



Private Antitrust Litigation

in 27 jurisdictions worldwide

Contributing editor: Samantha Mobley

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Romania

Paula Bourdenet, Marius Magureanu and Bernhard Kofler-Senoner

Gilescu & Partenerii / CHSH Cerha Hempel Spiegelfeld Hlawati

Legislation and jurisdiction

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

Private antitrust litigation is at an early stage of development. Competition law legislation does not provide for special provisions regarding private actions for damages, therefore the general principles of tort regulated by the Romanian Civil Code apply. At present, there seems to be no case law on private antitrust litigation. But taking into account the rapid development of the Romanian legal framework over the past 10 years, private antitrust litigation should gain importance.

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

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

In case of a breach of antitrust law, claimants are entitled to compensation exclusively before the ordinary courts (the 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 as to whether damages could only be awarded by ordinary courts after a decision of the Competition Council ascertaining the fact that the respective act or omission has indeed breached competition laws. In the light of the principle of direct applicability of European cartel law (article 81 EC Treaty) in member states, however, it is doubtful whether civil courts could deny direct actions for damages arising from cartel law infringements after Romania's accession to the European Union. A recent judgment decision acknowledged the fact that a decision of the competition authority is not required prior to filing a lawsuit for damages.

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 – approximately €136,000), 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 (ie, trials arising from acts and deeds carried out by commercial companies):
 - from commercial district courts (claims of up to 100,000 lei – approximately €29,000), appeal goes to the commercial section of the regional courts; and
 - from commercial regional courts (claims above 100,000 lei – approximately €29,000), 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; abuses 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 shall be filed with the relevant court of 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. Council Regulation 44/2001 has become effective after the accession of Romania to the European Union.

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.

Private action procedure

8 Are contingency fees available?

Romanian lawyers are only entitled to earn a kind of contingency 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 Law-

yers Profession, published in the Official Gazette No. 45 of 13 January 2005.

9 Are jury trials available?

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

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. There is also a procedure for the preservation of proofs, which is considered to be a kind of *in futurum* enquiry (ie, 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 of a person or for documents to be recognised if there is a threat that such proof may disappear at a later stage.

11 What evidence is admissible?

General provisions of the Civil Procedure Code do not provide for limitations with respect to the form of evidence admissible in damages proceedings. In particular, the following evidence is admissible: statements of the parties, testimonies of witnesses, inspections or independent and parties' expert opinions.

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

Private actions on damages are available separately even where there has been a criminal conviction in respect of the same matter (see also question 13).

Romanian competition law provides for several criminal offences, such as the 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 conceiving, organisation or realisation of the above-mentioned anti-competitive practices.

13 Can the evidence or findings in criminal proceedings be relied upon by plaintiffs in parallel private actions?

According to article 16 of the Criminal Procedure Code, 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.

14 What is the applicable standard of proof and who bears the burden?

The Romanian Civil Procedure Code does not provide for a standard of proof definition. The appreciation of evidence is conducted by the 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 which he or she deems appropriate.

The Romanian legislation reflects the Latin principle '*actori incumbit probatio*', therefore it is the plaintiff who bears the burden of proof. In case the defendant raises counter-claims, it is the defendant who carries the burden of proof in respect of such claims.

15 What is the typical timetable for class and non-class 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.

16 What are the relevant limitation periods?

Damage claims generally become time-barred three years after the damages and the author of the damages are 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 after termination of the anti-competitive behaviour. In case of continuous breaches, the limitation period starts from the date of the last act of anti-competitive behaviour.

17 What appeals are available?

Appeals against decisions of the district courts (as court of first instance) in damage proceedings 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 damage proceedings are heard by the higher regional courts (third instance is available and ruled by the High Court of Cassation and Justice). 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 for appeals against decisions of the commercial regional courts.

Decisions of the Competition Council (eg, cease and desist orders) are subject to appeal which is heard by the Appellate Court. Decisions of the Appellate Court may be revised by the High Court of Cassation and Justice, as court of third and final instance.

Class proceedings

18 Are class proceedings available in respect of antitrust claims?

Romanian law does not expressly provide for class proceedings. It is, however, 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.

In such case, 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 in any way the other litigating parties.

19 Are class proceedings mandated by legislation?

No, see question 18.

20 If class proceedings are allowed, is there a certification process? What is the test?

There is no certification process, since there are no class proceedings.

21 Have courts actually certified class proceedings in antitrust matters?

As indicated in question 20, there is no certification process.

22 Are 'indirect claims' permissible in class and non-class 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 27.

23 Can plaintiffs opt out?

Not applicable.

24 Do class settlements require judicial authorisation?

Romanian law on civil procedure does not provide for class settlements.

25 If the country is divided into multiple jurisdictions, is a national class proceeding possible?

Not applicable.

26 Has a plaintiffs' class-proceeding bar developed?

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

Remedies

27 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. In case natural restitution is not possible because of an objective reason, compensation shall be made by pecuniary compensation.

28 What other forms of remedy are available?

The Romanian Civil Procedure Code provides for the court's possibility to order injunctions in urgent cases for the preservation of a claim which might be jeopardised or for the prevention of an occurrence of damages that could not be recovered. A further requirement is that the behaviour of the undertaking represents a *prima facie* breach of (competition) legislation.

29 Are punitive or exemplary damages available?

Punitive or exemplary damages are not available under Romanian law.

30 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.

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

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.

31 Are fines imposed by competition authorities taken into account when settling damages?

Fines imposed by the Competition Council are revenues to the state income, whereas damages are challenged by the prejudiced party before the courts. Consequently, courts do not take into account fines imposed by competition authorities when settling damages.

32 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 shall be incumbent on the losing party upon request. Legal costs are reimbursed only upon request of the winning party.

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 the first court hearing and he or she had not been previously in delay with the execution, such defendant will not be obliged to pay the plaintiff's legal costs.

33 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.

34 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 other (potential) defendants in line with their actual contribution.

35 Is the 'passing on' defence taken into account?

The possibility of a passing on defence is not regulated per se under the Romanian law. Since there is no case-law on this issue so far, it is hard to say whether this defence could be successful.

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

No specific defences are provided by competition law.

37 Are there alternative means of dispute resolution available?

Alternatives to ordinary dispute resolution are: arbitration proceedings and mediation (regulated in Romania by law 192/2006). Private antitrust enforcement is, however, generally not conducted through alternative means of dispute resolution.

GILESCU & PARTENERII
Cerha Hempel Spiegelfeld Hlawati

CHSH
Cerha Hempel Spiegelfeld Hlawati

Contacts: Paula Bourdenet
Marius Magureanu
Bernhard Kofler-Senoner

e-mail: paula.bourdenet@gp-chsh.ro
e-mail: marius.magureanu@gp-chsh.ro
e-mail: bernhard.kofler-senoner@chsh.at

Splaiul Independentei 42-44
5th district, code 050084
Bucharest
Romania
Tel: +40 21 311 213
Fax: +40 21 314 24 70
Website: www.gp-chsh.ro

Parkring 2
1010 Vienna
Austria
Tel: +43 1 514 35 0
Fax: +43 1 514 35 35
Website: www.chsh.at