# Competition - Romania

## Understanding Merger Control Procedures

Contributed by **Musat & Asociatii**

October 04 2007



Since Romania joined the European Union, control over concentrations with an EU dimension has been exercised by the European Commission pursuant to the EU Merger Regulation (138/2004) and subsequent legislation. Consequently, concentrations which fall outside the ambit of Article 3 of the regulation and meet the thresholds set by Romanian law must be notified to the national competition enforcement authority, the Competition Council.

**Regulatory Framework**

The Romanian regulatory framework in the field of merger control includes the Competition Law (21/1996), as amended, and the council's Regulation on the Authorization of Economic Concentrations, as amended.

The law's definition of 'concentrations' encompasses transactions including:

- the merger of two or more previously independent undertakings;
- the acquisition of direct or indirect control of all or part of one or more undertakings by one or more parties which already control at least one undertaking, or by one or more other undertakings, whether by the purchase of securities or assets, by contract or by other means; and
- the creation of a long-term, autonomous joint venture which has the effect of a concentration (ie, a full-function joint venture).

Within the meaning of the law, 'control' may be exercised by rights, contracts or any other means which, either individually or in combination, allow a party to exercise decisive influence over an undertaking.

A minority interest acquisition can give rise to either sole or joint control of an undertaking. Sole control is usually gained by acquiring the majority of the voting rights. However, it can also be exercised by a minority shareholder, either *de jure* or *de facto* (ie, by law or in fact). *De jure* sole control is exercised by a minority shareholder which has been granted preferential shares that confer the majority of the voting rights or the power to decide the strategic commercial behaviour of the undertaking (eg, the right to appoint over half of the members of the board of directors). *De facto* sole control is exercised by a minority shareholder if there is a significant probability that it will be able to exercise the majority of the voting rights in shareholders' meetings because the remaining shares are widely spread. *De facto* sole control can also be acquired by a minority shareholder which has the right to manage the undertaking's business and determine its commercial policy.

However, minority interest acquisitions will usually grant joint control over an undertaking. Exercising joint control requires a prior agreement between the controlling parties, either on a *de*

*jure* or *de facto* basis, as it is essential for the controlling parties to make joint decisions regarding the undertaking. *De jure* or *de facto* joint control may be exercised by shareholders if they (i) exercise equal voting rights (irrespective of their share in the undertaking) or equal rights to nominate executive bodies, or (ii) are granted veto rights over strategic commercial decisions. If the veto rights allow the minority shareholders to oppose only key decisions regarding the undertaking (eg, changes to its statutes, changes in share capital or a decision to liquidate the undertaking), the minority shareholders do not exercise joint control, but are deemed to have been granted protection for their financial interests in the undertaking.

*De facto* joint control may also exist when the minority shareholders have strong shared interests which lead them to vote in a consistently coordinated manner. However, if decisions are not always taken by a consistent majority of the same minority shareholders, such shareholders will not be deemed to have joint control.

A qualitative change of control (from sole to joint control or vice versa) is also caught by the merger rules. In addition, the relevant legislation provides that any other circumstances which allow an undertaking to exercise a decisive influence over another undertaking give rise to an economic concentration which is potentially subject to notification.

**Jurisdictional Thresholds**

The law provides that there is an obligation to notify if, in the financial year before the transaction, the undertakings' combined worldwide turnover was over €10 million and at least two of the undertakings had an individual turnover in Romania of over €4 million.

For the purpose of the second threshold test, turnover is calculated by considering all sales in Romania - irrespective of the product market which would be affected by the economic concentration - after deducting export duty and state taxes. The calculation includes the turnover of each undertaking involved in the transaction and that of the group of companies of which each undertaking is a part (ie, its subsidiaries and parent companies, other subsidiaries of its parent companies and any other undertakings jointly controlled by two or more of the companies in the group).

Turnover relating to intra-group transactions (ie, transactions within the existing group before the merger takes place) is not taken into account in respect of the target company. If a group includes a joint venture, its turnover is allocated equally between its parent companies for the purpose of the threshold test. In the event of the creation of a joint venture, the turnover of the two parent companies (together with their respective groups) must be assessed for the threshold test.

The turnover-based threshold generally applies. However, for transactions involving the acquisition of assets, the value of such assets is represented by the percentage of the assets in the aggregate turnover of the party in question.

Market share thresholds do not apply. A party may fall within the scope of the merger control provisions even if its market share does not increase following an economic concentration. Regardless of the changes in the relevant market, if the applicable turnover threshold is met, an economic concentration is subject to prior approval by the council. The existence or absence of an overlap in the relevant market is taken into consideration only when the council assesses whether the proposed transaction is compatible with a normal competition environment; turnover thresholds are the only decisive indicators for the purpose of the notification obligation.

**Foreign Transactions**

Given that the jurisdictional thresholds refer to the volume of sales (either direct or through distributors) on the Romanian market, irrespective of the parties' presence in Romania in the form of subsidiaries, branches or assets, transactions between foreign entities may be caught by the notification obligation.

**Exemptions**

The law identifies a number of types of transaction which are not caught by its provisions, irrespective of the market share held or the nationality of the parties involved. A transaction is exempt if:

- control is acquired and exercised by a liquidator (designated by a judicial ruling) or by a person empowered by a public authority to oversee cessation payments, judicial liquidation or similar proceedings;

- banks or similar credit institutions, other financial institutions or insurance or reinsurance

companies whose activity includes dealing in securities on their own account or on behalf of clients temporarily acquire securities in an undertaking with a view to reselling them, provided that (i) the parties do not exercise the voting rights conferred by such securities in such a way as to determine the undertaking's competitive behaviour, and (ii) the securities are resold within one year;

- undertakings with control over an entity do not exercise their voting rights to elect members of its administrative, executive, supervising or controlling bodies, except for the purpose of protecting the undertakings' financial interests arising from their investment; or

- the economic agents in question are involved in restructuring and reorganization procedures.

In addition, intra-group mergers or takeovers are not subject to notification.

**Notifying Parties**

The transaction must be notified jointly by the parties in the event of a merger, an acquisition of joint control or the creation of a full-function joint venture. Where sole control is acquired, the acquirer must notify the concentration. The filling fee is €800.

The merger notification form requests information on the parties, the transaction, the relevant markets and the main suppliers and customers of the parties involved. The notification form is available on the council's website at www.consiliulconcurentei.ro/Diverse/Formular%20concentrari%20economice.pdf.

**Deadline for Submission**

The parties involved in the transaction must inform the council in writing of their intention to submit a notification seven days before filing. The parties must submit the notification form to the council within 30 days of signing the merger agreement. The seven-day deadline is included in the 30-day deadline.

Romanian merger provisions do not mention the submission of notification before a binding agreement is signed; however, merging parties are presumably allowed to submit prior notification, as this is not expressly forbidden.

In practice, the council supports parties that wish to notify a proposed transaction before signing the final agreement, but the parties' merger negotiations must be at a relatively advanced stage and have reached a certain degree of certainty. Parties choosing to notify the council before the merger is concluded must submit a copy of the final agreement once it is signed.

Parties contemplating a transaction may ask the council to provide a formal advance ruling on whether a particular situation falls within the scope of the law and is therefore subject to notification. The council will respond officially to such a request, but the response is not binding and is not always conclusive. If the transaction proposed by the parties raises questions that require further information or documents for review, the authority usually recommends that the parties submit a formal notification before it issues an official opinion.

The council's staff are usually available for informal meetings and discussions with the parties on various aspects of the notification process before a binding agreement is signed.

In the absence of specific legal provisions with respect to public offers or bids, practitioners consider that a notification may be submitted based on the intention to purchase. Furthermore, in the case of privatization of state-owned companies, the interested party must inform the council of its intention to acquire the stock in question before submitting a final offer, which must be accompanied by proof of prior notification.

**Timeframe for Scrutiny**

The law provides that if the council deems that the notification is complete (ie, that no additional information is necessary in order to take a decision), it has 30 days to issue its decision. If the notification is incomplete, the council may ask for additional information within 20 days of filing, in which case the parties involved must provide the council with such information within 15 days. The notification becomes effective when the council considers that the notification is complete, at which point the council must issue a decision within 30 days.

Although the initial waiting period (ie, the period in which the council must make a decision) is approximately four weeks, in certain cases it may be extended to eight weeks or more.

The council's Merger Regulation provides for a second-phase review if the council has doubts about the transaction's compatibility with a normal competition environment. If the council decides to start an investigation, its final decision must be issued within five months of the date on which the filing is considered complete. The five-month term includes the initial 30-day waiting period; the entire procedure of reviewing the transaction and deciding whether to approve or reject it may last no more than five months.

At the end of the second-phase review the council will issue:

- a refusal, if the notified economic concentration is deemed incompatible with a normal competition environment;
- an authorization, if the notified economic concentration is deemed compatible with a normal competition environment; or
- a conditional authorization, if the notified economic concentration is compatible with a normal competition environment only if certain conditions are met.

The regulation also provides for a simplified notification procedure which applies only if:

- two or more economic agents acquire joint control over another economic agent, but the jointly controlled company has no economic activity or negligible economic activity in Romania. This condition applies only if, considering only the company's turnover, assets and activities in Romania: (i) the turnover of the jointly controlled company and/or the value of transferred activities does not exceed €4 million; and (ii) the total value of the assets transferred to the jointly controlled company does not exceed €4 million;
- two or more economic agents merge, or one or more economic agents acquire sole or joint control over another economic agent, but none of the parties involved is commercially active in the same geographical product market, the same product market or a product market upstream or downstream from that of any other party involved in the transaction; or
- a merger takes place between two or more economic agents, or one or more economic agents acquire sole or joint control over an undertaking, and either: (i) two or more of the parties involved are commercially active in the same geographical product market (ie, horizontal relations exist); or (ii) one or more of the parties involved is commercially active on a product market situated upstream or downstream from one in which any other party involved in the economic concentration is active (ie, vertical relations exist).

In the last case the simplified procedure applies only if the combined market share of the parties is below 15% in the case of horizontal relations and below 25% in the case of vertical relations.

**Substantive Test for Assessment**

The substantive test laid down by the law and applied by the council when deciding whether a notified transaction should be authorized - and, if so, whether conditionally or unconditionally - is whether the transaction leads or could lead to the creation or consolidation of a dominant position in the relevant market in which the transaction takes place.

The transaction is assessed according to:

- the need to maintain and develop competition within the Romanian market in view of the structure of all markets concerned and the actual or potential competition between undertakings based in Romania or abroad;
- the market share held by the undertakings concerned and their economic and financial power;
- the alternatives available to suppliers and users, their access to supplies and markets and any other impediments to market access, whether established by law or otherwise;
- the trends in supply and demand for the relevant products and services;
- the extent to which intermediate and end customers' interests may be affected; and
- its likely contribution to economic and technical progress.

Following Romania's accession to the European Union, the council has slightly changed its

approach in recent decisions, moving from the dominant position test towards the test applied by the European Commission - that is, whether the proposed transaction significantly impedes competition on a given market. Moreover, the council usually takes the commission's practice as a reference point.

**Ancillary Restrictions**

Pursuant to the regulation, the council's powers to analyze a transaction also extend to ancillary restrictions of competition, such as non-compete clauses, licence agreements and non-solicitation and supply obligations. Thus, the decisions issued by the council with respect to economic concentrations normally cover all ancillary restrictions (where these are material to the implementation of the transaction).

**Standstill Obligation**

Before the council takes a final decision on an economic concentration, the parties involved are subject to a standstill obligation (ie, they are expressly prohibited from proceeding with the implementation of the transaction). However, the parties involved may take measures which are not irreversible and do not decisively change the structure of the market in question. Measures which are deemed to change the market structure permanently and are therefore prohibited by law include amending the statutory activity of the target company, withdrawing a product from the market and entering a new market.

**Penalties**

Romanian law provides for penalties identical to those under EU law. Failure to notify a transaction which falls within the council's remit carries a fine of up 1% of the parties' aggregate income for the previous financial year. If parties implement a notified transaction in breach of their standstill obligations or in contravention of a council decision, they may face a fine of up to 10% of their combined turnover for the preceding financial year. When determining the size of the fine, the council considers the gravity and duration of the transgression and its effect on competition in the relevant Romanian market.

The council's right to impose fines is subject to statutory limitations under the law. A three-year term applies if the undertaking in question has:

- provided inaccurate or incomplete information or refused to provide information requested by the council;
- provided incomplete information or documentation during an inspection procedure; or
- refused to submit to an inspection.

A five-year term applies for all other breaches of the law.

*For further information on this topic please contact Anca Musat at **Musat** & Asociatii by telephone (+40 21 202 5900) or by fax (+40 21 223 3957) or by email (ancam@musat.ro). The **Musat** & Asociatii website can be accessed at www.musat.ro.*

The materials contained on this website are for general information purposes only and are subject to the disclaimer.

Comment/question for the author
Print version
Send to a colleague
Advanced Search

**Updates by this firm** **Updates for this jurisdiction** **Updates for this work area**

OFFICIAL ONLINE MEDIA PARTNER TO THE INTERNATIONAL BAR ASSOCIATION
AN INTERNATIONAL ONLINE MEDIA PARTNER TO THE ASSOCIATION OF CORPORATE COUNSEL
EUROPEAN ONLINE MEDIA PARTNER TO THE EUROPEAN COMPANY LAWYERS ASSOCIATION

**Disclaimer** **Privacy Policy** **© Copyright 1997-2007 Globe Business Publishing Ltd**