Merger Control

2017

Sixth Edition

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glg global legal group

CONTENTS

Romania

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Overview of merger control activity during the last 12 months

In a snapshot, 2016 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 59 merger cases on the table, more than in the previous year. There was an increase of 69% in the number of merger decisions compared to 2015 (i.e., 35 cases in 2015). Also, the merger decisions issued by the CC represented 70% of all decisions issued by CC (84 decisions in total). 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. 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. Financial specialists even stated that 2016 was one of the best years for the global M&A market since the financial crisis[1], even though a decline occurred in the first half of 2016[2]. Indeed, the reduced activity was counterbalanced by the last half of 2016.

As to Romania, in 2016, the M&A market increased in value by 23% compared to 2015. In other words, bigger M&A deals were concluded in 2016. Therefore, the augmentation of the M&A market has automatically led to an increase in the number of notifiable transactions.

From a merger control complexity standpoint, apparently the CC has not faced great challenges. A quick review of the publicly available merger clearances shows us that the CC issued all of its merger decisions in Phase I of the notification procedure, and only one decision had commitments attached[3]. This means 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 2016 basically did not raise serious doubts as regards their compatibility with a normal competitive environment.

One of the high-profile cases was the case concerning the acquisition of control by Carrefour Nederland BV over Billa Romania S.R.L, Billa Invest Construct S.R.l and Allib Rom S.R.L, where CC cleared the acquisition on 21 June following acceptance of the remedies proposed by the notifying party[4]. Carrefour proposed a structural divestment commitment; more precisely Carrefour undertook to assign the activity of retail sale of three supermarkets (one Carrefour Market and two Billa) situated in a geographic area

where the concentration was likely to affect competition. In addition, Carrefour undertook not to acquire control again over the said supermarkets for a period of 10 years[5]. The CC issued a final decision within four months as of the notification date.

Worth noting as well is that in 2016, almost 24% of the notified concentrations received the CC's clearance after undergoing the so-called simplified assessment procedure, which is clearly less than last year when almost half of the notified concentrations were assessed using the simplified 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 also tell us that in 2016 there was one downward merger case referral from the European Commission to the CC since the merger was likely to significantly affect competition on a distinct market within Romania[6]. This is an element of novelty as 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 Tengelman supermarket chains (plus branded stores) in Romania. As in the past years, there were no upward referrals from the CC to the European Commission.

2016 brought some interesting changes to the: (a) competences given to the Supreme Council of National Defence (SCND); and (b) merger authorisation fee.

Along with the CC, our national competition authority which conducts the substantive assessment of notifiable economic concentrations, SCND is another administrative body that can intervene in merger control cases that might raise national security risks.

This would be the case for mergers (notifiable or not to CC) that involve companies active in national security domains[7] 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 amended version of the Competition Law, which came into force on 1st January 2016[8], 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.

Before these amendments, the CC might have rendered a decision in a merger control case before the finalisation of the SCND's assessment regarding the existence of a national security risk. Because of these parallel proceedings (the CC, along with the SCND), a contradiction could arise: an economic concentration may be prohibited by the SCND but authorised by the CC.

Therefore, the amendments grant more value to the assessment carried out by the SCND. Based on public information, the SCND has never issued a prohibition decision. The CC also drafted a reform project of the Regulation concerning merger control in order to harmonise the secondary legislation with the new provisions[9].

The revised Competition Law (entered into force on 1st January 2016) provides that the authorisation tax ranges between €10,000 and €25,000 depending on the target's turnover for decisions issued in Phase I of the proceedings, and between €25,001 and €50,000 depending on the target's turnover for decisions issued in Phase II of the proceedings. Before this change, the authorisation tax varied between €10,000 and €25,000 depending exclusively on the value of the turnover of the firm. As a consequence of this modification, the secondary legislation regarding this tax was repealed by the new Instructions regarding the calculation of the mergers' authorisation tax issued by the CC, which came into force on 14th July 2016[10].

Mergers become more costly under these new provisions whenever the merger notified requires a deeper assessment.

Also under the new provisions, the decisions concerning fines or those establishing authorisation taxes for economic concentration are automatically qualified as executory titles within 30 days from their communication.

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[11].

Although the two-level turnover thresholds 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), from now the revised Competition Law expressly allows the CC to change the thresholds if it deems necessary. But, before making the change, the CC must obtain the 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. 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. Nonetheless, until now, the CC has never 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.

"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 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 whether 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. Breaching the obligation to notify an economic concentration 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. For instance, in 2016, the CC applied a fine of approximately €170,000 for failure to notify the economic concentration before its implementation[12].

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. 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 available on the CC's website[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).

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.

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 revised 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.

To the best of our knowledge, as in 2015, the CC did not issue any decisions in 2016 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

Economic concentrations that made it to the CC's working agenda in 2016 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 2015.

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 noticed since 2015, it seems that lately, the CC is willing to change its views when it assesses relevant geographic markets In 2016, the CC issued several decisions in which the relevant geographic market was considered to be the European Economic Area or even global. For instance, the CC stated that the relevant geographic market for design, manufacture and sale of semiconductor products has at least a Community dimension[14]. Also, the market for reinsurance services was deemed to be global[15]. 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.

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 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[16]. 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 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

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[17]. In 2016, the CC cleared one transaction subject to structural remedies[18]. 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 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.

If the parties do not respect the commitments they undertook, the CC can 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 resulted 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[19].

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 2016, 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.[20] 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 the transactions envisaged in the economic sectors qualified by the CC as being concentrated/highly concentrated, 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 of banking services, car insurance[21], wholesale and retail of medicine, manufacture and sale of cigarettes and manufacture and sale of cement.

Reform proposals

As we mentioned in the "Overview of merger control activity during the last 12 months", the CC drafted last year a revised form of the Regulation concerning merger control. 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 amended version of the Competition Law.

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

* * *

Endnotes

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