Lexis®PSL **Competition**

Romania merger control (2015)

Produced in partnership with Tuca Zbarcea & Asociatii

A conversation with Raluca Vasilache, partner, and Anca Jurcovan, managing associate, at Romanian law firm Ţuca Zbârcea & Asociaţii, on key issues on merger control in Romania.

A conversation with a local expert—top questions

1. Have there been any recent developments regarding the Romanian merger control regime and are any updates/developments expected in the coming year?

The latest amendments to the merger rules were introduced in June 2015 and give the Romanian Competition Council (RCC) the power to modify the turnover based thresholds that trigger mandatory notification of economic concentrations. This means that the RCC now has the flexibility to adjust the value of the thresholds based on the socio-economic context. Adjustments can be made to the thresholds after obtaining the approval of the Ministry of Economy, Trade and Tourism.

Other amendments to the merger rules were introduced in 2014 and 2012 and include the following:

- any request for consultations with the RCC regarding a merger has to be submitted at least 14 days prior to the notification and the relevant information (parties, market definition, information on the market, summary of the transaction, etc) on the merger has to be sent to the RCC at least five days before the meeting
- in relation to qualification for the simplified procedure, where two or more undertakings merge or acquire sole or joint control of another, the combined market share thresholds have been increased—for horizontal merging activities, the merger market share has to be less than 20%; in the case of vertical mergers, it has to be less than 30%. Also, any merger in which at least two parties are active in a neighbouring market, or where one or several parties have an individual market share of at least 30% on any market of the product where there is no relationship between the parties (horizontally or vertically) but where another party is active in a neighbouring market, is excluded from the simplified procedure
- in highlighting the potential significant impact on other markets, the parties to the merger must indicate if one of them has a market share of at least 30% and any other party of the merger is a potential competitor on that respective market—a potential competitor is a party to the merger which intends to enter the respective market or has sought to or intended to enter the market during the previous three years.
- the possibility for the undertakings concerned to notify transactions for legal certainty where the specific circumstances of the case do not clearly indicate the obligation to notify the operation to the RCC
- the introduction of a new procedure by which mergers are also notified to the Council of National Defence (SCND) in order to test compatibility with the state defence criteria. The procedure with the SCND occurs in parallel with the RCC notification. In case the SCND's analysis indicates that a transaction raises serious issues regarding its compatibility with state defence criteria, the SCND may propose to the government the issuance of a government resolution banning the transaction. No prohibition decision has however been made so far.

2. Under Romanian merger control law, is the control test the same as the EU concept of 'decisive influence'? If not, how does it differ and what is the position in relation to 'minority shareholdings'?

The control test provided by the Romanian Merger Regulation is similar to that applied under EU merger control rules. Accordingly, an economic concentration is deemed to arise where there is a change in control of an undertaking that may result from the acquisition, by one or more undertakings, of direct or indirect control of the whole or parts of at least one other undertaking. Control is defined as rights, contracts or other means which, either separately or in combination, and in all the factual and legal circumstances, confer on the acquirer the ability to exercise decisive influence on an undertaking. Such control may be acquired by one undertaking acting alone (sole control) or by several parties acting jointly (joint control). There is no defined shareholding level at which decisive influence arises.

The acquisition of minority shareholdings are not be covered by the merger control requirements unless such shares include the benefit of veto rights (either a de facto veto or based on agreement) of the nature to confer joint control. A minority shareholder (eg holding 5-10% of shares) may be deemed to have joint control where it has veto rights covering decisions on market strategies of the target–eg aspects regarding the budget, business plan, important investments and appointment of senior management of a company. Veto rights aimed at merely protecting the interests of minority

shareholders do not confer a joint control situation (eg increase or decrease of the social capital or liquidation of the company).

3. Are joint ventures caught by the national merger control provisions (including non-structural, cooperative joint ventures)?

Where the joint venture performs on a lasting basis all the functions of an autonomous economic entity and fulfils the full-functionality criteria, the merger control provisions come into play.

Non-full function joint ventures are not caught by merger control rules.

4. What are the merger control thresholds and would a purely foreign-to-foreign transaction be caught?

There are two cumulative turnover-based thresholds:

- the combined aggregate worldwide turnover of all the undertakings concerned is more than €10m (in its RON equivalent, and
- at least two parties involved in the transaction each have a turnover in Romania exceeding €4m (in its RON equivalent).

The Romanian Competition Law applies if the relevant turnover thresholds are met, regardless of the place of incorporation of the parties.

Each undertaking acquiring joint or sole control (and its respective group) is considered a party to the transaction for the purpose of verifying the notification thresholds.

For the establishment of a new joint venture, the relevant parties for meeting the revenue thresholds are represented by all undertakings that can exercise decisive influence over the JV (typically majority shareholders and any minority shareholders with the ability to block majority decisions). If a change of control over an existing joint venture occurs, the joint venture (and the companies controlled by it, if any) is also considered as 'undertaking concerned' (separately from the group exiting the joint venture or modifying the control structure from sole to joint control).

To see whether thresholds in Romania are met, see Where to Notify.

5. Are there any specific issues parties should be aware of when compiling and calculating the relevant turnover for applying the jurisdictional thresholds?

The Romanian turnover for the purpose of applying the second threshold test is calculated by considering the total revenues achieved by the undertaking through sales of products and/or services during the previous fiscal year, from which shall be deducted the amounts representing fiscal obligations and the accounted value of the exports (performed directly or through agents), including intra-community supplies. In cases where the transaction involves the acquisition of assets, the relevant turnover shall be calculated by considering only the sales related to the assets constituting the object of the transaction.

The Romanian merger rules require that the turnover of all companies related to the undertakings concerned, ie ‘group’ companies are included in the calculation of aggregate turnover for applying the jurisdictional thresholds. Therefore, the aggregate turnover shall include: the turnover of the concerned undertaking, the turnover of its branches, the turnover of the parent companies, the turnover of other branches of the parent companies, and the turnover of the companies jointly controlled by two or more companies of the group.

If the group includes a joint venture, revenue should be apportioned equally between all parties having control over the entity. For instance, in cases of two independent shareholders holding joint control, the turnover of the subsidiary company shall be allocated 50%-50% even if the actual shareholding is split 35%-65%.

The ‘internal turnover’ of the group, respectively the value of the sales between undertakings belonging to the same group, is not taken into account when calculating the turnover of the concerned undertakings. Thus, the amounts taken into consideration reflect only the transactions which take place between the group of undertakings, on the one hand, and third parties, on the other. Purely internal transactions where the ultimate control remains within a group of companies are not caught by merger control rules.

6. Where the jurisdictional thresholds are met, is notification mandatory and must closing be suspended pending clearance?

The Romanian merger control rules require mandatory notification of the transaction to the competition authority if the relevant thresholds are met.

The national merger regime is suspensory, ie the parties cannot complete the transaction pending issuance of the clearance decision by the RCC.

The principle of suspension of economic concentrations does not apply in cases of a public offer or transactions on the capital market accepted for trading on the stock exchange provided that the following conditions are met:

- the concentration is immediately notified to the RCC, and
- the person acquiring control does not exercise its voting rights or if it exercises its voting rights such is limited to actions aimed at preserving its investments pursuant to a derogation granted by the RCC.

Accordingly, the exception would apply for public bids only if performed on the capital market under the above-mentioned conditions. In case of bids occurring outside the capital market (for instance, in cases of privatisations that are not performed based on an IPO procedure), the parties must include a condition precedent to closing related to the final clearance of the transaction by the RCC.

Is it possible to close the deal globally prior to local clearance?

Yes, local closing can be 'carved out' from global completion pending clearance.

7. Is there a deadline for filing a notifiable transaction and what is the timetable thereafter for review by the RCC?

There is no time limit for submitting the notification to the RCC. Nevertheless, the parties may not implement the transaction pending issuance of the clearance decision by the RCC.

The notification becomes effective on the registration date, unless the RCC considers that the supplied information is incomplete and requests additional data. If the RCC requests supplementary data, the notification becomes effective on the date following the submission of all requested supplementary information. The RCC communicates to the notifying parties, in writing, the date when the notification becomes effective.

Note–the deadline runs from the day the notification becomes effective.

From the date the notification becomes effective, the RCC must observe the following maximum deadlines for issuing a decision:

For a Phase I review

- 30 calendar days, if the economic concentration operation does not fall under the scope of the Competition Law
- 45 calendar days if a decision not to raise objections is issued by the RCC—such decision is issued when:
    - there are no serious concerns regarding the compatibility of the notified operation with a normal competitive environment, even if the operation falls under the scope of the Competition Law, or
    - the parties propose commitments which remove the serious doubts raised by the operation and as such are accepted by the RCC
- 45 calendar days if the RCC decides to open an investigation in cases where the notified economic concentration falls under the scope of the Competition Law and there are serious concerns regarding its compatibility with a normal competitive environment.

For a Phase II review

The deadline is set at five calendar months from the date the notification becomes effective for the RCC to issue:

- a negative decision
- a clearance decision, or
- a conditional clearance subject to implementation of commitments by the parties.

8. Who is responsible for filing a notifiable transaction (noting also whether there is a specific form/document used and an applicable filing fee)?

In cases of a merger between two or more previously independent undertakings or parts of undertakings, notification must be submitted by each of the concerned undertakings. If the economic concentration is achieved following the launching of a public offer or a public notice regarding the intention of making a public offer, the notification must be submitted by the bidder. In other cases, notification must be undertaken by the entity/entities acquiring control over one or more undertakings or parts of undertakings.

The notification standard form provided by the Regulation on merger control contains complex information requests regarding the parties, the transaction, the financial and economic structure of the economic concentration, the relevant markets, market shares of the parties, as well as of competitors etc. The Regulation also provides for a simplified notification form. Both the standard and the simplified notification forms include information requests significantly similar to the notification forms applicable under the EU merger control rules.

The filling fee is RON 4,775. The notification is not accepted by the competition authority in case proof of payment of the filing fee is not attached to the file. Post-clearance, the notifying party/parties should also pay a fee ranging from €10,000 to €25,000.

9. Please confirm/comment on the penalties for failing to notify or suspend transactions pending clearance and the

RCC's record/stance in terms of pursuing parties for failing to notify relevant transactions (commenting, if relevant, on any statute of limitations regarding sanctions for infringements of the applicable law).

As of August 2010 there is no time limit for submitting the notification. Nevertheless, the parties may not implement the transaction pending issuance of the clearance decision by the RCC. In case the parties implement a transaction without approval, the RCC may impose a fine from 0.5% up to 10% of the turnover achieved by the party/parties having the notification obligation in the year preceding the issuance of the sanctioning decision.

The RCC does not refrain from applying sanctions to undertakings for implementing transactions in the absence of prior clearance. In 2011, the RCC imposed a fine of €775,000 for implementing an economic concentration before obtaining a clearance decision. In January 2014, the RCC imposed a fine of €40,783 to a buyer which exercised voting rights in the acquired company before notifying the RCC about the economic concentration.

The statute of limitation in such cases is set to five years. The term starts to run as of the date the transaction is implemented.

10. Are there any other 'stakeholders' other than the RCC (for example, any 'sector regulators' who might have concurrent powers)?

In addition to the control exercised by the RCC, any merger must also be assessed by the SCND in case the operation may raise national security risks. Based on public information on the SCND's practice, the SCND would not be expected to raise state defence concerns on transactions occurring in the market. The only time when the SCND raised potential concerns on a potential transaction relates to the privatisation of the Romanian freight carrier (CFR Marfa) when it issued a recommendation regarding clauses to be included in the privatisation agreement aimed at preserving national security interests in freight activities.

The RCC may also notify other public institutions or authorities if issues falling under the competence of such institutions are discovered, such as potential breaches of the law in the taxation field. Notification will only concern information regarding potential infringement of legal norms and will take into account the confidential nature of the information in possession of the RCC.

11. What (if any) are the other 'hot' merger control issues in Romania?

The Organisation for Economic Co-operation and Development (OECD) peer review report published in 2014 regarding the competition policy and regulatory framework in Romania recommends assessing whether notification thresholds should be maintained at the actual level or increased in order to capture only those transactions involving parties with relevant market power.

Getting The Deal Through guide

A copy of the latest Getting The Deal Through merger control guide for Romania is available here:

GTDT Merger Control 2015 Romania