

Our Extensive Expertise in Competition Law



Țuca Zbârcea & Asociații offers legal advice on the application of competition/antitrust law in various domestic and cross-border transactions (mergers, acquisitions, joint ventures etc.). Our competition department provides both legal assistance and economic advice on virtually all aspects of competition law cases, drawing on robust economic analysis and quantitative techniques. This interdisciplinary combination of law and economics is a first in Romania. As such, our expertise encompasses the economic analysis of competition law and, in this respect, our clients benefit from the highly-regarded expertise of George Musliu, a former Vice-president of the Romanian Competition Council, which acts as the exclusive 'of counsel' on competition matters at Țuca Zbârcea & Asociații.

Our lawyers have advocated for clients' rights before the national competition authorities as well as in litigation before the judicial courts in a variety of disputes.

Scope of Practice

With a highly experienced team of lawyers, Țuca Zbârcea & Asociații renders legal services within a broad range of competition issues, covering:

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Merger & Antitrust Clearances: achieving competition clearance during initial phase and/or in-depth merger investigations; negotiation of remedies acceptable conditional clearance arrangements with competition authorities where this is necessary to ensure that the transaction is cleared; securing necessary approvals from sector regulators in utility transactions, alongside competition clearances; antitrust counselling with relation to obtaining individual exemptions of clients' agreements that could fall within the competition law restrictions.

Competition Investigation: acting for clients in competition investigations, 'dawn raids' and proceedings, handling appeals against adverse decisions by the Competition Council; acting for clients in benefiting from leniency programs in cartel investigations; acting for companies, victims of anti-competitive practices by their suppliers or competitors in submitting and sustaining complaints to the Competition Council; submitting reports to the competition authorities on potentially complicated issues in clear and compelling terms.

State Aid: notifications for Competition Council clearance under the state aid rules; representing clients in Competition Council investigations of alleged state aid abuse, handling state aid complaints on behalf of third parties; advising on the application of the private investor principle; advising during the monitoring stage of authorized state aid.

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REGULATION

1. Please give a brief overview of the legislation that allows a leniency programme, the authority that administers it and details of any published guidance.

The Competition Council, the Romanian anti-trust regulatory authority, introduced a leniency policy in 2004 (*see box, The regulatory authority*). The Competition Council published its Guidelines on Leniency (Leniency Guidelines) in 22 May 2004. These were inspired by the European Commission's Notice on immunity from fines and reduction of fines in cartel cases (*OJ 2002 C45/03*) (Leniency Notice).

2. What infringements of competition law are covered by the leniency programme?

The Leniency Guidelines apply to the most serious agreements or practices restricting competition, that is, cartels relating to (*Chapter 1, Leniency Guidelines*):

- Price-fixing.
- Fixing the level of production.
- Sales quotas.
- Market or client sharing.
- Bid-rigging.
- Import-export restrictions.

The Leniency Guidelines do not expressly exclude vertical agreements, and the Competition Council has not made a clear statement as to which breaches are eligible for leniency. However, given this restrictive definition of cartel, the Competition Council may follow the European Commission's practice and not give leniency to vertical agreements (especially those that require notification in Romania for an individual exemption).

3. Please provide examples of notable recent cases in which the leniency programme has been applied.

The Competition Council has not, as yet, applied the Leniency Guidelines to the cartels that it has investigated.

AVAILABILITY OF LENIENCY

4. Is full immunity from civil fines available and what conditions must be met for immunity to be granted?

A company that approaches the Competition Council can obtain immunity if it offers relevant proof of its participation in a cartel and it is either (*Chapter II, Leniency Guidelines*):

- The first to submit evidence which, in the Competition Council's view, may enable it to open an investigation (as long as the Competition Council does not already have sufficient evidence).
- The first to submit evidence which, in the Competition Council's view, may enable it to prove a breach of Article 5(1) of the 1996 Competition Law (as republished in 2005) in connection with an alleged cartel (as long as the Competition Council does not already have sufficient evidence). Article 5(1) is the legislative section that prohibits agreements which have, as their object and/or effect, the restriction, prevention or distortion of competition.

In addition, conditional immunity must not have already been granted to another company that has revealed information leading to the opening of an investigation into the cartel.

Immunity applicants must also comply with the following additional conditions:

- Provide continuous, prompt and full co-operation during the proceedings, including:
 - providing all evidence in its possession, or which is available to it, that is related to the suspected breach;
 - being available to answer any request from the Competition Council that may contribute to establishing the facts.
- End its involvement in the breach, by no later than the time it applies for immunity.
- Not have taken steps to coerce others to participate in the breach.

As the Competition Council has not, as yet, made any decisions on leniency applications, it is not clear what evidence it would regard as sufficient to comply with these conditions.

5. Is there a sliding scale of available leniency from civil fines (for example, if full immunity is not available, are decreasing levels of leniency available for subsequent applicants)?

Companies that are not eligible for immunity can benefit from a reduction in the fine that would usually be applied (of up to 50% (see below)) (Chapter IV, Leniency Guidelines). To qualify, the applicant must:

- Provide evidence of a substantial added value to that already held by the Competition Council. Whether evidence is of a substantial added value depends on the extent to which it strengthens, by its nature and level of detail, the Competition Council's ability to prove the facts in question.
- End its involvement in the breach, by no later than the time it submits the evidence.

The potential level of leniency granted depends on the timing of the application:

- First applicant to meet the conditions: a reduction of 30% to 50%.
- Second applicant: a reduction of 20% to 30%.
- Subsequent applicants: a reduction of up to 20%.

To determine the level of reduction within these percentage bands, the Competition Council takes into account:

- The time at which the evidence that fulfils the conditions was submitted.
- The extent to which the evidence represents added value.

It may also take into account the extent of any co-operation provided (and whether it was provided continuously) after the application was made.

6. Is immunity or leniency for civil fines available to individuals (for example, managers and employees of an undertaking that has been granted immunity or leniency)? If so, what conditions apply?

The Leniency Guidelines and the Competition Law do not contain provisions for immunity or leniency concerning individuals. Individuals are not subject to civil fines, although they can be subject to criminal prosecution under the Competition Law (see Question 7, *Circumstances*).

7. Is leniency or immunity available for companies and/or individuals in relation to criminal prosecution? If so, please state:

- The circumstances in which leniency or immunity from criminal prosecution is available.
 - Whether criminal proceedings can be brought against individuals in an undertaking that has been granted leniency or immunity (whether from civil fines or criminal prosecution).
 - How employees' interests can be protected when a company applies for leniency.
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■ **Circumstances.** Leniency or immunity from criminal proceedings is not available for individuals. Under the Competition Law, it is possible for individuals to be prosecuted who participated, deliberately and with a fraudulent intention, to plan, organise and implement prohibited practices. Companies are not subject to criminal prosecution for anti-competitive behaviour so far.

■ **Proceedings against individuals.** Leniency or immunity from criminal proceedings is not applicable (see above, *Circumstances*). However, a criminal prosecution against an individual can only be started by the Competition Council bringing a case against that individual in court. It would be contradictory to bring a case against an individual after granting leniency to an undertaking in which that individual is a manager or employee.

■ **Employees' interests.** Not applicable (see above, *Circumstances*).

APPLICATION PROCEEDINGS

8. When should an application for leniency be made?

The timing of the application depends on the case, but should generally be made as soon as the conditions can be fulfilled. This is because whether immunity is available, and the level of leniency that can be obtained, depends on the timing of the application (see Questions 4 and 5). If an application is made after the Competition Council opens a formal investigation, stronger evidence must be provided, as the Competition Council already holds sufficient evidence to open proceedings.

9. Please set out how an application for leniency must be made. In particular:

- To which authority should an application be submitted?
- Who should make the application (for example, the company itself, its legal adviser or an individual employee)?
- Is it possible to obtain informal guidance on a confidential basis before submitting an application, to determine whether an undertaking will qualify for full immunity or leniency?
- What form of application is used?

- **Can a marker be obtained to secure a certain level of leniency until all conditions can be met?**
- **What type of information or evidence are applicants expected to provide?**
- **Are oral statements accepted?**

- **Relevant authority.** An application must be made to the Competition Council.
- **Applicant.** The company must apply itself, through its legal representative.
- **Informal guidance.** Informal guidance can be obtained on a confidential basis.
- **Form of application.** There is no standard form of application. It is possible to make an immunity application on an anonymous, hypothetical basis (*see below, Information/evidence*).
- **Markers.** It may be possible to obtain a marker, but as yet there is no practice of doing so. It is possible to make an immunity application on an anonymous, hypothetical basis (*see below, Information/evidence*).
- **Information/evidence.** If immunity from fines is available for a suspected breach, the company can either (*Chapter III, Leniency Guidelines*):

- provide all the evidence at the same time as the application, by producing a detailed description of all relevant facts and available documentary evidence; or
- provide the evidence in a two-stage process, by initially making the application on an anonymous, hypothetical basis, including with the application a descriptive list of the evidence it proposes to disclose at a later agreed date. The list must accurately reflect the nature and content of the evidence, while safeguarding its hypothetical character (for example, redacted copies of documents, from which sensitive information has been removed, can be used to illustrate the nature and content of the evidence). This option gives the company more time to collect and organise the relevant evidence, while still benefiting from the initial date it submitted the application and descriptive list.

Applicants for leniency must generally provide the evidence at the same time as the application. There are no specific provisions that allow an application for a reduction from fines to be made on a hypothetical basis. Generally, an applicant will apply for full immunity, and only benefits from a reduction of the fine if that is unsuccessful (because it is not public information whether other participants have qualified for full immunity an applicant will not usually know that it has not qualified when it submits the application).

- **Oral statements.** There is no provision, under the Leniency Guidelines, to allow an application to be made on the basis of oral statements provided on the company's behalf.

10. Please set out the procedure and timetable.

Immunity applications

The following procedure applies (*Chapter III, Leniency Guidelines*):

- On receiving an application, the Competition Council provides a written acknowledgment, confirming the date on which the undertaking either:
 - submitted its evidence; or
 - made a hypothetical application (*see Question 9, Information/evidence*).
- The Competition Council makes a provisional review as to whether the conditions are complied with (for example, it checks that no prior immunity application has been received, and that the evidence in its possession is not sufficient to establish a breach). After this review, the Competition Council immediately informs the company whether it accepts or rejects the application (there is no time limit provided for "immediately" under the Leniency Guidelines). The Competition Council then grants the company conditional immunity in writing (if the application is hypothetical, the Competition Council does not grant conditional immunity until it assesses the evidence disclosed in the descriptive list (*see Question 9, Information/evidence*)).
- If, at the end of the process, the company has met the additional conditions, the Competition Council grants it immunity in its final decision (*see Question 4*).

Leniency applications

The following procedure applies (*Chapter V, Leniency Guidelines*):

- On receiving the application, the Competition Council confirms in writing to the applicant the date on which the application is made.
- Once the Competition Council has assessed whether the information provided is valid and useful and the percentage band of reduction to which the applicant is entitled, the authority confirms in writing that it intends to grant a reduction (no later than the date it issues the statement of objections, the final report containing the Council's conclusions on the infringement that is communicated to the parties involved). However, the applicant is only told its ranking in the leniency queue and the percentage band of reduction (*see Question 5*). The exact amount of the fine is only provided when the final decision is made.

No specific time limits apply to the immunity or leniency procedures.

11. In what circumstances can leniency be withdrawn and at what stage in the proceedings? What implications does the withdrawal of leniency from one company have for other applicants (for example, could full immunity become available again)?

A company can fail to meet the conditions under the Leniency Guidelines (see Questions 4 and 5) (Chapter VI, Leniency Guidelines). In that case, the Competition Council can withdraw its offer of immunity or leniency. If the applicant fails to meet the immunity conditions, it can either (Chapter III, Leniency Guidelines):

- Withdraw the evidence disclosed for the purposes of its application.
- Request that the Competition Council consider it for a reduction from the fine.

(The Competition Council can still use its ordinary powers of investigation to obtain the relevant information.)

There are no specific provisions under the Leniency Guidelines relating to withdrawal of evidence if an applicant fails to meet the conditions for a reduction from the fine (most applications are made for immunity in the first instance (see Question 9, Information/evidence)).

Withdrawal of full immunity or leniency from one company may make another applicant eligible for full immunity or a different percentage band of leniency. It is very unlikely that full immunity or leniency will be withdrawn after the Competition Council has issued its final decision.

SCOPE OF PROTECTION

12. What is the scope of leniency protection after it has been granted (for example, does it apply only in so far as the infringing activities are revealed in information provided by the applicant to the competition authority, or also where further evidence of infringement is collected by the authority)?

There are no provisions in the Leniency Guidelines and no case law available concerning this point. It is likely that leniency protection will only apply to the specific cartel in relation to which information was provided.

13. Does the competition authority offer any further reduction in fines for activities in one market if an undertaking is the first to disclose restrictive agreements and practices in another market (leniency plus)?

There are no provisions in the Leniency Guidelines and no case law available concerning this point. In the absence of specific guidance, it is probable that leniency plus is not available.

THE REGULATORY AUTHORITY

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Responsibilities. The Competition Council is responsible for monitoring and enforcing the competition rules in Romania, including an immunity and leniency regime.

Person/department to apply to. Mrs Zoe Radetchi (see above, Contact details).

Procedure for obtaining application documents. There are no specific application documents.

CONFIDENTIALITY AND DISCLOSURE

14. In relation to confidentiality:

- Is the identity of a leniency applicant disclosed during an investigation or in a final decision?
- Is information provided by a leniency applicant passed on to other undertakings under investigation?
- Can a leniency applicant request confidentiality of its identity or information provided?

■ **Identity disclosure.** The co-operation of an undertaking during the procedure (and its identity) is made public in the final decision granting immunity or leniency (Chapter VI, Leniency Guidelines). However, it is kept confidential during the investigation.

■ **Information disclosure.** Information is not disclosed during the investigation. However, information may be passed on after the investigation report is delivered and interested parties are granted access to the file.

■ **Confidentiality requests.** There is no specific reference to requests for confidentiality in the Leniency Guidelines. However, the applicant can request that the Competition Council treat the evidence it has provided as confidential and therefore not disclose it, in whole or in part, when the other interested parties have access to the investigation file.

15. In relation to statements made in support of a leniency application:

- Can information submitted in your jurisdiction be made subject to discovery orders in the domestic courts?
- Can information submitted in your jurisdiction be made subject to discovery orders in foreign courts?
- Can information submitted in foreign jurisdictions be made subject to discovery orders in the domestic courts?

- **Domestic submissions and domestic discovery.** In theory, information may be subject to discovery under the Romanian Civil Procedure Rules.
- **Domestic submissions and foreign discovery.** Information may be subject to discovery to the extent that Romania and the foreign jurisdiction requesting the information are parties to the same bilateral or multilateral international convention.
- **Foreign submissions and domestic discovery.** See above, *Domestic submissions and foreign discovery*.

INTER-AGENCY CO-OPERATION

16. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities from other jurisdictions in relation to leniency? If so, what is the legal basis for and extent of co-operation?

The Competition Council has not publicly disclosed the extent to which it co-operates with other regulatory authorities in relation to leniency.

PROPOSALS FOR REFORM

17. Please summarise any proposals for reform.

There are currently no proposals for reform to the Romanian leniency programme.





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