

Merger Control

Third Edition

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Overview of merger control activity during the last 12 months

The Romanian Competition Council (the “RCC”) is the Romanian authority that analyses economic concentrations which fall under the main merger control legislation (namely the Competition Act No. 21/1996, hereinafter referred to as the “Competition Act”) and the secondary legislation. In case of an economic concentration that may raise national security risk, in parallel with the attributions exercised by the RCC, an important role is also played by the Supreme Council of National Defence and the Government.

In 2013, while performing the analysis of the economic concentrations and antitrust practices, the RCC also focused on issuing opinions and standpoints on various draft enactments (e.g. standpoint on the draft bill regarding public-private partnership; draft bill regarding the procedure of granting, amending and extending the validity and transferring the audio-visual licence and authorisation decision; and the draft Emergency Ordinance amending and supplementing the Emergency ordinance no. 34/2006 on the awarding of public procurement agreements).

The RCC’s reports, drafted with a view to analysing the competition in certain key business sectors/markets (energy, automotive, food retail etc.) are also worth mentioning.

Within the 2013 report on competition in key sectors, the RCC analysed *inter alia* the aggregate index of competitive pressure (AICP) for certain markets/industries from the national economy. Following the analysis on AICP, the RCC held that (i) the industries that are the most predisposed towards free competition are the following: industry of spare parts for automobiles, real estate brokerage services, food retail (supply), wholesale distribution of automobiles, production of drugs; while (ii) the industries that are the most predisposed towards anticompetitive behaviours include: distribution of LPG for cookers, production and sale of natural gases, bank cards, notary services, production and sale of cement.

Also within the above-mentioned report, the RCC mentions several conclusions that should be taken into consideration by the companies which intend to implement transactions in the key sectors analysed in this report.

Therefore, with respect to the food retail sector, the RCC holds that, although in the past two years a series of economic concentrations in this industry have taken place, the competition is still strong, the concentration level of the industry remaining relatively low (the first five retailers holding together a market share of approx 30%). Moreover, it is important to mention also that the RCC included in the economic concentrations analysis conducted in the retail sector (primarily food), the use of certain economic analysis methods, i.e. *ex ante* (GUPPI) and *ex post* (the “Difference in Differences” method). Also

regarding the food sector, it should be noted that the RCC undertook for the first time a post-acquisition analysis on the impact/actual impact on the market, as a result of the economic concentration (cleared in 2010) whereby Lidl took over a store network (103 stores). Within such analysis, the RCC analysed the market structure, the market shares and their evolution, as well as the parties' behaviour towards prices, the category of private labels by reference to the general trend of the market.

Regarding the automotive industry, the RCC holds that, in fact, the market shares of the main undertakings have registered significant fluctuations from one year to another, which leads to the conclusion that a high degree of competition is present on the market, and therefore one may hold that a concentration performed on such market should not raise any competition issues.

With respect to the RCC's practice regarding economic concentrations, statistics show that during the past few years there was a downward trend. Thus in 2011 and 2012, the number of decisions issued by the RCC on merger control represented less than 50% of the total number of decisions issued by the RCC, while within the years prior to this period almost 80% of the RCC's decisions concerned economic concentrations. These statistics, made based on the information posted on the RCC's official website, show that the RCC's activity was focused mainly on anticompetitive practices.

The main reason behind this trend was the general economic crisis that determined a lower number of transactions and, as a consequence, a lower number of notifications to the RCC regarding economic concentrations. If, in 2011, the RCC issued 35 decisions with respect to economic concentrations, in 2012 there were 42 such decisions issued by the RCC and, in 2013, according to the information made public by the RCC on its website, there were only 32 decisions.

As a general remark, the RCC's decisions were mainly issued in Phase I of the notification procedure and rarely does the RCC conduct an investigation into notified economic concentrations.

In 2012, out of a total of 42 decisions concerning the authorisation of economic concentrations, 14 decisions were issued following the simplified procedure¹. While in 2013, there were five economic concentrations that were authorised by the RCC making use of the simplified procedure².

The economic concentrations notified in 2013 to the RCC concerned undertakings acting on a variety of relevant markets. Nevertheless, there was a significant number of concentrations reviewed by the RCC in the financial sector (i.e. eight economic concentrations in this sector, mainly in banking, life insurance and leasing services markets). Also the energy and retail food market were subject to the RCC's analyses in merger control proceedings.

New developments in jurisdictional assessment or procedure

After the intense reform process carried out in 2010 with respect to the domestic legislation, in 2011-2013 only a few amendments were implemented.

The main amendment brought to the Competition Act is with respect to the RCC's dawn raids.

According to article 35 of the Law no. 255/2013³ for implementing the Law no. 135/2010 with respect to the new Criminal Procedure Code, RCC's dawn raids may not be initiated and performed solely based on the order issued by the RCC's President. Based on this new provision, before launching a dawn raid, the RCC should also obtain the judicial

authorisation issued by the President of Bucharest Court of Appeal or a judge delegated thereby. A certified copy of both the order of the RCC's President and of the judicial ruling must be served to the company under investigation before the dawn raid commences. The judicial authorisation may be appealed with recourse in the High Court for Cassation and Justice, within 48 hours. For the RCC, the appeal term starts when the ruling is served, while for the companies under investigation, the appeal term starts at the moment the ruling on the judicial approval is served. However, it is important to highlight that the appeal does not suspend the execution.

With respect to the secondary competition legislation, the RCC's Regulation on economic concentrations⁴ – the "Regulation", the RCC's Guidelines regarding the right to access the RCC file in cases regarding an alleged breach of articles 5, 6 and 9 of the Competition Act or article 101 and 102 of the TFEU or, in cases of economic concentrations⁵ – the "Guidelines" (and the Order no. 62/2013 regarding the implementation of the organisation and functioning regulations of the Railway supervision council) were also subject to amendments; we have detailed below the key amendments:

- (a) The increase in the RCC's decision-making power regarding procedural matters. *E.g.:*
 - (i) the RCC can decide about the necessity to organise hearings in the second phase of the assessment; (ii) the RCC can notify other authorities of possible infringements in their area; (iii) the RCC may carry out the simplified assessment procedure even if the parties have submitted the complete form; and (iv) after opening an investigation into an economic concentration, in the second-phase investigation, the RCC may take depositions from proxies of the legal person.
- (b) The individualisation of fines. *E.g.:* (i) the limits of the fines for newly established companies with no turnover in the previous year were reduced to half; (ii) fines for public authorities regarding their obligation to provide relevant information requested by the RCC were reduced; (iii) the recognition procedure was introduced – if one of the parties, concerned by an investigation report issued in Phase II, after its receipt and after exercising its right of access to the investigation file or during the hearings, admits the breach of the Competition Act, the procedure triggers the application of a mitigating circumstance.
- (c) The procedure in case of an economic concentration that may raise national security risks (these amendments will be detailed in subsection '*Specific provisions in case of economic concentration that may raise national security risk*' below).
- (d) The access to the RCC's file. *E.g.:* (i) by contrast to the previous provisions that did not determine a term, currently, the hearings, if considered necessary in Phase II, shall not take place earlier than 30 days since the date when the investigation report was communicated to the concerned parties; (ii) according to the new provisions, the access to the investigation file shall be granted only once and the parties do not have access to the other parties' observations on the investigation report, whereas, before the new amendments, the RCC could have derogated from these rules.
- (e) The assessment procedure for multi-jurisdictional mergers.
- (f) The organisation, functioning and attributions of the railway Supervision Council. Within the competences granted to the railway Supervision Council, the competence to monitor the activity of the railway services markets was also included. It is, however, expressly provided that the achievement of such attribution will not affect the Competition Council's authority to apply the Competition Act.

In light of the European Competition Network's *Best Practices on Cooperation between EU National Competition Authorities in Merger Review*, the amendments introduced a

special provision regarding correspondence between national competition authorities in case of “multi-jurisdictional mergers” (an economic concentration notifiable both in Romania, to the RCC and in at least another Member State of the European Union).

Thus, the parties involved in the concentration are advised to grant the RCC the permission to provide confidential information to other national competition authorities that are assessing the same merger (the “NCA”). For this purpose, the Regulation provides a form similar to the one annexed to the *Best Practices on Cooperation between EU National Competition Authorities in Merger Review*. If the parties thus agree, the RCC may provide such information to the NCA without notifying the parties. Even so, the RCC is still compelled to use the information provided by the parties in the form only within the assessment of the relevant economic concentration.

The criteria already existing in the Competition Act concerning the minimum set of conditions that must be met in order for a transaction to be qualified as an economic concentration, which must be notified to the RCC, remain the same. According to the domestic antitrust rules, the transactions resulting in a change of control over a certain company or business must be cleared by the RCC, to the extent that they exceed the following legal turnover thresholds: (i) the aggregate turnover of the involved parties (in the previous year of the transaction), is above €10m; and (ii) each of at least two of the undertakings involved has obtained in Romania a turnover exceeding €4m and at the same time, the turnover figures are below the *de minimis* thresholds set by EC Merger Regulation No. 139/2004.

Similar to the provisions applicable at the European Commission level and in other national jurisdictions from the EEA, the Romanian legal framework divides the notification procedure initiated by the RCC in case of notified economic concentrations into two phases.

General remarks on RCC control procedure

The Regulation on economic concentrations provides two possible procedures to be followed when assessing an economic concentration. Depending on the expected effects on the competitive environment, the assessment may follow the complete or the simplified procedure. The simplified procedure requires less information and less time for assessment. An economic concentration is notified according to the simplified procedure when it is expected, after implementation, to have insignificant effects on the competitive environment. The effect is considered insignificant in the following cases:

- (a) two or more undertakings acquire joint control over a target, provided that the joint venture does not carry out significant activities on Romanian territory (*i.e.* the turnover of the joint venture, transferred activities or transferred assets do not exceed €4m on Romanian territory);
- (b) there is no overlap among the relevant markets (including upstream and downstream markets) on which the parties to an economic concentration carry out their activity;
- (c) the cumulated market share, which corresponds to the market in which the parties to the economic concentration overlap, does not exceed: 15%, in case of horizontal relations; and 25%, in case of vertical relations (upstream or downstream markets); or
- (d) an undertaking acquires sole control over a company already under its joint control.

During Phase I, the RCC conducts an assessment of the notification, and information and documents received from the notifying party, and it requests additional information in case the notification is incomplete or inaccurate. As regards the last scenario, it should be mentioned that within 20 days after submitting the notification, in case the RCC establishes that the notification is incomplete or the information provided in the notification form is

inaccurate, the RCC will send to the notifying party a written request for information and, as the case may be, it will grant the undertaking a 15-day term to provide the answers (with the possibility of extending the term by an additional five-day period).

At the same time, in practice, the RCC requests information from the market, both from the private sector (competing undertakings, suppliers, clients) and from the public sector (regulatory authorities, National Statistics Institute, professional associations of undertakings, etc.).

In most cases, and even in those transactions which raise no competitive issues, the RCC's traditional approach during the assessment of the notifications leads to detailed checking and cross-checking of the information gathered from the market, on the one hand, and of those provided by the parties, on the other hand.

In light of the latest amendments of the Regulation on economic concentrations, the RCC can notify the competent public authorities or institutions in case the former identifies possible breaches of national rules (e.g. tax obligations). When doing so, the RCC will communicate only the information concerning the alleged infringement, and it is bound to protect the confidentiality of the information submitted by the parties.

During Phase I, the parties involved do not enjoy the right of access to the RCC file, as such fundamental right of defence is granted to the parties in the last stage of the Phase II merger control procedure, if they get there.

Upon completion of the procedure depicted above, the RCC may reach various conclusions based on which a certain decision shall be issued. Thus, in those cases where the RCC reaches the conclusion that in fact the assessed operation does not meet the legal conditions to fall under the scope of the Competition Act, the RCC shall notify, through an address, the parties concerned about such conclusion within 30 days as of the date the notification is deemed as complete.

In case of an economic concentration notified according to the simplified procedure and that falls under the Competition Act, if the conditions are met and no special circumstances occur, within 45 days as of the effectiveness of the notification, the RCC will issue a non-objection decision (*i.e.* no serious doubts were identified as regards the compatibility with a normal competitive environment on the relevant markets). In some cases, the RCC may decide to return to the complete procedure even if the economic concentration was notified using the simplified form and, in other cases, the RCC may carry out the simplified assessment procedure even if the parties have submitted the complete notification form.

In the complete procedure, to the extent that the notified operation falls under the Competition Act, based on the RCC's conclusions as regards the operation, and within 45 days of the effectiveness of the notification, the RCC has the legal option: (i) to issue a non-objection decision when the RCC establishes that no serious doubts have been identified as regards the compatibility with a normal competitive environment on the relevant markets or any identified doubts are removed by proposed commitments; or (ii) to initiate Phase II procedure by opening an in-depth investigation if the economic concentration raises serious anticompetitive issues⁶.

According to article 10 of the RCC Regulation on economic concentrations, a notification becomes effective on the date when it is submitted with the RCC, except for cases where the information provided is incomplete and/or inaccurate and/or imprecise.

From the RCC's recent practice (2009-2013), it can be seen that, in fact, the notifications became effective after one to three months as of the date the notification form was submitted

with the RCC (depending on the nature of the information that must be provided by the undertakings).

In those cases when the RCC decides to open an investigation and thus to initiate a Phase II procedure, the RCC shall grant an at least 30-day term to the involved undertakings to submit written observations to the investigation report. According to the new amendments of the Regulation, the RCC will organise hearings only if the involved parties demand so, or if the RCC deems it necessary in order to establish the truth. Previous to these amendments, the organisation of a hearing before the RCC's Plenum was compulsory.

In Phase II of an economic concentration assessment, within five months as of the effectiveness of the notification, the RCC has the following legal options: (i) to issue a decision whereby it declares the economic concentration to be incompatible with a normal competitive environment; (ii) to authorise the economic concentration in cases which do not raise serious doubts; or (iii) to authorise the economic concentration subject to certain commitments undertaken by the parties involved, in order to ensure the compatibility of the proposed operation with a normal competitive environment.

The RCC may accept commitments from the undertakings involved in an economic concentration⁷ proposed in either of the two Phases. The main purpose of such commitments is to eliminate any anticompetitive concern identified by the RCC and thus to clear the economic concentration.

In case the RCC intends to accept the commitments proposed by the parties, the RCC shall publish on its official website a summary of the case, together with the key content of the proposed commitments. Within the term established by the RCC, interested third parties may communicate to the RCC their observations on the published content of the commitments. In case of commitments proposed by the parties during a Phase I procedure, the RCC has no legal obligation to publish on its official website the parties' intention to propose commitments and the content thereof.

Based on the specific issues identified in the context of a notified concentration, the commitments proposed by the parties may have a structural or behavioural nature but there is no restriction for the parties to propose and for the RCC to accept both types of commitments in case of a notified concentration. According to the Competition Act, structural commitments (e.g. a commitment to divest an activity/business) are preferable in most cases as they are more likely to prevent on a lasting basis the anti-competitive effects that would have been generated by the economic concentration.

When accepting the commitments proposed by the parties, the RCC issues an authorisation decision stating that, in light of and subject to full observance of the undertaken commitments, the notified economic concentration is compatible with a normal competitive environment. The commitments form is annexed to the clearance decision and both documents are also published on the official website of the Romanian competition authority.

Considering the relatively short period of time since these provisions have been in force, there is no consolidated practice regarding the commitments procedure or the RCC position with respect to such commitments.

In 2013, the RCC accepted commitments in only two cases concerning economic concentrations, notified with the RCC in March 2013 and August 2013 respectively.

The commitments accepted by the RCC were attached to the merger control clearances obtained (a) by Auchan Romania SA for the acquisitions of S.C. real, Hypermarket Romania SRL⁸; and (b) by Burda Verlag Osteuropa GmbH and Burda România SRL for

acquiring control over Sanoma Hearst România SRL⁹.

The above mentioned transactions received clearance from the RCC through Decisions no. 32/2013 and respectively Decision no. 42/2013, without initiating a Phase II procedure.

As detailed in Decision no. 32/2013, the parties presented a complex set of commitments consisting of behavioural remedies with respect to the trade market for consumer goods, primarily food, in Craiova and Târgu-Mureș including: (a) the obligation not to open/purchase new stores in view of trading consumer goods in Craiova and Târgu-Mureș for a period of five years as of the clearance date of the concentration; and (b) the obligation that, after achieving the concentration, for a period expiring at the end of 2015, the average sale prices to be practised in the stores located in Craiova and Târgu-Mureș will not exceed by more than 5% the average sale price of all the other stores of Auchan România.

With respect to the economic concentration subject to RCC's Decision no 42/2013, the parties undertook structural remedies, assuming the obligation to sell several activities (the activity related to "Rețete: Bucătăria de azi" magazine, the activity related to "Ioana Visul Copiilor" magazine, owned at present by Burda România, the activity related to the special edition "Ioana Vine Barza", and the activity related to the edition "Casa de Vacanta"). In addition, Burda România and BVO undertook the obligation to provide the RCC with relevant information requested by the latter, within 10 years from the RCC's clearance decision.

Also in 2013, the RCC granted derogation so that the purchaser could take control over the target before obtaining the clearance on the economic concentration¹⁰. Such derogation was possible bearing in mind (i) that the activity of the target was suspended due to the fact that its parent company was undergoing a reorganisation procedure in Cyprus and this could have had a negative impact on consumers, and (ii) the combined market share of the purchaser and the target was below 2% – a lot lower than the market shares held by the top five main competitors on the same market.

Court control over the RCC's decision

The RCC's decision may be challenged mainly by the parties to whom it is addressed, before the Bucharest Court of Appeal within 30 days from its communication. The decision of the court of appeal may in its turn be reviewed by the High Court of Cassation and Justice of Romania. Even if the competition legislation does not include a special reference, third parties – justifying a legitimate interest (based on general law provisions) – may also challenge the RCC's decision.

The court of law may decide, upon request, to suspend the enforcement of the decision which is to be reviewed. In case of decisions containing obligations to pay fines, the suspension shall be granted only subject to payment of a judicial bail. In light of the recent amendments, the bail can amount to up to 20% of the value of the fine, while, before the amendment of the Regulation, the bail was 30% of the fine.

Until now, parties directly involved, or third parties, have not submitted to the competent courts of law any legal claims against RCC decisions for the authorisation of economic concentrations.

Sanctions for failure to notify an economic concentration

Theoretically, the RCC has the means to actively monitor general compliance with the rules of the notification procedure, by requesting information from the Romanian Trade Register, the Romanian National Securities Commission or other relevant authorities. However, in the absence of any public information in this respect, we cannot confirm that such monitoring is

actually performed. Nevertheless, the RCC may become aware of a failure to notify in the course of other proceedings (e.g. notification of another economic concentration).

As per Article 51 of the Competition Act, the undertaking is penalised with a fine ranging from 0.5% up to 10% of the total turnover achieved in the previous financial year if, wilfully or negligently, it: (i) fails to notify a concentration falling within the scope of the Competition Act; (ii) implements a concentration prior to obtaining the RCC's authorisation; and/or (iii) implements a concentration declared by the RCC as incompatible with a normal competitive environment. For newly established companies with no turnover in the previous year, the fines are between Ron 15,000 and Ron 2,500,000. Before the recent amendments, these limits were twice as high.

Moreover, in case the RCC finds that an economic concentration has been implemented and that such concentration was declared as being incompatible with a normal competitive environment, the RCC, by issuing a decision, may request the undertakings involved to dissolve the entity that resulted from the concentration, in order to restore the situation existing prior to the implementation of the economic concentration, or to impose any other adequate measure in order to ensure that the undertakings involved dissolve/reverse the concentration.

Specific provisions in case of an economic concentration that may raise national security risk

The Competition Act¹¹ provides that: (a) in those cases when an operation raises national security risks, the Government, based on the proposal made by the Supreme Council of National Defence (the "SCND"), shall issue a decision which prohibits such operation; and (b) the RCC shall inform the SCND in relation to the economic concentration operations notified to the RCC and which are susceptible to appraisal from a national security standpoint.

The latest amendments to the Regulation regarding economic concentrations regulate a special procedure of cooperation between the RCC, the Government and the SCND in these cases.

Furthermore, the Regulation now provides an independent definition for "*operations that may raise national security risks*". Thus, "*operations that may raise national security risks*" means the acquisition by a person of decisive influence on the basis of rights, contracts or any other means, over undertakings or assets of interest to national security, which can function independently and have economic utility.

The analysis from a national security risk standpoint will occur regardless of whether the acquisition of control is also an economic concentration within the meaning of the Competition Act. The following are considered domains of national security¹²:

- citizen and community safety;
- safety of the borders;
- energy safety;
- safety of information and communication systems;
- financial, tax, banking and insurance safety;
- safety of production and circulation of weapons, ammunition, explosives, toxic substances;
- industrial safety;
- protection against disasters;
- agriculture and environment protection; and
- protection regarding privatisation of state-owned companies or their management.

The new provisions require the RCC, upon receiving an economic concentration notification, to notify the SCND about it, providing at the same time the following information about the transaction: description of the economic concentration nature (e.g. merger, acquisition); the involved parties and their identification data; field of activity of the involved parties; manner of performing the operation; and the transaction's object (*i.e.* a company or assets).

According to the Regulation on economic concentrations, the SCND shall inform the RCC within 30 days whether the economic concentration should be analysed also from a national security point of view. If the analysis is considered necessary, the involved parties shall be immediately informed about this, and the correspondence from that moment on shall take place between the SCND and the parties.

The analysis regarding the national security risks shall be finalised within maximum 45 days as from the date when all the necessary information and documents were made available by the parties. In case, following the analyses, the SCND intends to propose that the Government issue a decision whereby the operation will be prohibited, the SCND will inform both the parties and the Government about its intention within five days.

Nevertheless, SCND Decision no. 73 dated September 27, 2012 ("SNCD Decision") imposes an obligation on the RCC to adapt, within 30 days, the terms provided by the Regulation to the responsibilities and functioning mode of the SCND. As the Regulation has not been amended following the SCND's Decision, it is safe to say that, at this time, the above terms remain in force.

In addition, in case of an economic concentration that does not exceed the turnover thresholds to fall under the Competition Act and, consequently, the notification to the RCC is not compulsory, the party or parties acquiring control must send directly to the SCND the necessary information about the transaction for it to be analysed from a national security standpoint.

The SCND Decision also provides that any notification received directly from the parties will **be diverted to the RCC within a 15-day term.**

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

In line with the RCC's aim to have clear overviews on the markets, it should be mentioned that, in general, the RCC's approach is to analyse in detail even those notifications which do not raise significant or particular issues on the market. However, it should be mentioned that, in fact, the RCC seems to be more relaxed in case of operations in which the parties involved (especially the target company) were assessed in the past by the RCC. In the case of these operations, the RCC focuses on the new elements of the market, the market trend, the evolution of prices, the entry of new competitors, development of new production capacities, etc.

As regards the key sectors analysed by the RCC, in 2013 the RCC's decisions focused on the food market, financial, insurance and energy markets.

Some of the noteworthy economic concentrations are: (a) in the *food market*: Profi Rom Food acquired sole control over five stores owned by SC PITA IMPEX SRL¹³ and six stores owned by SC Alimrom Trading SRL¹⁴; Auchan Romania SA acquired sole control over S.C. real, Hypermarket Romania SRL¹⁵; (b) in the *financial market*: Marfin Bank România S.A. acquired sole control over Bank of Cyprus Public Company Limited Nicosia, Romania subsidiary¹⁶; Societatea de Investiții Financiare Banat Crișana acquired direct control over Societatea de

Administrare a Investițiilor Muntenia Invest S.A. and indirect control over Societatea de Investiții Financiare Muntenia¹⁷; Raiffeisen Bank S.A. acquired control over the division of banking services for natural persons owned and operated in Romania by Citibank Europe Plc, Romania Branch¹⁸; Unicredit Țiriac Bank S.A. and Unicredit Consumer Financing IFN S.A. acquired control over the retail banking portfolio of RBS Bank (Romania) S.A.¹⁹; (c) in the *energy market*: the merger by absorption of SC Termo Craiova SRL by SC Complexul Energetic Oltenia SA²⁰; SNGN Romgaz SA acquired direct sole control over some assets of SC Electrocentrale București SA – Electrocentrale Mureș Branch²¹; and (d) in the *insurance market*: Societatea de Asigurare Reasigurare Astra S.A. acquired sole control over AXA Life Insurance S.A.²²; and companies from Aegon Group acquired control of the life insurance portfolio of Afacerii de Pensii Pilon II and of Afacerii de Pensii Pilon III, owned by Achmea Group in Romania²³.

As regards the definition of the relevant market in certain cases, the RCC relies mainly on past decisions issued by the RCC itself or by the European Commission.

Even if, as regards the products market, the RCC is more open to rely on and use the decisions issued by other competition authorities, when defining the geographical market the RCC's approach changes, particularly when the parties invoke arguments which support defining a market that exceeds the national territory.

In order to define the relevant market of an economic concentration, the RCC leans to a national or even local market.

In reviewing specific markets, with a strict regulation, the RCC's policy is to request information necessary for defining the markets from public regulatory authorities (*e.g.* Ministry of Health, Romanian National Health Insurance House, ANCOM etc.). The RCC takes into account the information and opinions provided by such authorities in assessing the specific markets.

In considering the impact of the operation on the relevant market, the RCC uses, in particular, the Herfindahl-Hirschman Index ("HHI"). The higher the HHI is, the more information the undertakings have to provide to the RCC. Even if the concentration of the market should be indicative in assessing the operation, for the RCC the HHI and concentration ratio become essentials tools for conducting the competitive assessment, in many cases being the determining factor.

When defining the relevant markets, and during the assessment of economic concentrations, an important role is attributable to the investigations initiated by the RCC *ex officio* on certain markets. The RCC's policy is to review periodically various sectors of industries and markets, and to prepare reports regarding these investigations.

For example, in the second semester of 2012 and 2013, the RCC issued several reports, namely: (a) the report regarding the evolution of the competition in the key sector (already mentioned in the first section of this article); (b) the report with respect to the market for construction works for roads and motorways; (c) the report with respect to the market for films distribution to cinemas from Romania; and (d) the report with respect to the card payment services market.

Hereinafter we have included the main findings of the above-mentioned reports which might have impact on the contingent transactions on such markets:

- *the market for construction works for roads and motorways* was held as being characterised by rigidity and even an offering decrease, few new players entering the market, growth tendency of the market concentration degree, maintaining high market shares of the first five players;

- *the market for films distribution to cinemas in Romania* – is a market with a high degree of concentration (HHI equals 2,550 high concentration ratio: 80%), with no excessive regulations that would slow down or restrict the access of the undertakings that intend to perform this type of activity;
- *the card payment services market*:
 - (i) the market for issuance is characterised by a weak concentration, indicating no issues with respect to competition, especially due to the large number of competitors active in such segment;
 - (ii) the market for acquisition of cards has a concentration potential higher than the market for issuance, yet the dynamic of the concentration indicator shows an important decrease for the period 2009-2011, firstly due to the decrease of leaders' share, corroborated by the growing dynamic of competitors who entered the market later, which reduces the concentration potential; and
 - (iii) inter-brand competition seems to be slowed down by the fact that most of the banks issue both Visa and MasterCard cards, and the purchasing/acquiring banks, in their turn, accept both brands.

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

The RCC uses the Significant Impediment to Effective Competition Test (SIEC). In order to declare an economic concentration compatible with a normal competitive environment, the RCC takes into account the risk of creating and consolidating a dominant position on the market corroborated by other additional factors, such as:

- the necessity of protection, preservation and further development of effective competition;
- market structure;
- actual and potential competition;
- the parties' market share and economic and financial power;
- alternatives available to suppliers and users;
- suppliers' and users' access to supply sources or markets, and any legal or other barriers to entry to relevant markets by other undertakings;
- supply and demand trends for the goods and/or relevant services;
- intermediary and final consumers' interests; and
- technical and economic development, provided that it is to consumers' advantage and it does not hinder the competition.

As a result, the use of the SIEC Test provides a profound and rigorous analysis, similar to the one used in the Community-specific practice.

As mentioned in the first part of this article, the RCC has included in the economic concentrations analysis conducted in the retail sector, primarily food, the use of specific economic analysis methods, i.e. *ex ante* (GUPPI) and *ex post* (the "Difference in Differences" method).

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

(i) Avoidance of second stage investigation

In order to avoid reaching Phase II in an economic concentration, communication with the competition authority is essential. Therefore, it is recommended that a communication

channel is established from the beginning, *i.e.* from the moment the notification form is submitted with the RCC.

By communicating with the RCC's representatives, the parties are able to anticipate the potential issues that the RCC might raise regarding the envisaged economic concentration. When this is the case, the parties may: (i) argue why the aspects that concern the RCC from a competition perspective are consistent with a normal competitive environment; or (ii) propose commitments in order to eliminate, before or after the authorisation of the economic concentration, the matters that raise significant impediments to competition.

In the preliminary stage of the notification, the undertakings are recommended to collect information from the market, client declaration, and expert opinions obtained from the parties, or from third parties that confirm that the notification is compliant with a normal competitive environment.

(ii) Following second stage investigation

After entering a Phase II investigation, the RCC has to decide within five months on the economic concentration. In this stage, the RCC may: (i) give a decision to declare the economic concentration as incompatible with a normal competitive environment; (ii) authorise the economic concentration because no serious doubts were identified about the compatibility with a normal competition environment on the relevant markets; or (iii) authorise the economic concentration under some commitments in order to comply with a normal competitive environment.

According to the public information registered in the RCC's Annual Reports, in our jurisdiction, no economic concentration has reached Phase II after the 2010 reform process.

Key policy developments and reform proposals

The main novelty brought by the latest amendments of the Romanian competition legislation is the development of specific provisions in case of economic concentrations that may raise a national security risk.

The implications of these amendments in the long term may be significant, but for now they bring a new concern to the attention of undertakings intending to enter into a transaction: their transaction must be notified either to the RCC (in case of a notifiable transaction) or to the SCND (in case of a non-notifiable transaction), and the decision of one or both of these bodies may interfere or prohibit the implementation of their transaction.

Regarding new expected developments, as mentioned above, the SCND's Decision imposes on the RCC the obligation to adapt, within 30 days starting September 27, 2012, the terms provided by the Regulation regarding the responsibilities and functioning mode of the SCND. As the Regulation was not amended following the SCND's Decision, it should be expected that further amendments to the Regulation will be made.

Separately, so far RCC has not made public any project to review or update the Competition Act or secondary competition legislation in the merger control area. However, the Action Plan published by the RCC in July 2012 shows the RCC's intention to implement in more cases the simplified procedure of assessing economic concentrations.

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Endnotes

1. According to the RCC's 2012 Annual Report available at: http://www.consiliulconcurentei.ro/uploads/docs/items/id8324/2012_annual_report.pdf.
2. According to the 2013 decisions published on the RCC's official website.
3. Published in the Official Gazette no. 515 dated August 14, 2013 and entered into force on February 1, 2014.
4. Enforced by Order no. 385/2010.
5. Enforced by Order no. 421/2011.
6. Articles 21 and 22 from the RCC's Order no. 385 dated August 5, 2010 regarding the approval of the economic concentrations.
7. RCC's Order no. 688 dated December 9, 2010 for approving the guidelines on the implementation of the economic concentrations commitments.
8. RCC's Decisions no. 32 dated July 29, 2013.
9. RCC's Decisions no. 42 dated November 14, 2013.
10. RCC decision dated 22 April 2013 granting derogation to Marfin Bank Romania SA to take control over Bank of Cyprus Romania.
11. Article 46(9) of the Competition Act.
12. SCND's Decision no. 73 dated September 27, 2012.
13. RCC's Decision no. 39 dated October 25, 2013.
14. RCC's Decision no. 12 dated March 4, 2013.
15. RCC's Decision no. 32 dated July 29, 2013.
16. RCC's Decision no. 38 dated October 22, 2013.
17. RCC's Decision no. 27 dated June 20, 2013.
18. RCC's Decision no. 25 dated June 6, 2013.
19. RCC's Decision no. 24 dated June 6, 2013.
20. RCC's Decision no. 20 dated May 29, 2013.
21. RCC's Decision no. 2 dated January 17, 2013.
22. RCC's Decision no. 56 dated December 23, 2013.
23. RCC's decision no. 23 dated June 4, 2013.

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