

Romania



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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, Romania's 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) on 13 May 2004. These were inspired by the European Commission's 2002 Notice on immunity from fines and reduction of fines in cartel cases (*OJ 2002 C45/03*) (Leniency Notice).

2. What infringements of competition law does the leniency programme cover?

The Leniency Guidelines apply to the most serious (horizontal) agreements or practices restricting competition, that is, cartels involved in (*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 vertical agreements are eligible for leniency. However, given the restrictive definition of cartel, it is likely that the Competition Council will follow the European Commission's practice and generally not award 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 the first to submit evidence which, in the Council's view, may enable it to either (*Chapter II, Leniency Guidelines*):

- Open an investigation (as long as the Competition Council does not already have sufficient evidence).
- 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.

An immunity applicant 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 cartel, by 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 unclear 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 apply (of up to 50% (see below)) (*Chapter IV, Leniency Guidelines*). To qualify, the applicant must:

- Provide evidence of a substantial added value to that which the Competition Council already holds. 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 cartel, by the time it submits the evidence.

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

- The first applicant to meet the conditions receives a reduction of 30% to 50%.
- The second applicant receives a reduction of 20% to 30%.
- Subsequent applicants receive 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 meets the conditions was submitted.
- 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 immunity or leniency available for companies and/or individuals in relation to criminal prosecution? If so, please state:

- The circumstances in which immunity or leniency from criminal prosecution is available.

- Whether criminal proceedings can be brought against individuals of an undertaking that has been granted immunity or leniency (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 prosecution is not available for individuals. Under the Competition Law, it is possible for individuals who participated, deliberately and with fraudulent intent, to plan, organise, implement and participate in prohibited practices, to be prosecuted. To date, companies are not subject to criminal prosecution for anti-competitive behaviour.

Only the Prosecutor can bring criminal actions before a court. The Competition Council notifies the case to the Prosecutor but does not prosecute the individuals concerned.

- **Proceedings against individuals.** Leniency or immunity from criminal proceedings is not applicable (see above, *Circumstances*). However, it would be contradictory for the Competition Council to bring a case before the Prosecutor 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 met. 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?**
 - **Are short form applications in accordance with the European Competition Network (ECN) Model Leniency Programme accepted?**
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- **Relevant authority.** An application must be made to the Competition Council.
 - **Applicant.** The company itself applies, 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.** The Leniency Guidelines do not expressly provide a marker system. This is because the Competition Council has not yet amended the domestic rules in line with the relevant provisions of the European Commission's Notice on immunity from fines and reduction of fines in cartel cases (*OJ 2006 C298/17*) (2006 Leniency Notice). A company can, however, secure its place in the queue by applying for immunity on an anonymous, hypothetical basis (see *Question 10*).
 - **Information/evidence.** If immunity from fines is available for suspected involvement, the company can provide all of the evidence either (*Chapter III, Leniency Guidelines*):

- at the same time as the application, by producing a detailed description of all relevant facts and available documentary 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.

This 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 is no specific provision allowing a reduction of the fine on a hypothetical

basis. Generally, an applicant applies for full immunity, and only benefits from a reduction of the fine if that is unsuccessful. Confidentiality at the investigation stage means that an applicant does not usually know whether it has qualified for immunity when it submits the application (see *Question 14, Information disclosure*).

- **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.
- **Short form applications.** This procedure is not, as yet, available and it is not known when it is likely to be introduced.

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 certain conditions are complied with. For example, it checks that:
 - no prior immunity application has been received; and
 - the evidence in its possession is sufficient to establish a breach.
- After the provisional review is completed, the Competition Council immediately informs the company whether it accepts or rejects the application. The Leniency Guidelines do not specify a particular time limit to define "immediately" in this context.
- After informing the company whether it accepts or rejects the application, the Competition Council then grants it 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*):

- The Competition Council confirms its receipt of the application in writing to the applicant when it receives it.

- The Competition Council assesses whether the information provided is valid and useful and the percentage band of reduction to which the applicant is entitled.
- The Competition Council confirms in writing that it intends to grant a reduction (this is done no later than the date it issues the statement of objections, which is the final report on the case containing the Council's conclusions on the infringement to all parties concerned). 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 and at what stage of the proceedings can leniency be withdrawn? What implications does the withdrawal of leniency from one company have for other applicants (for example, could full immunity become available again)?

If a company fails to meet the conditions under the Leniency Guidelines (see *Questions 4 and 5*) (*Chapter VI, Leniency Guidelines*), the Competition Council can withdraw its offer of immunity or leniency.

If immunity is withdrawn, the applicant can either (*Chapter III, Leniency Guidelines*):

- Withdraw the evidence disclosed for the purposes of its application.
- Request that the Competition Council consider a reduction of its 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 of 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 qualify for a different percentage band of leniency. It is very unlikely that full immunity or leniency would 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 insofar as the infringing activities are revealed in information provided by the applicant to the competition authority, or also where the authority collects further evidence of infringement)?

There are no provisions in the Leniency Guidelines and no case law available concerning this point. It is likely that leniency pro-

THE REGULATORY AUTHORITY

Competition Council

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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 Daniela Badila (see above, *Contact details*).

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

tection only applies to the specific cartel in relation to which information was provided.

13. Does the competition authority offer any further reduction in fines for an undertaking's activities in one market if it 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.

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 anonymity or confidentiality of information provided?**
- **Identity disclosure.** An undertaking's identity and co-operation is kept confidential during the investigation (see *Question 9, Information/evidence*). However, these facts are made public in the final decision granting immunity or leniency (*Chapter VI, Leniency Guidelines*).

- **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 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. However, following Romania's entry into the EU, the Competition Council is now a full member of the European Competition Network. This provides a forum and mechanism for co-operation between EU member states and with the European Commission in all aspects of competition enforcement (including leniency), in accordance with the European Commission's Notice on co-operation within the network of competition authorities (*OJ 2004 C101/43*).

PROPOSALS FOR REFORM

17. Please summarise any proposals for reform.

There are currently no proposals to reform leniency policy. To date, the Competition Council has not issued any information concerning further developments of the leniency policy, including on the relationship between national and EC leniency provisions.

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Our Extensive Expertise in Competition Law

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In 2008, the firm was distinguished as the leading practice in this specialty and received the **Competition Award of Excellence** for the overall performance in 2007 and impressive client portfolio, comprising multinational clients such as: ArcelorMittal, Carrefour, UPC Romania, Interbrands, Orkla Foods, Colgate Palmolive, Philip Morris.

Scope of Practice

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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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