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

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

#### **RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT**

-- Romania --

15 June 2015

*This document reproduces a written contribution from Romania submitted for Item III of the 121st meeting of the Working Party No. 3 on Co-operation and Enforcement on 15 June 2015.*

*More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/antitrust-enforcement-in-competition.htm>*

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-- Romania --

1. In Romanian legal system, the actions for damages have as legal basis the Civil Code, which is the general legislation for this matter. Hence, as a general rule, the Civil Code<sup>1</sup> provides that any person that caused harm to another is obligated to compensate the damages suffered, whether it was committed intentionally or with negligence. Correlatively, any person that suffered harm must be able to claim reparation from the person who caused that harm. These provisions are acknowledging the principle of the civil liability based on an illegal conduct.
2. Due to lack of special provisions, these rules are also applicable to actions for damages as a result of breach of European or national antitrust rules.
3. According to the applicable rules, the general conditions of the civil liability that the court must assess, once an application for seeking damages was brought before it, are: the existence of harm, the existence of illegal conduct, the causal link between the illegal conduct and the harm suffered and the fault of the person whose conduct caused that harm, intentionally or with negligence. In competition private enforcement cases, the court must ascertain the causal link between the breach of the antitrust rules by the offender and the losses suffered by the claimant.
4. According to the Competition Law, damages actions may be brought before courts either before or after a decision sanctioning an antitrust infringement was adopted by the Romanian Competition Council (*hereinafter referred as RCC*). The damages actions can be brought before the courts by harmed persons, by an attorney on behalf of a number of harmed persons, based on individual will expressed by each of them, or by the associations for the protection of the consumer's interests or trade associations.
5. The applicable procedural rules are those provided by general legislation, respectively the Civil Procedural Code.
6. The competent courts, in a first instance, are the local courts and county courts, civil or commercial sections, depending on the level of the damages claimed.
7. The burden of proof is on the plaintiff, as in public enforcement. The court may use, at the request of the parties or ex officio, any type of evidence, including witnesses and expertise. The Romanian Competition Law, as amended and supplemented in 2010 and 2011 took over most of the recommendations made by the European Commission in its White Paper on Damages actions for breach of the European antitrust rules. As such, with regard to the follow-on private actions, the Competition Law grants the courts the power to ask for documents from the case file of the administrative procedure before RCC, provided that the legitimate interest of the undertakings in protecting their business secrets is observed. The provisions of the Procedural Civil Code contain also provisions on the management of evidence owned by third parties and the conditions for their submission before the court.
8. In private judicial procedures, a decision issued by the competition authority, prior to a final judgment, may represent a strong presumption in relation to the illegal conduct and the responsible persons. If the appellate court has given a final judgment upholding the competition authority's decision, this decision is mandatory for the civil or commercial courts with regard to decided aspects, on the *res judicata* principle.

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<sup>1</sup> The new Civil Code is in force as of 1 October 2011; it contains modern and efficient provisions in respect of the liability for torts.

9. Also, the full compensation principle is applicable, meaning that the damaged persons are able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest. Thus, the Competition Law establishes this principle in Art 64 para. (1). The Civil Code contains also provisions regarding the full recovery of the harm (Art.1531-1537) and the Procedural Civil Code establishes the way of covering the legal expenses (Art. 451-455)

10. It should be emphasized also that in Romanian legal system the civil liability has a reparatory role and not a punitive role as the damages do not represent a punishment.

11. Competition Law provides also that the passing-on overcharges defence is not a legal basis for considering that the harm does not exist. The unjust enrichment principle is also applicable to all private litigations. It means that damages shall be granted for both direct and indirect buyers, for covering the harm they prove to have suffered.

12. In order to ensure that the leniency program is attractive, the Competition Law provides that civil liability of successful immunity applicants is limited to the damages attributable to its conduct, in this case the general civil principle of the joint and several liability not being applicable.

13. Another important modification brought to the Competition Law during 2010-2011 consists in the introduction of the RCC's role as *amicus curiae*, giving it the power to issue observations to courts in particular cases when the national and European competition rules are applied. These observations may be issued ex officio or at the request of the courts.

14. This role of RCC may be exercised in private enforcement cases as well, since the competition authority is not part of the trial as plaintiff or defendant.

15. It must be emphasized that the *amicus curiae* role of public institutions in Romania is also provided by the new Civil Procedural Code that entered into force in 2014, these institutions being empowered to intervene in cases for the protection of public interest.

16. With regard to time limits for seeking compensation, Competition Law provides at Art. 64 para. (5). for a special limitation period of two years that will start once the infringement decision of the competition authority, on which a follow-on claimant relies, has been confirmed by a final court decision. The general time limit for seeking compensation provided by the Civil Code is three years since the date the claimant had to know or he should have known about the appearance of this right.

17. The quantification of harm suffered by the victims in the actions for damages based on infringements of European and national antitrust rules rests entirely with the judge. In practice it is very likely that the judge will ask for an expert opinion, on the expense of the plaintiff.

## **1. National case-law**

18. Until now, the national courts in the first instance dealt with two private litigation cases on antitrust matters. Currently, the cases are pending before the appellate courts.

19. According to Article 64 para. (8) of the Competition Law, the first instance courts decisions were submitted to the European Commission via RCC. More specifically, Article 64 para. (8) provides that in all the cases in which the national courts directly apply the provisions of Arts. 101 and 102 of the Treaty on the functioning of the European Union, after the communication to the parties of the decision susceptible of the exercise of a means of challenge, they have the obligation to send at once copy of these decisions to the European Commission, through the RCC.

20. The cases concern:

- civil sentence no.1363 dated 21.03.2014 ruled in the case no.4982/3/2012 (already published on the EC webpage). By decision no. 1250/17.12.2014, the Bucharest Court of Appeal dismissed the appeal. The decision may be further appealed before the High Court of Cassation and Justice.
- civil sentence no. 6469 dated 19.12.2014 ruled in the case no. 55246/3/2011 – appeal filed on 02.02.2015.

21. The damages actions represented stand-alone actions, as there was no final decision of the competition authority at the ruling date.

22. In both cases, the first instance court retained that the claimants did not prove the commitment of any anticompetitive deed; therefore, one of the conditions of tort liability was not met. Consequently, the damages actions were dismissed for being ungrounded.

23. The conclusion that emerges from the judicial practice is that the plaintiffs haven't developed their claims following a definitive and irrevocable decision of the Romanian competition authority. Such a decision of RCC could have hold up the proceedings in the court. Even if in the second case there was a decision of the first instance court maintaining the decision of the competition authority, this decision couldn't have been capitalized because the solution of this court was not irrevocable. Therefore, the court invested to solve the damages action could not take into consideration this solution as being evidence of the existence of illegal conduct.

## **2. Recent developments**

24. The OECD Peer-Review exercise on competition law and policy developments in Romania conducted in the period 2013-2014 revealed that the obligation on national courts to report cases involving European competition law to the RCC (that will in turn forward the information to the European Commission) may not be found in the cases involving Romanian competition law. To support the development of private litigation in Romania, RCC currently contemplates to introduce such a provision in the current process of further modifying and completing the primary legislation in competition field.

25. Another important development is the current contribution of RCC in the process of transposing the Directive 2014/104/UE concerning the damages actions under national law for infringements of the competition law, having deadline of transposition 27 December 2016. RCC welcomes the initiative of EC in this area and it expects that the effects of taking over the EC Directive will bring about a fairer competitive environment both for consumers and undertakings and a uniform application of the legislation across the EU Member States, regardless of the national competent Court called to solve a damage claim.

26. To obtain the balance between the need for public repression of cartels and the need to stimulate private litigation in antitrust matters in Romania, the recent decision made by RCC with the support of the Ministry of Justice has been to transpose the EU Directive in a law dedicated to private enforcement of competition law and not by reviewing private enforcement provisions laid down in Art. 64 of the Competition Law.

### **3. Conclusions**

27. The two stand-alone cases prove that private litigation involving competition law claims before national courts exists but they are still underdeveloped. Fortunately, the EU Directive provides that the limitation period is suspended if RCC takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law, the suspension term being of at least one year after the infringement decision has become final.

28. RCC will continue to deploy efforts towards ensuring private litigation case outcomes consistent with the policy goals of the Romanian competition regime. A major impact in this direction will have the transposition of the provisions of the EU Directive into national legislation.