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Merger Control

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Romania

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Overview of merger control activity during the last 12 months

In a snapshot, 2015 was fairly similar to previous years when it comes to merger control activity. In Romania it is the Competition Council (**CC**) that is primarily in charge of "merger control activity", our national competition authority which conducts the substantive assessment of notifiable economic concentrations.

Broadly speaking, another public authority with some input to merger control cases is the Supreme Council of National Defence (**SCND**), however its scrutiny prerogatives are rather limited by the actual activities concerned by the notified operation. The SCND has the right to intervene only in merger control proceedings conducted by the CC in case of notifiable concentrations that might raise national security risks. This would be the case for mergers that involve companies active in national security domains[1] such as financial, fiscal, banking and insurance safety, agriculture and environment protection, energy safety, industrial safety, etc. When it finds it necessary, the SCND conducts its own assessment of merger cases which feature potential national security risks. And the SCND's role basically ends here, because the decision to prohibit a merger due to potential national security risks rests with the Romanian Government. So, if the SCND believes that the merger should be prohibited, it must inform the Romanian Government and the CC.

In 2015, the CC had 35 merger cases on the table − fewer than in the previous year (i.e., 42 cases in 2014), which points to an apparent downward trend of merger control activity at local level. In 2014, the 42 merger control decisions issued by the CC accounted for almost 70% of the total number of decisions issued by the CC. Last year saw a decrease of 17% in the number of merger decisions issued compared to 2014, as the 35 merger clearances represented less than half (approximately 45%) of the total number of decisions issued by the CC during 2015.

To explain this, we can think of several factors that influenced and will most likely continue to determine the number of mergers falling under the CC's scrutiny. The most important and straightforward ones would be the features displayed by the Mergers & Acquisitions (**M&A**) market, complemented by macro-economic, financial and political events at local, regional and global levels.

But first, let us take a look at the local M&A market, because the M&A market is intimately linked to and basically determines the shape of local merger control activity. Simply said: an increasing number of M&A deals and necessarily higher values of transactions are the essential ingredients for more merger cases that would make it on to the agenda of the CC. If we take a closer look at what happened during the last 12 months on the M&A market, we can say Romania enjoyed a pretty full year of M&A activity, showing that it continued

on the ascending path similar to previous years. So then, why were fewer merger cases brought to the CC for review? For a variety of reasons such as: the size of most M&A deals was medium or small and thus did not meet the notification thresholds, or larger transactions (by value) were made by dealmakers with no presence in Romania, so there were fewer new entrants on the market.

Then, if we look at the evolution of the exchange rate of our local currency (Romanian leu) against the euro, we can see a weak local currency. This also affects merger control activity because practically, a weak Romanian leu means that fewer economic concentrations are able to meet the turnover thresholds imposed by the Competition Law no 21/1996, republished and further amended (the **Competition Law**). We have a two-level turnover prerequisite set in euro (and not in local currency) that once exceeded, triggers the obligation for the acquirer(s) of control to file for and obtain the CC's approval. The first level is given by the aggregated turnovers of all involved parties which must exceed €10m, while the second-level test narrows the scrutiny to Romania (i.e., each of at least two involved parties should have obtained in Romania a turnover exceeding €4m). Relevant when conducting this quantitative test are the turnovers achieved in the year preceding the transaction.

Moving beyond statistics on the number of issued merger decisions, from a merger control complexity standpoint, apparently the CC has not faced great challenges in 2015. A quick review of the publicly available merger clearances shows us that the CC has issued the merger decisions in Phase I of the notification procedure, and also that none of the decisions had any commitments attached. This means the economic concentrations submitted for CC's review were, so to speak, "competition rules friendly" as they pose no risks to effective competition on the concerned, relevant and affected markets. It follows thus that the merger cases examined by the CC in 2015 basically did not raise serious doubts as regards their compatibility with a normal competitive environment.

Worth noting as well in the context of the above merger complexity topic is that in 2015, almost half (around 40%) of the notified concentrations received the CC's clearance after undergoing the so-called simplified assessment procedure. This "simplified assessment procedure" is in fact a fast track to clearance applicable only to economic concentrations that do not raise any potential competition law concerns. It is obviously about mergers that do not affect the markets (relevant ones, upstream and downstream) either because, for example, the involved parties are not actual or potential competitors or because the merger would not lead to vertical integration.

The merger clearances published on the CC's official website[2] also tell us that in 2015 there were no downward merger case referrals from the European Commission to the CC, or upward referrals from the CC to the European Commission. Anyway, the referral procedure has been used extremely rarely in our jurisdiction: the last referral from the European Commission to the CC was in 2010 with Lidl's proposed acquisition of the Tengelmann supermarket chains (plus branded stores) in Romania.

New developments in jurisdictional assessment or procedure

Strategic and policy aspects

Some rules governing the jurisdictional assessment of mergers under the Competition Law and the Regulation on economic concentrations[3] (**Merger Regulation**) have changed in 2015.

Although the two-level turnover thresholds have been the same since 2003, the revised Competition Law expressly allows the CC from now to change the thresholds if it deems necessary. But, before making the change, the CC must obtain the approval from the

Ministry of Economy and Commerce. The new thresholds must afterwards be approved by decision of the Plenum of the CC, which will be implemented by order of the President of the CC. Nevertheless, the new thresholds will become applicable following the lapse of a six-month period as of the publication in the Official Gazette of Romania.

The Competition Law uses a quite general wording when it acknowledges this power for the CC, leaving us enough room to comment upon the rationale behind the amendment, the meanings and practical implications.

First, the newly added wording refers to the "value thresholds", which means that at least theoretically, the CC may decide to shift from turnovers to market shares or any other relevant indicators. Basically, the CC has the option to choose from several economic indicators before deciding which would be the most appropriate "tool" to delineate between mergers worth being scrutinised by the CC and those that do not need to undergo an assessment from a merger control standpoint.

The primary separation level here (before lowering or increasing the notification thresholds) will remain, of course, the potential impact of operations on the relevant market(s) and the effects on other markets. So generally, irrespective of the chosen thresholds, only concentrations that pose no actual or future risks to effective competition on the concerned markets should escape the CC's scrutiny.

Other criteria which give us an overall image of potentially significant items that are worth considering when assessing economic concentrations are the micro and macro perspectives of the economic, financial and political environments. This is basically interrelated with the first criteria and it refers, for example, to economic health and growth, political upcoming events, local currency and euro projected variations for the medium to long term, etc.

"Warehousing" or "parking" structures versus "standstill" obligation

Although the CC has not yet ruled on the validity of so-called "warehousing" structures, the expected approach of the CC would be in line with the relevant rules in the Merger Regulation that basically transpose the European Commission's Consolidated Jurisdictional Notice. These transaction structures, where the target is "parked" or "entrusted" with a bank based on an agreement between the seller and the ultimate buyer on the future onward sale of the target to the ultimate buyer (while the ultimate buyer also secures antitrust approval), are expressly dealt with in the Merger Regulation.

The approach in the Merger Regulation is to discuss them in those sections that detail the scenarios in which a change of control occurs "on a lasting basis". And the view is that the ultimate buyer of the "warehoused" target will be considered as the acquirer of control. So the entire structure will in fact represent a single economic concentration, including the temporary "pass" of control to the interim party, which will be just a preparatory step in one overall arrangement that will be completed when the ultimate buyer gains control over the target.

This naturally leads us to the conclusion that a notification of the "full" transaction will be necessary from the outset. Otherwise, based on the currently applicable version of the Merger Regulation, the CC might find that the entire scheme amounts to classical "gun jumping" and that the acquirer of control has breached the obligations to standstill and not implemented the control rights before obtaining the clearance from the CC.

This rather formal take on the "warehousing" deal structure displayed by the Merger Regulation basically runs against the interests of businesses when it comes to transaction planning. The possibility to "park" the target does not have an unlawful objective as it does

not tend to avoid or somehow escape the obligation to apply for merger clearance, it just delays it. The issue here is much simpler: it is essentially about flexibility for businesses, which is justified by commercial grounds when some few weeks' delays or conditional purchases are not an option in practice.

Approach to mergers which must be notified, but which do not raise concerns

The rule under the Merger Regulation is that economic concentrations that exceed the turnover thresholds set by the Competition Law must seek the CC's approval before implementation. It is irrelevant if the transaction might raise or not concerns; any concentration above the notification thresholds has to be notified to the CC. We have no "*de minimis*" escape clause under our local Merger Regulation in the pre-notification phase.

Although the obligation to notify stays for economic concentrations above the turnover thresholds, merger cases may enjoy a simplified assessment procedure provided that they do not raise concerns. This basically translates into insignificant effects on the competitive environment and is the case, for example, when there is no overlap in parties' activities on the relevant markets (including upstream and downstream markets) or, where any horizontal or vertical overlap exists, it remains below 20% or 30% respectively.

Merger notifications made under the simplified procedure are subject to an expeditious assessment by the CC. Simplified notifications mean a shorter merger notification form, with less information to be provided by the involved parties especially when it comes to competitive conditions on the relevant markets (suppliers, clients, competitors etc.) and description of the relevant market(s) structure(s).

The deadline for the CC to issue the clearance in case of economic concentrations assessed based on the simplified procedure rules is the same as for mergers filed under the ordinary procedure (i.e., 45 days as of complete notification). Practice shows us that when it deals with simplified assessment merger cases, the CC issues the clearance in approximately 2-3 weeks.

"Gun-jumping" and applicable sanctions

Similar to the European Commission Merger Regulation and rules in other European jurisdictions, the Romanian Competition Law and the Merger Regulation impose the "standstill obligation" for economic concentrations that must be brought before the CC because they qualify for merger control.

"Standing still" means to abstain from effectively using any rights of control before the CC issues the clearance. So, no implementation of any powers to direct or influence targets' commercial behaviour on the market. This basically means no joint marketing, transfers of shares, conclusion or termination of contracts with suppliers or clients, etc.

To the best of our knowledge, the CC did not issue any decisions in 2015 enforcing the "gun-jumping" prohibition.

If "gun-jumping" is found, the CC may impose administrative fines in accordance with the Competition Law. The amount of the fine imposed for "gun-jumping" is capped at a maximum of 10% of the turnover obtained by the undertaking in breach in the preceding fiscal year.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

Economic concentrations that made it to the CC's working agenda in 2015 concerned several industries that correspond to the economic sectors where dealmakers were mainly

active. To this end, the majority of the CC's decisions were made in the real estate market, financial and banking, energy, food and non-food retail and wholesale sectors, and pharma.

When it comes to relevant market definition, especially from a geographic perspective, the traditional CC approach, which has been reinforced over the years, is to stay within national boundaries. This means that the CC is quite reluctant to discuss and accept geographical markets that go beyond the national territory and extend to the European Economic Area or at global level.

But it seems that lately, the CC is willing to change its views when it assesses relevant geographic markets. This is confirmed by a recent clearance issued in 2015 in a case concerning detergents, fabric care products and dishwashing products[4], when the CC approved the economic concentration where the relevant geographic market was considered to be the European Economic Area. By defining the relevant geographic market at the European Economic Area level, the overall competitive assessment of the impact of the transaction on the relevant markets became more relaxed, as it was less likely that competition concerns would arise given the size of the geographic market.

While conducting its assessment in a particular merger case, the CC might take into account various economic or social aspects that are relevant in a certain transaction and may allow the acquirer of control to implement its controlling rights before obtaining formal approval from the CC. This is done in a special procedure, i.e., the so-called request for derogation. The aim of the derogation is to obtain a green light from the CC for implementing the economic concentration before the CC has finalised the assessment of the operation from a merger control perspective. Derogations are granted by the CC only in exceptional cases, when there are real risks for huge financial losses or harmed social interests to take place unless the transaction is immediately implemented. Of course, the parties have the duty to obtain the merger control clearance and thus file the notification before or after the request for derogation.

The CC has done so when it granted a derogation decision to Banca Transilvania, in the context of the envisaged acquisition of sole control over Volksbank Romania SA and Volksbank Romania Services SRL. The main reasons considered by the CC when approving the derogation were the continuous financial losses of the target companies (i.e., Volksbank) during the past three years in an activity with medium to high risks involved, together with the social unrest around the CHF loans crisis triggered by the huge increase of the exchange rate. In this context, Volksbank's clients, both legal persons and individuals, especially those that had contracted loans in CHF, were unable to reimburse the loans and thus the acquirer (i.e., Banca Transilvania) had to take control over the target with the purpose of immediately implementing feasible solutions to avoid even worse financial and social consequences.

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

Similarly to the European Commission, the CC employs the so-called "classic" economic appraisal techniques as substantive tests both when it defines relevant markets and when it makes measurements of the concentration levels on affected markets.

For relevant market definitions, the CC uses the re-formulated Significant Impediment to Effective Competition Test (**SIEC Test**). According to the substantive SIEC Test, an economic concentration will be cleared as being compatible with the normal competitive environment if it does not restrict effective competition. This translates into the envisaged

operation not entailing risks of creating or consolidating a dominant position on the Romanian market or on a substantial part thereof. Supplementary to the traditional test, the CC takes into careful consideration several other aspects directly linked to the relevant market(s): market structure; actual and potential competition; alternatives available to suppliers and users; access to supply sources or markets; legal and other regulatory barriers to market entry; supply and demand trends for the relevant goods or services, etc.

When the CC examines the effects of an economic concentration that might lead to actual or future changes in the concentration levels of the market(s), it uses the Hirschman-Herfindahl Index Test (**HHI Test**). The HHI Test is the tool used by the European Commission for measuring the level of a firm's concentration in the market, as a potential indicator of market power.

The HHI Test is relevant in cases of horizontal mergers in order to evaluate the potential effects of a merger on market concentration. The HHI Test gives a "before" and "after" snapshot of the competitive landscape on the affected markets.

Our Merger Regulation does not set thresholds for the change in the HHI in order to determine whether a horizontal merger has the potential to generate market power and reduce competition. So, in its decisions, the CC refers directly to the HHI thresholds applied by the European Commission and detailed in the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

Approach to remedies to avoid Phase II investigation

The Competition Law gives the parties to a notified economic concentration the option to propose commitments during the first phase of the merger control procedure. In fact, it is highly advisable to initiate discussions on potential remedies as early as possible in complex and potentially problematic transactions. This way, the length of the proceedings before the CC would be shorter and the parties will have a real chance to take into careful consideration and conduct a comprehensive assessment of all available potential remedies in order to identify the most appropriate commitments.

So, the notifying party already has the possibility to offer remedies (behavioural and/or structural) together with the notification and, following discussions and "negotiations" with the CC, the notified transaction may receive a conditional clearance already in Phase I.

It is essential to start the planning of the pre-notification procedure from the outset in those cases where the notifying party intends to propose commitments in the early stage (Phase I) of the merger control assessment procedure. This way, the parties to the economic concentration will benefit from enough time to thoroughly discuss and agree upon the most suitable and commercially acceptable remedies.

At the same time, it would be better for the parties effectively to have contacts with the CC before filing the notification form, because this will allow them to really understand the competition concerns, with a view to identifying together with the CC the best options to properly eliminate the CC's concerns.

Approach to remedies following Phase II investigation

The CC may decide to start a Phase II investigation in a merger case by means of a notice within 45 days after receiving the complete notification of the economic concentration.

This would happen when the CC takes the view that the notified merger raises serious doubts when it comes to the operation's compatibility with the normal competitive environment; provided, of course, that the "competition damage concerns" have not been eliminated in Phase I of the merger control proceedings.

The notice that informs the parties on the CC's intention to take the merger case in the second-phase investigation usually indicates the competition concerns that should be remedied. Although the CC brings to the parties' attention the potential "concerns" it has identified, it has no power whatsoever to impose commitments. At the best, the CC will discuss with the parties various potential commitments in order to determine the ones capable of answering all potential competition issues. It is therefore the parties' prerogative to "offer" commitments.

There is no "recipe" for what remedies would be acceptable to the CC in a particular merger case. The type of commitments (behavioural and/or structural) will be determined on a case-by-case basis, because each transaction has its particularities that are shaped by the specific sector or industry, goods and services involved in the transaction.

Key policy developments

In the 2014 report released by the Organization for Economic Co-operation and Development (**OECD**) on the policy and competition law in Romania[5], the OECD expressly confirmed that the overall Romanian Competition Law and secondary legislation was in line with European standards, while merger control proceedings were found to follow the standards meant to ensure an effective and efficient merger review regime.

The same 2014 report issued by the OECD recommended a revision of the turnover thresholds used for separating "must notify" economic concentrations from mergers that do not need to be scrutinised by the CC. The main reason behind the recommendation was that almost one third of notifiable economic concentrations basically qualify for the simplified assessment procedure. Moreover, this is a clear indication that the number of notifications of economic concentrations can be limited by increasing the quantitative thresholds. A limitation on the number of merger cases that must be assessed by the CC would in fact lead to cost reductions for the body, for example.

Romania had a positive and visible reaction to the OECD's recommendation and in 2015 changed the Competition Law by adding the CC's right to change the "quantitative thresholds" for merger control. We gave more details and commented on this legislative change in our 'Overview of merger control activity' above.

However, we can expect further developments in the merger control area following the intended consultations between the CC and representatives of the OECD and the World Bank.

Reform proposals

We are not aware of any reforms or developments in the "pipeline" at this moment that would concern the merger control domain. And 2015 saw no reform proposals linked to merger control in 2015.

* * *

Endnotes

1. SCND's Decision no. 73 dated September 27th, 2012.
2. http://www.consiliulconcurentei.ro.
3. Regulation on economic concentrations from August 5th, 2010, published in the Official Gazette no. 553 *bis* from October 5th, 2010.
4. CC's decision no. 12 of March 25th, 2015 in case no. RS-63/December 22nd, 2014 concerning the acquisition of sole control by Dalli Production Romania SRL over all assets representing Timisoara Manufacturing Facility (*Fabrica de Productie Timisoara* in Romanian) from Detergenti SA.
5. Report available at: http://www.consiliulconcurentei.ro/uploads/docs/items/id9159/romanian_peer_review_2014_16x23final_ro.pdf.

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