and Brazil, China, Mexico and Switzerland.

In addition, the Competition Council has signed a number of cooperation memoranda with competition authorities from various third-party states (e.g., Russia and China) in order to exchange information regarding:

- competition legislation;
- investigation procedures; and
- studies concerning competition rules.

Do the relevant enforcement authorities request waivers so as to allow for increased cooperation with authorities in other jurisdictions? What are the consequences of declining to grant a waiver?

At the international level, a non-binding template for waivers of confidentiality has been created within the International Competition Network framework. Although a member thereof, the Competition Council could not request or use the template other than within the leniency application framework, as waivers are not regulated in Romania in regard to cartels (although certain provisions concerning waivers of confidentiality in merger control procedures exist).

Decisions

How is a cartel investigation resolved? Are settlements, plea bargains or other negotiated resolutions available?

A cartel investigation ends with a final Competition Council resolution that can be challenged in court.

A negotiated resolution is possible only:

- within the framework of the cartels leniency procedure; and
- where the Competition Council accepts commitments from the parties to the cartel, provided that:
 - o the commitments are sufficient for safeguarding competition; and
 - o their implementation would lead to the elimination of the situation that triggered the investigation.

What is the process for negotiating a settlement, plea bargain or other negotiated resolution? Do such resolutions require court or other approval?

The negotiated resolutions require neither court nor other approval. Nonetheless, they can be challenged along with the Competition Council's final resolution regarding the investigation.

If a settlement is not reached, what is the procedure for adjudicating a charge of cartel conduct?

If a settlement is not reached, the procedure follows the stages described in the 'Formal stages of investigation' section above.

Which party must prove its case? What is the relevant standard of proof?

In competition investigations, the burden of proof lies with the Competition Council, unless the concerned undertaking invokes certain exemptions from the prohibition of cartels (in which case the burden of proof lies with the concerned undertaking).

Under Romanian law, there is a general standard of proof requiring evidence concerning an alleged breach of the Competition Law to be sufficient (failing which, the Competition Council must close the investigation).

If the Competition Council's resolution is challenged, the court will normally require that the evidence filed be useful, pertinent and conclusive to the case.

The Supreme Court has also examined whether proof leading to penalties applied by the Competition Council complied with the standard established by EU case law – specifically, whether the evidence used by the council was "precise and consistent".

In actions concerning private damages, the burden of proof regarding the existence of the competition breach (which can be ascertained via a definitive resolution of a competition authority or assessed by the court if no prior

decision of a competition authority exists) and the evidence concerning the quantum of the damages lies with the claimant. The standard of proof required for the quantification of damages must not render the exercise of the right to damages impossible or excessively difficult.

Is there a hearing? If so, what is the process for submitting evidence and testimony?

The Competition Council may organise a hearing after completion of the investigation report, either on its own initiative or at the request of one of the parties concerned. The hearing of the parties may be conducted separately or in the presence of other invited parties, subject to the legitimate interest of the undertaking in relation to their trade secrets and other confidential information. The hearings are recorded, but not public.

If considered necessary and useful for the case, the Competition Council president may appoint experts.

The Competition Council president may also approve the participation and hearing of the complainant, as well as any other person who might provide relevant information.

The president, or a designated replacement, will chair the hearings. The chair will allow the parties concerned to make statements regarding the investigation report and support their claims or defences, particularly those deemed to be relevant for clarifying the essential aspects of the case.

What are the accused's procedural rights?

The main right of an undertaking undergoing investigation is the right to a defence, which encompasses:

- the right to be assisted by an attorney;
- the right to access the case file;
- the right to be informed in writing of various aspects throughout the procedure (e.g., the investigation order and related documents);
- the right to submit its views on the investigation report before a resolution is taken;
- the right to be heard by the Competition Council in a hearing, if the council deems a hearing necessary; and
- the right to challenge the Competition Council's resolutions in court.

In addition, the undertaking has a right to claim the confidentiality of certain parts of the submitted documents or information.

Appeal process

What is the appeal process?

The final Competition Council resolution regarding the outcome of an investigation can be appealed in court within 30 days from its communication. The following resolutions can also be appealed along with the final resolution:

- resolutions to commence an investigation;
- refusals to grant leniency; and
- resolutions regarding the confidentiality of documents or access to the case file, among other things.

The court may, but is not obliged to, suspend the enforcement of a resolution. If fines were imposed by the resolution, the suspension will be adopted only against a cash collateral, to be established by the court pro rata to the fine amount in accordance with the rules set out by law (Lei14,500 plus 0.1% of the fine being the highest cash collateral that can be imposed for fines exceeding Lei1 million).

To what extent can the appeal body review the agency's findings of fact, legal assessment and penalties?

The appeal body can fully assess and review the findings regarding the facts, legal assessment and penalties.

Penalties

Penalties for companies

What are the potential penalties for companies involved in a cartel?

The potential penalties for companies involved in a cartel can be up to 10% of their annual turnover for the preceding year.

Are there guidelines in place for penalties? If not, how are penalties normally calculated?

The Competition Council has issued guidelines on the calculation of penalties. Penalties are established with regard to the gravity of the infringement. A base penalty of between 4% and 8% of the company's annual turnover applies to cartels. However, aggravating or mitigating circumstances may increase or reduce the penalty.

Do the authorities take into account any penalties imposed in other jurisdictions?

As per EU case law, an infringement of both EU and national competition legislation should be punished only once (i.e., it will not be punished as an infringement of both EU and national legislation) if it concerns the same person and the protection of the same interest. Further, Romanian legislation expressly provides that no one can be punished twice for the same deed, in either criminal or administrative offence proceedings. Hence, it is unlikely that a single deed would trigger multiple penalties in various EU jurisdictions.

Where the same conduct breaches the competition laws of non-EU jurisdictions, it could be punished twice or more if no pleas can be invoked to prevent double punishment of the same offence in those jurisdictions. In Romania, a plea exists which can allow a party to escape double liability.

How can a company mitigate its exposure to fines?

A company may wish to consider benefiting from the cartels leniency programme, which may lead to full relief or the substantial reduction of a fine.

In addition, if a company acknowledges its participation in a cartel before any hearings and, where applicable, proposes remedies that can generate the end of the breach, the Competition Council may reduce the basic level of the applicable fines by 10% to 30%.

Further, a company may diminish its exposure by considering the mitigating circumstances that have a bearing on the calculation of fines in Romania – for instance:

- implementing a proper competition compliance programme;
- ceasing the breach as soon as the Competition Council has intervened; and
- concluding settlement agreements to compensate parties aggrieved by the cartel.

Penalties for individuals

What are the potential penalties for individuals involved in a cartel?

If an individual is deemed to be an undertaking within the meaning of the Competition Law, the same penalties as for companies (ie, between 0.5% and 10% of the annual turnover) can be inflicted thereon.

Do the authorities take into account any penalties imposed in other jurisdictions?

The authorities do not consider penalties imposed in other jurisdictions when calculating fines. However, in certain cases, especially in the ones handled and decided upon at EU level by the European Commission, conduct that has already been punished cannot, as a matter of principle, be subjected to further fines in Romania.

Is a company permitted to pay a penalty imposed on its employee?

The only case where an employee could be subject to a fine for competition infringement is where he or she holds a management position and the criminal prosecution bodies find that he or she has wilfully conceived or organised a cartel action. In such cases, if the penalty applied is a fine, rather than imprisonment, the company may provide the relevant amounts to the employee to pay the fine (alternatively, the company may enter into an insurance policy to this effect). There is no express interdiction for the company to provide such amounts.

Is a company permitted to continue to employ an employee involved in cartel conduct?

There is no express interdiction for a company to continue to employ a person involved in cartel conduct. However, a court may decide to revoke the employee's right to exercise the function or carry out the activity which was used to commit the offence. In such cases, the company cannot continue to employ the employee involved in cartel conduct.

Private actions

Private damages actions

Can private actions for damages be brought in your jurisdiction? If so, who may assert such actions?

Private actions for damages can be filed in court by any natural or legal person who has suffered damages due to a cartel. While this was previously a matter of principle under the Competition Law, Government Emergency Ordinance 39/2017 of 31 May 2017 added significant details, having transposed the EU Directive on Antitrust Damages Actions (2014/104/EU).

What relief may be awarded to successful claimants (eg, damages, costs, injunctive relief or attorneys' fees)?

Successful claimants may be awarded compensation for the entire amount of the damages incurred, as well as loss of profit generated by the cartel and the due interest rate. Litigation costs, such as attorneys' fees, can also be awarded.

The Competition Council may order injunctive relief in case of an emergency grounded on the risk of an irreparable and material prejudice to competition. The council's resolution may be challenged in court.

How are the amounts of any damages, costs or attorneys' fees calculated?

Damages, costs and attorneys' fees are calculated based on due evidence ascertaining the amount thereof (including expert reports, where required). The final amount is therefore to be established by the competent court on a case-by-case basis, in relation to the relevant evidence submitted by the involved parties.

Have there been any notable recent cases in which a private action was the subject of adjudication?

While unrelated to cartel conduct, in 2016 the Bucharest Court of Appeal awarded damages amounting to Lei4,137,677 (roughly €899,434) to a courier company which had suffered damages due to the state-owned Romanian Post Company's abuse of its dominant position. The abuse had constituted the offering of better competitive conditions to a competitor of the claimant.

Class actions

Can class actions be brought in your jurisdiction? If so, what is the procedure for such cases?

Class actions can be brought by:

- consumer protection-focused non-governmental organisations for consumers affected by breaches of competition rules; and
- professionals or employers' associations for professionals or employers affected by breaches of competition rules.

Immunity and leniency

Immunity and leniency programmes

Is an immunity and leniency programme available for companies? If so, how does it operate?

Yes, an immunity and leniency programme is in place for cartels.

At present, undertakings participating in material infringements of the Competition Law (e.g., horizontal agreements aimed at fixing prices or commercial conditions or the allocation of production or sales quotas, markets or clients, including fake tenders, restricting imports or exports and other anti-competitive acts aimed at competitors) may seek two types of leniency:

- Type A leniency – for the disclosure of information and evidence of an agreement that allows the Competition

Council to commence an investigation and conduct dawn raids; or

- Type B leniency – for the disclosure of information and evidence that enables the Competition Council to establish an infringement of the Competition Law.

General conditions must be met irrespective of the type of immunity applied for. If leniency is granted, the undertaking may be exonerated from all or part of the fine (e.g., immunity is granted on a first-come, first-served basis, so that applicants that rank second or third may be granted only a reduced fine).

Can the enforcement authority decline or withdraw leniency? If so, on what basis?

Immunity cannot be awarded to undertakings that:

- adopted coercive measures against other undertakings to encourage them to take part in or remain part of an agreement; or
- do not meet all of the requisite conditions for leniency.

Are there benefits for cooperators that do not qualify for immunity? If so, how are these benefits determined?

Good cooperation with the Competition Council is a mitigating factor when calculating fines. In addition, undertakings that expressly acknowledge their infringement of the Competition Law before the hearings can benefit from a 10% to 30% fine reduction.

What benefits (if any) are available for employees and former employees of a company that seeks leniency?

Leniency programmes and other benefits apply only to concerned undertakings – hence, employees and former employees are excluded. However, individuals concerned by criminal proceedings arising from breaches of the Competition Law may benefit from specific immunity or mitigation clauses (please see the criminal liability section below).

Is an immunity or leniency programme specifically available for individuals? If so, how does it operate?

There is no immunity or leniency programme designed specifically for individuals. However, individuals deemed to be undertakings within the meaning of the Competition Law may fall under the scope of the leniency programme and qualify for other benefits in the same way as an undertaking. In addition, individuals concerned by criminal proceedings arising from breaches of the law may benefit from specific immunity and mitigation clauses (please see the criminal liability section below).

Have there been any notable recent cases in which a leniency application was the subject of adjudication?

In the cartel punished by Competition Council Resolution 77/2017, the main participant in the cartel (in terms of adjudicated tenders and profits made) acted as whistleblower and filed a full upfront immunity application with four months before the investigation was launched. Further to the consideration of all elements of the case, the council found that the whistleblower met all the criteria laid down by the law for being granted full immunity and that it did not act coercively against the other members of the cartel (despite this being a matter of debate by the other undertakings concerned). This the most high-profile case in which the council has granted full immunity to the fine based on an undertaking's submission for type A leniency.

Criminal liability

Is immunity from criminal prosecution available? If so, how and under what conditions is immunity granted?

The only criminal offence set out by the Competition Law is the intentional conception or organisation of anti-competitive agreements or practices forbidden by the law on the part of a person who is a director or legal representative or holds another management position within an undertaking.

The following immunity and mitigation causes are available:

- A person who discloses his or her participation in such an offence before the commencement of the criminal investigation, thus allowing the identification and punishment of other participants, will not be punished.
- A person who committed such an offence and, during the criminal investigation, disclosed and facilitated the identification and punishment of other participants can benefit from a 50% reduction of the punishment limits.

Application procedure

What is the procedure for a leniency application?

A leniency application should be registered with the Competition Council's separate leniency unit. A marker request can be filed in order to ensure priority of the application until conditional leniency is granted.

The leniency application should provide the Competition Council with all information and evidence available regarding the alleged infringement, as well as arguments regarding the fulfilment of the leniency conditions. In a preliminary stage, the information may be described in a hypothetical form (e.g., a descriptive list of evidence that will be presented at a later stage; the names of the undertakings involved in the alleged infringement do not necessarily have to be disclosed). Nonetheless, the type of infringement, the relevant products and services, the relevant geographic area and the duration of the alleged infringement should be clearly presented.

The Competition Council will confirm in writing its receipt of the leniency application and whether the undertaking is eligible to benefit from the leniency programme. On completion of the investigation, the Competition Council will make a final assessment regarding the fulfilment of the conditions for leniency and will grant leniency, where applicable, via the final resolution of the investigation.

What is the typical timeframe for consideration of a leniency application?

The law does not specify a timeframe for the Competition Council to resolve a leniency application. However, since the final resolution is adopted at the time of the investigation's finalisation, the timeframe can vary from several months to several years.

What information and evidence is required?

For Type B immunity, the applicant must provide the Competition Council with all relevant information and evidence available. The applicant must be the first party to have provided the relevant information and evidence, which must not have already been known by the Competition Council. Further, no other undertaking must have already obtained Type A immunity.

Apart from the matters mentioned above, for Type A immunity, the applicant should provide a detailed description of:

- its purposes, activities and manner of functioning;
- the relevant products and services;
- the relevant geographical area;
- the duration of the agreement;
- the market volumes of the relevant products or services affected;
- the dates and locations of meetings, the content of the discussions and details of the participants; and
- all relevant explanations regarding the evidence that supports the application.

What information and evidence is disclosed to subjects of the investigation other than the leniency applicant?

Access to such documents is given only to the parties involved, provided that they agree not to copy them or disclose information qualified as confidential by the Competition Council (in practice, the council allows for handwritten copies to be made, but not mechanical copies such as photographs). The information from such documents can be used only with regard to an investigation concerning a breach of the Competition Law.

What level of cooperation is required from applicants?

Applicants for any kind of leniency should cooperate with the Competition Council in a real, total, continuous and prompt manner for the investigation's entire duration.

What confidentiality protection is offered to applicants?



Any document filed with the Competition Council in relation to the leniency programme is part of the case file and protected as such. However, no protection will be ensured if the applicant discloses the leniency application to third parties.

Can the company apply for a marker? If so, under which conditions?

An undertaking may request a marker in order to secure the priority of its immunity or leniency application. The marker is granted for a period that will be specified on a case-by-case basis.

To obtain a marker, the applicant should provide the Competition Council with certain information regarding its identity and the disclosed breach of competition, as well as other similar applications filed with other authorities.

The applicant must provide the relevant information in the timeframe provided by the Competition Council and cannot do so in a hypothetical manner. If the relevant information and evidence is provided within the established timeframe, it will be deemed to have been submitted at the date of the marker. If the application is incomplete at the end of the timeframe established by the Competition Council, the application will be rejected. If the applicant refiles for immunity, it will no longer be able to obtain a marker, but will nonetheless be able to file a leniency application.

Law stated date

Correct as of

Please state the date as of which the law stated here is accurate.

1 October 2018.