

## Competition - Romania

### Don't Jump the Gun! First Dawn Raids in Merger Control Case

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On November 19 2009 the Competition Council announced that it had opened an investigation into the allegedly premature implementation of an economic concentration involving the Advent group's acquisition of assets owned by Ozone Laboratories SA, a well-known generic pharmaceuticals company. More surprisingly, the council's inspectors carried out dawn raids at both parties' premises. This is the first time that the council has ordered a dawn raid in connection with a merger control case. The council has stressed that it is entitled to use all tools and methods available to it under competition laws and regulations. Moreover, the imposition of fines in such a case will be carefully noted by Romanian competition law practitioners and companies contemplating mergers.

The regulatory scrutiny of the Advent/Ozone merger began on September 8 2009, when the council announced that it was assessing a notified economic concentration in respect of Advent's takeover of certain Ozone assets, including the Ozone brand and other trademarks under which Ozone produces and distributes a large number of pharmaceutical products in Romania. The notifying parties were SC Ozone Laboratories Pharma SA and Perpetuem Limited, which is part of the Advent group.

The acquirer, Advent, is active in various sectors of the Romanian economy. It controls another generics company, Labormed Pharma SA, and its distributor, Labormed Pharma Trading SA, but it also controls Dufa Deutek SA, one of Romania's main manufacturers of paints and varnishes, as well as brick manufacturer Ceramica SA, which is based in eastern Romania. The council examined Advent's indirect acquisition of control over Ceramica in 2007, when it decided that the concentration did not give rise to competition concerns because it did not strengthen or create a dominant position in the relevant market.

Ozone is the Romanian subsidiary of Ozone Laboratories Group, a well-known generics producer which is active throughout Central and Eastern Europe. It entered the Romanian market in 2001 and is the country's eighth-biggest generics producer.

Article 15(4) of the Competition Law requires parties to an economic concentration to observe a standstill obligation if certain turnover thresholds are met. The parties must notify the council and await approval before implementing the transaction. If they fail to do so, the council may open an *ex officio* investigation to assess whether an infringement has taken place and, if so, what distortion of competition has occurred. The council's inspectors are empowered to conduct dawn raids on the parties' corporate headquarters and on other premises where information relating to the case may be found, and to collect documents that support their suspicions and relate to the case. The council had never used this important power before, as it had been confident that notifying parties would not take steps to implement transactions before clearance. However, council representatives have stated on several occasions that a growing number of transactions have been found to have been implemented between notification and authorization.

Such a breach is punishable by a fine of up to 10% of the notifying parties' turnover for the preceding year. Moreover, the limitation period for imposing the fine is five years. Given its previous statements on the issue, it was always likely that the council would take the first opportunity to react against such practices and make known its position.

The most common implementing measures that amount to a breach of the standstill obligation are:

- the appointment of new directors;
- the approval by the acquirer of the acquired company's business plan, most frequently encountered if the economic concentration takes place at the end of the

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year; and

- the approval of decisions taken in the shareholders' general meeting by the forthcoming shareholders that are likely to have an impact on the competitive behaviour of the acquired company on the market.

If the acquirer envisages such measures, an individual request must be filed with and accepted by the council in advance.

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