

# Competition Law and Policy in Romania

## A Peer Review



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2014



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## FOREWORD

This report was the basis of a two and a half hour peer review in the OECD Global Forum on Competition on 27 February 2014. It assesses the development and application of competition law and policy in Romania, since the establishment in 2004 of the Romanian Competition Council (RCC), with a focus on activities over the previous three years (2010-13).

The report concludes that Romania has a competition regime well in line with internationally recognised standards and practices and with the RCC, a well-regarded enforcement agency. Many of the recent changes represent ambitious efforts by the RCC to improve the effectiveness of the enforcement regime and its ability to make markets work better. The report also notes that catching up on so many fronts creates its own challenges; in many cases reforms are underway and have not yet delivered results.

Recommendations in the report focus on:

- cartel enforcement where better co-ordination with criminal prosecutors appears to be a priority;
- on mergers and the need to consider an adjustment of notification thresholds; and,
- an evaluation of behavioural remedies.

The report also makes some recommendations on RCC's institutional features to comfort its mission and to build a constructive relationship with regulators. The report's analysis and recommendations are timely because effective implementation of national competition policy is an important element of a continuing effort by Romania to integrate with western markets.

This report was undertaken at the request of the government of Romania. The lead reviewers were Mr German Bacca Medina, Colombia; Mrs Elisabeth Flüry-Hérard, France; Mrs Skaidrite Abrama, Latvia and Mrs Anita Vegter, The Netherlands. The report was prepared by Andreas Reindl working as a consultant for the OECD Secretariat.



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## EXECUTIVE SUMMARY

Romania has a relatively young competition regime. After the adoption of the first modern competition law in 1996, the development of an effective competition regime was for a while lagging behind efforts in other Central and Eastern European transition economies. Today, as a result of more recent efforts and ambitious reforms, the competition regime appears to be well in line with internationally recognised standards and practices.

The Romanian competition regime has greatly benefited the Europeanisation and “internationalisation”. Competition law in Romania is firmly anchored in European enforcement standards: the framework for substantive analysis, secondary regulations, and law enforcement practices are essentially in line with the European enforcement model. A few vestiges of an earlier transition period remain, such a provision allowing the Government to impose price controls in certain circumstances; but they have no influence on current enforcement practice. The relevant OECD Recommendations are also well reflected in the Romanian competition regime: hardcore cartels and bid rigging have become a priority for the Romanian Competition Council (RCC). The RCC is actively involved in national efforts to fight procurement fraud and has a dedicated directorate to discover bid rigging cartels and promote better procurement practices. Criminal enforcement is possible in particular for cartels, although it remains under-used. Merger review follows the standards developed for effective and efficient merger review regimes, and RCC’s professional and pragmatic approach in merger cases is recognised by stakeholders. The RCC takes an active role in competitive impact assessment, and has been a successful advocate for changes in laws and regulations that hampered competition.

The enforcement process is transparent overall, with a strong separation of investigative and decision making functions within the authority. The RCC has moved toward a more pro-active enforcement approach and considerably reduced the number of investigations based on complaints. Less time is spent on vertical cases, and more resources are used for cartels and abuse of dominance investigations. The RCC is highly respected in Romania for its professionalism and expertise.

Many of the recent changes represent ambitious efforts by the RCC to incorporate advice of international donors and to adapt to international standards, enforcement practices, and institutional solutions, with a view toward improving the effectiveness of the enforcement regime and its ability to make markets work better. But while the RCC has shown great openness toward adopting internationally promoted standards and concepts, their consistent and continuous implementation creates challenges. Many reform projects are of a recent date and several have not yet been completed; continuous attention will be required to ensure delivery.

Anticartel enforcement has not yet become the credible threat it should be: Fines in cartel cases remain relatively low; the leniency programme, although consistent with European and international models, is not yet working. Prioritisation efforts have not yet led to a significant shift toward the types of cases the RCC wants to pursue and have significantly reduced the average duration of antitrust investigations. The newly acquired responsibility to enforce parts of Romania's unfair competition law can create policy conflicts and threatens to remove resources from competition matters. Full liberalisation of energy markets and the removal of price controls will create complex challenges that require the RCC's attention and solid co-operation with the sector regulator to ensure that consumers will draw the benefits of competition while conditions for investment improve.

Successive presidents of the RCC, although all highly accomplished in their own rights, had different priorities for the authority, undermining continuity in the RCC's development. The RCC is well staffed in comparison to many other competition authorities, but a considerable portion of its staff work in small teams in regional offices in all 41 counties, where they contribute less effectively to the RCC's mission. The difficult general economic situation threatens to undercut financial incentives for RCC staff, increasing difficulties to retain the most talented officials and putting a premium on consistent and systematic efforts to maintain and develop the RCC's human capital.

This report was prepared to assist the Competition Committee in its peer review of Romania in February 2014. It is based on Romania's responses to the Secretariat's questionnaire, findings from the Secretariat's fact-finding missions, and additional research. The first sections of the report describe the policy foundations, substantive law and enforcement experience with respect to private and public restraints of competition, the treatment of competition issues in regulatory and legislative processes, institutional structure, and sectoral regulatory regimes. The concluding section summarises these findings.

Particularly relevant themes for this assessment were: (1) the current situation of competition policy and enforcement, (2) the magnitude and direction of change in competition policy over the last 5-10 years, and (3) a comparison of current standards and practice with OECD recommendations with particular relevance for competition law and policy. In this assessment, the Report describes the formal features of the Romanian competition regime, such as the competition policy and law enforcement instruments that have been put in place and their consistency with international standards, procedural rules, and the institutional arrangements and infrastructure. The Report also examines delivery, including the implementation of the procedural framework in the competition authority's day-to-day work, the impact of prioritisation policies on

case selection and outcomes, and evidence that the competition authority's efforts have resulted in better market outcomes and benefits to consumers. Both dimensions provide important insights that help to better understand the Romanian competition regime, its accomplishments as well as the continued challenges it faces.

## **1. Foundations**

### ***1.1 Economic and political context***

Romania is an EU member state located at the intersection of Central and South Eastern Europe. It shares borders with Bulgaria, Serbia, Hungary, the Ukraine and Moldova. It also borders on the Black Sea. Romania's population is approximately 21 million, which makes it the 7<sup>th</sup> largest EU member state. In 2012, the GDP of Romania was approximately EUR 267 billion based on Purchasing Power Standards (PPS). GDP per capita based on PPS was approximately EUR 12 600 and has reached approximately 50 % of the EU 27 average.<sup>1</sup>

The authoritarian Ceausescu regime had chartered a somehow independent course within the Soviet Block. It maintained stronger diplomatic and economic ties with Western countries than other Eastern European countries. The influence of international donor organisations already started to grow in the 1980s, largely as a result of a financial crisis. But the communist regime not only thoroughly suppressed any political freedoms, strict austerity measures especially during the last years of the regime's existence also thoroughly weakened the Romanian economy.

Recovery and transition to a functioning market economy after the fall of communism took longer than in several Central and Eastern European countries (CEEC). Economic reform, including the privatisation of the state sector, started later than in the other CEECs and progressed slowly and hesitatingly. The privatisation environment, relying in part on mass privatisation, was not favourable to FDI, and there was no effective strategy to attract foreign investment. FDI remained very low until approximately 2000, well below the FDI levels in other CEECs.

Slower post-communist developments also affected Romania's European aspirations. Romania signed an Association Agreement with the European Union already in 1992. But formal accession negotiations did not begin until the early 2000s as the slower pace of political and economic changes made

Romania much less prepared than some other CEECs to join the EU. Romania finally became an EU member in 2007.

Romania underwent a period of economic reform, rapid economic growth, and increased FDI between 2000 and 2008, earning the country the designation of the "Tiger of Eastern Europe." Annual growth peaked at approximately 8 % and Romania was able to narrow the economic gap with European peer Member states. But the economic boom was not based on a sustainable model as it relied on "cheap money" to finance consumer spending, and as wage increases outpaced productivity gains. Economic growth was not accompanied by necessary structural and fiscal reforms. The economy was heavily affected by the financial crisis. In 2009, Romania was forced to seek international financial support and signed on to a \$26 billion emergency assistance package from the IMF, the EU, and other international lenders. Worsening international financial markets, as well as a series of drastic austerity measures implemented to meet Romania's obligations under the bail-out agreement contributed to a GDP contraction for the following two years. In March 2011, Romania and the IMF/EU/World Bank signed a 24-month precautionary stand-by agreement, worth \$6.6 billion. The conditions that came with the agreements focused on promoting fiscal discipline, encouraging progress on structural reforms, and strengthening financial sector stability.

Today, the economy has returned to a more moderate annual growth of 1 to 2 % that is expected to stabilise at around 2 % in the near future.

Government involvement in the economy overall is not particularly high. Government spending is equivalent to 35.5 % of total domestic output. State aid as a percentage of GDP has been reduced consistently during the past ten years. In 2011, non-crisis state aid amounted to approximately 0.4 % of the total GDP, considerably lower than the EU average.<sup>2</sup>

But state ownership continues to raise questions as it threatens to hold back increases in competitiveness. A recent World Bank study observed that state owned companies remain active in 14 of 20 key economic sectors, and suggested that state ownership and weak regulatory oversight could create particular problems for the competitive performance of certain sectors.<sup>3</sup> However, the story here appears to be more nuanced. In some sectors SOEs remain active but their shares are quite low. For example, state owned firms continue to operate in the banking and telecommunications sectors, but their shares are low and competition in these sectors appears to be robust. Greater concerns about state ownership and lack of competitiveness appear to be

justified in certain sectors, such as the energy sector, where much of the energy production remains under state control and the prospect for a larger role of the private sector remain uncertain, the transport sector, and the postal sector.

Overall, the low competitiveness of the Romanian economy remains a concern. In the most recent Global Competitiveness Report, Romania is ranked 76, behind most other CEECs as well as other EU member states.

The economic and political developments have affected competition law and policy. In recent years, international donors identified renewed efforts to strengthen competition and the regulatory environment as a key pillar in improving Romania's competitiveness and economic performance. They have insisted on pro-competition reforms and provided support for a thorough review of the institutional environment. The Romanian Competition Council (RCC) has also been recently subject to a critical examination by the World Bank.<sup>4</sup> The World Bank report identified several strategic initiatives to strengthen the performance of the RCC, which has led to several ongoing reform projects. While these developments have strengthened the position of the RCC, austerity measures forced the government to reduce salaries in the public sector which has significantly affected RCC salary levels.

Corruption is a major concern for the Romanian Government and international organisations, affecting both the administration and the judiciary. The country has one of the lowest scores among EU member states on the Transparency International Corruption Perceptions Index.<sup>5</sup> Since joining the European Union, the country remains subject to a Co-operation and Verification system focusing on the fight against corruption and on judicial reform.<sup>6</sup> Reforms have been instituted to combat corruption more effectively, including the creation of the National Anticorruption Directorate, an agency that is tasked with investigating and prosecuting corruption-related offenses. Several other respected authorities have become involved in the efforts to combat corruption and fraud, including the RCC with respect to procurement cartels.

Romania traditionally had strong ties to the French governmental and administrative system. The Constitution is based on the Constitution of the French 5<sup>th</sup> Republic and the judicial system is influenced by the French model. The initial institutional design of the competition regime with two competition authorities, which was in place until 2004, also followed the then existing French model. But it appears today that the influence of the French administrative system is weakening, as stronger ties with the EU institutions and international donor organisations gain increasing influence.

*Development of basic competition law*

After the fall of the communist regime, Romania adopted its first competition law in 1996. The law covered institutional aspects and the enforcement process, as well as substantive antitrust and merger law. From the outset, the substantive competition law broadly followed the European model. The enforcement system likewise was based on administrative enforcement. Individual criminal penalties were possible in restrictive agreement cases as well as abuse of dominance cases, but were never relevant in practice. Merger review was already part of the initial competition law. There were no significant exclusions for any sectors of the economy.

The law has been substantially amended since 1996. Several changes were influenced by efforts to align Romanian competition law with European competition law and other international standards. Major recent changes to the institutional system and substantive norms occurred in 2003/04 and in 2010. In 2004, the Competition Council was merged with the Competition Office, which had been part of Ministry of Finance, creating the RCC as a single, independent competition authority.

Some of the 2010 amendments were directly related to the need to achieve greater convergence with EU competition law. For example, the notification system for restrictive agreements was abandoned and replaced by the EU's self-assessment model. The 2010 amendments also incorporated the EU's block exemptions into Romanian competition law. The possibility of settlements was introduced whereby defendants that accept the charges of the RCC can be granted substantial discounts in fines. The scope of criminal enforcement became better focused as well: criminal sanctions were limited to fraudulent restrictive agreements and no longer apply to abuse of dominance cases; procurement cartels were removed from the scope of the Competition Law's criminal enforcement provision and are subject to a special set of criminal sanctions in the Criminal Code applicable to procurement fraud.<sup>7</sup> Thus, criminal sanctions under the Competition Law today are essentially limited to hard core cartels outside the procurement context.

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More changes will become effective in 2014. They will expand the requirements to seek judicial authorisation for dawn raids. Changes in the Criminal Code should lead to a more effective co-ordination mechanism between criminal enforcement and the RCC's leniency programme, thus hopefully increasing the incentives to apply for leniency. New criminal sanctions for procurement cartels will also become effective. There are no further major changes planned for the time being.

### ***1.2 Policy goals: purpose and approach***

Free markets and competition are protected by the Romanian Constitution. According to Article 135, the State must protect fair competition and an environment in which factors of production can be utilised.

Article 1 of the Competition Law refers to the protection of consumers as the principal goal of competition enforcement. It implies that protecting competition and a normal competitive environment should ultimately serve consumers' interests. In the RCC's view, consumer interests are a proxy for a consumer welfare standard in competition enforcement. It has explained that efficiencies and preserving a competitive industry structure are considered particularly important in cases in which it is difficult to directly assess the effects on consumer welfare.

Article 4(1) of the Competition Law confirms, consistent with this policy goal, that prices should be set freely in accordance with demand and supply conditions. But Article 4(3) authorises the Government to intervene in markets and impose price controls in order to combat "excessive" prices in crisis situations, when a major imbalance between demand and supply exists, or where a market is obviously dysfunctional. Such measures may be imposed for up to six months and can be successively renewed by three months. They must always be endorsed by the Competition Council.<sup>8</sup> The provision in Article 4(3), which has been unchanged since the first adoption of the Competition Act in 1996, could be seen as a limitation of the commitment to free and competitive markets, as it potentially enables the Government to pursue more populist "consumer protection" goals under the Competition Act. It may also have been the price that had to be paid to make an independent competition law enforcement that pursues its own goals politically acceptable. Whatever its rationale, the only occasion when the provision was applied dates back to 1997, when the Government imposed a two-month price cap on sunflower oil. It has not had any impact since then.

Case enforcement has not always been rigorously grounded in consumer welfare concerns. In some cases, the RCC condemned conduct that had no obvious harmful effects on consumer welfare, and might in fact have had positive effects. For example, the RCC has in the past condemned export bans that pharmaceutical companies imposed on their local distributors. Intervention by the RCC in this case might have undermined the interests of domestic consumers as it may have resulted in a reduction of domestic supplies.

The protection of SMEs or similar structural concerns does not play any major role on competition policy or law enforcement. Article 8 CL includes a *de minimis* rule for certain agreements where the parties have low market shares. These rules in Article 8 substantially follow the European Commission's *de minimis* Notice.<sup>9</sup> They could be seen as an illustration of the policy of protecting smaller firms, but only assuming that low market shares are a good proxy for small firm size. The more plausible explanation for the *de minimis* rule is that it represents a formal expression of an effects based approach to agreements. Similarly, the prohibition in Article 8(1)(f) of the Competition Act against abuses of economic dependence could be seen as a provision that primarily helps smaller firms against "exploitation" by larger firms. But its practical effects appear to be limited.

The RCC recognises that competition enforcement should ultimately improve economic performance. Early activities of the RCC have been directly linked to the transition to a market economy. During the transition period, the RCC sought to ensure that newly formed private entities did not foreclose markets and exploit consumers. More recently, the RCC's focus has shifted to examining essential sectors that can improve Romania's competitiveness, thus linking competition law and policy with the goal of improving competitive performance.

### **1.3 Exclusions and exemptions**

There are no sectors of the Romanian economy that are excluded or exempted from the application of competition law. The Competition Law used to provide for exemptions of labour markets and labour relations, as well as monetary markets and securities markets to the extent that they were subject to a special regulatory regime. But these exemptions have been removed. Given the significance of EU competition law concepts in Romanian competition law, it is conceivable that certain trade union agreements which pursue the improvement of employment or working conditions would continue to be exempted from Romanian competition law in line with the judicially recognised

exemptions in European law.<sup>10</sup> But the existence of such an exemption has not been tested in Romania.

Existing sector regulation complements competition law and may be relevant in competition law assessment, but does not replace it. As in any other EU member state, sectoral exemptions from national competition law would in any event have a very limited significance, given that EU competition law would continue to apply to conduct and agreements in those sectors, provided they have an effect on trade between member states.

## **2. Substantive issues: Content of the competition law**

The Competition Law's provisions on restrictive agreements, single firm conduct, and merger control largely follow the norms in EU competition law and implementing regulations, with a few exceptions. As Romania is an EU member, Articles 101 and 102 of the TFEU are applicable as well in proceedings before the competition authority and the courts. The Competition Law also regulates in Article 9 under what circumstances the RCC can intervene against acts by public institutions that limit, prevent, or distort competition. And it gives the RCC authority to issue opinions on how public acts, including proposed statutes, affect competition. Other sections of the Competition Law deal with institutional issues and sanctions.

Article 60 CL provides for the possibility of individual criminal sanctions in particular in hard core cartel cases. Special provisions on criminal sanctions in the Criminal Code will apply instead of Article 60 in bid rigging cases when the new Criminal Code becomes effective in 2014. Criminal cases must be brought by the public prosecutor, in certain cases by specialised units within the prosecutor's office. The investigative and enforcement procedures in these cases are regulated in the Criminal Code and the Code of Criminal Procedure. Effective 1 February 2014, the Criminal Code also includes a provision that will make it possible to extend the benefits of a successful leniency (immunity) application before the RCC to criminal immunity.<sup>11</sup>

### **2.1 General rules about restrictive agreements**

#### **2.1.1 Substantive principles**

The provisions in the Competition Act are modelled after Article 101 of the TFEU. Like Article 101 TFEU, Article 5(1) prohibits firms from entering into agreements that restrict competition and provides a non-exhaustive list of

restrictions that may be considered unlawful under the Act. The list deviates from Article 101(1) in two respects: Article 5(1)(f) explicitly mentions bid rigging as prohibited practice; and Article 5(1)(g) prohibits practices that eliminate other competitors from the market or limits their freedom of exercising competition as well as group boycotts. The latter provision potentially could be of far-reaching scope. Taken literally, it would cover procompetitive, efficient agreements that make it more difficult for rivals to compete. The provision does not appear to have influenced the RCC's enforcement practice. But its application should be carefully monitored if and when private litigation expands, as there could be a greater potential of abusing the provision in favour of less efficient rivals.

Article 5(2) identifies the conditions under which an agreement that falls under Article 5(1) will nevertheless be lawful. The provision is identical to Article 101(3) TFEU, thus putting efficiency concerns in the centre of analysis of agreements found to potentially restrict competition. There are no alternative criteria for exempting restrictive agreements, and no other, non-competition policies against which the harmful effects of an agreement can be balanced. Article 5(3) makes the European Commission's block exemption regulations applicable to agreements that are subject to the Competition Law, including those that do not affect trade between member states. The parties have the burden of proof that their agreement meets the exemption criteria in Article 5(2) or qualify for an exemption under a relevant block exemption.

Article 49 declares that agreements that infringe Article 5 or the abuse of dominance provision in Article 6 (or their EU law equivalents) are null and void, and therefore unenforceable.

Article 8 introduces the provisions of the European Commission's *de minimis* Notice in the Competition Act, thus exempting certain agreements from the application of Article 5(1) where the parties have very low market shares. Like in the *de minimis* Notice, the market share thresholds are 10 % for horizontal agreements and 15 % for vertical agreements. The Article 8 *de minimis* exception does not apply to agreements that include restrictions that are considered "hard core," such as price fixing, the sharing of customers, and a range of vertical intra-brand restraints such as RPM.

As a result of the direct copying of European norms into Romanian competition law, the Competition Law treats harshly also certain territorial restraints in vertical agreements. They are ineligible for an exemption under the *de minimis* rule in Article 8 as well as under block exemptions under

Article 5(3). There is a market integration explanation for this approach at a European level. It remains unclear what policy goals the same rules should pursue in Romanian competition law where integration of the domestic Romanian market is not a particular policy goal that overrides possible efficiency justifications of territorial restraints. The only plausible justification for the rules in Romanian Competition law is that the use of provisions that are identical with those in EU law will avoid difficult jurisdictional questions. If agreements were subject to different analytical rules depending on whether they affect trade between EU member states and therefore are subject to EU competition law, jurisdictional disputes likely would arise that could distract from the substantive assessment.

### *2.1.2 Application process*

When the competition law was adopted in 1996, parties had to notify their agreement to obtain an exemption from the RCC under Article 5(2). A formal exemption decision was required to ensure that the agreements were enforceable. The system was abolished in 2010 and was replaced by the EU's self-assessment model. It generated almost no benefits, and only imposed costs on notifying parties and the RCC. Especially during earlier years, the process generated a substantial number of notifications, in particular requests for confirmation that agreements benefitted from block exemptions. For example, in 2001 the RCC dealt with 163 notifications related to block exemptions, which represented 45 % of all antitrust and merger decisions adopted in that year. Notifications related to a formal request for an individual exemption were always rare. Especially during the last years of its existence, the notification system resulted in a small number of notified agreements every year, suggesting that the market place had already adjusted to the self-assessment approach that had been in place in EU competition law since 2004, while accepting the risks that this approach entailed under the notification/exemption system still in place in Romania.

## 2.2 *Horizontal agreements*

### 2.2.1 *Principles*

The largest share of enforcement decisions under Article 5 CL involving horizontal agreements concerns hard core cartels and similar agreements affecting price competition. Other, potentially procompetitive horizontal agreements have been investigated much less frequently.

### 2.2.2 *Hardcore cartels and bid rigging*

Cartel enforcement occurs within the general framework developed by the European and international enforcement communities, including the OECD Recommendations on Hardcore Cartels and on Fighting Bid Rigging in Public Procurement:<sup>12</sup> The legal rules and enforcement practice establish unequivocally that hard core cartels infringe the Competition Law, and specifically mention bid rigging as a practice incompatible with Article 5; the RCC has broad investigative powers, including dawn raids, and its leniency programme is based on the ECN's model leniency programme; violations can lead to administrative fines of up to 10 % of the revenues during the preceding fiscal year as well as individual criminal sanctions; and the RCC is reaching out to the business community as well as procurement authorities to promote greater awareness of the law.

Fighting cartels and bid rigging has become a priority of the RCC. There have been occasional earlier decisions against cartels. For example, in 2003 the RCC imposed substantial fines on car insurance companies for fixing rates for international car insurance rates;<sup>13</sup> in 2004 it detected a cartel among issuers of meal vouchers;<sup>14</sup> and in 2005 a fine was imposed on a local cartel among real estate agents for fixing commission rates.<sup>15</sup>

But in recent years the fight against cartels has become more focused, following a decision by the RCC in 2008 to prioritise cartel enforcement. Since then, there have been a number of decisions against cartels, both concerning nation-wide and local cartels, and the number of pending investigations has increased. Two cartel decisions in 2009 concerned a driving school cartel in Bucharest, and the "bread cartel" in two Romanian counties. Taxi companies were found to have formed local cartels in two decisions in 2010 and 2011. The highest fines in a cartel case to date were imposed in 2011 after the RCC determined that the six major gasoline suppliers had colluded in 2008 and agreed to cease the supply of a particular type of gasoline.

### **Cartel in the gasoline market: Co-ordinated withdrawal of Eco Premium gasoline**

After observing that each the major gasoline suppliers in Romania, OMV Petrom, OMV Petrom Marketing, Lukoil, Rompetrol, MOL, and ENI had withdrawn Eco Premium gasoline from its product offering in the course of 2008, the RCC opened an *ex officio* investigation.

Eco Premium gasoline met a specific demand as it was used as a replacement for leaded gasoline, which had been prohibited since 2005. It was used in particular by passenger cars that were not equipped with a catalytic converter. In 2005, all suppliers had introduced Eco Premium gasoline, promoting it among consumers as a replacement for the previously leaded gasoline. The share of Eco Premium gasoline sales reached between 18%-28% of the total gasoline sales by 2007-08.

The RCC uncovered that the parties had discussed the Eco Premium gasoline market with a view toward jointly eliminating the product from the market. During the discussions on this topic, the parties drafted a preliminary agreement to stop selling Eco Premium. The text of the draft agreement provided even for certain coercive measures (penalties, fines) sanctioning potential deviations of non-complying suppliers. Although the RCC did not find evidence of a written final agreement, the parties implemented their common plan and, starting in April 1, 2008, gradually eliminated Eco Premium gasoline from the product range they offered to customers.

The RCC concluded that there was sufficient evidence that the parties had jointly decided to stop selling Eco Premium gasoline. In addition to the documentary and conduct evidence, it found that each supplier individually would not have eliminated Eco Premium from its product offering since there would have been the risk that other suppliers would have continued supplying Eco Premium. Their agreement eliminated such risks and made a joint withdrawal of the product possible.

The RCC rejected the argument of the parties that they were under a legal obligation to eliminate Eco Premium. In fact, there was an obligation to reduce the sulphur content of all gasoline sold in Romania as of January 2009. But the obligation equally affected all types of fuel and could not explain why the parties had agreed to eliminate one type of fuel.

The RCC imposed a total fine of RON 892 million (approximately EUR 200 million) on the six firms.

Prioritisation of anticartel enforcement also has an institutional component. The RCC followed the advice of the World Bank and established a separate Cartel Unit which is responsible for the investigation of all hard core cartels, as well a separate Directorate for procurement cartels and other bid rigging offenses. The two groups have a combined staff of 18 officials.

Information exchanges among competitors can in principle also lead to the finding of an unlawful cartel agreement, although when the information is not exchanged directly among competitors there must be sufficient evidence to support the conclusion that parallel conduct cannot be explained by rational independent decision making. In 2005, the RCC adopted an infringement decision in an information exchange case concerning the cement industry, but ultimately lost the case in the Supreme Court. The RCC had attempted to establish that the communication of price increases, individual cost, productivity rates, and profit data for each major player through trade journals, combined with evidence of regular meetings, constituted sufficient support for the finding of an unlawful price fixing agreement.<sup>16</sup> Upon appeal by one participant, the Supreme Court disagreed. It found that under the demanding standards in *Wood Pulp*,<sup>17</sup> the RCC failed to produce evidence of conduct by the defendants that could be explained only by the existence of unlawful collusion.

In a more recent case concerning motor vehicle and repair services the RCC found that the exchange of systematic information on future prices and marketing strategies, evidence of regular meetings, and a note indicating adherence to a joint pricing strategy were sufficient evidence for the finding of a cartel agreement.<sup>18</sup>

### 2.2.3 *Investigations and sanctions*

The RCC prosecutes hard core cartels as administrative violations. It has broad investigatory powers, including the right to conduct dawn raids on business premises and private homes. Dawn raids are a frequently used investigatory tool. Their use is not limited to hardcore cartel cases. In recent years, the RCC regularly inspected more than 100 premises per year. Under the current law, dawn raids on business premises can be authorised by the RCC President. Judicial authorisation is required only for dawn raids at private properties. A new law, effective February 2014, will require judicial authorisation for all dawn raids, thus requiring the RCC to submit sufficient evidence to a court to justify the issuance of a search warrant. A greater court involvement should

increase the credibility of the enforcement system. Whether this will limit the effectiveness of the RCC's inspection powers remains to be seen.

The RCC also has the right to inspect and seize documents and electronic evidence, and request statements from representatives and employees regarding documents found during an inspection. The RCC, however, cannot compel oral testimony. For interviews with individuals the RCC must rely on voluntary co-operation.

The RCC adopted its first leniency programme in 2004. The programme was modified in 2009 when the RCC adopted new *Guidelines on the Conditions and Application Criteria of a Leniency policy*.<sup>19</sup> The 2009 Guidelines reflect changes in the European Commission's leniency programme in 2006 and are fully harmonised with the European Competition Network (ECN) Model Leniency programme. The most important changes in 2009 concerned the introduction of a marker system for immunity applications, and adaptations to allow for summary immunity applications in cases that may fall under the jurisdiction of several NCAs or/and the European Commission.<sup>20</sup>

The leniency programme, however, has not yet been a great success to date. Informal complaints and tip-offs by other government agencies have been the main sources of information that triggered cartel investigations. Although the RCC has brought several cartel cases, the perception that there is a significant risk of getting caught and of receiving substantial fines for participating in a hard core cartel might not yet be widespread enough to trigger leniency applications. The RCC expects that as more substantial fines are imposed and upheld by the courts, leniency applications will increase. But this has not yet happened.

According to Article 51, cartel violations are considered serious violations and fines can reach 10 % of the total worldwide revenues of the previous year. The RCC has adopted fining guidelines for substantial infringements, which closely follow the methodology in the European Commission's Fining Guidelines.<sup>21</sup> There have been vast differences in the levels of fines imposed in more recent cartel decisions. Total fines for cartels have ranged from a few thousand euros in connection with a local taxi cartel to approximately EUR 200 million in a cartel involving multinational firms in the gasoline market. With the exception of the cartel involving gasoline multinationals, fines have been rather modest in comparison with developments in other EU member states. Fines represent typically 4 % to 6 % of the defendant firm's relevant annual revenues. Thus, low fines reflect to a great extent the small size of firms

caught in cartels. But it is also clear that the RCC is not using the full fining powers under the statute.

During the last five years, the number of cartel decisions and fine levels has developed in the following way:

**Table 1. Fines in hardcore cartel cases 2008-2012**

Year	Number of cases with fines	Amount (RON)	Approximate amount EUR (at 2013 exchange rates)
2008	2	5 691 219.00	1.3 million
2009	2	7 823 450.00	1.8 million
2010	6	15 237 743.50	3.4 million
2011	3	892 714 625.00	200.5 million
2012	3	29 068 659.20	6.5 million

Since 2010, Article 52(2) CL allows for a type of “settlement” procedure: an admission of guilt by a defendant, after receiving the investigatory report, can be considered as a mitigating factor and the fines can be reduced by 10 to 30 %. The “settlement” procedure has been applied in a handful of cases since 2010. Two of these concerned cartels, the rest concerned vertical agreements and a violation of the merger review notification procedures. It appears that the prospect of obtaining a reduced fine when litigating an RCC decision is still more attractive for many defendants than settling a case. The 30% upper bound is comparatively high. Having greater flexibility in negotiating settlements may be useful, but if settlements become more popular, the RCC will have to be careful that generous settlement discounts do not undermine incentives to apply for leniency. The RCC’s fining guidelines seek to address this concern by limiting the maximum fines discount to 20% if a cartel participant could have applied for leniency but failed to do so and where a settling party has been involved in a cartel and another cartel participant has been granted immunity from fines.<sup>22</sup>

#### 2.2.4 *Bid rigging*

Bid rigging has for a number of years been the subject of particular attention in the Romanian competition regime, in line with a broader trend in Romania to focus on fraud and organised crime in connection with public tenders and the use of public resources.<sup>23</sup> The law specifically mentions bid rigging as a violation of Article 5 of the Competition Law. In addition to

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administrative fines, criminal fines can be imposed on individuals. As of 2014, when the new Criminal Code becomes effective, sanctions can include imprisonment from one to five years.

Since 2010, the RCC has a Directorate dedicated to bid rigging which is separate from the Cartel Unit. Its main tasks are the investigation of alleged procurement cartels, co-operation with other government institutions investigating unlawful procurement activities, and the raising of awareness among procurement authorities on the risks of bid rigging and measures to reduce those risks. Since its creation, the Directorate has investigated twelve suspected procurement cartels.

The OECD Guidelines for fighting bid rigging in public procurement<sup>24</sup> are regularly used in presentations for procurement authorities, to inform about signs of cartel activity during the procurement process and to educate authorities about measures to make the formation of bid rigging cartels less likely. The Directorate's outreach activities and co-operation with other parts of the government involved in monitoring procurement activities have resulted in several tip-offs concerning potential procurement cartels: one of these cases ended with an infringement decision,<sup>25</sup> one case is pending, and two cases were closed due to a lack of evidence.

The RCC successfully advocated for the introduction of a Certificate of Independent Bid Determination (CIBD) as mandatory condition for participating in public procurement. The CIBD became mandatory in 2010, following a decision by the National Authority for Regulating and Monitoring Public Procurement (ANRMAP). Draft legislation is currently under review that would provide for the possibility to disqualify firms that have been found guilty for participating in a procurement cartel from future public procurements. Its enactment will depend, among other things, on addressing concerns about the constitutionality of such a sanction.

The RCC has an interesting additional instrument in its tool box to fight anticompetitive procurement procedures. Article 9 of the Competition Act gives the RCC the right to issue decisions against acts of public authorities that limit, prevent or distort competition. The RCC has used its Article 9 authority to find competition law violations where public institutions failed to organise procurement procedures where legally required or organised procedures under unreasonably restrictive conditions that excluded potential bidders.<sup>26</sup>

### 2.2.5 *Criminal liability*

Individuals involved in cartel conduct are subject to criminal sanctions as well, including jail time of up to three years. When changes to the Criminal Code become effective in 2014, criminal liability will be limited to directors and company management, but the maximum jail time will be extended to five years. The provision on criminal sanctions in Article 60 is not formally limited to cartels. Although abuse of dominance cases have been eliminated from its scope, it still applies to restrictive agreements in general. But the emphasis on infringements with a fraudulent intention and the premeditated organisation of an Article 5 violation strongly suggests that the provision's principal areas of application are hard core cartels. In fact, other types of restrictive agreements have never been prosecuted as criminal offenses.

Different organisations within the public prosecutor's office are responsible for criminal prosecution in cases in which the RCC enforces the Competition Law administratively. Bid rigging will frequently involve the type of organised criminal activities that will be prosecuted by the Directorate for Investigating Organized Crime and Terrorism (DIICOT), an independent office within the general Prosecutor's Office attached to the High Court of Cassation and Justice. The Anticorruption Directorate of the Prosecutor's Office could be involved in procurement cases outside the DIICOT's remit. The Ministry of Finance has established a separate Antifraud Directorate which is headed by a prosecutor. It was expected to become operational in late 2013. The prosecution of "normal" hard core cartels under Article 60 is the responsibility of other parts of the Prosecutor's Office.

It has been difficult for the RCC to systematically establish good co-operation with all relevant parts of the Prosecutor's Office, and there appears to be a tendency to work with those parts that are considered most effective and are most open to co-operation. Co-operation between the RCC and DIICOT, which is considered one of the most dynamic and effective units of the Prosecutor's Office, has been particularly good. For example, information about possible collusion provided by DIICOT led to the investigation of a bid rigging cartel related to natural gas fittings and services related to the exploration of natural gas. Within a year after receiving DIICOT's information, the RCC was able to conclude its investigation and imposed fines from EUR 500 000 to EUR 2.5 million on a total of four companies in two decisions.<sup>27</sup> The two institutions currently co-operate in parallel investigations of conduct in the grain and cereal markets that might include both cartel activity and economic fraud.

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Since 2011, the RCC and the Public Prosecutor's Office also have a co-operation agreement to facilitate the exchange of information and co-ordinate actions where criminal and administrative investigations proceed in parallel.<sup>28</sup> But clearly, to date actual co-operation is most developed with DIICOT, perhaps because it has the reputation of being most effective and as it seems to actively seek co-operation with the RCC. Actual co-operation with other prosecutors is much less developed. This may have limited opportunities for the RCC to obtain more information about potential cartel activity, but also its ability to encourage prosecutions under Article 60 of the Competition Law.

An additional reason for co-ordinating more effectively parallel administrative and criminal proceedings is the effectiveness of the RCC's leniency programme. Currently, potential individual liability in criminal proceedings and a lack of co-ordination with grants of immunity in administrative proceedings may contribute to the lack of leniency applications. Some members of the private bar did in fact suggest that such concerns might have prevented leniency applications. Under the current law, a successful immunity application does not come with any assurance that individuals associated with the corporate leniency applicant will also receive immunity from criminal prosecution.

Reforms of the Criminal Law should result in better co-ordination between administrative and criminal enforcement. When the new criminal law becomes effective in February 2014, a successful immunity application under the leniency programme may also result in immunity from criminal sanctions. However, individual criminal immunity apparently will not automatically follow from the granting of corporate immunity in the administrative process. The uncertainty that a leniency application could expose individuals to criminal prosecution might continue to undermine incentives to file for leniency.

The RCC is currently working with DIICOT to develop a protocol for the application of the new provision in the criminal law. Experience in other countries suggests that incentives to file leniency applications will be maximised if the protocol results in a guarantee of immunity from criminal prosecution. The greater DIICOT's discretion, the greater the uncertainty for leniency applicants. Moreover, DIICOT is responsible for only some forms of cartels. Since other cartels are subject to prosecution by other prosecutors, efforts to ensure a better co-ordination between leniency application and criminal immunity should be extended to other parts of the Prosecutor's Office.

Administrative proceedings against corporations and criminal investigations against individuals can proceed in parallel. There are no legal barriers against exchanging information between the RCC and the prosecutor. However, evidence obtained by a prosecutor through criminal enforcement powers that go beyond the RCC's investigatory powers cannot be used as evidence in RCC decisions.

Although much of the framework for prosecutions appears to be in place, no criminal conviction has been obtained in a cartel case to date. There are reports that at least one criminal case against individuals in connection with a procurement cartel is pending.

#### *2.2.6 Reaching out to the business community*

Increasing awareness in the business community of the prohibition against cartels and the sanctions cartel participants can incur remains a priority for the RCC. Publications, press articles, and speeches at conferences have been used to publicise the RCC's efforts to detect cartels. All decisions are published. Leniency and compliance programmes have also been topics of speeches at business conferences. In parallel, the RCC has been seeking to raise awareness of the risk of procurement cartels among public institutions, by holding speeches and working closely with them. A Guide regarding bid rigging activities relies directly on the OECD Recommendation on Fighting Bid Rigging in Public Procurement and the accompanying guidelines when describing signs of possible bid rigging and measures that can prevent bid rigging.

Members of the private bar and representatives of trade associations confirm that the RCC is making some progress in raising awareness especially among larger companies, frequently those that are subsidiaries of international parents. To what extent the RCC has succeeded in raising awareness of cartel enforcement among the broader business community, however, remains unclear and difficult to test.

#### *2.2.7 Conclusions*

The essential elements of a successful anti-cartel programme and a programme to fight bid rigging are in place. Resources dedicated to the fight against cartel, the enforcement process, and the framework for sanctions appear adequate. The RCC views both areas as a priority, and has dedicated resources to them.

But there has not yet been a major breakthrough in the RCC's anti-cartel programme. Leniency applications are rare; the number of new cases opened each year is not overwhelming. There has not yet been a criminal conviction and administrative fines remain rather low in most cases.

Changing the status quo remains challenging. As long as the likelihood of getting caught and the threat of credible sanctions remain low, incentives to use the leniency programme will be limited. Much will depend on maintaining the current focus and consistent effort. Continuing the current close co-operation with procurement authorities, and persuading them of the benefits of a competitive bidding process should further raise the ability to detect signs of bid rigging. Consistent efforts to raise fine levels, clearly explaining the level of fines in decisions, and rigorously defending them before courts should eventually make courts more willing to uphold the fine portions of decisions. The RCC's market monitoring and evaluation efforts might generate some leads, although realistically the chances of detecting a major, sophisticated and clandestine cartel in this way appear quite limited. A single criminal conviction, combined with a transparent rule that co-ordinates leniency and criminal immunity programmes, could be a game changer. Closer and more systematic co-operation with prosecutors could help to generate criminal cases.

#### 2.2.8 *Other horizontal agreements*

The RCC has also brought a number of cases against trade associations and professional associations that were found to have engaged in anticompetitive agreements, even though not in the form of clandestine cartels. An earlier case involved tariff lists published by the association of dental technicians. More recently, the RCC concluded cases against the professional association of accountants for setting fees in the profession,<sup>29</sup> providers of car repair services,<sup>30</sup> and against the national union of bailiffs for agreeing on a common schedule for execution expenses and for a scheme to restrict access to the profession.<sup>31</sup>

To date the RCC has had limited experience with horizontal agreements that require a fuller examination of possible restrictive effects under Article 5(1) and potential benefits under Article 5(2), as well as a careful balancing between potential restrictive effects and plausible efficiencies. There is therefore no established practice on the standards under which efficiencies will be evaluated. The RCC is currently reviewing a network sharing agreement between the largest telecommunication providers, but has not yet decided whether there are competition grounds to intervene.

The switch to a self-assessment system and the statutory *de minimis* rule in Article 8, which exempts horizontal agreements that do not include price fixing or other hard core restraints from Article 5 if the parties' market share does not exceed 10 %, make it less likely that many horizontal agreements outside the area of hard core cartels and trade associations will reach the RCC.

### 2.3 *Vertical agreements*

The RCC applies the same approach to vertical agreements as its peers in Europe. On the one hand, the focus on consumer welfare standards and the system of block exemptions that are applicable also in Romania remove many vertical agreements from the prohibition against anticompetitive agreements. In addition, Article 8 exempts vertical agreements that do not include hard core restraints from Article 5 if neither party's market share exceeds 15 %. The approach behind these two instruments and the market share screen they employ is consistent with a consumer welfare/market power based analysis. All this suggests that most vertical agreements are unlikely to create any competitive harm in the absence of market power.

On the other hand, the RCC has regularly and consistently pursued certain vertical restraints, mostly intrabrand restraints, that it considers hard core restrictions. Fines in these decisions can exceed the fines imposed in hardcore cartel cases. In 2008 and 2011, the total fines imposed in cases involving vertical restraints amounted to approximately RON 83 million and RON 79 million (approximately EUR 20 million at current exchange rates).

Several RCC cases have involved resale price maintenance. In an earlier case, Wrigley was accused of fixing retail prices of sweets and chewing gum. A fine of RON 20 million (approximately EUR 5 million at current exchange rates) was imposed.<sup>32</sup> More recent examples include RPM for fresh fruit sold in certain grocery chains that resulted in total fines of approximately EUR 6 million,<sup>33</sup> and a partial settlement after RPM had been detected in the clothing distribution market that resulted in total fines of approximately RON 1.26 million (approximately EUR 300 000).<sup>34</sup>

Particularly remarkable are parallel cases brought against the suppliers of pharmaceutical products imposing export bans on wholesalers in Romania. In 2011, the RCC found that the export bans were "hard core" restraints and imposed (limited) sanctions on the firms involved. These cases are interesting because the intervention by the RCC, although well in line with EU competition law principles, can hardly be explained on consumer welfare grounds. To some

extent, restrictions on exports may have benefitted Romanian consumers. This view appears to be shared today at least by some within the RCC. The cases involved the first application of the new “settlement” procedure and some defendants benefitted from a 20 % reduction in their fines after admitting the infringing conduct.<sup>35</sup> This suggests that the defendants accepted the RCC’s strict interpretation of the law and did not consider it worthwhile to raise questions about the merits of the case before courts.

Some within the RCC are critical not only of the parallel export case, but more generally consider that the enforcement emphasis on intra-brand restraints in vertical agreements is to some extent misguided for a competition authority that has a consumer welfare centred approach. More dedicated resources are allocated today to investigations of horizontal cases, clearly indicating a shift in prioritisation. The effects of this shift on the RCC’s willingness to bring cases involving vertical intra-brand restraints remain to be seen. There have been recent cases involving vertical price restraints that ended with commitment decisions; this might suggest that the RCC no longer considers this type of vertical restraint as so serious that fines are required.<sup>36</sup> And a more recent decision rejecting a complaint against export restraints suggests that the RCC might have become more reluctant to intervene against export restrictions for pharmaceutical products.<sup>37</sup>

Article 5 cases focusing on exclusionary effects of vertical restraints have been rare. One of the cases involving export bans for pharmaceutical products represents an example of such a case. The RCC found that a non-compete provision imposed by the producer on Romanian distributors could have anticompetitive effects. The summary of the decision does not make it entirely clear how rigorous the analysis of foreclosure effects was in this case, and whether the restriction in isolation would have led to an intervention by the RCC.

A fairly unique feature of the Romanian competition regime is the extension of the leniency programme to vertical restraints considered “very serious” infringements. Consistent with the case law and, more generally, the prevailing European approach, restrictions on the freedom of the purchaser to determine its sale price and/or of the territory or of the clients to which it may sell are categorised as “very serious” infringements. They are therefore covered by the leniency programme. So far the leniency programme has not generated any applications involving vertical restraints.

There are a number of conceptual reasons to question that policy: in particular, extending leniency programmes to vertical restraints mixes agreements that are unambiguously detrimental to consumer welfare with those that have much more ambiguous, case specific effects and will many times be at least competitively benign. This can undermine the clear message that the RCC considers hard core cartels a unique category of infringements that justify the use of special prosecutorial tools. In the end, this could undermine the willingness of firms to use the leniency programme in the case of hardcore cartels. Second, leniency programmes are designed to uncover clandestine conduct, and therefore not really suitable for explicit vertical restraints. The RCC appears to have some concerns of its own. The *Leniency Guidelines* provide that the RCC will evaluate the effectiveness of including this latter category of vertical agreements and concerted practices into its leniency policy.

## **2.4      *Dominance-monopolisation***

### **2.4.1    *Principles***

The single firm conduct provision in Article 6 of the Competition Law is based on the same principles as Article 102 TFEU. It prohibits the abuse of a dominant position held by one or more undertakings. Article 6 also provides a non-exhaustive list of potentially unlawful conduct. The RCC believes that all Article 6 enforcement should be based on an effects analysis, thus putting consumer welfare concerns and the analysis of efficiencies in the centre of abuse of dominance cases.

Article 6 has a few features that are different from Article 102. First, since 2010 Article 6(3) establishes a presumption of dominance where the individual share of one firm or the cumulative share of several firms exceeds 40 %. Article 6(3) is a curious provision in several respects. First, although it is certainly not unique in comparison with other jurisdictions, it was introduced at a time when there is growing acceptance that market shares (especially at the relatively low level of 40 %) are not necessarily a useful proxy for substantial market power. The Bucharest Court of Appeal has in at least one case also criticised the RCC for unduly relying on market shares when determining dominance, although the RCC's approach was ultimately confirmed on appeal.<sup>38</sup> Given its recent introduction, it is too early to tell whether Article 6(3) will have any particular effect on the RCC's enforcement practice. In particular, it is unclear whether it will in fact make it easier for the RCC to establish dominance without robust evidence that the firm under investigation has durable, substantial market power.

A second interesting feature is Article 6(3)'s introduction of a presumption of joint dominance at a 40 % market share level. According to the wording of Article 6(3), several undertakings are presumed to hold a dominant position if their combined market share exceeds 40 %. Taken literally, there would be a presumption of joint dominance in every relevant market. Even if all players have minor shares, there will always be a (potentially large) group of market participants with a combined share over 40 %. Obviously that cannot be the meaning of the new provision. Leaving aside the question whether joint dominance is a useful concept at all, there would probably be better ways to establish a statutory presumption of joint dominance, for example by requiring that the combined shares of two or three market participants exceed a certain threshold. Joint dominance has not played any significant role in Romanian competition law, and it is therefore too early to tell whether this aspect of the new provision on Article 6(3) will have any significant impact.

Article 6 also has two unique provisions in the illustrative list of abusive conduct. Article 6(f) prohibits the abuse of the state of dependency, including the termination of a contract only for the reasons that the dependent firm refuses to comply with unjustified commercial conditions. In contrast to some other jurisdictions, the prohibition applies only to firms that are found to have a dominant position. Economic dependency is therefore not an alternative to, or an extension of, the concept of dominance.

In the RCC's interpretation, "exploitation of dependency" can consist in particular of conduct mentioned elsewhere in Article 6, such as unfair prices, tying, or discrimination among customers. In this perspective, the provision appears to add little to the general prohibition against the abuse of a dominant position. This interpretation appears to be confirmed by the decision against *Posta Romana*. *Posta Romana* is commonly cited as a case relying on the economic dependency concept. In this case, however, Postal Service allegedly used discriminatory pricing policies to foreclose rivals for mail sorting services. Therefore the economic dependency analysis does not add anything to a "conventional" abuse of dominance analysis focusing on foreclosure effects.<sup>39</sup> In fact, the decision suggests that the RCC used the economic dependency concept to establish or support the finding that *Posta Romana* was a dominant firm, not to support the finding of unlawful conduct.

More generally, the concept of "unjustified commercial conditions" is poorly explained and could be used to import concepts into Article 6 cases that are inconsistent with consumer welfare and efficiency concerns. So long as the

RCC is essentially the only institution to bring Article 6 cases in Romania, that risk appears to be very small. But if private litigation becomes a more common alternative to public enforcement, the provision could provide unhappy competitors the possibility to challenge the conduct of dominant firms on grounds that are inconsistent with the policy goals of the Romanian competition regime.

Consistent with other European competition laws, Article 6 prohibits also exploitative abuses in the form of excessive prices and unfair contract terms. Article 6(e) specifically mentions the charging of “excessive” prices as a potentially unlawful conduct, in addition to the more general language prohibiting “unfair sales and purchase prices.” Article 6 targets an additional form of exploitation as it prohibits export sales below production cost while covering the difference through increased domestic prices. It does not appear that the prohibition against predatory export sales has been enforced in practice, and it is difficult to imagine how the RCC could bring a case based on the necessary evidentiary support.<sup>40</sup>

Concerns about excessive prices also played a central role in the RCC’s *Posta Romana* case, in addition to concerns about discriminatory discount practices. The excessive pricing portion of the case had several interesting features, as at the time only commercial (bulk) mail was subject to a universal service obligation and to price regulation. Direct private mail, which was the relevant activity in the investigation, was an unregulated activity. RCC’s concerns focused on allegedly excessive prices in the unregulated sector for private mail, but ultimately accepted *Posta Romana*’s argument that its cost structures in the two segments were essentially the same and that its prices for private mail were not higher (and sometimes could be lower) than the regulated prices for commercial mail. Thus, RCC accepted price regulation in one segment as a justifiable defence against excessive pricing claims in the other segment.

Article 6 has not generated a huge amount of cases. In particular, there have been few excessive prices/unfair terms cases. An example of a case focusing on the use of unfair terms by a dominant firm was the RCC’s decision against the cable-TV operator UPC, although it has more the flavour of a breach of contract case than a competition case proper. The RCC determined that contractual clauses in UPC’s standard contracts with cable-TV subscribers stipulated that prices would increase only if UPC’s costs increased. It found that certain tariff increases were not cost based, and that certain tariffs had increased while the costs decreased. The RCC considered this conduct a violation of Article 6 because it imposed unfair prices on consumers.<sup>41</sup>

Most cases brought by the RCC under Article 6 have focused on exclusionary strategies by dominant firms in regulated sectors. In a decision concerning the freight railway market, the RCC found that CFR Marfa, the state owned provider of freight railway services, was denying certain ancillary services, such as depot services, sheds, and fuel services to its privately owned competitors. The RCC found that CFR Marfa continued to hold a dominant position in these ancillary services markets, and that by charging its privately owned rivals substantially higher fees for certain ancillary services it had forced them to increase freight charges in contracts with their customers.<sup>42</sup>

A similar concern about a discriminatory practice that foreclosed rivals led to an infringement decision in the *Posta Romana* case. In this case, the RCC focused on the question whether Posta Romana used discount practices for pre-sorted mail to harm rivals to its own mail preparation services. Essentially it made discounts for pre-sorted mail available to its clients that were senders of mail and not (or to a much lesser extent) to intermediaries that sorted mail for the senders. The case raised interesting issues at the interface between regulation and competition law, as Posta Romana argued that its practices were consistent with the applicable regulatory framework. The RCC considered, but ultimately rejected the defence. It concluded that Posta Romana's pricing strategy was not mandatory under the applicable provisions and that Posta Romana's interpretation of the applicable regulation was inconsistent and seemed to pursue only the goal of legitimising its anticompetitive conduct. The case ended with a fine of approximately RON 103 million (approximately EUR 25 million at current exchange rates).

The only other major abuse of dominance case by the RCC focused on network access and refusal to deal issues. The case focused on the refusal of the local subsidiaries of Vodafone and Orange, which were both major providers of telecommunication services in Romania, to terminate on their networks calls from the network of Netmaster, a rival provider of telecommunication services. The RCC determined that each of the defendants held a dominant position with respect to terminating calls on its network. By refusing to terminate calls from the Netmaster network without objective justification, Vodafone and Orange had violated their duty to provide access to the facilities they controlled and undermined the ability of Netmaster to compete as provider of telecommunications services. In addition, for a certain period of time they were found to have terminated calls at rates exceeding the maximum rates set by regulation.

The RCC determined that the rates also had violated the defendants' obligation to charge non-discriminatory rates. As in the *Posta Romana* case, it closely worked with the sector regulator during the investigation. The case ended in 2010 with infringement decisions in which the RCC imposed fines of RON 147.9 million (EUR 34.8 million) and RON 120.3 million (EUR 28.3 million) on Orange and Vodafone, respectively. Both parties appealed separately, and in the case of Vodafone the appeals court upheld the RCC decision, whereas it overturned the RCC decision in the case of Orange. Both cases are currently pending before the Supreme Court.<sup>43</sup>

The RCC also regularly publishes decisions in cases where it has not found a violation of Article 6. This can be an important practice because it increases transparency and makes it easier for firms to distinguish conduct that potentially raises issues under Article 6 from conduct that likely is lawful.

In the few abuse of dominance cases decided to date, the RCC has used primarily – substantial - fines, in addition to orders to cease the incriminating conduct. It has not used particular, more specific conduct remedies or divestitures to prevent future infringements. Criminal fines, which until 2010 in theory could have been imposed for Article 6 violations were never imposed. Like in some other jurisdictions, fines in single firm conduct cases exceed the typical fine in cartel cases, which could raise concerns about prioritisation and proper focus on the most harmful conduct. But the high fines can be explained by the larger size of the firms that have been defendants in single firm conduct cases, compared to most defendants in cartel cases. In terms of percentage of revenues, fines in single firm conduct cases appear to be at the same level, or slightly below, the fines in cartel cases.

#### 2.4.2 *Conclusions*

The RCC has a relatively limited case record in abuse of dominance cases. But it is not obvious that changes would be required and would lead to improved market outcomes. Dominance cases are difficult to bring. And especially outside regulated sectors with dominant incumbents there might in the end not be so many cases where conduct by dominant firms is so clearly anticompetitive that it can be successfully challenged. Consistent with this interpretation, the World Bank Report observed for a period of up to 2010 that in single firm conduct cases the RCC was twice as likely as in other antitrust cases to close preliminary investigations without opening a formal investigation.<sup>44</sup> The RCC may have more effective tools to prevent dominant firms from engaging in anticompetitive conduct, including closely working with

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sector regulators and advocating clear regulatory frameworks and regulatory solutions that limit instances of vertically integrated dominant firms.

## **2.5 Mergers**

### *2.5.1 Substantive rules*

Merger review has not been a particularly contentious area of competition law enforcement in Romania. Merger review was already in place during the period of privatisation. But there were no particularly contentious or sensitive mergers where emerging new players attempted to consolidate their market position. An example of a merger in connection with privatisation that was reviewed by the RCC is OMV's acquisition of the previously state-owned oil company Petrom. OMV held a minority interest in a Petrom competitor, and the RCC authorised the merger subject to the divestiture of the minority interest.<sup>45</sup> In most sectors, the economy continues to display fairly dynamic characteristics, with low concentration rates and high rates of entry and failure. Therefore, many notified mergers involve relatively small players and do not lead to concerns about unlawful consolidation of market power.

The 2010 amendments imported the EU's variant of the SLC test, the substantial impediment to effective competition test, into Romanian merger review. The new statutory language in Article 12 of the Competition Law requires an assessment whether a transaction would "raise significant obstacles in the way of the actual competition on the Romanian market or a significant part thereof, in particular as a result of the creation or strengthening of a dominant position." In practice, the RCC appears to focus on whether a notified merger would likely result in price increases. In implementing this approach, the RCC has used Pricing Pressure and Gross Upward Pricing Pressure tests in some recent mergers, relying on the support of the newly created chief economist team. Thus, the RCC appears to follow the prevailing trends in EU merger review and in most other mainstream competition regimes.

The few cases that the RCC had to examine in greater detail demonstrate that the RCC is using the commonly applied methods for market definition and the identification of entry barriers. Where available, the RCC will rely on European precedent to define relevant markets. Markets will be defined in each case primarily in light of consumer preferences, including their willingness to travel to obtain the same products from alternative suppliers. For example, in a recent merger concerning dialysis products and services the RCC defined the geographic market according to the catchment area of relevant dialysis centres.

Focusing on the willingness of customers to travel to alternative centres, the RCC determined that the each centre's catchment area had a radius of approximately 50 km.<sup>46</sup> In a recent merger concerning pharmacies, the catchment area of each relevant pharmacy was defined much more narrowly, again focusing on the (more limited) willingness of customers to seek alternatives.<sup>47</sup>

The RCC recognises that efficiencies can play an important role in merger analysis. It requires the parties to submit sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefits of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have. In 2010, the RCC authorised a merger with very high market share in which a failing firm defence played a substantial role, which suggests that efficiency concerns can in practice play a decisive role.<sup>48</sup>

Article 48(2) of the Competition Law used to provide for the possibility of a government decision to override in the general public interest a merger review decision by the RCC when a proposed merger involved a state owned enterprise. The provision was never used and it was eliminated during the latest amendments of the Competition Law.

### 2.5.2 *Process of notification and decision*

The merger review process in Romania closely follows the European model. It also is in line with the relevant OECD Recommendation on merger review.<sup>49</sup> The definition of a notifiable merger transaction is modelled after the EU Merger Regulation (EUMR).<sup>50</sup> Since 2004, the notification thresholds rely on simple objective standards. Merger review is divided into two investigative periods, with a 45-day phase I period, and a Phase II period for mergers that have raised concerns during the initial review period. The maximum period for a combined Phase I and Phase II review is five months. Notifiable mergers must not be consummated prior to obtaining a clearance decision, with the possibility of certain derogations. The applicable rules and procedures are transparent; several secondary rules and regulations have been published and are available on the RCC's website.

Since 2004, mergers are subject to review by the RCC only if the parties' combined worldwide revenues exceed EUR 10 million and each of at least two parties to the transaction had domestic revenues of at least EUR 4 million.<sup>51</sup> The previous thresholds were much lower and there was growing recognition that

they led to too many notifications of mergers that had no economic significance. The change in thresholds appeared to have the desired effects: while in 2003 the RCC adopted almost 250 decisions in merger cases, the number has dropped to approximately 40-50 decisions per year since then. This is a positive trend, even when considering that changes in the economic environment likely have contributed to a reduction of the total number of mergers.

The definition of a “merger transaction” also follows the EUMR model. The key concept to identify a “merger transaction” is that of control/decisive influence. Acquisitions of non-controlling minority shareholdings are not subject to merger review.

The notification thresholds are jurisdictional thresholds and the RCC cannot review mergers that do not meet the thresholds. Notification of mergers that meet the thresholds (and are not subject to an EUMR notification) is mandatory and a notifiable transaction must not be closed prior to obtaining RCC approval. Notifications can be submitted prior to reaching a final merger agreement. Failure to notify a transaction is considered a serious offence like infringements of Articles 5 and 6. Sanctions could reach 10 % of annual revenues, although in practice they are much smaller.

The merger review process is subject to statutory deadlines set forth in Article 46 of the Competition Law. From the time it receives a complete notification, the RCC has a 30-day period to decide whether the notified transaction is indeed subject to merger review. The Phase I review period for transactions that fall under the RCC merger review jurisdiction is 45 days. At the end of Phase I, the RCC can issue a no-objection decision because the transaction does not raise serious issues or because any serious issues have been resolved by way of commitments. Alternatively, it can open a Phase II investigation if any serious concerns about the transaction have not been resolved. Investigations can last up to five months, counting from the time when a complete notification has been received (*i.e.*, the Phase II review period is less than four months).

The review periods are triggered only when a complete notification is received. In practice, most notifications are considered incomplete when first received, extending the actual Phase I review period to two months or more.

The RCC has recently introduced a simplified review process for non-problematic mergers, responding also to suggestions by the business community to reduce review times for non-complex mergers. The simplified procedure is

available in limited circumstances, provided the aggregate market shares of the parties do not exceed 15 % (horizontal relations) or 25 % (vertical relations). In 2012, one third of all notifications were reviewed under the simplified procedure. The real benefits of the simplified procedure, however, remain uncertain. Members of the private bar express concern that so much information is required even in simplified cases that there is no real difference to “normal” notifications.

But stakeholders are generally highly positive about the RCC’s ability to effectively and efficiently handle merger notifications. Pre-notification meetings are available to clarify open issues before a formal notification is submitted. The ability of the RCC to quickly focus on the relevant issues is appreciated. Competitive problems have in some cases been resolved by commitments submitted during Phase I. There are no complaints from the private bar about undue delays in the review process or unfocused, burdensome data requests to drag out investigations.

Phase II reviews are rare. Between 2008 and 2012, an in-depth review was opened in less than 10 transactions, compared with more than 200 Phase I clearance decisions. Remedies were imposed in 6 decisions. The last prohibition decision dates back to 2001.

Merger review decisions continue to constitute a major part of the RCC’s output. For a long time the vast majority of cases, and decisions for failure to notify were almost the only enforcement decisions involving fines issued by the RCC. This trend has been reversed. Since 2010, the RCC has issued only three fining decisions in connection with failures to notify a merger and the fines involved are much smaller than in antitrust cases.

Given the small number of notified mergers that need intervention, the number of merger cases in which the RCC has sought remedies is fairly limited. Nevertheless, the RCC has now issued Guidelines on remedies in merger cases that closely follow the European Commission’s guidelines.

In some earlier cases, the RCC was able to clear mergers after the parties agreed to structural remedies, including the selling of minority interests in third parties that were found to compete with the merger target,<sup>52</sup> and the divestiture of trademarks.<sup>53</sup>

Since then, remedies appear to have become more complex with an increasing reliance on behavioural remedies. Remedies in recent merger cases

include the commitment to keep a foreign production facility and associated domestic distribution channels separate over a two-year period, combined with a price reporting obligation;<sup>54</sup> a five-year commitment of continuing to supply downstream competitors at non-discriminatory terms, to refuse supplies only when objectively justified, and to refrain from imposing non-compete obligations;<sup>55</sup> a buyer's commitment not to exercise significant influence over the target over a ten-year period;<sup>56</sup> and the buyer's commitment for a three-year period not to raise prices in certain markets by more than 5 % compared to the medium selling prices in the buyer's other stores, and accompanied by an annual submission of a price analysis.<sup>57</sup>

Since 2001, transactions can also be subject to review by the Supreme Council for National Defence (CSAT) to determine whether they create any risks for national security. The CSAT has identified a number of sectors where transactions could raise national security concerns and therefore are subject to the review process, including border security, energy and transport, critical networks, and banking. The RCC must notify the CSAT when it receives a notification of a merger in the relevant sectors. The CSAT will notify the RCC that a transaction does not raise national security concerns. Negative CSAT decisions will be forwarded to the Government which may prohibit the transaction on national security grounds. To date, the new review procedure has not resulted in any prohibitions of transactions that the RCC would have authorised under competition law.

### 2.5.3 *Conclusions*

Given that the last adjustment of merger notification thresholds dates back almost ten years, it might be worthwhile to review them to identify the potential of further adjustment. Almost one third of all notified mergers qualify for a simplified review procedure, which indicates that there may be room to limit the number of notifications by raising thresholds. A review of all recent notification may suggest that thresholds could be raised without significant risk of missing important transactions that are no longer considered merger transactions.

The RCC's reliance on behavioural remedies in several recent cases, even if they are frequently combined with structural remedies, raises concerns about compliance and monitoring costs, and ultimately the effectiveness of the merger review system. The remedies typically require the RCC to keep an eye on the market for several years after the consummated merger, and are therefore resource intensive for the RCC. The RCC has not regularly been using monitoring trustees and therefore much of the burden of monitoring rests with

its staff. The more complex the remedies, the easier it may be for the parties to evade them. Behavioural remedies might be justified in some cases if they are the only way to preserve an efficient merger while preventing harm to consumers. But they should not become a general substitute for robust merger enforcement.

Although the RCC has started with *ex post* evaluations of mergers, it has not yet evaluated the effectiveness of these more recent remedies. Whether they have really worked remains unclear. At the same time, the data the RCC receives in the parties' annual reports might form a useful basis for an *ex post* review exercise concerning the effectiveness of these remedies.

## **2.6 Unfair competition**

The RCC has recently become one of a number of public authorities in Romania with a mandate to enforce a portion of Romania's unfair competition laws through administrative procedures. In addition, certain violations constitute criminal offenses and are prosecuted by a public prosecutor, and civil enforcement before regular courts is possible as well for certain offenses (although rare in practice). In short, unfair competition enforcement has grown over time into a complex enforcement structure with little co-ordination among various players, and no mechanism to ensure common standards and case outcomes across the board that are consistent with competition goals. The current enforcement structure can be explained by historic developments and the need to implement over time different European directives that can have unfair competition components.

Since 2011, the RCC has been responsible only for the enforcement of Article 4 of the Unfair Competition Act which addresses practices such as denigration of an undertaking, unfair attraction of customers, and the disorganisation of enterprises. Under the law enforced by the RCC, most offenses are considered administrative offenses and can result in fines. Certain violations, those that can be broadly characterised as industrial espionage, can result in criminal fines, including jail time of up to five years. Private litigation is possible as well, as an independent action or as a follow-on action for damages, but apparently remains rare.

Other authorities involved in unfair competition law enforcement include the Ministry of Finance, which is responsible for the law on comparative and misleading advertising (which implements an EU Directive); the National Audiovisual Council which has responsibility over misleading and comparative

advertising in audiovisual field; the State Office for inventions and trademarks with responsibility for trademarks and geographical indications; and the National Authority for Consumer Protection, which enforces a law on fighting unfair commercial practices of traders in their relationship with consumers (which implements another EU directive).

The system leaves at the core of the RCC's enforcement authority unfair competition offenses that can potentially be most directly opposed to the goals of a consumer welfare oriented competition law. Claims that a rival has "unfairly" attracted rivals or "unfairly" denigrated a competitor can easily be used by a less successful firm as a weapon against aggressive, but ultimately beneficial competitive behaviour. Offenses related to misleading advertising that could most directly interfere with the proper working of markets and therefore appear to be most closely linked with the RCC's mission, are enforced by two other public authorities, depending on whether allegedly misleading advertising occurs through audiovisual media or not. There appears to be very little co-ordination among the various authorities. No common standards or policy goals have been developed.

Unfair competition law can generate a large number of complaints. In the first half of 2013 alone, the RCC has investigated 45 complaints. In principle, every directorate dealing with antitrust cases with the exception of the cartel directorate can investigate unfair competition cases in the relevant industry sectors. This could create the risk that at least in some Directorates valuable staff resources will be drawn into enforcing unfair competition laws, especially because under the current law the RCC does not have discretion to investigate only select cases.

The RCC President has decided to allocate the responsibility for unfair competition cases mostly to the territorial offices, retaining a relatively small group of officials in the headquarters that are involved in unfair competition law enforcement. This would appear to be a reasonable move, allocating the enforcement of a law that is not directly related to the RCC's core mission to parts of the RCC that have a lesser involvement in the enforcement of antitrust and merger review laws; they also have more direct access to local markets to which many of the complaints relate. But this should not distract from the important question whether the RCC's current enforcement powers in the area of unfair competition law are based on a sound rationale and whether the RCC is currently using them in such a way as to minimise potential conflicts with the policy goals of competition law. Moreover, the allocation of the unfair

competition portfolio to territorial offices has generated new problems. The private bar has expressed concerns that the investigations by staff of territorial office do not follow the same (high) professional standards as investigations led by the headquarters. The perception is that these investigations are not transparent, do not respect the defendant's procedural rights, and can be of excessive length. The RCC has adopted internal measures to address these concerns, such as increased transparency requirements and limitations on the duration of investigations, but they have not yet been effective in dispelling third party concerns.

Proposed legislation could change this situation to some extent, as it would enable the RCC to investigate only conduct that has effects on the functioning of markets and not only on the bilateral relationship between two competing firms. That could enable the RCC to better use its resources. But it would also require careful case selection and close supervision of the territorial offices' investigations, thus leading to a greater involvement of the headquarters. The new law reportedly would also simplify the system of various offenses under the Unfair Competition Law. But it would leave the current complex enforcement structure intact.

As long as a more rationale allocation of enforcement responsibilities cannot be implemented, it could be useful to at least seek some form of co-ordination among the various authorities enforcing components of unfair competition law. At the moment, it appears that the RCC is not aware of enforcement practices by the other authorities, including whether at least in some cases competitors can use unfair competition claims to limit aggressive, but beneficial competitive conduct before other authorities or to limit the information that can reach consumers and help them make better informed choices.

## **2.7 Consumer protection**

The RCC has no powers related to consumer protection laws. In general, consumer protection law and policy falls within the remit of the National Authority for Consumer Protection (ANPC), a public authority within the Ministry of Economics. The ANPC also takes the lead when European consumer protection laws must be implemented in Romania.

The RCC and the ANPC have created a formal co-operation mechanism in 2007 by signing a Memorandum of Understanding with a view toward developing joint actions to promote the economic interests of consumers in the

application of competition rules. It provides for a range of collaborative efforts to inform consumer organisations and consumer rights advocates about competition law enforcement and to identify how competition enforcement can benefit consumer interests.

Although co-operation between the two authorities does not appear to have a long-standing history, there is a recent example of successful co-operation that provided measurable benefits to consumers in Romania. When Romania implemented Directive 2008/48/EC on credit agreements for consumers, the ANPC was the lead authority. It requested the support and co-operation of RCC in its efforts to eliminate the early reimbursement fee for customers seeking to switch between loan providers. The RCC developed the idea of extending the elimination of limitation of early reimbursement fees from the Directive's narrower scope to consumer loans issued by banks. Intense joint lobbying efforts by the ANPC and the RCC ultimately led to the adoption of national legislation broadly eliminating early termination fees for all bank consumer loans, as had been suggested by the RCC.

An *ex post* impact study performed one year later by RCC demonstrated that the measure has generated increased client mobility, lower switching costs and, implicitly, higher competition on the retail banking market, with estimated benefits for consumers exceeding EUR 15 million.<sup>58</sup>

There are no reports of instances where the two authorities held conflicting views on certain policy issues affecting consumers.

### **3. Public actors restricting competition**

The Competition Law has provided the RCC with a range of enforcement tools and other instruments to address instances where intervention by public authorities is interfering with markets: the RCC can adopt decisions against anticompetitive, non-legislative acts by public institutions under Article 9 CL. It continues to have a broader consulting role in all privatisations under Article 30 CL. Additional powers exist under Article 26 CL: initiators of draft normative acts that may have the effect of limiting competition must request the RCC opinions and the RCC can withhold endorsement. The RCC also can engage in advocacy efforts with respect to regulations and laws that limit the development of competitive markets. The RCC also plays a central role in the review of state aid, even though formal decisions concerning the compatibility of proposed state aid measures rest with the European Commission.

The RCC has begun to use all these tools extensively in its dealings with other government institutions. Each substantive Directorate can in principle choose among those instruments to address competition concerns in the relevant sectors, with the exception of state aid review which is concentrated in a separate Directorate. What is lacking at this point are internal guidelines that provide criteria for the selection of the most appropriate instrument, including competition enforcement, in each case.

### **3.1 *Anticompetitive acts by public authorities***

Article 9 prohibits public authorities at the central and local levels to adopt acts that limit competition or discriminate among market players. The RCC has the power to issue decisions that order the re-establishment of the competitive environment. Decisions issued under the RCC's Article 9 authority can be enforced before the Bucharest Court of Appeal: if the addressee of the decision refuses to comply, the RCC can request the Court to annul the measure in dispute.

Investigations into possible violations of Article 9 typically begin after informal complaints or based on the RCC own initiative. In Article 9 investigation, the RCC has in principle all the investigatory tools available as in "normal" antitrust cases. Importantly, since the latest amendments to the Competition Law, the RCC can impose significant fines on a public authority and their leaders that provide inaccurate or misleading information. Investigations are conducted by one of the RCC's operational directorates, depending on the sector involved. This gives each Directorate the opportunity to decide what tool to use when confronted with an intervention in markets by a public institution that may have anticompetitive effects. In particular, the RCC might decide to use "soft" advocacy efforts to remove public restraints of competition before bringing a "hard" enforcement case. In the RCC's experience, such an approach will in many cases be more effective and use its resources more effectively.

Article 9 cases represent approximately 5 % of all pending investigations. Actual infringement decisions are not numerous, but are adopted on a fairly regular basis. A recent example of an infringement decision concerns regulations issued by the Ministry of Economy and a State Inspection Service requiring firms that were authorised to re-fill and sell LPG gas bottles used for heating stoves to seek permission from the bottle owners to fill and sell the bottles. The RCC determined that this measure would have affected the ability

to compete in particular of smaller rivals and generally could have limited competition in the market for the filling and selling of LPG gas bottles.<sup>59</sup>

More recently, the RCC has opened an investigation into a decision by the National Audiovisual Council, which contains some provisions that appear to limit the commercial autonomy of the service providers in the sector and establish discriminatory conditions for their activity.<sup>60</sup>

Article 9 has become a particularly effective tool to examine procurement procedures and force procurement authorities to revise procedures in order to remove unnecessarily restrictive terms and conditions. One such case involved a tender procedure by a hospital which required each participant in the procurement process to submit a certificate issued by the relevant producers confirming that it would supply the bidder with the relevant product for the entire contract period. One of the bidders was able to prove that it had enough of the relevant product in stock to cover the entire contract period, but it was excluded from the procurement process because it lacked the requisite producer certificate. The RCC concluded that this was an unjustified restriction and required the hospital to amend the terms of procurement.<sup>61</sup> The RCC also used the results of the investigation to submit a recommendation to the Health Ministry to inform institutions under its authority that restrictions of the kind used in the investigated case were incompatible with competition law.

Another recent decision in this area was adopted against the Bucharest authorities for their failure to use procurement procedures to award sanitation contracts, and instead simply extend the existing contracts for a significant period of time.<sup>62</sup> As the Bucharest authorities refused to comply with the RCC decision ordering them to organise a procurement procedure, the RCC brought a case before the Bucharest Court of Appeal where the RCC decision was upheld. The case is currently pending before the High Court after the authorities appealed.

### **3.2 *Competition impact assessment, competition advocacy and policy studies***

Over the last few years, the RCC has adopted a more pro-active and systematic approach in its competition advocacy efforts. Competition impact assessment has become a standard element in the regulatory assessment of draft legislation. In addition, the RCC can use more informal advocacy efforts to raise concerns about anticompetitive effects of proposed regulations as well as existing regulations that restrict competition.

### 3.2.1 *Legislative authorisation scope*

According to Article 26(1)(l), the RCC can issue opinions on draft legislation that may have an anticompetitive impact. The power to object to anticompetitive legislation has existed since 1996. But the RCC has stepped up efforts to intervene against anticompetitive acts much more recently. Since 2008, the number of interventions has increased. And the RCC's ability to use the review power more systematically in the framework of a formalised process has markedly improved in 2010, when Romania decided to formally include competition impact assessment as part of a broader impact assessment exercise required for all acts at the early stages of the legislative process.<sup>63</sup> The major driving force behind this step was the RCC, which successfully promoted the 2009 OECD Council Recommendation on Competition Assessment<sup>64</sup> and the OECD Competition Assessment Toolkit<sup>65</sup> as part of the review of proposed public policy measures among the central authorities. Under this new system, the RCC has issued approximately 40 opinions in the past three years.

### 3.2.2 *Processes*

The regulatory impact assessment process is centrally co-ordinated by the Government Chancellery. The RCC participates in early co-ordination meetings discussing proposed legislation to identify relevant legislative projects that could affect competition or state aid. In each legislative project identified as relevant for competition and state aid issues, obtaining the opinion by the RCC is mandatory.

Since the new framework has been introduced, the RCC's opinions are purely advisory. Under the previous system the RCC could submit binding opinions on legislative proposals, although it did not have the same opportunity to systematically participate in the impact assessment process. Conferring on a government authority the power to issue opinions that are binding on the legislator might raise difficult political questions. Arguably, in the end there must be a political decision on how much weight should be given to competition concerns and other potentially competing concerns in a specific matter. But there is the risk that advisory opinions under the current system can be ignored more easily than before. The RCC's position would be strengthened if decisions not to follow an RCC opinion would have to be fully explained by the institution promoting the law or regulation, as this would force the addressee to engage in a substantive debate of the issues raised by the RCC.

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The impact assessment system is currently under review by the Chancellery. Approximately 1 300 relevant pieces of legislation are subject to review every year. In addition to competition concerns, impact review covers a range of other issues, like financial impact, impact on regional policies, impact on the business environment and reduction of red tape, and compliance costs. A number of other government actors are involved in the impact assessment process, including several ministries such as the Justice Ministry and the Ministry of Economics, and several specialised agencies and sector regulators. The experience with the impact review process is mixed. Regulatory impact assessment is taken seriously by some parts of the Government, and has much less effect with a number of other ministries. In particular ministries that deal with social issues and those that administer government interests in SOEs appear to be more reluctant to constructively engage in the review exercise.

The undifferentiated approach with across-the-board reviews of all legislative proposals is no longer considered efficient. It is too resource intensive and not sufficiently output oriented. The Chancellery seeks to develop a prioritisation policy that should lead to an in-depth, empirically based review of fewer legislative proposals which are considered to have a higher impact on markets and society at large. How these reforms will affect the RCC's role is uncertain at this point. Representatives of the Chancellery expressed a highly favourable opinion concerning the RCC's input in the impact assessment process so that there appears little risk that revisions to the system could limit the RCC's involvement. Better prioritisation could actually help the RCC. It might enable the RCC to use its resources more efficiently and conduct fewer, in-depth studies before issuing opinions that may ultimately have greater persuasive force.

In addition to the formal opinions in competitive impact assessment proceedings, the RCC can also use alternative advocacy tools to influence legislation, including issuing more informal points of view on proposed normative acts as well as proposals to amend existing anticompetitive laws and regulations. These opinions can be issued to ministries in charge of drafting legislation, and the RCC has also worked directly with the relevant parliament committees. The total number of advocacy efforts, including competition impact assessment opinions, is substantial. In the past five years, the RCC has intervened in about 150 cases. In 2012 alone, it issued 50 opinions, points of view, and interventions. That is a substantial number, even if the RCC has a group of five officials who work exclusively on advocacy matters.

The RCC's opinions cover a wide range of industry sectors. It has repeatedly intervened, for example, against proposed anticompetitive legislation in the retail sector. One proposal opposed by the RCC sought to limit opportunities to construct large retail spaces in urban areas with a view toward ensuring a competitive environment. Other proposed laws that the RCC opposed included a law that would have required stores to sell at least 80 % Romanian products, and a plan to require economic operators to market products and services with information about the production costs. Proposed harmful legislation was rejected consistent with the RCC's advice, and restrictions on the establishment of retail outlets were repealed as suggested by the RCC. Thus, as far as the retail sector is concerned, the RCC has been more successful than some of its peers in opposing legislation that might undermine competition in the sector.

Another example of an intervention by the RCC that could directly confer benefits on consumers was proposed legislation that would have forced driving instructors to work exclusively through driving schools and would have prevented them from offering their services directly to customers. The proposed act was dropped, consistent with the RCC's intervention.

The RCC has also taken an active role in reviewing legislation establishing a new pricing system for pharmaceutical products, advising the Government how to structure its reimbursement policy more cost effectively. Intervening in the regulation of pharmaceutical prices could create conflicts for a competition authority as the goal of reducing national health care expenditure might conflict the principle that markets should reward innovation.

As in other jurisdictions, the RCC's advocacy interventions have repeatedly focused on liberal professions: minimum fee limits were eliminated for accountants, architects, lawyers, veterinarians and geodesists. Entry barriers in the form of a limitation on the number of licensed service providers have already been removed for dentists. They are expected to be removed after 2014 for pharmacists as well.

The RCC has achieved only a partial victory in its efforts to liberalise the notary sector. In these efforts, the RCC has worked directly with Parliament, as well as the Ministry of Justice and the notaries' professional body, the UNNPR. The RCC was pushing for amendments to the existing regulation in order to eliminate minimum fees for some of the acts and procedures of public notaries. It also targeted rules that authorised the Justice Ministry to establish minimum fees and the maximum number of public notary positions based on a proposal

by the notaries' professional organisation, as well as rules that limited advertising.

As a result, amendments to the Law regarding public notary profession were adopted in 2012. They provide for the possibility of liberalising the market through flexible tariffs for certain acts and notary procedures, in line with RCC's point of view. However, the implementation by Order of the Ministry of Justice of these provisions is still pending, more than a year after the adoption of the new law. Thus, some progress has been made, but the RCC's efforts have not yet had the desired practical impact.

The RCC's efforts in competitive impact assessment as well as its broader advocacy activities can be supported by market studies and sector inquiries, which the RCC has increasingly used in the past five years. For example, a 2009 study into real estate markets and the role of notaries in this sector concluded that the prices of relevant notary services in Romania were 14 times higher than the price for comparable services in Germany. This provided strong support for the arguments that reducing some regulatory restraints were in the public interest because they would ultimately benefit consumers.

Along the same lines, the RCC's involvement in formulating new policies in the regulation of pharmaceutical prices was based on a sector inquiry initiated in 2009 that focused on the distribution system for pharmaceutical products in Romania. A recently concluded sector inquiry into road and highway construction could provide the RCC additional information to formulate more effective policies for the procurement of road construction work. And it might enable the RCC to better understand signs of possible cartel activity in the sector.<sup>66</sup>

During the more recent past, the RCC has launched about three new sector inquiries every year. Sector inquiries are carried out by the substantive Directorate that deals with the relevant sector, with the possible support of the chief economist group. Many market studies are published in the RCC's annual report on competition in key sectors in the economy.

### 3.3 *State aid*

The RCC continues to be involved in the review of state aid cases and dedicates significant resources to the task. Prior to joining the European Union, the RCC was in charge of reviewing notifications and authorising grants of state aid by Romanian institutions. This was a significant responsibility. State aid

was a great concern for the European Union, and the number of cases involving state aid issues could easily exceed 100 per year. Even though since 2007 the European Commission has the exclusive responsibility to authorise state aid in Romania, the RCC remains the national contact point for state aid applications. The RCC has a Directorate dedicated to state aid with a staff of approximately 20.

The RCC currently has an important, but largely formal role in state aid cases. It reviews all draft applications to ensure that they are complete and comply with EU requirements. That role can also involve re-drafting applications so they better make relevant arguments. In this case, the RCC essentially becomes an advisor to the applicants. In these cases, potential conflicts cannot be completely excluded, as the aid grantor might expect support from the RCC even if the authority concludes that the proposed aid will not improve the functioning of markets. The RCC also monitors all state aid in Romania and prepares an annual report. It also serves as an information point for applicants and other stakeholders. As part of its information initiatives, it created the Romanian State Aid Network, an online platform designed to inform about state aid issues and facilitate co-operation among interested parties.

There are currently internal deliberations in the RCC whether its role in the state aid process should be intensified. One such project would involve an *ex post* assessment of state aid cases to assess whether the aid had the expected benefits and reached its objectives. Another option would be to engage in a more substantive analysis of a state aid project before the application is sent to the European Commission. Such an analysis could focus on whether the proposed grant of aid is a good and effective use of public money in order to address instances of market failure. Such a review would of course not replace review by the European Commission, but could become an additional screen.

There is a certain logic behind such ideas. The authority in charge of ensuring that markets work effectively and other parts of the government do not engage in actions that distort competition arguably could also examine whether public funds are used effectively with the goals of remedying market failures and strengthening market performance, and do not effectively distort markets. At the same time, such a review risks duplicating the review that would have to be done by the Commission if an application for the authorisation of state aid is submitted. Perhaps more importantly, the RCC's greater involvement in the review of state aid cases creates the risk of pursuing conflicting policy goals. And engaging in a more substantive review might open up the RCC to more political pressure and influence. If that were to happen, the reputation of the

RCC as an independent institution could be undermined, with negative effects even in competition cases.

#### **4. Institutional issues: Enforcement structure and practices**

Article 16 of the Competition Law establishes the RCC as independent government authority with legal personality. Its current configuration has been created in 2004. It is the central institutions for all matters concerning competition law and policy in Romania. Beyond its enforcement mandate, it is heavily involved in many matters involving questions of competition policy, including the evaluation of proposed laws and regulations, and it has over time acquired additional mandates, such as unfair competition and rail regulation.

The RCC has succeeded in establishing an excellent reputation among stakeholders, including other parts of the government, business associations, and the private bar. It is generally considered one of the most professional and best performing government authorities in Romania, second only to the Central Bank.

##### **4.1 Competition policy institutions**

###### *Decision-making body*

The Competition Council consists of seven members, including the President, two Vice-Presidents, and four Competition Counsellors. The position of president of the RCC is considered equivalent to the minister position, the Vice-President position to the state secretary position and the competition Counsellor position to the state sub-secretary position. The Competition Council was initially a larger body, but the number of members has been reduced to the current seven.

The law provides for the independence of all competition council members. They are prohibited from taking up any professional activities and from membership in a political party. Their position can be revoked only for cause, such as a criminal conviction. It appears that the independence of Council members is well respected by politicians and institutions. Among stakeholders the prevailing perception is that the Competition Council adopts decisions free of political influence.

Council members are appointed by the Romanian President for a five-year period, and their mandate can be renewed once. The law provides for a series of

qualifications for any appointment to the Competition Council. In particular for the president it requires demonstrated managerial competence. Some stakeholders have raised concerns about the uneven qualifications of Council members, suggesting that perhaps on occasion factors other than professional qualification may have influenced appointments.

It remains to be seen whether the involvement of the newly formed Competition Council Advisory Board will have an impact on the appointment process. The Advisory Board is a consultative body consisting of former Competition Council Presidents, representatives of the academia, business community, and consumer associations, and of other experts in the field. In addition to the tasks of providing recommendations and opinions on main aspects of competition policy and activities of the Competition Council, the Advisory Board is also responsible for proposing the names of candidates for the Competition Council to the Government. Proposed candidates may be rejected only by a reasoned opinion. The Advisory Board has not yet exercised its role in the appointment process. It is therefore too early to assess whether the new process will effectively ensure that only highly qualified professionals may get into Council positions.

The Council adopts decisions either in the plenum or in a “Commission” that consists of a three-member panel led by a Vice-President. Many competition cases are decided by a Commission. All decisions are adopted by majority vote. On a limited number of matters the President has sole decision making powers. With respect to investigations the President can, for example, order the opening of investigations based on a decision by the Council, designate the rapporteur, and take a number of procedural decisions such as access to file or the appointment of experts. On the institutional side, the President has the authority to hire and dismiss staff, exercises disciplinary authority, and approve the organisational structure of the staff and job descriptions.

The staff of the RCC is organised into Directorates that are headed by Directors. In most cases, Directors report directly to the President. In order to alleviate the President of some of his day-to-day responsibilities in managing the authority and its personnel, questions have been raised whether the RCC should create a position of a Director General who would supervise the Directorates and report to the President. Such a move could have the benefit of enabling the President to focus more on strategic questions and relations with other institutions. Yet, creating an extra level of bureaucracy could slow down

processes at the RCC, undermine motivation among staff, and limit the President's ability to direct the authority, set priorities, and implement reforms. Thus, it appears uncertain whether such a re-organisation would in the end have net benefits.

The RCC has budget autonomy. It prepares its own budget which is separate from the general state budget. But its annual, overall budget is decided by Parliament. Fines and fees from merger review notifications go directly to the state budget.

By international comparison, the RCC is a well-resourced competition authority. Its budget was reduced during the recent economic crisis and in 2012 amounted to RON 41.2 million (approximately EUR 10 million). That is a significant reduction from the RON 47 million budget in 2008 (approximately EUR 11.7 million), but is up by RON 7 million (approximately EUR 1.7 million) compared to 2011. Staff levels have decreased from 302 in 2008 to 292 in 2012, but the RCC is still one of the largest competition authorities in the EU.

**Table 2. Five-year developments in budget and personnel**

	2008	2009	2010	2011	2012
Budget (RON, in million)	47 369	41 887	36 640	34 328	41 251
Staff	302	299	295	286	292

Source: RCC

Competition inspectors/case handlers represent approximately 70 % of all staff. The remainder is allocated among general functions, cabinet positions, and management. In terms of professional training, economists are by far the largest group. Only about 15 % of staff are lawyers.

But absolute staff numbers can be misleading, given that almost one third of all RCC personnel works in the territorial offices and the central Directorate overseeing them. The substantive Directorates employ only approximately 25 % of all staff, not counting the staff in the territorial offices.

The RCC's substantive Directorates are organised by industrial sectors. In addition, there are a number of specialised and horizontal directorates and units such as the Cartel Unit, the Public Procurement Directorate, the Litigation Directorate, the Research Directorate, and the Directorate for International Affairs and Communications.

**Table 3. Allocation of RCC personnel in 2012**

<b>The type of the functional unit</b>	<b>Total personnel</b>
Competition directorates and services	73
The State aid directorate	21
The territorial directorate (including the territorial inspectorates)	86
The legal directorate	15
The research directorate	19
The external relations directorate	12
Railway Supervision Council	1
The Plenum assistance compartment	4
Secretary General directorates	48
Internal auditing unit	2
Public managers	2
Dignitary cabinets	3

Source: RCC

A newly created “chief economist group” was set up recently, based on a recommendation by the World Bank. It operates as part of the Research Directorate and is not set up as a strictly independent unit that reports directly to the President. The formal guidelines on its involvement in cases have not yet been adopted, and internally there are those who consider that an independent role with direct reporting to the President or Council would more effective. In addition to providing checks and balances in ongoing cases, its main role is to support case teams and strengthen economic analysis in cases. This can involve more complex empirical work or simply ensuring that theories of harm developed in a case are based on sound economics. In 2013, it has been involved in more than 20 ongoing investigations. In addition, its major task is training of case handlers to improve general knowledge of basic economic concepts.

The RCC has observed that defendants increasingly rely on economic evidence in their submissions, although evidence submitted in most cases has not yet become highly sophisticated. Thus, by strengthening in-house economic expertise, the RCC might be ahead of developments and be better prepared once the use of sophisticated economic advice becomes more common among defendants.

The RCC has in the past been encouraged to move away from the organisation focused on industry sectors to one focusing on various types of enforcement and policy tasks.<sup>67</sup> This suggestion has led to the creation of the

Cartel and Public Procurement Directorates. But going further into that direction, for example, by creating a separate Merger Directorate, creates risks. The RCC has an extensive range of instruments in its toolbox, from antitrust enforcement and merger review to actions against anticompetitive measures by public authorities such as advocacy, impact assessment opinions, informal working relationships with other authorities, and unfair competition laws. Maintaining an organisation centred on industrial sectors will enable the RCC to prioritise among the various tools it has to address problems in the market, and benefit from previous experience when using new tools to address competitive problems in a sector.

A unique feature in the organisation of the RCC is the existence of territorial offices which are under the supervision of the Territorial Directorates. Territorial offices are located in each of Romania's 41 counties, and they typically have very limited staff. In total, the territorial offices and the centralised Directorate represent more than 25 % of the RCC's total staff, making the Territorial Directorate the largest directorate. The territorial offices are to some extent a vestige of earlier price control functions of the RCC. Some stakeholders recognise that the territorial offices can continue to be useful in order to gather local information and evidence; but others appeared to be more concerned that the territorial offices are not well integrated in the central structures and do not always meet the same professional standards as their colleagues working in the headquarters.

The question remains whether maintaining staff in territorial offices in the best possible use of the RCC's resources, in particular in light of the RCC's efforts to become a more effective and efficient competition policy and enforcement institution. Staff working in territorial offices generally has been working for the RCC for a long time. But their background and skill set is not always most useful in potentially complex antitrust cases. Allocating unfair competition cases to the territorial offices was probably a sensible move in order to use resources that are otherwise difficult to deploy for an area of law enforcement that is not at the RCC's core mission, and to get them involved in cases that largely have a local scope.

The RCC has been moving some experienced staff from the headquarters to the territorial offices in order to strengthen their levels of expertise. Whether this is the most effective way to address the current structure remains unclear. It may be worth exploring whether the RCC's resources could be used more effectively if positions in territorial offices are not renewed and at least some of

the territorial offices are closed, provided that there is an understanding with the Government that such a re-organisation will free up financial resources that the RCC President could use in order to have more flexibility in setting competitive salaries through bonuses and other rewards.

Budget reforms required salary cuts across the public administration, including the RCC. Special supplements assimilating salaries of competition inspectors to those of magistrates were eliminated. All salaries were further cut by 25 %. Although some of the deepest cuts have been reversed, problems remain. A variety of factors had made the RCC in the past one of the most attractive employers in the public sector in Romania, and salary levels were a significant factor. This position is at risk, and employment in the private sector becomes relatively more attractive.

The staff turnover rates at the RCC has remained relatively low and reached only 6.5 % in 2012. But the numbers may be misleading. The most qualified and experienced staff members are most likely to leave for the private sector. Some already have, leaving substantial gaps as qualification and motivation among RCC staff remain very uneven. Both the European Commission and the World Bank have voiced concerns in the past that adequate financial resources will be required to maintain the RCC's human capital and prevent a brain drain. Clearly, financial and other measures focusing on maintaining and strengthening the RCC's human capital continue to be required in order to maintain the RCC's position as an attractive workplace.

The RCC has developed good relations with the Romanian academic institutions, and has invested in promoting competition law and economics as topics for academic research and debate. In 2011, the RCC and the Law Faculty of the University of Bucharest co-founded the Center for Studies in Competition Law. The Center hosts annual events and a series roundtables which serve as opportunities to promote competition topics and bring various stakeholders together for discussions. It has not yet developed into an academic research centre. Academic research related to competition law and economics appears to be more strongly developed in a number of economics faculties.

In an effort to encourage additional academic work related to competition law and economics and to establish closer ties with the academic community, the RCC has recently published a list of topics for which it would want to see academic papers. The RCC has also founded the Romanian Competition Journal in 2013 to provide a forum for scholarly articles.

## 4.2 *Enforcement processes and powers*

### 4.2.1 *Basic proceedings powers*

The investigation of cases rests largely with case teams in the Directorates, with certain decision marking formal steps in the investigative process reserved for the Competition Council. At the end of the process, the investigatory file and proposed decision is presented by a rapporteur to the Council in a formal hearing where representatives of the defendants also participate and present their views. A formal, final decision will be adopted by the Council.

Investigations are started based on complaints, *ex officio*, or as a result of leniency applications. Today by far the most cases are initiated *ex officio*. *Ex officio* investigations can be triggered by intelligence gathered from other enforcement proceedings, information provided from other agencies, or publicly available information. Fewer cases are based on formal complaints. This represents a remarkable shift from previous practice: until 2007, complaints represented by far the largest source of formally investigated cases; since 2008, their significance has significantly dropped. The high portion of *ex officio* investigation indicates that the RCC today is taking a much more pro-active approach to enforcement to move away from a largely complaints driven system. This is consistent with the advice the RCC received from the World Bank. It may also be based on the recognition that the number of reasonably strong complaints is fairly low. To date, leniency (immunity) applications have led to only one new case investigation.

Since 2011 the RCC has an internal guidance paper with prioritisation criteria for ex-officio investigations. It uses a range of criteria including impact on consumers, strategic significance, as well as risks and resources involved, to decide whether an investigation should be started. Although the RCC considers that the prioritisation guidance paper is now working, its actual impact on case selection is not yet apparent. Even within the RCC there is recognition that the prioritisation criteria have not yet been applied rigorously enough to effectively weed out investigations into low impact matters.

Once an investigation is started, a fairly detailed preliminary analysis follows. Its results are presented to the Council. Information gathering, market analysis, and the drafting of a preliminary report are in the hands of investigative teams. Other departments like the legal department and the chief economist unit will be involved where needed and can contribute to the report before it is presented to the Council. The reports at the end of the informal

investigative period follow a fairly detailed model that includes not only a description of the conduct, parties and preliminary analysis under applicable competition laws, but consider also further steps like additional evidence that would be needed and the “end game” in the form of remedies that would have to be imposed to restore competitive markets should an infringement be found.

When the RCC considers that a complaint is sufficiently complete, it has a 60-day period to reach a conclusion how to proceed. It is not under an obligation to formally investigate every complaint, but it must sufficiently analyse the factual and legal aspects of a complaint to make an informed decision whether to reject it or to follow up by a formal investigation. Decisions to dismiss a complaint can be challenged in court, although there has been no recent case where the court has overturned a dismissal decision by the Council.

If the Council decides to open a formal investigation, parties are informed about the decision to go forward. Where applicable, complainants and leniency applicants will be also informed as well. A press release will also ensure that the public is informed, although notification and publication may be postponed where continued confidentiality of the investigation is warranted.

Council decisions to open a formal investigation can be challenged in court, although only at the end of the formal investigation. These challenges occur not infrequently. They allege essentially that the available evidence at the time when the formal investigation was opened was insufficient to support such a decision, regardless of the final outcome of formal investigation. Thus, when an adverse decision is challenged in court, the court may have to examine not only the lawfulness of the final decision but in a parallel process also the lawfulness of the decision to open a case. To date no final decision has been overturned on the grounds that the initial decision to open a case was flawed, but the system does create opportunities for wasteful litigation.

A rapporteur in charge of preparing the case and eventually presenting the case before the Council will be appointed. At this stage of the investigation, dawn raids can be used as part of broader information gathering efforts. Interim measures might be adopted to prevent lasting harm to competition. As the investigation progresses, the legal department will be consulted in the process to ensure that the assessment is legally correct, but also to increase the chances that a final decision will survive a court challenge. The Chief Economist group will also assist the case teams as needed.

During the formal investigation, the case handlers may also consult with sector regulators. An example of well-functioning co-operation is the RCC decision against Vodafone and Orange, where the RCC closely consulted with ANCOM, the telecommunications regulator, to reach a better informed decision on the two firms' practices concerning call termination on their own networks.<sup>68</sup>

Cases might be ended at this stage by way of a formal commitment decision. The RCC adopted guidelines on the use of commitments in 2010, which regulate the circumstances in which commitments may be considered an acceptable remedy as well as the procedural framework for submitting and examining commitments.<sup>69</sup> They follow the same framework as the European Commission's Best Practice Notice,<sup>70</sup> but are more detailed. Commitments will generally be available only for less serious infringements. Hardcore cartels are explicitly excluded from this form of case resolution. Commitment decisions have already been used in a few cases, suggesting that the benefits of resolving competitive problems through a settlement can prove attractive to both the RCC and parties under investigation.<sup>71</sup>

An early application of the commitment procedure was the RCC's case against the Romanian Football Federation and the Professional Football League concerning the selling of television rights. Both had been involved in establishing a system of collective, centralised selling of television rights for all games in particular of the First League. The RCC was concerned that the centralised sale mechanism limited competition among broadcasters that sought to transmit football matches and prevented price competition among clubs. In the course of the investigation, the Football League and the Federation submitted proposed commitments which were market tested and re-submitted in a revised version, and eventually accepted by the Competition Council.<sup>72</sup> The thrust of the commitments was to enable broader access to the transmission of football games, but selling rights in separate packages, limiting the terms of agreements to three years without automatic renewal, and by ensuring that not all of the most popular games will be transmitted by the same broadcaster.

Peer review panels may be used to vet the soundness of a proposed report before a formal case is presented to the Council decision. Peer review panels have been used in approximately ten high profile cases in recent years. They have often confirmed the proposed report, but there have been instances where the review panel disagreed with the proposal. Thus, while it is difficult to assess whether the peer review panels have improved the quality of decisions, the

process does appear to insert a useful checks and balances element in the investigation and can seriously question the results of the proposed report.

When the report is finalised, defendants have at least 30 days to review the document and prepare their defence. The parties will also have access to file during this period. They may submit written observations on the report and/or demand a hearing. The Council may also decide on its own motion to organise a public hearing. In most cases, the Council will adopt a final decision only after a formal hearing during which the rapporteur presents its report and the defendants have the opportunity to reply. Thus, decisions will be based on the written reports and replies, as well as the oral hearing.

Some members of the private bar, although generally positive about the conduct of investigations and the professional standards they follow, have raised concerns about the lack of access to case handlers during the investigation in antitrust cases and a lack of opportunity to provide input or obtain information about the course of the investigation.

Concerns have been expressed in particular about the role of the Council which they view as not sufficiently independent and critical of the rapporteur's report, and too willing to vote in favour of finding an infringement. It is true that in practice the Council will follow the report by the rapporteur in the large majority of cases, at least on the question of infringement. Since 2010, the Council adopted in approximately 50 cases the substance of the rapporteur's report, while rejecting only 4 cases and sending 5 cases back for further investigations. It is more likely that the Council will disagree on the proposed fines than on the substantive evaluation.

But these concerns reflect also different views about the fundamental role of the Council. Members of the bar who find the Council too partial would prefer a decision making body that acts more like an independent judicial panel. But the members of the Council see themselves as the leadership of an enforcement authority, not as an independent tribunal. Their decisions are in the end about cases that an enforcement authority should bring.

It is worth highlighting that the structure of the RCC's investigation does ensure that the decision makers are separate from the investigators that prepare a proposal of a decision, even if the decision is not adopted by a judicial panel. By international comparison, the separation between investigative and decision making functions appears fairly strong and effective, as Council members do not appear to interfere with ongoing investigations. It is also worth noting that

there are no suggestions that decisions by the Council are affected by political influence.

#### 4.2.2 *Process efficiency*

The duration of investigation has repeatedly been a cause for concerns. Outside reviewers commented on the tendency to open many investigations and the failure to bring open matters to an expedited conclusion. They also noted the absence of any deadlines or at least indicative timeframes for antitrust investigations.<sup>73</sup> The RCC has taken these concerns on board, although the renewed focus on more efficient investigations has not yet produced material results. While it does not use formal deadlines in antitrust cases, the RCC has set the goal to conclude new antitrust investigations within two years and to expeditiously finalise investigations that are already older than three years. But there are no formal mechanisms and control instruments in place that should help achieve these goals.

For the time being, a two-year deadline for antitrust cases remains an ambitious goal. In 2012, the average duration of antitrust cases was 2.5 years, considerably better than in 2010 when the average duration was 4.3 years. But the trend was going up again in 2013. The significant fluctuation between years suggests that a few long-lasting investigations that are brought to a close can have a disproportionate impact on the statistics and that one has to be careful about reading too much of a clear trend into the recent data.

There is no question that the RCC's efforts to reduce the duration of investigations are important. Clearly, there is room for improvement. As one RCC official pointed out, if there is not sufficient evidence to support a case after a while, the chances of finding missing pieces of evidence by dragging out the investigations are slim, and closing down such a case would be the best option. But reducing investigation times remains a complex challenge. A more effective prioritisation policy should help to eliminate low impact cases and free up time, but the high impact cases that would remain would generally be more complex and time consuming. In addition, the (reasonable) decision by the RCC to give individual Directorates responsibility for all available instruments applicable to a given industry sector means that case handlers cannot focus only on antitrust cases. Externally driven matters that require intervention by the RCC, such as pending legislation on which the RCC should issue an opinion, are more time sensitive than internal investigations where the RCC controls timing.

### 4.3 Enforcement statistics, prioritisation and ex post review

An overview of enforcement developments shows a clear shift toward horizontal agreements and abuse cases, and a relative lesser emphasis on vertical agreements, consistent with the RCC's more recent enforcement priorities. The number of infringement decisions for failure to notify a merger has also been reduced, both in absolute and relative terms. Perhaps the most worrying trend is the sharp increase in unfair competition matters in the last two years. If the trend continues, unfair competition may start diverting resources away from antitrust enforcement and advocacy.

**Table 4. Trends in Competition Policy Actions**

	Horizontal agreements	Vertical agreements	Abuse of dominance	Mergers	Unfair competition
<b>2012</b>					
Matters opened	14	4	17	5	92
Matters closed/ complaints dismissed	10	5	19	4	83
Orders or sanctions imposed	3	0	0	1	24
Total sanctions imposed	29 068 659.20	0	0	1 064 827.00	3
<b>2011</b>					
Matters opened	11	10	9	2	66
Matters closed/ complaint dismissed	5	1	7	0	46
Orders or sanctions imposed	3	6	2	2	-
Total sanctions imposed	892 714 625.00	79 478 398.00	268 323 109.00	3 654 544.00	-
<b>2010</b>					
Matters opened	9	12	4	2	*RCC took over the enforcement of Law no 11/1991 in 2011
Matters closed/ complaint dismissed	3	2	5	2	
Orders or sanctions imposed	6	0	1	0	
Total sanctions imposed	15 237 743.50	0	103 373 320.00	0	

	Horizontal agreements	Vertical agreements	Abuse of dominance	Mergers	Unfair competition
<b>2009</b>					
Matters opened	6	15	2	9	
Matters closed/ complaint dismissed	0	1	1	1	
Orders or sanctions imposed	2	0	0	4	
Total sanctions imposed	7 823 450.00	0	0	774 352.98	
<b>2008</b>					
Matters opened	6	5	2	10	
Matters closed/ complaint dismissed		1	2	2	
Orders or sanctions imposed	2	1	0	7	
Total sanctions imposed	5 691 219.00	83 698 729.61	0	836 517.05	

Source : RCC; Fines in RON

A review of cases during the last few years does not show a clear prioritisation in terms of industry sectors. The RCC's has started to regularly examine essential sectors that have a high impact on Romania's economic performance. During the past five years the RCC has published an annual report on the evolution of competition in key sectors of the Romanian Economy that highlights progress in sectors considered fundamental to economic growth as well as in sectors with particular importance for consumers. The Reports of the past two years have examined the competitive conditions and potential competitive problems in approximately ten sectors, including freight rail transport, telecommunications, banking, gas, and electricity.<sup>74</sup> The reports are seen as an important tool for the RCC to formulate proposals for legislative and regulatory measures that can improve competitive conditions in particular sectors. In addition, the RCC has for several years been working on competitive indicators for a number of key economic sectors and is in the process of creating a more comprehensive aggregate competition index across industry sectors. When completed, the index should provide additional guidance for the RCC's prioritisation policy.<sup>75</sup>

It remains to be seen if the RCC's focus on priority sectors will in the future result in a larger share of enforcement actions in those sectors. Of course, focusing only on antitrust enforcement actions may to some extent also be misleading as other instruments in the RCC's toolbox may be used more effectively to address competition concerns.

#### 4.3.1 *Ex post review*

The RCC has more recently started to use *ex post* evaluations, although this has not yet become a regular and systematic part of its activities. Its first *ex post* review of a merger decision was initiated in 2011. It concerned the RCC's decision in the *Cosmote/Telemobil* merger in the telecom sector in 2009.<sup>76</sup> It was a qualitative *ex post* study, although a significant amount of data on industry developments was used as well in that assessment. The *ex post* analysis confirmed the initial analysis that the merger was pro-competitive and that the non-objection decision was well grounded.<sup>77</sup>

In 2012, the RCC initiated an *ex post* study of its decision in the Lidl/Plus grocery retail merger, which the RCC approved without remedies.<sup>78</sup> The RCC had identified 26 relevant markets in which the transaction led to horizontal overlaps in terms of retail activities in everyday consumer products, sometimes with combined market shares of 25-45 %. The aim of the *ex post* merger exercise, which is led by the Chief Economist group, is to evaluate the impact of RCC's decision on the relevant market and to assess whether RCC's assumptions underlying the merger review decision are consistent with the market conditions that occurred since then. Reviewing the effectiveness of the behavioural remedies that were used in several more recent merger decisions might also be a valuable exercise.

The RCC has also begun to study the impact and benefits of certain decisions. Following its infringement decision against the Professional Association of Accountants and Licensed Accountants, which found that the Association had set the level of fees its members should charge their clients, the RCC investigated the impact on the decision on the accounting market. The study estimated that increased competition could save consumers of accounting services at least EUR 16 million per year. A study following the RCC's detection of a local bread cartel focused on the estimated harm instead of the potential benefits. It estimated that consumers had been over-charged by approximately EUR 2 million during the duration of the cartel. While there was no formal impact assessment, the results suggest that bringing the cartel to an end did save local customers significant amounts.

The RCC has also studied in one case the potential benefits of its advocacy work and regulatory intervention. In co-operation with ANCP, the Romanian consumer protection authority, the RCC had successfully pushed for a broader application of the reduction of early reimbursement fees to all types of consumer credits. The expectation was that reducing these fees would enable more consumers to refinance their loans. An *ex post* evaluation of developments in the banking sectors confirmed that refinancing transactions sharply increased shortly after the relevant regulation was adopted. The RCC estimated that within one year, consumers were able to save approximately EUR 17 million.<sup>79</sup>

#### 4.3.2 Institutional reforms

The RCC is also engaged in a massive operation to review internal procedures and institutional arrangements. Much of this was triggered by the 2011 a World Bank report that identified many areas where the RCC's internal procedures could be improved. The recommendations reached from improvements in the governing legal framework to restructuring of the RCC and improvements in its internal capacities. The recommendations resulted in a strategic document that the RCC uses as a guideline in its reform efforts. Some reforms have already been implemented, like the creation of the Chief Economist Group, the Cartel and Procurement Directorates, and the Advocacy Unit. Other steps in the reform are pending, such as an improved prioritisation and case management system, and initiatives to broaden training initiatives and to improve personnel management. The RCC has also embarked on a review of its internal procedures. It has identified 97 different operational procedures that are currently in place. The review should ensure that a more rational system for internal procedures is in place and that a more systematic and uniform approach is used when procedures are drafted and adopted.

Undergoing so many reforms concurrently is a challenge for the RCC and its staff. Many of the proposed reforms were considered a high priority. As a result, leadership attention was required for many areas, making a consistent implementation of reforms and review of the practical effects difficult. There is a risk that the most complex reforms, such as those related to supporting and improving the RCC's human capital, lag behind and might in the future not receive the necessary attention as new challenges arise elsewhere. Skills improvement, meaningful personal development plans and performance reviews, the development of non-financial incentives and rewards, and measures to encourage informal collaboration across units and directorates remain important, although challenging, areas. The consistent implementation

of effective reforms concerning the management of the RCC's human resources could have a major positive impact on the RC's performance. In particular, it could ensure continuity beyond the term of the current leadership.

#### **4.4      *Judicial review***

##### *Institutions*

All RCC decision can be appealed within 30 days before the Administrative Section of the Bucharest Court of Appeal, which hears appeals from a wide range of government authorities. In addition to seeking to have the final decision by the Competition Council overturned, parties can also seek a court order to suspend the effects of a decision while the appeal is pending. Although rarely successful, appeals for suspensive effects are commonplace, binding additional RCC litigation resources. In addition a number of procedural issues can be appealed within 15 days, including decisions concerning confidentiality of information, the legal privilege, and inspection orders.

Further appeals are possible to the High Court of Cassation and Justice, Romania's Supreme Court. Under the new Civil Procedure Code, which comes into force in February 2014, appeals to the Bucharest Court of Appeal can raise issues of law and facts, while appeals to the High Court are limited to questions of law. Under the previous rules that will continue to apply to all cases filed before February 2014, all appeals could raise issues of law and of facts.

There are no specialised chambers at the Bucharest Court, and matters are assigned randomly among the more than 30 judges of the court's Administrative Section. The lack of specialisation creates problems, as in particular the private bar has emphasised. The judges are specialised in administrative law matters in general, but not competition law. Their experience in competition matters and their willingness to prepare can be very uneven, and no judge has the opportunity to build up the necessary expertise. The willingness of judges to engage in arguments related to economic evidence appears limited, and although the court could appoint economic experts, in practice they are rarely used. In addition, appeals by different parties in essentially the same case can end up before different judges, and inconsistent outcomes are possible. An example is the RCC's abuse of dominance case against Orange and Vodafone related to call termination, where the RCC decision was reversed in one case, but upheld in the other.<sup>80</sup> Both cases are currently on appeal before the High Court.

The random assignment of cases and the decision against specialisation is rooted in the public distrust of institutions and concerns about corruption in the judiciary. But everyone agrees that the current approach comes at a price and creates challenges during judicial review. Given the general problem of distrust in the judiciary that the current approach seeks to address, it may be difficult to find a competition law specific solution. In principle, however, it would appear that the creation of a smaller group of judges among which competition cases are randomly assigned could address some of the current problems, as it would increase the rate at which individual judges hear competition cases while making it impossible in advance to determine which judge would hear an appeal in a specific case.

The appeals process functions without significant delays. On average, an appeal before the Bucharest Court of Appeal takes approximately 14 months, whereas appeals before the High Court are decided within 9 months.

The RCC has a good record before the court. Although some decisions have been reversed, overall approximately 85 % of all RCC decisions have been upheld on the question of infringement (leaving aside appeals for suspensive effects where the RCC's success rate is even higher). Appeals concerning fines are more successful, and approximately 60 % of the fines are upheld on appeal.

Judges of the Bucharest Appeal Court have a favourable view of the RCC's work before the court, compared with other authorities whose decisions can be appealed. They generally find that decisions are better prepared, cases are better argued, and references to European precedent are more helpful than in many other cases. They appear to be more open to arguments against fines. As one judge of the Bucharest Court of Appeals explained, fines appear to be more a question of judicial discretion; for judges, policies other than deterrence play a greater role and need to be balanced against the deterrence goals pursued by the RCC. She also expressed the view that the RCC could do a better job in explaining the fining portions of their decisions.

#### **4.5 Other means of applying competition law**

##### *Private actions*

Romanian competition law provides private parties full rights to litigate their cases involving antitrust claims before civil court, in line with EU law requirements. The right to sue for damages is also in line with the newly adopted Civil Code.

The 2010 amendments introduced several provisions specifically dealing with private litigation in Article 61 of the Competition Law. Among other things, the Competition Law eliminates joint and several liability in follow-on actions for damages with respect to defendants that benefitted from immunity in the public enforcement case. The Law explicitly provides for the possibility of access to documents on file with the Competition Council. Plaintiffs in follow-on actions are given the right to bring their claims until two years after an infringement decision by the RCC has become final. And the law provides for the possibility of collective actions that can be brought by consumer associations, professional associations, and associations of employers. The RCC is authorised to intervene in private actions to submit observations.

Private litigation involving competition law claims before national courts exists, but has been rare. Even members of the private bar report that competition law claims are usually not raised in disputes between private parties. Competition law claims appear to come up occasionally in contract disputes where one of the parties raises competition law issues. There has been no known action for damages based on a competition law violation. The new provisions in the Competition Law are favourable to plaintiffs considering an action for damages, but are too new to have any impact.

Although the RCC has the right to intervene in competition cases before national courts, it has no tools to gather information about pending cases. Curiously, the law imposes an 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), but there is no equivalent obligation to inform the RCC about cases involving Romanian competition law. That is unfortunate, given that both the private bar and the RCC expect an increase in private litigation following the recent changes in the law and the greater number of RCC decisions against hard core cartels. The generally increased awareness of private litigation in competition cases in Europe may also have an impact in Romania, as members of the bar will be able to more effectively advise their clients. If these expectations become reality, a more proactive role of the RCC would appear desirable to ensure case outcomes consistent with the policy goals of the Romanian competition regime.

#### **4.6      *International issues***

The dominant factor in the RCC's international activities is Romania's EU membership. The RCC is member of the ECN, and thus of a network that allows for the exchange of information, co-operation, and mutual assistance

among all member competition authorities. Regular participation in ECN meetings allows the RCC to discuss practical enforcement questions, trends, and experiences with its EU peers. Interviews with the RCC leadership highlighted that the familiarity with other ECN competition regimes provides meaningful benchmarks for the RCC to assess its own strengths and weaknesses. The RCC has also adopted policy documents promoted through the ECN, such as the ECN's model leniency programme.

EU membership also means that Romania has no authority in trade matters. The RCC is therefore not engaged in trade matters involving competition issues, and there are no Romanian bilateral free trade agreements that could include competition related provisions.

#### 4.6.1 *Extraterritorial effects*

Subject matter jurisdiction in international cases is based on an effects test. According to Article 2(4), Romanian competition law will be applicable to domestic conduct and to foreign conduct that produces domestic effects.

While by far the most cases have involved players with a domestic presence, there have been a few cases in which the ability of the competition law to reach conduct by foreign firms was an issue. One case concerned the retail price maintenance scheme that a Turkish perfume manufacturer applied to its distribution network in Romania. Although the relevant market in this case was limited to Romania, the RCC determined that the RPM practice had been planned and organised by the foreign producer. Because the practices had domestic effects, the RCC was able to apply Romanian competition law and found that the practice infringed Romanian competition law.

In another recent case, the RCC has been investigating a number of foreign firms with no presence in Romania for engaging in an alleged bid rigging scheme in connection with government defence contracts. Here, again, the fact the conduct has effects in Romania is sufficient to apply Romanian competition law. The RCC adopted an infringement decision in December 2013 and imposed combined fines of approximately EUR 2.8 million on the four parties.<sup>81</sup>

While in both cases the application of Romanian competition law was well within the RCC's statutory powers, obtaining evidence from the foreign defendants has been a challenge. The RCC sought to co-operate with its counterparts in Turkey and Switzerland, but was told that the conditions for

co-operation were not met since the conduct under investigation affected only Romania. It had to seek information from the defendants through diplomatic channels, sending them requests for information through the Romanian foreign ministry and the ministry's foreign counterparts. Ultimately, these efforts proved successful as the defendants did reply to the RCC's request, but the process was time consuming and ultimately contributed very little to the evidence that the RCC had already been able to secure domestically. To date, there remain also serious questions as to whether the Turkish perfume producer can eventually be forced to pay the fine imposed on it for the unlawful retail price maintenance scheme. The recent decision against the four weapons suppliers in connection with government defence contracts might raise similar problems.

The RCC has not yet received a similar co-operation request from a competition authority outside the EU.

#### *4.6.2 Treatment of foreign parties*

The Competition Law applies to domestic and foreign firms alike, and there have been no indications that the RCC has treated foreign firms or their local subsidiaries less favourably than their domestic counterparts. Although the highest fines to date have been imposed on subsidiaries of Vodafone and Orange, two foreign firms, the fines imposed on Posta Romana, a state owned firm, were not significantly lower.

#### *4.6.3 Co-operation, participation in international networks and technical assistance*

The RCC has signed several bilateral co-operation agreements with competition authorities in countries outside the EU, including Armenia, China, Moldova, Russia, Serbia, South Korea and Turkey. The agreements provide for regular exchanges of information, including information about enforcement activities, and experiences as well as the possibility of co-operation in international activities. They do not permit the exchange of confidential information in ongoing enforcement cases.

For several years, the RCC has been the recipient of technical assistance under EU supported twinning projects. In 2011, the RCC became one of the leading providers of technical assistance to Moldova in the framework of an EU twinning project. Since then the RCC has been co-operating closely with the

Moldovan competition authority and has organised meetings and training programmes.

Romania has been a participant in the OECD's Competition Committee since 2006 and actively contributes to its discussions. It is also an active member of the International Competition Network (ICN), participating in several of its workgroups. This report has highlighted several instances where the RCC used the output of the OECD and the ICN to implement domestic reforms in order to strengthen the competition regime.

#### **4.7 Sectoral regimes**

##### **4.7.1 Telecommunications**

The regulatory framework governing the telecommunications market, including to some extent the institutional setting, is largely determined by EU law. Romania has implemented the Framework Directive and all other relevant sector directives.<sup>82</sup> ANCOM, the national telecommunications regulatory authority, is a BEREC member and closely co-operates with its EU counterparts.<sup>83</sup>

Much of ANCOM's market assessment and regulatory approach follows harmonised EU standards. Various telecommunications markets are subject to regular review to determine whether they are competitive or whether competition is not effective and therefore *ex ante* regulation continues to be required. ANCOM's decisions are subject to review by the European Commission. The degree of competition in Romanian telecommunications markets is well in line with other EU member countries; overall, Romania has made more effective progress toward introducing and maintaining competition in several telecommunication markets than many of its peers.<sup>84</sup>

Romtelecom, the previous monopoly provider of fixed-line telephony services has been privatised and is majority owned by OTE, the Greek telecommunications provider in which Deutsche Telekom is the largest shareholder. It continues to own the legacy fixed line network and controls the local loop. Romtelecom has not been subject to vertical separation, and offers services also on several retail markets, including fixed line and mobile telephony, as well as internet access. ANCOM revised and tightened account separation rules in 2012, to ensure transparent accounting for cost and price, and to clearly separate Romtelecom's activities as a network operator and provider of access services from those in the retail market.

Romtelecom's position as a provider of telecommunications services has declined as it has been slow to adapt to increasing competition. It continues to have a large share in fixed line telephony, but cable television networks have undergone a period of consolidation and today provide a viable, alternative network solution, particularly in many metropolitan areas. In addition, fiberoptic networks have been built out primarily by Romtelecom competitors. Romtelecom has also been subject to effective access regulation by ANCOM. As a result of these developments, there are a large number of alternative service providers in fixed line telephony services, both on the wholesale and the retail levels.<sup>85</sup> Switching fixed line service providers with number portability has increased significantly between 2010 and 2012. Competition in markets for local and national calls was apparently robust enough to enable the RCC to authorise Romtelecom's acquisition of a rival provider of fixed-line telephony services in 2010, although the target's weak financial condition was apparently also a major factor in the decision.<sup>86</sup>

A new law on access to telecommunications infrastructure was adopted after many years of debate in 2012.<sup>87</sup> The law addresses access to private and public property in order to install or maintain network elements and the shared use of telecommunications infrastructure. Among other issues, the law authorises ANCOM to order the shared use of network infrastructure elements. It is expected that the new law will provide greater clarity and the required legal framework that supports the necessary building out and upgrading of telecommunications networks.<sup>88</sup>

The mobile telephony market has continued to grow in the most recent years. There are six competing providers of mobile phone services, and the largest ones are foreign owned. Penetration rate based on active SIM cards is approximately 120 %. The market for internet access services has been growing significantly as well, although from comparatively low numbers. The take-up rates for fixed and mobile broadband access remain well below the EU average. But the number of service providers is very high, and the share of high speed connections and availability of next generation access is well above EU average. The share of the incumbent operator in internet access markets is well below EU average. This indicates that markets are competitive, and that the low penetration rates for broadband services are the result of demographic and economic conditions and not of uncompetitive markets.

ANCOM is an independent, regulatory authority for the telecommunications and postal sectors in Romania. After a series of

institutional changes and mergers between regulatory authorities in the telecommunications field, ANCOM was established in 2009 as an autonomous public authority that reports directly to Parliament. The President is appointed for a six-year period, renewable once, and can be removed only for cause. ANCOM is a relatively large organisation with a staff of approximately 600. It is a well-respected authority which is seen as using its regulatory powers effectively to contribute to a competitive environment in Romanian telecommunications markets.

ANCOM has no power to apply the provisions of the Competition Law to sectors under its regulatory authority, although it is authorised by law to take “all appropriate measures to prevent and remove actions that envisage or may envisage the distortion or the restriction of competition in the fields of electronic communications.”<sup>89</sup> Conversely, sector regulation does not limit the powers of the RCC to apply the provisions of the Competition Law. Thus, the two authorities have overlapping jurisdiction with respect to the telecommunications and postal sectors.

Co-operation between the RCC and ANCOM is envisaged in the law,<sup>90</sup> and the two authorities have signed a detailed co-operation agreement in 2009.<sup>91</sup> The work relationship between the RCC and ANCOM has been particularly good and effective. Regular meetings at staff level cover topics of mutual interest, such as the setting of termination rates and market definition in the framework of ANCOM’s regulatory powers. A recent example for the effective co-operation between ANCOM and the RCC is Romania’s first spectrum auction which was completed in 2012. ANCOM requested the RCC’s support to provide a binding opinion on the draft regulatory framework for the planned auction which ANCOM considered deficient. Major industry players also requested the RCC’s input as they considered the conditions in the draft regulation unnecessarily restrictive. Both authorities explain that their co-operation and joint intervention in this case were highly successful, as the auction not only netted approximately EUR 700 million for the Romanian budget, but also resulted in outcomes that should increase competition, improve services, and bring new services to currently underserved areas in Romania.<sup>92</sup>

The RCC has also worked with ANCOM when competition cases involved the telecommunications industry. In its investigations of the practices of Orange, Vodafone, and Romtelecom related to call termination on their networks, the RCC sought the input of ANCOM (and its predecessor), in

particular because termination rates were regulated by ANCOM and Vodafone, and Orange allegedly evaded the maximum tariffs set by regulation.

#### 4.7.2 *Postal services*

The regulatory framework governing postal markets in Romania is also largely determined by EU legislation,<sup>93</sup> including the pace of market liberalisation, essential institutional features, and the designation of a universal service provider. As for telecommunications markets, ANCOM exercises regulatory authority also in the postal sector.

Market liberalisation in postal markets was introduced gradually. Parcel post and express mail were liberalised earlier. Posta Romana, the incumbent postal operator, retained monopoly rights for certain letter post until recently. Romania was among the EU member states that received a two-year derogation from the liberalisation schedule and opened up the last segments of the postal market to competition in 2012.

Liberalisation has led to entry by a large number of service providers in all relevant segments. In 2012, more than 200 authorised providers of postal services were active in Romania, although many of them remain very small. The degree of competition differs significantly among sectors. In letter mail, Posta Romana retains a more than 80 % market share, whereas its share for parcel services has fallen to less than 10 %. For express delivery services, its share was below 40 %.

Various surveys suggest that in particular the market for letter services, where Posta Romana retains a dominant position, is not performing particularly well. Prices for letter services have increased substantially in the past five years, maintaining Romania's position as one of the countries where the service was least affordable, based on a comparison with general wage levels.<sup>94</sup> But higher prices have not translated into better service. The quality of service measured by speed and reliability of delivery has actually fallen between 2010 and 2012. Despite a target of 85 % for D+1 delivery, actual D+1 performance was 40 % in 2012, down from 52 % two years earlier.<sup>95</sup>

Letter service, as well as a number of other services, have been subject to universal service obligations. Posta Romana has in the past been designated as the universal service provider, in line with EU law principles. No firm applied to become the next universal service provider, and ANCOM has recently proposed to renew *ex officio* Posta Romana's mandate until 2018.<sup>96</sup> Services

within the scope of the public services obligation are price regulated and subject to additional regulatory requirements to prevent anticompetitive conduct. But at the same time the relevant services are open to other competitors. ANCOM observed that even before total liberalisation there was some entry into services within the scope of universal services,<sup>97</sup> and this is a trend that should presumably continue as Posta Romana no longer enjoys any exclusive rights.

The weak performance metrics suggest that the incumbent has been resistant to reforms and regulation that would increase competition and the quality of service. Posta Romania currently is 75 % government owned, and the remaining 25 % are owned by a public property fund. The government has announced plans to sell a further 51 % stake, although the plans were put on hold shortly after the first announcement. Posta Romana is a major employer in Romania with approximately 35 000 employees, and concerns about social problems may affect the speed of privatisation and the willingness to transform Posta Romana into a leaner, more effective service provider.

The RCC investigated Posta Romana for using discriminatory tariffs that excluded rival providers of pre-sorting services, a conduct that has also been investigated by several other European competition authorities. The RCC imposed substantial fines of approximately EUR 25 million.<sup>98</sup> A parallel investigation into excessive prices was terminated without the finding of an infringement. Otherwise the RCC has not used its enforcement powers in the postal sector.

#### 4.7.3 *Rail transport*

Rail transport is another regulated sector where some of the regulatory framework, including industry restructuring, is the result of EU law requirements.<sup>99</sup> Freight rail transport has been successfully opened up to competition, while competition has not yet taken hold for passenger rail transport.

The foundations of the current industry structure were created in 1998 when the incumbent, vertically integrated railway company SNCFR was split into five independent companies, including the infrastructure company CFR, the passenger transport company CFR Calatori, and the freight company CFR Marfa. Regulatory functions remained with AFER, a regulator within the Ministry of Transport.

Since restructuring, competition has taken hold in the freight transport sector. Over 20 private competitors exist, although not all of them have large

operations. Marfa's share has fallen to approximately 45 % in 2011. Currently privatisation of Marfa is under way. Despite increased competition, rail freight transport has fallen over the same period by more than 20 %, reflecting underinvestment in infrastructure maintenance, development and repair, and increased competition by road transport.

While the introduction of competition was successful, there was an ongoing concern that Marfa continued to control important ancillary services such as depot services, sheds, and fuel services. The RCC found that Marfa had charged its privately owned competitors discriminatory rates for access to these ancillary services markets and imposed a EUR 7 million fine.<sup>100</sup>

In 2011, the Government moved the Railway Supervision Council (RSC) to the RCC, reflecting demands from the European Commission to ensure regulatory separation and independence of access regulation. The RCC had also earlier expressed concerns that access regulation through the Transport Ministry, which also held the government interests in CFR Marfa and CFR Calatori, could lead to a less favourable treatment of Marfa competitors when allocating access rights to the rail network.<sup>101</sup>

The members of RSC's five member board are appointed from among RCC members by the President of the RCC. One RCC Vice-President is the RSC Chairman. The RSC is tasked only with ensuring transparent and non-discriminatory access to the railway infrastructure. AFER retained all other regulatory functions such as safety regulation and the granting of operating licenses. Within the RCC, there is the expectation that decisions concerning access to infrastructure should improve, given the greater expertise within the RCC and the ability of the RSC to co-operate with members of the Directorate in charge of railways.

#### 4.7.4 *Energy*

Like for several other regulated industries, the regulatory framework governing electricity and gas is heavily influenced by EU directives; this applies also to features of the institutional setup.<sup>102</sup> The sector regulator participates in CEER and ACER, the European institutions for co-ordination among energy regulators.<sup>103</sup>

Unlike some other sectors such as telecommunications, liberalising energy markets has been a much more challenging and politically sensitive issue in Romania. Romania is much less dependent on energy imports than many other European countries; all demand for electricity and a large share of the demand

for gas can be met with domestic production. This has allowed governments in the past to maintain very low energy prices, and has resulted in a lack of genuine political will to move toward fully liberalised, competitive markets.

There has been great reluctance to open up both sectors and to fully integrate them with neighbouring markets because of the potential implications on the electricity production level, on upstream supply of domestic coal, and in particular on the consumer segment of the retail markets for electricity and gas. All legally necessary steps toward liberalisation have been taken, but regulated retail markets continue to co-exist along a competitive segment limited to large industrial users, resulting in significant market distortions. Price regulation that is influenced by political factors and is difficult to reconcile with cost recovery principles has undermined incentives to invest in the much needed repair and expansion of production facilities and infrastructure. Romania has adopted a roadmap for abandoning all price regulation. The transition to liberalised markets until 2017 for electricity and until 2018 for gas will create major challenges for the sector regulator, but also for the RCC.

#### 4.7.5 *Electricity*

The structure of the electricity market has developed gradually as the former integrated monopolist, RENEL, was restructured through vertical and horizontal separation. The market was separated into production, transmission, distribution and supply activities, with different players on each level.

At the generation level, separate electricity generation companies were formed based on energy source, creating state-owned, large single source production companies focused on hydroelectric power, nuclear power, and the running of coal fired plants. The same structure continues today at the production level: the group of state owned companies continues to dominate production and accounts for 80 % to 90 % of total production, with hydroelectric power accounting for approximately 30 % of production, nuclear energy for approximately 7 %, and coal for approximately 32 %, and hydrocarbons for approximately 18 %. Privately owned companies that produce energy from gas fired plants and renewables account for approximately 13 % of total electricity production.<sup>104</sup> Given the low electricity prices in Romania, imports play no significant role.

Even though most production capacity is state-owned, the RCC considers that the production companies are individually managed and compete with each other.<sup>105</sup> Other sources have used the term “soft cartel” to describe the

relationship among the state owned producers. They have expressed concerns that the market is not fully competitive because even though each generator is organised as a separate legal entity, all are controlled by the same ministry and pursue strategies that independently owned, privatised players likely would not pursue.<sup>106</sup> While the energy mix on the market as a whole is well balanced, each producer is essentially relying on a single source of energy, making an optimal operation of power plants more difficult. In particular high cost suppliers are put at risk as the market restructures, the share of renewables increases in light of generous incentive schemes, and lower demand creates production overcapacities. A restructuring on the production sector had been planned, but there was disagreement over how the industry should be re-organised. Parts of the government had preferred a concentration of all state-owned production assets in two companies, whereas ANRE favoured a solution with more players in order to reduce the risk of collusion. The government's restructuring plan has been withdrawn and necessary decisions continue to be delayed.

The electricity transmission network is operated by a state-owned Independent System Operator (ISO), Transelectrica. The market operator OPCOM is responsible for several market based activities, including administering the market place for wholesale electricity contracts and green certificates. Both are subject to regulatory oversight by ANRE, the regulatory authority for energy markets.

The distribution network is owned by eight distribution companies that have a local monopoly based on concession. The majority of the distribution companies have been privatised and are subsidiaries of large European energy conglomerates. They are also considered suppliers "of last resort" for retail customers that continue to receive energy under regulated conditions and not on the free market. Distribution companies are also subject to ANRE regulation.

Energy supply, both on the wholesale level and the retail level has been opened up to competition. More than 100 suppliers hold electricity supply licenses issued by ANRE, although not all of them are active and many of them are very small. Suppliers can be active on both wholesale and retail markets. On retail and wholesale levels, market concentration is very low. On the retail market the share of the largest supplier is just over 20 % and the combined share of the ten largest suppliers is below 75 %.<sup>107</sup>

The Romanian electricity market is supposed to become closer integrated with neighbouring CEEC markets, as Romania, together with Poland, is expected to join an existing market integration project initiated by the Czech

Republic, Hungary, and Slovakia.<sup>108</sup> But there is a concern that current transmission tariffs will hinder trade with other member states. In addition, limited interconnector capacity might prevent efficient cross border trade.<sup>109</sup>

While supply contracts can be concluded on the market place organised by OPCOM, parties have in the past also entered into bilateral long-term supply agreements outside the market place. Until recently, almost one third of total production was governed by such contracts, although Hidroelectrica's recent insolvency resulted in the termination of its bilateral contracts (Hidroelectrica is the state-owned operator of hydroelectric power plants). The evaluation of long-term contracts and their proper regulation raises difficult policy issues. Several long-term contracts by Hidroelectrica are under investigation by the European Commission as the low prices for electricity for major industrial customers raise state aid issues. In parallel, the RCC is investigating several contracts for potential anticompetitive effects as they might foreclose access to markets and remove liquidity from the spot market.<sup>110</sup>

At the same time, long-term contracts provide significant benefits, as they can secure financing for much needed investments by producers and reduce price volatility in particular for users. There appears to be some uncertainty in the market place about the effect of the new Energy Act 2012,<sup>111</sup> which imposes a transparency requirement on all bilateral electricity supply contracts and requires the use of market places for all supply contracts. ANRE recognises that the uncertainty about the lawfulness of long-term contracts under the new law has made many players reluctant to use them, and is looking for an appropriate policy response.

The major source of distortions to effective competition in energy markets is the large regulated retail market, which has repercussions on the other market levels as well. While large industrial users have been supplied under competitive conditions for several years, which has encouraged the creation of a competitive supply market, private customers and small companies continue to benefit from price regulation that keeps price levels at artificially low levels. Rates are regulated by ANRE and not the government, but they do appear to reflect political concerns more than cost recovery principles. Private customers and small companies currently have the option of switching to competitive suppliers, but very few have done so. Especially among private users switching rates have been very low. Consumers that have switched to the competitive segment of the market cannot come back to the regulated segment, which creates an extra disincentive to switch. In 2013, ANRE reported that

approximately 56 % of total demand was supplied under competitive contracts, and 44 % under regulated contracts.<sup>112</sup>

Price regulation has effects beyond retail markets as the suppliers in the regulated segment of the retail market purchase large portions of the required electricity supply through regulated contracts with price caps. While the use of regulated wholesale contracts has been limited by ANRE, they continue to cover approximately 25 % of total electricity output.<sup>113</sup> Moreover, as ANRE also regulates the distribution companies, it may have an incentive to prevent them from passing through cost increases in order to protect prices for end consumers, which in turn undermines incentives to invest in the building out of the network.<sup>114</sup>

The transition to a fully competitive market will gradually continue until the end of 2017. The larger customers in the regulated retail market will be moved to the competitive market in 2014, while some private customers have the right to remain in the protected segment until the end of transition.<sup>115</sup> It is clear that the final steps toward liberalisation create major challenges for the sector regulator and the RCC. Prices for final customers will have to rise, but political pressures to maintain lower electricity rates might be significant. The current experience suggests that many customers will be slow to adapt to a changing environment. The number of complaints submitted to the consumer protection authority is high, but it is focusing mostly on lack of transparency in electricity bills. There is a risk that if transition is not properly managed, the number of complaints will sharply increase and the trust in competitive markets could be undermined. This, in turn, could increase political pressures to maintain price regulation. A programme for enhanced co-operation among the consumer protection office, ANRE, and the RCC has been developed to address these issues in a timely manner, but it has received no funding.

#### 4.7.6 *Gas*

Gas markets face a similar situation as electricity markets. While liberalised in principle, prices in large portions of the market remain regulated. This has resulted in very low prices for private consumers that are less than 50 % of average EU prices and less than a quarter than in the most expensive EU member state.<sup>116</sup> The need to transition to a fully liberalised market again creates major challenges.

Romania has significant domestic gas production, covering approximately 70 % of total domestic demand. The remaining 30 % is imported mainly from

Russia. Domestic production is largely in the hands of two companies, the state-owned Romgaz and the privately owned Petrom. Romgaz also controls much of the gas storage facilities.

Production, transport, and distribution have been vertically separated. Transgaz is the ISO for the transmission network. It applies regulated tariffs for domestic transport activities. Opcom operates the gas market place. A large number of independent suppliers have been licensed by ANRE. Distribution is in the hands of the more than 50 regional distribution companies. They are also the “default” suppliers for customers in the regulated segment of the market, although since 2007 the largest distributors have to separate their supply functions from the distribution functions.

Trading in the deregulated segment of the market requires a functioning, transparent market place and access to the necessary infrastructure. Not all the required elements have been put in place. The gas exchange is not yet fully functional, limiting the trading opportunities for independent suppliers, and creating concerns about the ability of incumbents to exercise market power.<sup>117</sup> The RCC and ANRE have started to co-operate on developing effective *ex ante* regulation for the gas market place, but the project has not yet been completed. Much of the storage capacity remains in the hands of one of the two main gas producers. Investments in infrastructure will be required as well, in particular to further increase reverse flow capacities of the network.

As in electricity, the major challenge in the gas sector is the large, currently regulated retail segment of the market, and the commitment to transition to a fully liberalised market by 2018. Private consumers can already opt for the liberalised market, in which case they are prevented from returning to the regulated segment, but very few do. The obvious concern is the inevitable increase in gas prices as the current price regulation which is difficult to reconcile with cost recovery principles ends,<sup>118</sup> and domestic gas prices will become more aligned with international prices. The government has a history of intervening in markets; during the economic crisis in 2011, the government introduced a temporary ban on domestic gas exports. The measure was repealed in March 2013 following an infringement procedure launched by the European Commission.

Much of the necessary support for private customers to better understand a liberalised market could be considered a consumer protection concern, as the main focus will be on providing the necessary information, ensuring transparency, and enabling consumers to switch suppliers. But in the end a

successful transition to a liberalised market will be a concern for the RCC as well, as the public could lose faith in market liberalisation.

In addition, the efforts to ensure a properly functioning, transparent market place for gas trading are connected to the concerns about the effects of liberalisation. Consumers are more likely to benefit from market liberalisation if there is functioning competition among suppliers and the current “default suppliers” have less opportunity to keep rival suppliers out of retail supply markets. Thus, progress on establishing a functioning market place can also contribute to more successful liberalisation of the retail market. Conversely, an increased willingness of consumers to trust alternative suppliers will create incentives for new suppliers to compete in the market place.

The sector regulator for electricity and gas is ANRE, since 2012 an independent public authority as required by applicable EU legislation.<sup>119</sup> Romania used to have two independent regulators for, respectively, gas and electricity, but in 2007 ANRE took over all regulatory functions in both sectors. Under the current law, the ANRE President and the Vice-Presidents are appointed by Parliament for a five-year term, renewable once, and can be removed only for cause. All regulations must be approved by a Regulatory Committee consisting of the President, the two Vice-presidents and four Regulators that are also appointed by Parliament. A Consultative Council provides input by major stakeholders, including the RCC, and creates greater transparency. ANRE has currently approximately 240 staff members.

ANRE does not have a longer history of independence and generally does not command the same respect among stakeholders as an independent and professional organisation like the RCC or ANCOM. Until the 2012 reforms, the ANRE president was under the co-ordination of the Prime Minister. There was the perception of political influence on ANRE’s decision making that made ANRE largely ineffective.<sup>120</sup> Although the appointment process has been reformed to ensure greater independence, some have criticised the first appointments as too politically influenced.<sup>121</sup> While the political sensitivity of energy prices can explain the desire of the government and Parliament to maintain some influence on ANRE’s decisions and policy directions, political influence does increase the challenges for ANRE to develop fully liberalised and competitive energy markets.

ANRE has no powers to enforce provisions of the Competition Law. But in addition to maintaining security of supply and protecting consumers, it is tasked with ensuring competitive energy markets. Thus, the powers of the RCC and

ANRE overlap with respect to the energy sector. Co-operation between ANRE and the RCC has been formalised by a co-operation agreement. The agreement dates back to 2004 and, unlike the co-operation agreement with ANCOM, its co-operation provisions are kept at a fairly general level. ANRE can inform the RCC about possible anticompetitive practices it has detected in the market. ANRE will consult the RCC when adopting relevant regulations, which is facilitated by the RCC's participation in the Advisory Committee of ANRE. Conversely, the RCC will consult ANRE in investigations concerning energy markets.

In practice, co-operation between the RCC and ANRE has not always been very productive. Co-operation appears to have improved more recently, including at staff level, although recently the RCC has opened a case under its Article 9 authority and investigates ANRE for adopting acts which undermine competition for renewable energy.<sup>122</sup> Given the enormous challenges ANRE faces with regulating the transition to liberalised markets in the coming years, closer co-operation between ANRE and the RCC appears to be necessary to increase the likelihood that the reforms will be successful. In addition to co-operating and exchanging know-how in order to jointly create the conditions for more competitive energy markets, RCC support might also help ANRE to better resist political pressure to maintain its role as a politically oriented price regulator.

## **5. Conclusions and policy options**

### **5.1 *Strengths and weaknesses of the Romanian competition regime***

This Section summarises the strengths and weaknesses of the Romanian competition regime in light of the three main themes identified above: the status quo, recent changes, and a comparison with international practices including the relevant OECD instruments. It also identifies areas in which steps to further strengthen the performance of the competition regime should be considered.

Overall, the legislative and regulatory framework of the Romanian competition regime is well in line with the standards developed by the international competition law community. It is well grounded in European competition law policies, enforcement standards and practices, and also appears to be in line with the OECD Recommendations that are particularly relevant for competition law.

The RCC has increasingly adopted a consumer welfare centred approach to competition policy and law enforcement, consistent with European and

international developments. This means increased attention to horizontal agreements, in particular bid rigging and other hardcore cartels. It also means a move away from a largely complaint driven enforcement system to a system that seeks to select cases based on their likely impact on market performance.

#### *5.1.1 Cartels*

Many of the legal and institutional elements for effective cartel enforcement are in place. Cartels are unambiguously prohibited, the RCC has effective investigative powers, the leniency programme is consistent with European and international standards, fines can reach 10 % of a defendant's annual revenues, and the law provides for individual criminal sanctions for bid rigging and other cartels. The RCC focuses on the fight against cartels. It has created a Directorate for Public Procurement and has a dedicated cartel unit to ensure that the necessary resources and expertise are available. The Procurement Directorate focuses not only on the prosecution of bid rigging, but also works with procurement authorities to improve procurement procedures. Among other initiatives, the RCC has successfully lobbied for the introduction of a certificate of independent bid determination, which can increase both deterrence and enforcement opportunities.

The RCC's efforts have resulted in a number of infringement decisions concerning bid rigging and other hardcore cartels. But there has not yet been a major breakthrough in its anticartel programme. In particular, leniency applications remain rare and no criminal conviction has been obtained in a cartel case. The criminal enforcement powers might actually have undermined effective anticartel enforcement, as there has been no realistic threat of criminal a conviction while concerns about criminal liability may have deterred leniency applications. Better co-ordination with public prosecutors is envisaged under a new law, but it is too early to tell whether it will be effective both in ensuring potential leniency applicants that their directors will not face criminal prosecutions and in encouraging prosecutors to open criminal cases. Administrative fines remain relatively low and courts have shown little deference to the RCC when reviewing fine levels.

#### *5.1.2 Mergers*

Merger review is an enforcement area that has created few controversies. The jurisdictional thresholds are based on objective criteria. Notification thresholds are based on the parties' revenues, and the definition of a merger transaction follows the EU model. A reform of notification thresholds

significantly reduced the number of notified transactions, although that reform dates back to 2004 and the large number of notification under a simplified procedure that the RCC currently receives suggests that there might be room for adjusting notification thresholds. Infringement decisions for failure to notify used to be the majority of the RCC's infringement decisions, but they have become rare in recent years.

Review periods are 45 days for Phase I, and five months for investigation combining Phase I and Phase II investigations, generally in line with international standards. Stakeholders are positive about the RCC's ability to effectively and efficiently handle merger notifications and review, focusing quickly on relevant issues and avoiding unfocused, burdensome data requests and undue delays. Pre-notification meetings are available to discuss matters. A simplified review procedure for certain, obviously unproblematic transactions was introduced in response to a suggestion by the business community, suggesting a constructive relationship between the RCC and its "clients" in merger review procedures.

The number of merger cases in which the RCC intervenes is limited. The last prohibition decision dates back to 2001. The RCC has accepted complex behavioural remedies in several more recent merger decisions. It is too early to say that behavioural remedies are being used "frequently" to clear problematic mergers. But their repeated use raises concerns because monitoring requires resources and the parties might find ways to evade complex remedies.

### 5.1.3 *Competition assessment and advocacy*

The RCC has a number of effective enforcement tools against restraints of competition by public actors. It has the authority to adopt infringement decisions against administrative acts by public institutions, and it is regularly requested to provide a competitive impact assessment in the legislative process. Infringement decisions against public authorities are not numerous, but they are adopted on a regular basis, probably sufficiently often to give the RCC credible leverage when it engages in soft advocacy efforts to persuade an institution to remove a public restraint of competition. The role of the RCC as a competition advocate in the legislative process formally has been reduced as its opinions on competitive impact are no longer binding. But the RCC continues to be recognised as an important contributor in the legislative process whose opinions are taken into account. The RCC's role could actually increase if and when the Chancellery implements a new impact assessment system that would prioritise

important legislative initiatives and would enable the RCC to use its resources in a more focused way.

The RCC has also used other, less formal advocacy tools with some success, targeting repeatedly restraints in liberal professions and proposed regulations designed to limit the expansion of large retail outlets and grocery chains. Its advocacy efforts are complemented by regular market studies and sector inquiries that have in some cases provided the foundation for more targeted intervention. Sector inquiries have become a step in the RCC's more ambitious project of creating a competition index for several key economic sectors. When completed and functional, the competition index might provide the RCC further guidance on markets that should be prioritised.

The RCC does to some extent get involved in markets and policy initiatives where its role is more ambiguous. It has taken a keen interest in pharmaceutical markets where it has advised the government on a more cost effective reimbursement policy. There is a risk that the RCC's core mission and principles, including the focus on functioning markets and rewards to innovation, might conflict with the short-term cost containment goals of the public health care system.

#### *5.1.4 Institutional process*

The RCC has become a respected public authority in Romania in recent years, second only to the Central Bank. Stakeholders appreciate its independence, expertise and professionalism. The decision making process is transparent with a clear separation between investigation and decision making. The RCC has a good track record of defending its decisions in court. It has been able to develop good working relations with other parts of the Government such as certain sector regulators, parts of the Prosecutor's Office, and institutions involved in regulatory impact assessment. Over time, the Government has assigned additional tasks to the RCC which is a sign that it trusts the quality of its work.

The President is the head of the authority, but there are few matters where he has sole decision making power. He can set initiatives, but in most matters he must seek a majority among the other members of the Competition Council. Nevertheless, leadership matters and different presidents in the past have had different priorities and goals. Continuity will be an important aspect to help the RCC succeed in its ambitious reform efforts.

In addition to specialised Directorates such as the Procurement Directorate and the Research Directorate, the RCC is organised along industry sectors. Maintaining an organisation along industry sectors appears to be a reasonable approach, and would be consistent with the organisation of many other competition authorities. In particular, the RCC has a set of different tools to address problems in markets and familiarity with specific markets should make it easier to prioritise among various tools.

One of the remarkable institutional features of the RCC is the continuing existence of territorial offices in each of Romania's 41 counties. Each office typically has very limited staff, but in total they represent more than 25 % of the RCC's staff. Territorial offices are involved in competition cases and cases involving unfair competition law. Various outside reviewers have in the recent past raised questions about the continuing existence of territorial offices, raising concerns about quality, expertise, and efficient use of resources. Stakeholders have also expressed concerns that the territorial offices are not well integrated into the central structure and do not always meet the same professional standards as their colleagues working in the RCC's headquarters.

Questions about the territorial offices appear to be legitimate. Among mainstream jurisdictions, there is no other country of a similar or larger size where the competition authority has so many regional offices with such limited staff. Even if the need to maintain a more localised presence is legitimate, control over the quality of their work and their commitment to efficient and transparent procedures must be more difficult than if all staff was working in the Bucharest headquarters. But there appears to be little interest within the RCC to change the status quo.

Maintaining and developing the RCC's human capital is a key concern in order to ensure that the RCC remains an competitive workplace and attracts the most talented professionals. This includes the re-introduction of competitive salary levels which have been reduced as a result of cuts to the general budget, but also non-financial measures, such as personal development plans and performance reviews, non-financial rewards, and measures to encourage informal collaboration across directorates.

#### *5.1.5 Sectoral*

The regulated sectors show many similarities with regulated sectors in other European countries. Much of the institutional and regulatory environment is shaped by EU legislation. Competition in telecommunications markets

appears to work reasonably well. Romania benefits from a less concentrated market structure than other countries, in part because the state-owned, incumbent provider was slow to react to market developments and demands, and competitors were able to establish a sizeable market presence and develop alternative infrastructure. There has been no mandatory vertical separation, but the regulator has taken measure to ensure better accounting separation, to more clearly delineate the incumbent's wholesale activities from those in retail markets. Regular surveys by the European Commission suggest that competition in telecommunications markets is well in line with other EU member countries.

The postal sector provides more of a mixed picture. The markets have been fully liberalised. Competition in some sectors like express delivery and parcel services appears to work well, but the incumbent still dominates letter mail and recent performance metrics indicate low quality levels. Social concerns might delay further reforms of the incumbent.

The sector regulator, which is responsible for telecommunications and postal markets, is well respected and co-operates well with the RCC. The RCC has adopted a few enforcement decisions in the relevant sectors, including infringement decisions that imposed high fines on two telecommunications operators and the incumbent postal operator. But the rate on intervention by the RCC has been relatively low, suggesting that competition works reasonably well and that the regulator is relatively effective.

In rail transport, structural separation was introduced in 1998, separating infrastructure management from two operating entities for freight and passenger transport services. All regulatory functions initially remained with the Ministry of Transport. Recently, however, the administration of access to the network has been moved to the Railway Supervision Council, an institution established within the RCC, in order to comply with European legal requirements.

Competition has taken hold in freight rail transport where the incumbent's share has fallen below 50 %. It is essentially non-existent in passenger transport. Underinvestment in infrastructure maintenance, development and repair creates a major challenge and has undermined the competitiveness of the rail sector compared to road transport.

The energy sector poses great challenges. The regulatory and market structure as well as the institutional framework are in line with EU requirements. The regulator is independent. Vertical separation has been

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introduced in both electricity and gas, separating production, network operation, distribution and supply functions. But serious obstacles to functioning markets remain.

Romania is to a large degree energy independent. All demand in electricity and a major share of gas demand can be met with domestic production. The government controls almost all electric power generation capacity and has also a strong presence in natural gas production. Electric power generators typically rely on a single source of energy, making them less flexible to react to emerging market trends. The need for a reorganisation has been recognised, but has been delayed for political reasons. Price regulation continues to exist in large segments of the gas and electricity retail markets. Although there has been a significant expansion of generation capacity using renewable energy sources, there is a great need to upgrade and renew production facilities in traditional segments as well as and infrastructure. But the current price regulation focuses more on maintaining politically acceptable low retail prices than on prices that encourage investment.

Unlike several other European countries, Romania is committed to introducing full liberalisation in all retail markets in the coming years. This creates major challenges. Prices will have to increase. This will create more opportunities to invest in infrastructure, including infrastructure that connects Romania and neighbouring markets, but will be politically unattractive. The sector regulator has in the past not created the reputation of a powerful, independent institution. The RCC's continued focus on energy markets and on effective regulation appears to be advisable to increase the likelihood that consumers will ultimately see the benefits of liberalisation.

#### *5.1.6 Benchmarks*

The Romanian economy scores low on reports on international competitiveness reports. Clearly, the RCC operates in a challenging economic environment. This has in the past also affected the evaluation of the performance of its competition regime, which generally received low marks in international comparisons. But the investigation for this report suggests that much of the competition regime's institutional features, enforcement process, prioritisation, substantive analysis of competition cases, and ability to intervene against public restraints of competition, are today well within the international mainstream.

Compared with its CEEC peers, the RCC has been coming from behind and has been catching up. Recent reforms have set the RCC on a path where it can match the work and impact of some of the most successful CEEC competition regimes. Some of the problems it faces are comparable to those in other CEEC jurisdictions, such as the difficulty to get the leniency programme off the ground and make it the cornerstone of aggressive anticartel enforcement. In other aspects it has gone beyond the efforts in some other CEEC jurisdictions, such as its focus on procurement cartels, its role in competitive impact assessment during the legislative process, and its interest in *ex post* reviews of past decisions. The transparency of the investigatory process and the separation of investigation and decision making are strong features of the system, also in comparison with many other jurisdictions.

## 5.2 *Capacities for change*

The current assessment is the result of significant changes and efforts in the Romanian competition regime during the past five to ten years. After the fall of the communist regime, not only political and economic developments, but also the development of the competition regime in Romania lagged behind developments in other CEECs. Competition law was from the beginning oriented at European norms and enforcement practices, but the system lacked coherence, expertise, and clear goals.

The 2011 World Bank report already noted the RCC's willingness to reform and improve performance, and the trend has certainly continued since then. The RCC has focused on the fight against cartels and against bid rigging, strengthened its capacity in economic analysis by creating a chief economist group, moved away from a largely complaint drive system, and successfully promoted competitive impact assessment as part of the general regulatory impact assessment process. Internal reforms have aimed at better prioritisation and improved decision making, including the use of peer review panels before a proposed decision is presented to the Council, and the RCC has started to engage in *ex post* reviews of some of its decisions. It has also started with systematic attempts to support the building up of academic research capacity which can in the long run contribute to better competition law analysis and policy.

In the course of these reforms, the RCC has shown a great willingness to adopt European and international standards and practices, as well as the necessary absorption capacity. Like other EU member states, it has benefitted from co-operation within the ECN and from the models and standards

developed by all ECN members. For example, the substantive competition law norms have been increasingly aligned with EU competition law, the leniency programme is based on the ECN model, and a “settlement” procedure has been recently implemented that follows in many respects the European Commission’s approach to settlements in cartel cases. The RCC has also adopted international standards promoted by the OECD and the ICN. It uses extensively, for example, the OECD bid rigging guidelines and has adopted the ICN’s model waiver provision for merger investigations. Many of the internal reforms that are currently pending are the result of advice the RCC received from the 2011 World Bank report.

But catching up on so many fronts and incorporating international practices and advice by outside reviewers creates its own challenges. It requires action and progress simultaneously on many fronts. Delivery on all issues is difficult, and even if reforms are implemented, they will not change market outcomes overnight. In many cases reforms are under way and need to be completed before they can deliver results. For example, co-operation with prosecutors has been non-systematic, and needs to be re-assessed after recent legislative reforms affecting criminal cartel prosecution. The RCC has received some tip-offs about potential procurement cartels, but it is unclear whether its outreach activities have really fundamentally changed procurement practices in Romania. The RCC’s focus on key economic sectors is important, but has not yet delivered leads for a more pro-active enforcement policy in some of the relevant markets. The RCC has an internal prioritisation policy, but it has not yet been applied rigorously and therefore has had limited impact. Several initiatives concerning human resources management are pending, but few have started to make a difference for staff.

### **5.3 Policy options for consideration**

- *Romania and the RCC should ensure continuity and a systematic implementation of reforms of the competition regime in the future.*

The main suggestion for consideration by Romania and the RCC is to ensure continuity and a systematic implementation of reforms of the competition regime. Measures to make investigatory instruments like leniency programmes work more effectively, to focus more effectively on key economic sectors, to manage more systematically the most effective use of bundle of tools that the RCC has to improve market performance, and to improve in-house expertise and strengthen human resources, can show effects only if consistently pursued over a longer period of time. In many instances the framework to

pursue these goals has been put in place, but results will be seen only the individual measures receive the necessary continued attention, with a particular focus on implementation and delivery in practice.

- *On cartel enforcement, better and more systematic co-ordination with criminal prosecutors appears to be a priority task.*

The Competition Law provides for criminal liability for certain individuals involved in cartel activities. But what could potentially be a powerful weapon in the RCC's fight against cartels is for the time being reportedly holding back some leniency applications because the RCC's administrative leniency programme and immunity from criminal prosecution are not co-ordinated. At the same time, criminal convictions have not yet materialised. The RCC has a good working relationship with DIICOT, a part of the prosecutor's office in charge of prosecuting organised crime and terrorism, and the two institutions are working toward a protocol to better co-ordinate administrative leniency and criminal immunity. DIICOT focuses mostly on organised fraud in connection with public procurement; all other cartel activity is subject to criminal prosecution by other parts of the prosecutor's office and the RCC's work relationship with them is much less developed. Further steps in that direction to understand what cartel cases prosecutors might be willing to bring and efforts to co-ordinate leniency and immunity programmes should be considered.

Further efforts to ensure that higher fines survive during the appeals process may also be necessary. The courts' willingness to substitute their own judgment of an "appropriate" fine for that of the RCC is of course a phenomenon beyond the RCC's direct influence. And Romanian courts are not unique in this respect. But the RCC could contribute to maintaining higher fine levels throughout the appeals process by raising the level of fines in its initial decisions, explaining fines in a more objective, transparent, and consistent way, and by defending them, comparing them to the results reached in previous court cases.

- *On mergers, it appears advisable to assess whether notification thresholds could be adjusted and to carry out an ex post review of the effectiveness of behavioural remedies.*

On **mergers**, the last revision of notification thresholds occurred in 2004. After ten years, it might be advisable to examine data from previous notifications to assess whether notification thresholds could be adjusted without running the risk that the costs of anticompetitive mergers that escape notification outweigh the potential cost savings. If notification thresholds are

raised, creating the opportunity to review non-notifiable mergers under certain circumstances might be a way to ensure that the RCC can examine smaller transactions with likely anticompetitive effects.

On merger enforcement, the use of behavioural remedies should be watched, as there have been several more recent cases where the RCC cleared potentially problematic mergers after accepting complex behavioural remedies. When the appropriate time has passed, a review of the effects of these remedies might be advisable to make better informed decisions in future cases.

- *RCC's independency should be rigorously protected. Certain aspects of the RCC's organisational structure should be reviewed and renewed attention should be devoted to maintaining and developing its human resources. The RCC's enforcement powers in the unfair competition law area should be reconsidered to ensure that the RCC's mandate remains clearly focused on consumer welfare goals.*

Concerning the RCC's **institutional features**, the current perception in the market place that the RCC can adopt all decisions without political influence must be rigorously protected. Some stakeholders have expressed concerns about the uneven qualification of the members of the Competition Council. The new appointment procedure that involves a recently created Advisory Board provides an opportunity to react to these concerns. Recently, a new appointment process was introduced for the energy regulator to ensure greater independence, but the process was criticised because the first appointments seemed to focus more on the appointees' political connections than on their qualifications, thus undermining the credibility of the regulator. This highlights the importance of the RCC's new appointment process and the need to ensure that in fact highly qualified individuals will join the RCC's leadership.

Romania and the RCC should also consider reviewing the current organisational structure. Outside observers have repeatedly noticed that the RCC might improve its performance if it were to look with greater flexibility at possible reforms concerning its territorial offices. Perhaps merging smaller regional offices into a few larger, more functional groups, could be a reasonable step. Overall, it should be preferable for the RCC to move resources from the territorial offices to the headquarters. This could include, for example, a decision not to renew certain positions in the territorial offices and using the financial resources instead to create a more flexible, competitive salary scheme in the Bucharest headquarter.

It also appears advisable to review the RCC's enforcement powers it recently obtained in the unfair competition law area. Policy goals in unfair competition law appear sometimes inconsistent with the RCC's mission to improve consumer welfare. And the high number of unfair competition cases could divert resources from the RCC core mission. At the same time, enforcement powers in areas of unfair competition law that focus on deception and therefore have a more direct impact on the proper functioning of markets remain with other public authorities. A more systematic, coherent allocation of tasks could benefit the RCC.

Maintaining and further developing the RCC's human resources deserves renewed attention. Salary levels are a concern after budget reforms required cuts across the entire administration. But especially the most qualified RCC personnel has options in the private sector, and therefore providing a relatively more competitive salary scheme as quickly as possible in light of budget consolidation will be important to retain crucial staff. One option may be to provide the President greater powers to determine individual salary levels, which could also serve as an important reward and incentive mechanism. But in the end, the RCC will never be able to match private sector salaries. It will retain personnel if it succeeds as a workplace that recognises and rewards good work and provides an interesting and stimulating work environment. Non-financial tools to encourage and motivate staff should be implemented as well. They are currently part of the broader reform plans, but have not yet received the necessary consistent attention so that they start making a difference for staff.

- The RCC should keep a focus on electricity and gas markets *and strengthen its expertise*, building a positive work relationship with ANRE.

On the **regulatory side**, the greatest concern is the energy sector. A continued focus on electricity and gas markets appears advisable, including measures to strengthen the necessary know-how and expertise within the RCC. Building a positive and productive work relationship with ANRE will be critical for the liberalisation process. The RCC may be able to support ANRE in formulating policy proposals and regulations aimed at ending price regulation, and it will have to use its enforcement powers to prevent private parties from conduct that could undermine the development of competitive energy markets.

## Notes

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- 7 Procurement cartels are considered restrictive agreements according to Article 5(f) of the Competition Law and are subject to administrative sanctions. Only criminal sanctions are provided for in a separate law.
- 8 In addition, Article 4(2) authorises the imposition of prices in sectors where competition is substantially excluded by law or the existence of a natural monopoly.
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- 10 Case C-67/96 *Albany International BV*, 1999 ECR I-5751 (ECJ holding that agreements to pursue the improvement of employment and working conditions may fall outside Article 101).
- 11 Law 187/2012.
- 12 Recommendation on Fighting Bid Rigging in Public Procurement, [C\(2012\)115](#); Recommendation Concerning Effective Action against Hard Core Cartels, [C\(98\)35/FINAL](#) (Also available at <http://www.oecd.org/daf/competition/recommendations.htm>).

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- 14 Decision 270/2004.
- 15 Decision 102/2005.
- 16 Decision 94/2005, Carpacement.
- 17 Joined Cases C-89/95 *et al.*, Ahlstrom v. Commission, 1993 ECR I-1307.
- 18 Decision 24/2010, Car Repair Services.
- 19 Instructions of August 21, 2009 governing the conditions and criteria based on which credit policies are applied according to Article 51, paragraph (2) of Competition Law No. 21/1996.
- 20 As in other European countries, the leniency programme covers not only the first applicant (immunity applicant), but also subsequent applicants that may benefit from reductions of fines if they provide valuable evidence of the infringing conduct.
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- 22 Instructions of 6 December 2011 to amend and complete the Instructions regarding the individualisation of the sanctions enforced as punishment for the offences specified under Article 51 of Competition Law No. 21/1996, Article I(6)(9)-(10).
- 23 See also *supra*, paragraph 10.
- 24 OECD, Guidelines for fighting bid rigging in public procurement, available at [www.oecd.org/daf/competition/guidelinesforfightingbidrigginginpublicprocurement.htm](http://www.oecd.org/daf/competition/guidelinesforfightingbidrigginginpublicprocurement.htm)
- 25 Decision 71/2012, Condmag & Insept; Decision 72/2012, TMUCB & Moldocor.
- 26 Decision 93/2011, Cluj Emergency Clinical Hospital.
- 27 Decision 71/2012, Condmag & Insept; Decision 72/2012, TMUCB & Moldocor.

- 28 Protocol No. 13924/2011.
- 29 Decision 47/2010, Accountant Services.
- 30 Decision 24/2010, Car Repair Services.
- 31 Decision 58/2012, Bailiffs.
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- 34 Decision 48/2011, Zarah Moden.
- 35 Decisions 51/2011, 52/2011, and 98/2001.
- 36 Decisions 21-23/2012, Orange, Vodafone, Cosmote; Decision 65/2012, Fornetti.
- 37 Decision 19/2013, Relad/Roche. Unlike the previous cases, the complaint focused on Article 6 of Competition Law and Article 102 TFEU and not on a possible restrictive agreement, but the approach of the RCC in this case should apply regardless of the relevant norm.
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- 45 Decision 299/2004, OMV/Petrom. There was also a very minor direct overlap between the parties, but it concerned only a few gas stations and did not affect the case outcome.

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- 48 Decision 17/2010, Romtelecom/Newcom.
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- 51 The statute expresses thresholds in Euro.
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