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Merger Control

Romania
Alina Popescu and Magda Grigore
MPR Partners | Maravela, Popescu & Asociații

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Law and Practice

Contributed by:
Alina Popescu and Magda Grigore
MPR Partners | Maravela, Popescu & Asociații ***see p.17***

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The main enactments covering merger control are the following:

- Law No 21/1996 on competition (the Competition Law), as further republished and amended;
- the Regulation on economic concentrations (the Merger Regulation), approved by Order No 431/2017 of the President of the Romanian Competition Council (RCC);
- the Instructions on the concepts of concentration, concerned undertaking, full-functioning joint ventures and calculation of turnover, approved by Order No 386/2010 of the President of the RCC;
- the Instructions on the definition of the relevant market approved by Order No 388/2010 of the President of the RCC;
- the Instructions on ancillary restraints approved by Order No 387/2010 of the President of the RCC;
- the Instructions on remedies in the merger sector, approved by Order No 688/2010 of the President of the RCC; and
- the Instructions on the calculation of the authorisation tax for economic concentrations, approved by Order No 439/2016 of the President of the RCC.

1.2 Legislation Relating to Particular Sectors

There are no specific merger control rules applicable for particular sectors.

However, when an economic concentration may affect national security, an approval from the Supreme Council for National Defence (SCND) is required.

The procedure concerning the SCND approval is governed by the Merger Regulation and Decision No 73 of 27 September 2012 of the SCND. Sectors potentially concerned by SCND approvals, as provided by said decision of the SCND, include the following:

- citizens' and communities' security;
- border security;
- energy security;
- transport security;
- supply systems of vital resources security;
- critical infrastructure security;
- security of informational and communication systems;
- security of the financial, tax, banking and insurance activities;
- security of the production and circulation of weapons, munition, explosives and toxic substances;
- industrial security;
- protection against disasters;
- protection of the agriculture and the environment; and
- protection of the privatisation of companies with State capital or of the management thereof.

1.3 Enforcement Authorities

The main authority entrusted with the enforcement of the merger control regulation is the RCC.

However, the SCND is also involved in the review process when a concentration may pose risks for national security, as mentioned in **1.2 Legislation Relating to Particular Sectors**.

2. Jurisdiction

2.1 Notification

The notification of a concentration is mandatory if the thresholds described in **2.5 Jurisdictional Thresholds** are met. If there are any doubts as to whether the thresholds are met, the concentration is to be notified.

2.2 Failure to Notify

The failure to notify an economic concentration that meets the requisite thresholds before its implementation (gun jumping) is an administrative offence sanctioned with a fine ranging from 0.5% to 10% of the turnover obtained by the notifying party in the year preceding the sanctioning.

It is noteworthy that special rules apply to the calculation for non-residents, in whose case the turnover will include:

- the turnover obtained in Romania by each of the Romanian-registered companies controlled by the infringing party;
- the revenues obtained from Romania by each of the Romanian-registered companies controlled by the infringing party; and
- the revenues obtained from Romania by the infringing party that are registered in its financial statements.

The RCC does enforce gun-jumping legislation in practice. Gun-jumping cases are made public upon the commencement and end of the investigation (via press releases), and by having the relevant decision published.

2.3 Types of Transactions

A transaction is caught by the merger control rules where there is a change of control on a lasting basis resulting from:

- the merger of previously independent companies or parts of such companies;

- the acquisition of direct or indirect control over an undertaking or parts thereof by acquisition of assets, stocks or by contractual provisions, by natural persons or legal entities that already control an undertaking or by one or more companies; and
- the creation of a full-function joint venture (which is an undertaking established in order to function autonomously for the long term).

2.4 Definition of "Control"

As per the Competition Law, "control" may derive from rights, contracts or any other elements that individually or collectively enable one to have a determining influence over an undertaking through ownership or usage rights over the entirety or parts of an undertaking's assets, or rights or contracts that confer a determining influence over the structure of said undertaking, the voting process or the decisions of the management bodies of such company.

Should acquisitions of minority shareholdings grant the minority shareholder a determining influence over the target (for instance, in the context of veto or other voting rights) then such operation is deemed as an acquisition of control.

Control, whether legal or factual, may also be acquired in common when two or more natural or legal persons would exert a decisive influence over an undertaking. However, only transactions that bring a lasting "change of control" to the undertakings concerned and in the structure of the market are covered by the merger control rules. Thus, transactions resulting only in a temporary change of control are not covered.

2.5 Jurisdictional Thresholds

The following thresholds for the notification of a concentration are to be met with regard to the preceding financial year: the cumulated global turnover of the undertakings involved exceeds the Romanian leu equivalent of EUR10 million, and each of at least two undertakings concerned has obtained in Romania an individual turnover exceeding the Romanian leu equivalent of EUR4 million.

2.6 Calculations of Jurisdictional Thresholds

The thresholds are calculated based on the undertaking's net turnover, to be computed as per its audited financial statements.

Under Romanian law, the net turnover is the total income obtained by the sale of products and/or the provision of services during the last financial year, out of which turnover related fiscal obligations, exports (including deliveries within the EU) and intra-group revenues are deducted.

Conversions of foreign currency amounts are made at the official exchange rate of the Romanian central bank on the last day of the relevant year.

After the date of the most recent audited accounts, adjustments of the turnover should be made in order to reflect the realities of the undertakings concerned. Hence, turnover resulted from operations such as acquisitions, assignments or cessation of activities is to be excluded from the calculation of the thresholds.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

The following undertakings are relevant for the purpose of calculating the jurisdictional thresholds.

- The undertaking concerned; ie, the actual party to the relevant concentration.
- Those undertakings in which the undertaking concerned, directly or indirectly:
  - (a) owns more than half the capital or business assets; or
  - (b) has the power to exercise more than half the voting rights; or
  - (c) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings; or
  - (d) has the right to manage the undertakings' affairs.
- Those undertakings that have in the undertaking concerned the rights or powers listed in the second item above.
- Those undertakings in which an undertaking as referred to in the third item above has the rights or powers listed in the second item above.
- Those undertakings in which two or more undertakings as referred to in the first to fourth items above jointly have the rights or powers listed in the second item above.

The parties to the concentration (namely, the undertakings concerned) are deemed to be the following:

- each of the merging entities, in the case of a merger;
- the target and the acquiring company (the seller is not an undertaking concerned), in the case of acquiring sole control;
- the acquiring shareholder and the joint venture (the selling shareholder is not an undertaking concerned), if sole control is acquired subsequent to joint control;
- each of the undertakings acquiring joint control (while the newly established undertaking is not considered an undertaking concerned), if joint control is acquired over a newly established joint venture;
- if joint control is acquired over a pre-existing company/commercial activity, the undertakings concerned are, on the

one hand, each of the companies acquiring the control and, on the other hand, the pre-existing company/commercial activity;
- in the case of a demerger and subsequent allocation of the assets thereof to two or more companies, such operation is deemed as acquiring sole control over said assets and, hence, the undertakings concerned are, for each operation, the company acquiring control as well as the assets to be acquired;
- "control' is acquired by natural persons if such persons perform economic activities and, thus, are classified as economic undertakings or if they control one or more undertakings, as defined under the Competition Law; in such cases, the undertakings concerned are the target and the natural person (including the undertakings they control); and
- a merger or acquisition of control between two State-owned undertakings or by the same public entity is an economic concentration if prior to the transaction the undertakings were part of different economic entities with independent decision-making powers; in such case, both companies are undertakings concerned.

2.8 Foreign-to-Foreign Transactions

There is no exception provided for foreign-to-foreign transactions, hence these are caught by the Romanian merger control legislation.

Thus, if the merger control thresholds are met, foreign-to-foreign transactions must equally be notified to the RCC, irrespective of whether the parties have a local presence or assets in Romania.

There is also no express requirement that the merger has local effects, but at least two undertakings concerned (and their relevant group, as detailed above) should each meet the Romanian turnover threshold mentioned in **2.5 Jurisdictional Thresholds**. Under practical terms, this normally means that there will be some effects on the Romanian market.

2.9 Market Share Jurisdictional Threshold

The jurisdictional thresholds do not take into consideration market shares held by the parties and the lack of a substantive overlap does not remove the obligation to notify the concentration, if the jurisdictional thresholds are met.

In any case, the lack of a substantive overlap (meaning aggregated market shares of less than 20% in the case of horizontal concentrations and neither party holding over a 30% market share in the case of a vertical concentration) may result in the notifying party(ies) being able to submit a simplified merger notice form.

2.10 Joint Ventures

Romanian merger control legislation applies in the case of full-functioning joint ventures, which are deemed to be those that fulfil on a lasting basis all the functions of an undertaking and are autonomous from an operational perspective.

Joint ventures that are not deemed as such will not be subject to merger control legislation but may be subject to antitrust legislation (ie, legal provisions prohibiting anti-competitive agreements and/or legal provision prohibiting abuse of dominance, as the case may be) if relevant conditions are fulfilled.

2.11 Power of Authorities to Investigate a Transaction

The RCC may not investigate a transaction that does not meet the jurisdictional thresholds for infringements to merger control legislation. However, where applicable, the transaction may be investigated by the RCC based on legal provisions prohibiting anti-competitive agreements and/or legal provision prohibiting abuse of dominance and/or based on the legal provisions concerning unfair competition.

The right of the RCC to apply sanctions lapses five years from the date when the infringement is committed, or, in the case of repetitive/continuous infringements, the date when the infringement ceases. If the five-year statute of limitations is suspended or interrupted (eg, written requests for information, the order of the President of the RCC to launch an investigation, carrying out dawn raids or the communication of the investigation report), the RCC decision must in any event be issued within double the limitation period; namely, ten years.

2.12 Requirement for Clearance Before Implementation

An economic concentration should not be implemented before the clearance of the RCC is granted. However, there are certain exceptions where the standstill obligation does not apply and in certain cases the RCC may upon request grant individual derogations from the standstill obligation, as further described in **2.14 Exceptions to Suspensive Effect** and **2.15 Circumstances Where Implementation Before Clearance is Permitted**.

In addition, although not formally required, it is to be expected as a matter of practice that the RCC will follow the practice of the European Commission and of the ECJ concerning gun jumping, including, for instance, the judgment of the ECJ in case C-633/16 Ernst & Young P/S v Konkurrencerådet (Fifth Chamber) of 31 May 2018 (Ernst & Young). In this preliminary ruling, it was stated that the standstill obligation, as provided by EU laws, must be interpreted as meaning that a concentration is implemented only by a transaction that, in whole or in part, in fact or in law, contributes to the change in control of the tar-

get undertaking. In that case, the termination of a co-operation agreement, in circumstances such as those in the main proceedings, was not regarded as bringing about the implementation of a concentration, irrespective of whether that termination has produced market effects.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Implementation of a notifiable transaction before its being cleared by the RCC is an administrative offence punished with fines from 0.5% to 10% of the turnover obtained during the preceding financial year.

The RCC does enforce gun-jumping legislation in practice. Gun-jumping cases are made public upon commencement and end of the investigation (via press releases), and by having the relevant decision published.

2.14 Exceptions to Suspensive Effect

The standstill obligation does not prevent the implementation of a public bid or that of a series of transactions with securities accepted for trading on a stock exchange (if the operation is quickly notified and the voting rights are used only for the preservation of the target's value).

However, the failing firm defence is not expressly provided under Romanian law.

The RCC may also grant derogations in certain cases, as further described in **2.15 Circumstances Where Implementation Before Clearance is Permitted**.

2.15 Circumstances Where Implementation Before Clearance is Permitted

Derogation

The RCC may grant derogations from the standstill obligation in justified cases.

In practice it is useful to have informal contact with the RCC before the submission of such a request.

The relevant request for a derogation (which can be submitted before or after the filing of the notification) should contain the following information in order to be taken into consideration:

- information on the parties (including the relevant sector);
- the description of the transaction and the stages;
- the description of the economic-financial operation of the parties;
- the practical measures of implementation for which the derogation is requested;
- the demonstration of the negative effects of the standstill; and
- the estimation of the impact of the economic concentration on the relevant market, detailing, in particular, the relevant market, the market shares of the parties, the important competitors and their market shares, and, in the case of vertical integration, the market shares of the party acquiring control on the upstream or downstream market from the relevant market.

Should the RCC deem the request as justified, it shall grant the derogation by decision.

Carve-Out Mechanism

The Romanian merger control legislation does not expressly regulate any carve-out (ie, ring-fence or hold separate) mechanism. On a case-by-case basis, depending on the structure of the transaction, these would be possible only provided that the transaction to be implemented following the carve-out would not fulfil the jurisdictional thresholds for notification in Romania.

This may be difficult, however, because interdependent transactions (ie, transactions that are deemed not to have occurred one without the other; transactions that occurred within two years between the same individual or legal persons are deemed as interdependent) are qualified as a single concentration by the Romanian competition legislation.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There are no formal notification deadlines as long as the notification is submitted before its implementation.

3.2 Type of Agreement Required Prior to Notification

As a rule, the notification should be made following the signing of an agreement, the public offer has been announced or the control package has been taken over.

However, should the parties be able to prove the intention to enter into an agreement or to make a public offer, such intention may be a basis for the notification of a proposed economic concentration even before the signing of an agreement.

3.3 Filing Fees

There are two fees to be paid in connection with a merger control filing:

- a filing fee that is a fixed fee of RON4,775 for the submission of the notification form and that is to be paid before the submission of the notification; and
- an authorisation fee, which is to be paid after the decision of the RCC is issued.

The authorisation fee ranges from EUR10,000 to EUR25,000 for a non-objection decision (a decision taken in Phase I of the RCC's merger control assessment) and from EUR25,001 to EUR50,000 for an authorisation decision (namely, a decision taken in Phase II of the RCC's merger control assessment, where the RCC detects substantial concerns regarding the potential anti-competitive effects of the concentration and an investigation is opened with respect to the same).

3.4 Parties Responsible for Filing

As a rule, the undertakings acquiring control are responsible for the filing, as follows:

- in the case of mergers, each of the undertakings concerned is under the obligation to file;
- in the case of acquisition of control, the party acquiring control must submit the notification; and
- in the case of public bids, the offeror is to file the notification.

3.5 Information Included in a Filing

There are two types of forms to be used depending on whether there is a substantial overlap on any relevant market as a result of the concentration:

- the simplified form, which comprises much less information as regards the conditions of competition on the relevant market; and
- the complete form, which, in addition to the information to be filed in the simplified form, requires the following.

The simplified form mainly requires information regarding the parties, the transaction and the definition of the relevant market, as well as some basic information regarding the same.

Documents to be Submitted

Usually, the following documents should be submitted with the notification (certain documents are not to be filed if the simplified notification form is used):

- certified copies of the document whereby the economic concentration is established;
- copies of the public offer document;
- certified copies of the audited financial statements for the year preceding the economic concentration; and
- copies of the minutes of the management body whereby the transaction has been discussed or excerpts thereof containing the relevant discussions, and any analyses drafted for the evaluation of the economic concentration and the evaluation of any of the affected markets from the perspective of market shares.

The notification forms should be submitted in three copies; two hard copies and one electronic copy. All appended documents shall be submitted in original and/or certified copies.

While the notification is to be submitted in Romanian, in the case of documents to be submitted in a foreign language, sworn translations thereof should be submitted as well.

3.6 Penalties/Consequences of Incomplete Notification

As a rule, the RCC requests further information if a notification form is incomplete. Moreover, the notification is deemed "effective" only when all the relevant information is gathered to the RCC's satisfaction.

The date when the notification becomes effective is notified in writing to the notifying party(ies) and is the starting point for the decision issue terms by which the RCC is bound.

As a matter of practice (and, in particular, where there are substantial overlaps or other reasons prompting the RCC to demand the use of a complete notification form), the RCC rarely finds that a notification is complete as of the date of its filing. Multiple requests for supplementary information are frequently addressed to the notifying party before a notification becomes effective.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Providing incorrect, inaccurate or misleading information to the RCC and delaying the filing of the supplementary information requested by the RCC are administrative offences punished by a fine ranging from 0.1% to 1% of the turnover obtained in the preceding financial year.

3.8 Review Process

Seven days from the registration of the notification, the RCC is to confirm in writing to the notifying party whether the notification can be considered as validly submitted.

The notification becomes effective at the date of its valid filing date with the RCC or, when the RCC deems it is incomplete, at the date when it receives all needed information to its satisfaction. If additional information is required, the RCC will request same from the notifying party under a deadline that cannot

exceed 15 days. This deadline can be extended at the request of the notifying party, in justified cases.

Under practical terms, the RCC usually accepts reasonable deadline extensions when there are due reasons for the same.

Merger Control Legislation
If the economic concentration does not fall within the scope of the merger control legislation, the RCC is to inform in writing the notifying parties of the same within 30 days from the receipt of a complete notification form.

If the transaction falls within the scope of the merger control legislation, the RCC shall issue a non-objection decision within 45 days from the effective date of the notification (Phase I assessment) if there is a lack of serious concern regarding the compatibility with a normal competition environment, or if there are serious concerns regarding the compatibility with a normal competition environment, but the concerns are dismissed through commitments assumed by the concerned parties.

Concerns and Investigation
If there are serious concerns and these have not been addressed by satisfactory commitments, the RCC will decide the commencement of an investigation (Phase II assessment) within 45 days from the receipt of a complete notification form.

In the case of a Phase II assessment, within a maximum of five months from the effective date of the notification the RCC shall issue:

- a decision rendering the economic concentration incompatible with a normal competition environment, due to the significant obstacles raised to effective competition on the Romanian market or a part thereof (in particular, by creating or consolidating a dominant position);
- a decision authorising the economic concentration; or
- a conditional authorisation decision detailing the obligations and/or conditions of the concerned parties aimed at ensuring the compliance of the parties with the commitments assumed.

If the RCC does not adopt a decision within the said timeframes, the parties can implement the economic concentration ("tacit approval").

For more information on how the procedure may be altered when the SCND is also involved in the review, see **4.6 Non-competition Issues**.

3.9 Pre-notification Discussions with Authorities
Pre-notification discussions are not mandatory, but according to the Merger Regulation they are strongly advisable. The RCC recommends, in particular, that such contact takes place at least two weeks before the proposed filing date if the notifying party intends to use the simplified form.

In such case, information regarding the parties, the transaction, relevant market definitions and market shares, and the agenda for the meeting should be submitted at least five days prior to the meeting to enable a fruitful outcome.

The existence and content of pre-notification discussion are, as a matter of practice, not disclosed to the public. However, it is recommended to indicate in writing to the RCC if any information provided (eg, turnovers, market share calculations) should be deemed as confidential, explaining the reasons for the same.

3.10 Requests for Information During Review Process
Requests for information from the RCC are common throughout the review process. The difficulty of such requests ranges from simple explanations required from the notifying party to complex economic assessments, on a case-by-case basis.

For more information on the way in which providing incomplete or incorrect information affects the timeframe of the review process, see **3.8 Review Process**.

3.11 Accelerated Procedure
The Competition Law does not provide an accelerated procedure for review.

A simplified notification form may be used if:

- two or more companies acquire joint control over an undertaking provided same does not carry out any, or it is predicted that it will not carry out any, business in Romania or carries out insignificant business in Romania;
- two or more companies merge or acquire joint control over another business and there is no horizontal overlap between the parties, provided that the parties are not active in markets in a vertical relationship;
- two or more companies merge or acquire sole or joint control in the case of a horizontal overlap, the aggregated market share does not exceed 20% and any of the parties active on an upstream or downstream market to another party does not hold a market share exceeding 30%; or
- one of the parties holding joint control over an undertaking acquires sole control over same.

Concentrations Excluded from the Simplified Procedure
However, certain concentrations can be excluded from the scope of the simplified procedure, for instance:

- when the market is already concentrated and:
  (a) the operation would eliminate an important economic force;
  (b) it could unite two important innovators;
  (c) the concentration encompassing an undertaking has products undergoing development; or
  (d) where there are indications that the operation would allow the parties to hinder the expansion of their competitors;
- concentrations for which the exact calculation of the parties' market shares is not possible; this may occur, in particular, when the concerned parties are active in new or underdeveloped markets;
- concentrations that may lead to an increase of the parties' market power; for example, by combining the technological, financial or other type of resources, even if the parties are not active on the same market; and
- concentrations in which at least two concerned parties are present in closely connected markets, etc.

At any time during the review process the RCC may resort to the complete notification form, when it deems at its sole discretion that more information is necessary for its assessment.

Simplified Notification
Where the RCC sticks to the simplified notification form, this does not formally shorten the terms for assessment and issuance of a decision.

However, under practical terms, this usually means shorter periods for the notifying party's collection of the relevant information and fewer requests for supplementary information, which altogether may result in a shorter time span, depending on the specific circumstances of each case.

Moreover, the RCC is usually mindful of the time constraints related to the transaction and may help with speeding up the assessment where the parties so request and when the timing and the quality of the notification allow it.

4. Substance of the Review

4.1 Substantive Test
Economic concentrations meeting the jurisdictional thresholds are assessed in view of determining their compatibility with a normal competition environment. In that sense, the RCC evaluates whether an economic concentration can raise significant obstacles in the way of an effective competition, especially as part of the creation or consolidation of a dominant position in the Romanian market or a significant part thereof.

In its analysis, the RCC thus relies on the necessity to protect, maintain and develop an effective competition in the Romanian market or a substantial part thereof, taking into account, amongst others, the structure of all relevant markets and the actual/potential competition thereon.

To this end, the RCC is likely to look at the intermediate and final consumers' interest and relevant market features, for instance:

- the market position of the concerned parties;
- the parties' economic and financial power;
- the alternatives available to providers and users;
- access to supply sources or markets and any other barriers (legal or other) to entry and expansion in the market;
- countervailing buyer power;
- the tendencies of the offer and request for the relevant goods and services;
- efficiencies created as a result of the merger; and
- technical and economic progress.

4.2 Markets Affected by a Transaction
Under Romanian competition law, a market is deemed as 'affected' under the following circumstances: two or more concerned parties carry out commercial activities in the same relevant market, if the concentration leads to a combined market share of 20% or more on such market; and one or more concerned parties carries out commercial activities in a market and any other concerned party holds a share of 30% or more in a downstream or upstream market, irrespective of whether there is a supplier/client relationship in place between the concerned parties.

An affected market is deemed to exist where the above conditions occur on Romanian territory or a significant part thereof. All the relevant product and geographic markets, in any plausible alternative, will be considered in view of determining an affected market.

Significant Market Impact
The RCC also takes into consideration markets on which the transaction can have a significant impact; namely, a market whereon:

- any of the concerned parties holds a market share exceeding 30% and any other concerned party is a potential competitor in such market (in that sense, a party can be deemed as a potential competitor if it intends to enter the market or if it has implemented such plans in the previous three years);

- any of the concerned parties holds a market share exceeding 30% and any other concerned party holds important IP rights in the respective market; and
- any of the concerned parties is present in a product market that is closely connected to a product market where any other concerned party is active and the individual or combined market shares of the parties on any of the concerned parties are 30% or above.

The product markets are closely connected when the products are complementary (when the use of one product implies the use of another) or when same belong to the same range of products purchased generally by the same category of clients for the same final use.

Pre-notification Phase

In order to make sure that they will be using the correct notification form, the concerned parties are usually advised to present in the pre-notification phase, without prejudice to their stance with regard to market definition, information on all markets in respect of which there is a doubt or alternative interpretation that they may be affected or significantly impacted, even if the parties consider that the respective markets are not actually affected.

There is no express market share threshold above or under which competitive concerns are irrefutably deemed to arise or not, the assessment being done on a case-by-case basis. Thus, the presence of an affected market, within the meaning mentioned above, will not in and of itself give rise to competition concerns (which depend on many other features of the given market than just market shares).

Commission Guidelines

Under practical terms the RCC is guided by the principles laid down in the Commission's guidelines concerning horizontal and vertical mergers. These lay down certain market shares and concentration level thresholds, based on which there are relative presumptions that competitive concerns are or are not likely.

Thus, in practice, where there is a horizontal overlap giving rise to a market share of roughly 40%, the RCC will look more closely at the concerned market. If the concentration levels are also above those set out in the Commission's guidelines as presumably safe, there will usually be concerns that will require in-depth market studies and assessments, and commitments from the parties concerned.

4.3 Reliance on Case Law

In its assessment of the case, the RCC relies primarily on its previous relevant decisions, as well as the practice of the Commission and the ECJ.

In certain cases it may equally be useful for the notifying party to present decisions or positions of other national competition authorities (in particular, those that are part of the European Competition Network), especially in cases where there is no available precedent at EU level or in Romania.

4.4 Competition Concerns

The RCC evaluates whether an economic concentration can raise significant obstacles in the way of an effective competition, especially as part of the creation or consolidation of a dominant position on the Romanian market or a significant part thereof. As part of such assessment, the RCC will look into all types of effects, including unilateral, co-ordinated, conglomerate, vertical concerns and elimination of potential competition.

4.5 Economic Efficiencies

Within a complete notification form, the parties are to provide detailed explanations concerning the efficiencies arisen as a result of the merger, the calculation methodology for same, the extent to which the consumers and customers can benefit from the increase in efficiency and the reasons for which such increase cannot be obtained by other means.

These are not required in the case of simplified merger forms. However, where efficiencies do arise, depending on the specific circumstances of the case, it may be recommended for these to be mentioned nonetheless.

In practice, the RCC does take into account economic efficiencies and frequently grounds its decisions, amongst others, on efficiencies-related considerations.

4.6 Non-competition Issues

If an operation of acquiring control over an undertaking or its assets gives rise to risks for national security, the government, at the request of the SCND, shall issue a decision for the prohibition of said transaction.

For that purpose, when registering a notification of a concentration that may be subject to analysis from a national security perspective, the RCC informs the SCND, providing details on the implementation of the transaction, the parties involved, the activities carried out by the parties, the object of the transaction and any further details required.

If it is deemed that the transaction does not affect national security, the SCND shall inform the RCC of the same and the procedure in front of the RCC shall continue. Conversely, if the SCND finds that the transaction may affect national security, it shall prohibit the transaction and the procedure before the RCC shall cease. The RCC is to inform the notifying party of the same within ten days from its receipt of such decision.

4.7 Special Consideration for Joint Ventures

As detailed in **2.10 Joint Ventures**, full-function joint ventures are within the scope of the merger control legislation.

However, this does not exclude the application of Article 101 TFEU and/or Article 5 of the Competition Law regarding anti-competitive agreements, decisions of associations of undertakings and concerted practices or of Article 102 TFEU and/or Article 6 of the Competition Law concerning abuse of dominance, if relevant conditions are fulfilled.

This may occur, for instance, if anti-competitive exchanges of sensitive information take place between parent companies that may be deemed as actual or potential competitors and/or if any conditions agreed between the parents are restrictive of competition.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere with Transactions

The RCC will usually have a constructive approach towards transactions and issues will normally be solved, if parties duly co-operate with the RCC. However, in exceptional cases where competition concerns are not or cannot be solved, the RCC has the power to prohibit the transaction.

Thus, a concentration that is found by the RCC to raise significant obstacles in the way of effective competition is deemed as incompatible with a normal competition environment and the RCC would have to prohibit it. In such case, the parties may attempt to modify the concentration and/or to provide commitments (remedies) in view of eliminating the competition concerns and to obtain the merger clearance.

Prohibiting or Reversing a Transaction

If the parties do not do so or the measures proposed are not to the RCC's satisfaction, the RCC will issue a decision prohibiting the transaction. In such a case, the parties may challenge the RCC's decision in court. If the court upholds the RCC's decision, the transaction may not be implemented.

If the RCC finds that a concentration has already been implemented and that such concentration is incompatible with a normal competition environment, it may order the parties to reverse the transaction. If this is not possible, the RCC may adopt any other adequate measure in order to reinstate the parties to their original standing before the concentration, to the extent possible.

5.2 Parties' Ability to Negotiate Remedies

As described in **5.1 Authorities' Ability to Prohibit or Interfere with Transactions**, it is the parties who propose remedies, while the RCC will analyse whether the remedies offered effectively lead to the exclusion of obstacles in the way of effective competition.

As a matter of practice, the RCC and the parties collaborate throughout the procedure to identify, adjust and finalise the remedies that are both feasible and effective.

Acceptable remedies will most often be structural or, in exceptional cases, behavioural.

5.3 Legal Standard

The RCC can only accept commitments that can render the concentration compatible with a normal competition environment. Such commitments have to be able to eliminate competition problems entirely and to be complete and effective from every perspective. Also, such remedies should be able to be implemented within a short period.

Structural remedies – in particular, divestments – meet such criteria only to the extent to which the RCC can conclude, with a sufficient degree of certainty, that the implementation thereof is possible and that the new commercial structures are susceptible of being viable enough in order to guarantee that a significant distortion of competition will not take place.

Behavioural remedies may be accepted only in exceptional circumstances, the preferred remedies being in most cases structural. Behavioural remedies can be accepted only when their viability is fully guaranteed by effective implementation and monitorisation, as well as when there is no risk that they will lead to the distortion of competition. In particular, remedies in the form of commitments not to raise prices, not to reduce the variety of products or not to eliminate certain licences, etc will be deemed not to eliminate competition problems arising from horizontal overlaps.

5.4 Typical Remedies

Typical remedies include:

- divestment of a viable and competitive business, which may in turn consist of:
  - (a) carve-outs;
  - (b) divestment of assets (trade marks and licences);
  - (c) alteration of trade marks; and
  - (d) non-reacquisition clauses;
- transfer to a suitable buyer;
- the sale of the divested activity in a fixed timeframe, subsequently to the decision;

- removal of links with competitors; and
- other commitments such as:
  (a) access remedies;
  (b) amendments to long-term exclusive contracts; and
  (c) other non-divestiture remedies.

The RCC will not consider non-competition issues.

Although it is not entirely excluded that remedies are taken into account when a transaction is assessed by the relevant authority from a national security perspective, there is no legal provision providing for such a procedure in front of the SCND.

5.5 Negotiating Remedies with Authorities

Phase I

During Phase I of the procedure, the parties can present remedies before the notification becomes effective or in two weeks thereafter. Under practical terms, the RCC will usually inform the parties of the potential competition concerns before the notification becomes effective. This will allow the parties and the RCC reasonable time to assess and adjust the remedies proposed.

In any case, remedies are accepted during Phase I only if the competition concern is easy to identify and to amend. Thus, the competition concern should be precise enough, while the commitments should be very clear, so that the initiation of an investigation may be excluded.

It is important that the parties submit as soon as possible all requisite information in order to enable the RCC to evaluate the potential competition concerns as well as the content, viability and adequate nature of the remedies.

Phase II

During Phase II of the procedure, the remedies proposed by the parties have to be submitted with the RCC within 30 days from the commencement of the investigation. The parties can request the prolongation of the deadline for a maximum of 15 days for justified reasons. Should the remedies be deemed as not sufficient, the RCC will accept limited amendments only in cases where it can be clearly established that, once implemented, the remedies resolve the competition concerns completely and without ambiguities.

5.6 Conditions and Timing for Divestitures

Parties are not under the obligation to implement the remedies before the completion of a transaction. Depending on the nature of the remedies, the transaction will usually be completed before remedies are complied with.

Thereafter, if the parties fail to comply with the remedies, fines ranging from 0.5% to 10% of the turnover obtained in the previous financial year may be applied.

Furthermore, in order to determine the parties to implement a mandatory remedy, the RCC may apply delay penalties of up to 5% of the daily average turnover of the preceding financial year.

5.7 Issuance of Decisions

Decisions issued by the RCC shall be communicated to the parties and shall be published in the Official Gazette of Romania, part I, at the expense of the infringer/applicant, as the case may be, or on the website of the RCC.

When publishing the decision, the RCC shall take into account the legitimate interests of the concerned parties to protect business secrets.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

Decisions prohibiting transactions have not been issued. Remedies are, however, more frequent and discussions concerning same come into play whenever competitive concerns are identified, usually in Phase I of the RCC's assessment.

The fact that a transaction is foreign-to-foreign has no bearing on the likelihood of competitive concerns and the need of having remedies, as competitive concerns are assessed based on the effects of the transaction on the Romanian market and not on the nationality of the parties concerned. Under practical terms, parties who do not have corporate presence or assets in Romania (and would thus be foreign) may still have a large share in a relevant market in Romania.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Similarly to EU law, restraints that are directly connected to and necessary for the implementation of a transaction are automatically covered by an authorisation decision. Thus, such restraints are not analysed individually by the RCC.

If such restraints are not deemed as directly connected to and necessary for the implementation of a transaction, Articles 5 and 6 of the Competition Law and Articles 101 and 102 of the TFEU may be applicable.

Criteria
The criteria regarding the direct connection and necessity are, by nature, objective and not because the parties deem same as such.

Thus, such criteria entail that, from an economic perspective, the restraints relate to the primary transaction and have the purpose to allow a transition without difficulties from the new to the old structure of the transaction, after the implementation of same.

The fact that the restraints have to be necessary for the implementation of the transaction implies that, in the absence of such restraints, the concentration cannot be implemented or can be implemented but in considerably unsure conditions, with significantly higher costs, in an appreciably longer period or with considerable difficulties.

7. Third-Party Rights, Confidentiality and Cross-border Co-operation

7.1 Third-Party Rights
Third parties may be involved in the process:

- at the RCC's initiative;
- where required by the competition legislation; and
- at their own initiative, where the competition legislation allows same.

The RCC usually sends requests for information to competitors, suppliers, customers and other public authorities for the purposes of the competitive assessment, and the third parties contacted by the RCC would then have an obligation to provide the information requested by the RCC; under practical terms, they may also (and often do) take the opportunity to comment on the (in)compatibility of the transaction with competition in the relevant market. Competition legislation requirements include, for instance, the remedies proposed by the parties are published in view of public consultations and may be accepted only after the public consultation period has lapsed.

Regarding parties own initiatives, this includes, for instance, parties who are directly and substantially affected by the implementation of a concentration prior to its authorisation may submit a complaint with the RCC that, in turn, may open an investigation; likewise, parties who can demonstrate an interest may challenge the RCC decision authorising the concentration and parties who have sustained a prejudice due to an infringement to the competition legislation may claim compensation in court

The rights and obligations of third parties differ depending on the legal grounds of their involvement.

7.2 Contacting Third Parties
During the merger review process, the RCC typically contacts third parties to gather the requisite information for its competitive assessment. Usually, written questionnaires are sent out to this end.

The RCC is to consult third parties with regard to any proposed remedies, for which purpose the draft remedies are published.

7.3 Confidentiality
A press release is usually made public following the submission of the notification form containing the names of the undertakings concerned, their countries of origin, the nature of the concentration, the main activities of the undertakings concerned and the date of the receipt of the notification.

At the request of the undertakings concerned, in justified cases, the RCC may not release information before a decision is issued, but this shall not apply in cases where the complexity and effects of the transaction require observations from third parties.

A press release is also usually published by the RCC on its website after the adoption of a decision. A non-confidential version of the decision is also published on the website and/or in the Official Gazette.

7.4 Co-operation with Other Jurisdictions
Within the notification form the parties must provide information as to whether the transaction is being notified in other jurisdictions, in view of enabling the RCC to make contact with its peers as per its needs for information and as per good practices in merger control.

Co-operation between competition authorities at the EU level is also particularly encouraged, within the framework of the European Competition Network.

Co-operation at EU Level
If an economic concentration is notified in Romania and at least one other EU state, the RCC may request the parties' permission to send confidential information with regard to the transaction to the authorities entrusted with the assessment of same from the other EU states.

As such, the parties will submit a specific form to the RCC (annex to the *Best Practices on Cooperation between EU National Competition Authorities in Merger Review*, adopted within the European Network of Competition). The confidential informa-

tion therein cannot be used by the RCC except for the assessment of the relevant economic concentration.

International Co-operation
The RCC may also co-operate with competition authorities from third-party states, within the framework of the International Competition Network. For instance, as per the ICN guidelines of best practices in merger control, the various competition authorities involved should seek to co-operate in their review of mergers that may raise competitive issues of common concern or involve remedial co-ordination. In such a case, the parties' consent regarding exchanges of confidential information would equally be taken where necessary.

In practice, where it is in their interest to do so, the parties may need to prompt the RCC to contact other competition authorities.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review
Decisions adopted by the RCC regarding economic concentrations can be challenged by the parties in front of the Bucharest Court of Appeal within 30 days from the communication thereof. The decision of the Bucharest Court of Appeal may be challenged within 15 days from its communication in front of Romania's supreme court; ie, the High Court of Cassation and Justice.

8.2 Typical Timeline for Appeals
It is difficult to provide the approximation of a normal timeframe for such an appeal, as this very much depends on the specific circumstances of each case. However, the timeline should normally not exceed 18 months for the first appeal and 12 months or more for the second appeal.

Although there are examples in practice of successful appeals, the overwhelming majority of the RCC decisions are upheld in court.

8.3 Ability of Third Parties to Appeal Clearance Decisions
Interested third parties can challenge a clearance decision in front of the Bucharest Court of Appeal within 30 days from its publication. The decision of the Bucharest Court of Appeal may be challenged within 15 days from its communication to the parties in front of Romania's supreme court; ie, the High Court of Cassation and Justice.

9. Recent Developments

9.1 Recent Changes or Impending Legislation
A new set of guidelines on merger control was adopted in 2017.

Also, recently, the Competition Law has been amended by replacing the turnover basis for the calculation of certain fines.

Specifically for non-resident entities (any foreign entity, without legal personality, that is not registered in Romania), fines concerning mergers shall apply to the following:

- the turnover derived by each of the companies registered in Romania, controlled by the infringer;
- the revenue obtained in Romania by each of the non-resident companies controlled by the infringer; and
- the revenue obtained by the infringer in Romania and registered in its individual financial statements.

9.2 Recent Enforcement Record
Most of the decisions issued during the last years by the RCC concern merger control.

For instance, in 2019 the RCC authorised 75 economic concentrations, out of which one was authorised with remedies. The latter case concerned the acquisition by a major player on the fuel distribution market of 8 fuel distribution stations held by a local player. The case entailed a structural remedy consisting of the sale of four petrol stations, alongside with the assets required for its daily operation, sufficient for ensuring the viability and competitivity of the stations in a certain period from the communication of the RCC's decision to an adequate buyer, approved by the RCC.

The average duration of the RCC's merger review process was roughly two months in 2018. Nonetheless, during the same year, the assessments of the notification submitted via the simplified procedure took place over 1.7 months on average, while those notified via the standard procedure, without remedies, had a duration of 3.3 months on average, as opposed to those cases where remedies were applied, which took place over 4.8 months on average.

9.3 Current Competition Concerns
The RCC's management is focusing on decreasing the timeline for assessment of economic concentrations, with the declared aim of reducing same to one month on average for mergers notified based on the simplified form and two months for mergers notified based on the complete form.

9.4 COVID-19

The RCC has continued with the review of economic concentrations as usual. From a procedural perspective, however, the RCC shows more understanding with respect to the burden of competition procedures and tends to grant longer deadlines when requiring information and documents from the parties concerned.

MPR Partners | Maravela, Popescu & Asociații is an internationally recognized and award-winning law firm offering full services in legal, tax advisory and insolvency matters. The firm's clients include large multinational corporations, sound Romanian private companies, private equity investors, public authorities and State companies, covering various industries. The firm's competition team is made up of one partner and five lawyers, and has hands-on expertise in the whole range of matters spanning antitrust (merger clearance, anticompetitive behaviour, dominance abuse) and State aid. The competition team has advised major clients in exchanges with the national competition authority and the European Commission on prospective/ongoing investigations, multi-jurisdictional merger control procedures, aid granting and aid recovery, and been involved with, among others, the assessment of anti-competitive agreements and practices, structuring of distribution, after-sale network and franchising systems, competition compliance audits, policies and training and merger clearance assessments.

Authors

Alina Popescu is one of the firm's founding partners and lead counsel in the firm's competition law assignments. She holds an LLM in European Union Law from the French University of Bordeaux IV and is currently part of King's College London post-graduate program of Economics for Competition Law. Her wide-ranging expertise in competition covers investigations of competition authorities, leniency and settlement procedures, assessment of anticompetitive agreements, abuse of dominance topics, complex merger clearance procedures and State aid matters. She has authored articles on competition matters for numerous leading publications and is a member of the International Bar Association's Competition Law chapter.

Magda Grigore is a key member of the competition law department. Magda holds an LLM in from University College London and is a member of the Bucharest Bar. Magda specialises in intricate merger control procedures, assessment of anti-competitive agreements, drafting of compliance e-trainings, competition lectures for students and State aid matters, competition investigations and leniency and settlement proceedings. She has contributed to numerous renowned international publications, writing on merger control, Romanian cartels and State aid schemes in Romania.

MPR Partners | Maravela, Popescu & Asociații

6A Barbu Delavrancea Street
Building C
Ground Floor
1st District
011355 Bucharest
Romania

Tel: +40 21 310 17 17
Fax: +40 21 310 17 18
Email: office@mprpartners.com
Web: www.mprpartners.com

MPR PARTNERS
MARAVELA, POPESCU & ASOCIAȚII