Merger Control

2018

Seventh Edition

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glg global legal group

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Romania

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Overview of merger control activity during the last 12 months

In a snapshot, 2017 was fairly similar to previous years in Romania when it comes to merger control activity. The Competition Council (CC) – which is primarily in charge of "merger control activity" – had 60 merger cases on the table.[1] There was a slight decrease in the total number of merger decisions, from 63 in 2016 to 60 in 2017.[2] Based on the CC's preliminary activity report, the merger decisions issued by the CC represented 77% of all 78 decisions issued by CC.

To explain the CC's activity, 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. 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. In 2017, the M&A market increased in value by 15% compared to 2016.[3] In other words, bigger M&A deals were concluded in 2017. Also, the number of transactions of between €100 million and €500 million reached 15 which, according to financial specialists, is a record performance in the past 10 years.[4]

From a merger control complexity standpoint, apparently the CC has not faced great challenges. A quick review of the publicly available merger clearances shows that the CC issued all of its merger decisions in Phase I of the notification procedure. This means that overall, the economic concentrations submitted for CC's review were, so to speak, "competition rules-friendly" as they posed no risks to effective competition on the concerned, relevant and affected markets. It follows thus that the merger cases examined by the CC in 2017 basically did not raise serious doubts as regards their compatibility with a normal competitive environment. However, the CC did issue four decisions that had commitments attached:

- Lactalis Group, a company active in the market for manufacture and sale of dairy products, acquired Covalact SA and Lactate Harghita SA, on the condition they assign the butter trademark "La Dorna" as well as all subsequent contracts concerning the butter commercialised under "La Dorna".[5] Indeed, by acquiring Covalact, Lactalis Group would have strengthened its position in the manufacturing and commercialisation of butter. The CC worried that this could affect competition and lead to higher prices.
- In order to acquire Payzone SA, Pay Point Services SRL proposed a behaviour commitment, undertaking not to raise prices for providing invoice collection services.[6]

In addition, the company took a series of commitments in order to ensure that competitors operating networks of payment terminals can obtain access in the commercial premises necessary for installing payment terminals situated in the countryside. The CC will monitor over a period of three years that the company complies with its commitments. In this respect, the company will send the CC annual reports.

- Afideea, a medical clinic, has acquired the imaging clinic Hiperdia, and undertook a structural divestment commitment: assigning the activity of five clinics situated in geographic areas where the concentration was likely to affect competition.[7]
- Family Radu has acquired control over Postmaster SRL and Zoto Investments BV. The buyer took a series of behavioural commitments, such as limiting the duration of services supply contracts, not including exclusivity clauses or obligations to acquire minimum quantities, and the structural commitment not to conclude another transaction on the relevant market during the next three years.[8] Compliance with the commitments will be monitored by the CC during a three-year period.

Worth noting as well, is that in 2017, almost 66% of the notified concentrations published on the CC's website[9] 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 for mergers that do not affect the markets (relevant ones, upstream and downstream) either because, for example, there is no overlap in parties' activities on the relevant markets (including upstream and downstream markets) or, where any horizontal overlap or vertical integration exists, it remains below 20% or 30% respectively.

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 (**Merger Regulation**) have changed in 2015 and once more in 2017.[10] The new Merger Regulation entered into force on September 4, 2017.[11] However, this revision has no impact on substantive law as the main modifications brought by the new provisions concern only matters of wording and numbering aimed at harmonising secondary legislation with the Competition Law. Also, there were some formal changes brought to the notification forms (complete notification form and simplified notification form).

The two-level turnover thresholds for notifying economic concentrations to CC have been the same since 2003 (i.e. the aggregated turnovers of all involved parties must exceed €10m in the year preceding the transaction and each of at least two involved parties should have obtained in Romania a turnover exceeding €4m). Since 2015, the Competition Law expressly allows the CC to change the thresholds if it deems it necessary, with prior approval of 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. The new thresholds will become applicable following the lapse of a six-month period as of the publication in the Official Gazette of Romania. However, until now, the CC has not used the opportunity to change the thresholds for notifiable economic concentrations.

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.

Worth noting as well is that along with the CC, the SCND is another administrative body that can intervene in merger control cases that may raise national security risks. This would be the case for mergers (notifiable or not to CC) that involve companies active in national security domains[12] 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. If the SCND believes that the merger should be prohibited, it must inform the Romanian Government and the CC. The Competition Law provides that the proceedings before the CC will be suspended from the moment the SCND notifies it that the economic concentration is likely to present a risk to national defence. The suspension effect ends when the SCND decides whether a risk to national defence exists or not. In case SCND issues a prohibition decision, the procedure in front of the CC will end and the CC will inform the notifying party in this respect.

"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 and other secondary pieces of legislation.

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 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 concerns or not; 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 market or no vertical integration, or where any horizontal overlap or vertical integration exists, it remains below 20% or 30% respectively. Even if these conditions are fulfilled, CC may, at its discretion, require a full notification. Accordingly, it is recommended to discuss with CC what type of notification procedure is to be followed. The notification form is attached to the Merger Regulation.[13]

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).

Procedural aspects

The Competition Law and the Merger Control Regulation advise the parties to seek the CC's guidance before submitting the notification form in the so-called pre-notification phase. Basically, parties meet with CC representatives in order to clarify important aspects related to the concentration. In order to do so, parties provide the CC with information regarding the parties involved, the relevant market and market shares as well as a description of the way in which the concentration will be realised.

Further, the parties submit the notification form and, if necessary, the CC requests additional information and clarifications to the involved parties in order to assess the economic concentration.

The deadline for the CC to issue the clearance in case of economic concentrations is 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 two to three weeks. Even in more complex cases, where clearance has been granted with commitments, the CC issues its decision in approximately one month.

Decisions concerning fines, or those establishing authorisation taxes for economic concentrations, are automatically qualified as executory titles within 30 days from their communication.

The parties to the merger may appeal the decision issued by the CC before the Court of Appeal of Bucharest in 30 days from the communication of the decision. The Competition law provides expressly that the decisions issued by the CC must be notified to the parties in a maximum of 120 days from their deliberation

"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, the implementation of any powers to direct or influence

targets' commercial behaviour on the market is prohibited. This basically means no joint marketing, transfers of shares, conclusion or termination of contracts with suppliers or clients, etc.

Breaching the obligation to notify an economic concentration and implementing a transaction that exceeds the turnover thresholds can be sanctioned by the CC with fines ranging from 0.5% to 10% of the firm's last year turnover. In 2017, the CC published on its website two other decisions concerning companies that failed to notify their economic concentration and have implemented the economic concentration.[14]

Key industry sectors reviewed and approach adopted to market definition

Economic concentrations that made it to the CC's working agenda in 2017 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. In fact, the concerned sectors were basically the same as those in 2016.

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, as we have noticed since 2015, it seems that the CC is willing to change its views when it assesses relevant geographic markets. In 2017, the CC issued several decisions in which the CC stated that the relevant geographic market could be considered the European Economic Area, or even global.[16] For instance, the CC left open the exact definition of the relevant geographic market of manufacture and sale of turbo-blowers for cars, and of manufacture and sale of coating materials for interior surfaces of cars, saying they have at least a Community dimension[15] or even global. By defining the relevant geographic market at the European Economic Area level, or even wider at a global 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.

When conducting its assessment in a particular merger case, the CC may 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 that will 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.

Based on the information made public until now, the last time the CC granted a derogation decision was in 2015, in the context of the envisaged acquisition by Banca Transilvania of sole control over Volksbank Romania SA and Volksbank Romania Services SRL.[17] 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

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 a risk of creating or consolidating a dominant position on the Romanian market or 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.

In this respect, one of the high-profile cases concerned the acquisition of control by ALPLA Plastic over the assets of Amraz Romania.[18] The transaction implied a horizontal overlap on the PET pre-forms production and commercialisation market. In this case, the degree of concentration on the market after the transaction was rather high (i.e. HHI of 1932 very close to 2000, an amount which most likely raises competition concerns). In addition, there was a rather important increase in the degree of concentration, as before the transaction the HHI was of 1403 (i.e. a variation of the HHI of 529). In spite of the above, the CC authorised the transaction by taking into consideration certain elements that proved that the transaction would not cause negative effects on the market (e.g. other producers are still on the market; there are no barriers to entry to the market; and the producers have an important capacity of production that could satisfy demand, etc.)

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

Approach to remedies to avoid Phase II investigation

The CC usually follows the principles set out in the European Commission Notice on remedies acceptable under Council Regulation (EC) 139/2004 and under Commission Regulation (EC) 802/2004. Structural remedies are usually preferred by the CC as: (i) they are more effective for remedying competition concerns; and (ii) unlike non-structural/ behavioural remedies, they do not usually require subsequent monitoring. This is expressly stated in the CC's Guidelines, according to which the divestment structural remedy is one of the most effective remedies.[19] In 2017, the CC cleared three transactions subject to structural remedies. 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 would 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 of 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. Because each transaction has its particularities that are shaped by the specific sector or industry, goods and services involved in the transaction, the type of commitments (behavioural and/or structural) will be determined on a case-by-case basis.

If the parties do not respect the commitments they have undertaken, the CC may sanction them with fines from 0.1% to 1% of their turnover, or even impose daily penalties up to 5% of their average daily turnover. The CC can also order the dissolution of the entity resulting from the concentration or any other adequate measure in order to re-establish competition.

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, 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.[20]

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, until now, the CC never used the possibility of changing the thresholds.

In 2017, the CC issued a report regarding the evolution of competition in which it identifies the relevant markets which are concentrated and facilitate infringements of competition law.[21] In its analysis, the CC used the aggregate index of competitive pressure, which depends on a series of different criteria (barriers to entry on the market, transparency on the market, prices, evolution of demand, degree of innovation, etc.) The conclusions of this report are important mainly for transactions envisaged in the economic sectors qualified by the CC as being concentrated/highly concentrated, i.e. mainly for the cases where the transactions lead to the consolidation between the companies already active in this market. As an example, some of the most concentrated markets identified by the CC are the markets for banking services, production of natural gas, notary services, wholesale and retail of medicine, and manufacture and sale of cement.

Reform proposals

Recently, the President of the CC announced in a public conference that the CC is planning to amend the secondary legislation (basically the Merger Regulation) in order to simplify the procedure applicable to merger control and thus ensure a faster procedure. However, up until now no official proposal of the amended version of the Merger Regulation has been published.

We are not aware of any other reforms or developments in the pipeline at this moment that would concern the merger control domain.

* * *

Endnotes

1. According to its preliminary activity report available here: http://www.consiliulconcurentei.ro/uploads/docs/items/bucket13/id13110/bilant_2017_ian_2018.pdf.
2. However, only after the CC publishes its final activity report will we see clearly if other decisions will be added. Indeed, last year the preliminary report mentioned 59 decisions, and in the final report 63 decisions were mentioned.
3. http://www.romaniajournal.ro/ma-market-up-to-eur-4-4-5bn-in-2017-2/.
4. https://www.romania-insider.com/deloitte-romania-ma/.
5. Decision no 29/26.06.2017, http://www.consiliulconcurentei.ro/uploads/docs/items/bucket12/id12909/decizie_bsa_cu_covalact_site.pdf.
6. Decision no 49/11.09.2017, http://www.consiliulconcurentei.ro/uploads/docs/items/bucket12/id12996/decizia49.pdf.
7. Decision no 24/2017, http://www.consiliulconcurentei.ro/uploads/docs/items/bucket12/id12857/decizie_affidea_angajamente_pt_site.pdf.
8. Decision no 13/22.03.2017, http://www.consiliulconcurentei.ro/uploads/docs/items/bucket12/id12176/decizie_13_22_03_2017_radu-pm_tp_cu_angajamente.pdf.
9. From the total of 60 decisions, only 44 have been published until now on the CC's website.
10. Regulation regarding economic concentrations of August 5, 2010 published in the Official Gazette Part 1, no 553 *bis* of August 5, 2010 amended by Regulation for the amendment of the Regulation regarding economic concentrations, published in the Official Gazette Part 1, no 683, September 8, 2015.
11. Merger Control Regulation of July 20, 2017, published in the Official Gazette, Part I, no 713/04.09.2017.
12. SCND's Decision no 73/27.09.2012.
13. http://www.consiliulconcurentei.ro/uploads/docs/items/id6510/formular_concentrari_economice.pdf.
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20. Decision no 42/24.08.2017, http://www.consiliulconcurentei.ro/uploads/docs/items/bucket12/id12851/decizie_amraz_pentru_site.pdf.
21. CC, Guidelines regarding the remedies in economic concentration field of December 9, 2010.
22. Published in the Official Gazette, Part 1, no 1, January 3, 2011.
23. http://www.oecd.org/daf/competition/Romania-Competition-Law-Policy-2014-RO.pdf.
24. http://www.consiliulconcurentei.ro/uploads/docs/items/bucket12/id12990/sinteza-raport-2017-cu-coperta.pdf.

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