International Comparative Legal Guides

Merger Control 2021

A practical cross-border insight into merger control issues

17th Edition

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The main authority entrusted with the enforcement of the merger control regulation is the Romanian Competition Council (the "RCC").

Additionally, the Supreme Council for National Defence (in Romanian "*Consiliul Suprem de Apărare a Ţării*" or "CSAT") may be involved in the review process when a concentration raises risks for national security.

1.2 What is the merger legislation?

The legal enactments covering merger control include the following:

- Law no. 21/1996 on competition (the "Competition Law"), as further republished and amended;
- the Regulation on economic concentrations, approved by Order no. 431/2017 of the President of the 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;
- the Instructions on the calculation of the authorisation tax for economic concentrations, approved by Order no. 439/2016 of the President of the RCC; and
- the Decision of CSAT no. 73/2012 on the application of article 46 paragraph (9) of the Law on competition no. 21/1996.

1.3 Is there any other relevant legislation for foreign mergers?

There is no specific merger control legislation regarding foreign mergers.

1.4 Is there any other relevant legislation for mergers in particular sectors?

There are no other merger control rules covering specific sectors.

However, as mentioned above, the approval of CSAT is required when an economic concentration may affect national security.

1.5 Is there any other relevant legislation for mergers which might not be in the national interest?

Besides the Decision of CSAT no. 73/2012 on the application of article 46 paragraph (9) of the Law on competition no. 21/1996, there is no other relevant legislation for mergers which might not be in the national interest.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

A transaction is caught by the merger control rules if a change of control on a lasting basis arises from:

- the merger of previously independent companies or parts thereof;
- the acquisition of direct or indirect control over an undertaking or parts thereof by the acquisition of assets or 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-functioning joint venture.

Control may derive from rights, contracts or any other elements which individually or collectively enable one to have a determining influence over an undertaking through (a) ownership or usage rights over the entirety or parts of an undertaking's assets, or (b) 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.

Control may be legal or factual, and may also be acquired in common (for example, in case two or more natural or legal persons would exert a decisive influence over an undertaking).

Transactions resulting only in a temporary change of control are not covered by the merger control legislation.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

If the acquisition of minority shareholdings grants the minority shareholder a determining influence over the target (for example, in the context of a veto or other voting rights), such operation is deemed as an acquisition of control.

2.3 Are joint ventures subject to merger control?

Full-functioning joint ventures, namely those which fulfil on a lasting basis all the functions of an undertaking and are autonomous from an operational perspective, are to be covered by the merger control regulations.

Joint ventures not meeting the above-mentioned criteria will not be subject to merger control legislation. Such joint ventures may, however, be subject to antitrust legislation on anti-competitive agreements and/or abuse of dominance

2.4 What are the jurisdictional thresholds for application of merger control?

Merger control applies where the following cumulative conditions are met: (i) the cumulative global turnover of the undertakings involved for the preceding financial year exceeds the Romanian leu equivalent of EUR 10,000,000; and (ii) each of at least two undertakings concerned in Romania in the preceding financial year has obtained an individual turnover exceeding the Romanian leu equivalent of EUR 4,000,000.

2.5 Does merger control apply in the absence of a substantive overlap?

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

However, the absence of a substantive overlap (namely, aggregated market shares of less than 20% in the case of horizontal concentrations, and none of the parties holding a market share of over 30% in the case of a vertical concentration) may under certain conditions enable the parties to submit a simplified merger notice form.

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

All foreign-to-foreign transactions are caught by the Romanian merger control legislation if they meet the relevant jurisdictional thresholds. This applies whether or not the parties have a local presence or assets in Romania. Notwithstanding, if EU merger control jurisdictional thresholds are met, the transaction may/is to be notified to the European Commission pursuant to the EU merger control rules. In such case, the transaction would no longer be subject to Romanian merger control rules.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

The law does not provide for any such mechanisms. However, a simplified merger control notice form may be used for transactions meeting certain conditions.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

Two or more transactions may be deemed as a single concentration when the result of multiple transactions confers on one or several undertakings direct or indirect control over the activities of one or more undertakings. For this, it must be assessed whether said transactions are interdependent to the extent to which a transaction cannot take place without the other.

If, during a period of two years, two or more transactions take place between the same two persons/undertakings, these are considered as a single concentration which occurred as of the date of the last transaction.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

With certain exceptions described in question 3.2 below, notification is mandatory when the thresholds are met, but there is no fixed deadline for its submission.

However, the parties may not implement the transaction before it is authorised by the RCC.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Clearance is not required in the following cases provided in the Competition Law:

(i) when control is acquired and exercised by a liquidator appointed by court order, or by any other person mandated by a public authority to carry out the procedures of cessation of payments, recovery, compositions, judicial liquidations or winding ups, forced execution on debt or other similar procedures;

(ii) under certain conditions, in the case of credit institutions or any other financial institutions or insurance companies that temporarily hold securities bought to resell them, if their normal activity includes dealing and negotiating securities for their own account or the account of others;

(iii) under certain conditions, when control is acquired by undertakings whose sole business purpose is the purchasing of shares in other companies, the management and monetisation of the same, without directly or indirectly engaging in the management of the companies in question; and/or

(iv) in the case of intragroup restructurings and reorganisations.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Implementation of a concentration without the relevant authorisation is sanctioned with fines ranging between 0.5%–10% of the annual turnover achieved in the fiscal year preceding the sanction.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

The applicable legislation does not expressly provide any carve-out mechanism.

Depending on the structure of the transaction, this would be possible only if the transaction to be implemented following the carve-out does not fulfil the jurisdictional thresholds.

This distinction may be difficult, nonetheless, since, as previously described, interdependent transactions are qualified as a single concentration by the Romanian competition legislation.

3.5 At what stage in the transaction timetable can the notification be filed?

The notification should be filed before the closing of a transaction.

As a matter of practice, the notification should be filed after an agreement in principle has been signed (not necessarily the final merger agreement), the public offer has been announced or the control package has been taken over, and in all cases before the taking of any measures that might amount to control being totally or partially taken over by the target.

Such measures include the entrance of the target on a different/new market as determined by the commercial strategy of the buyer, the exit of the target from the market, amendments to the scope of business, the exercise of voting rights for the appointment of members in management positions, the exercise of voting rights for the adoption of the income and expenses budget, the exercise of voting rights for the adoption of the business plan, the exercise of voting rights for the adoption of the investments plan, etc.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

There are three main stages under Romanian law (which equally apply where a simplified notification form is used):

(i) preliminary consultations with the competition authority; although not mandatory, these are strongly recommended in view of clarifying various aspects aimed at streamlining the drafting of the notification;

(ii) the notification phase, where a notification form and proof of payment of the notification fee are submitted; this phase includes the following steps:
   (a) within seven days as of the filing, the notifying party is informed of whether the form is validly filed;
   (b) within 20 days as of the filing, the RCC may issue requests for information; and
   (c) after all relevant information is received by the RCC, the notification becomes "*effective*" (the date when this happens must be confirmed in writing by the RCC to the notifying party) and the formal assessment stage can begin; and

(iii) the formal assessment phase, which is comprised of two stages:
   (a) Phase I assessment:
      - within 30 days from the effective date, the RCC is to inform the notifying parties in writing in case the economic concentration does not fall within the scope of the Competition Law; and
      - in case of a transaction that falls within the scope of the Competition Law, within 45 days as of the effective date, the RCC is to issue a decision which can be either a non-objection decision (if there are no competition concerns or if such concerns were removed via commitments offered by the acquirer) or a decision to commence an in-depth investigation; and
   (b) Phase II assessment – the RCC decides to commence an investigation after Phase I (to be closed within five months as of the effective date).

There can also be a case of tacit approval of a concentration if the RCC does not adopt any decision within the deadlines mentioned above, and there is no regulated suspension mechanism.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

Implementation of a concentration after the notification of the transaction to the RCC but before the relevant authorisation is sanctioned with fines ranging between 0.5%–10% of the annual turnover achieved in the fiscal year preceding the sanction.

This includes not only the effective closing of the transaction but also all instances where parties have taken pre-closing measures that may amount to the buyer exercising any form of control over the target, such as, for instance, the exchange of certain competitively sensitive information or decisions regarding the target's conduct on the market.

3.8 Where notification is required, is there a prescribed format?

Where notification is required, there are two types of mandatory forms in place:

- a shorter ("simplified") form, which contains less information regarding the market structure and which can be used in certain cases where there are no substantial overlaps between the parties; and
- a longer ("complete") form, which is used in all other cases.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

There is no accelerated procedure as per the relevant Romanian legislation.

Nonetheless, a simplified notification form can be used where:

(i) joint control is acquired over an undertaking that does not carry out any (or it is not foreseen that it will carry out any) business in Romania or carries out insignificant business in Romania (for instance, the turnover obtained does not exceed EUR 4,000,000);

(ii) there is no horizontal overlap between the parties, provided that the parties are not active in markets in a vertical relationship;

(iii) in case of a horizontal overlap, the aggregated market share does not exceed 20%;

(iv) in case of vertical overlaps, any of the parties active on an upstream or downstream market to another party does not hold a market share exceeding 30%; or

(v) one of the parties holding joint control over an undertaking acquires sole control over same.

The RCC may switch to the normal notification form at any time, if it considers that more information is required to assess the transaction.

3.10 Who is responsible for making the notification?

The undertakings acquiring control are usually responsible for the filing, as follows:

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

3.11 Are there any fees in relation to merger control?

The RCC charges a fixed fee of RON 4,775 (slightly over EUR 1,000) for registering the merger control notification form. This should be paid before the submission of the notification form.

Separately, the RCC imposes an authorisation fee, which is to be paid after the decision of the RCC is issued. It ranges from EUR 10,000 to EUR 25,000 for a non-objection decision (a decision made in Phase I of the assessment) and from EUR 25,001 to EUR 50,000 for an authorisation decision (a decision taken in Phase II of the assessment), where the RCC identifies substantial concerns regarding the potential anti-competitive effects of the concentration and an investigation is commenced to this end.

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

Romanian competition law contains special rules governing public offers.

In such a case, a notification must be made where the undertakings concerned have announced the intention of making a public offer (if the planned offer gives rise to a notifiable transaction).

For economic concentrations resulting from a public offer, the notification shall be made by the offeror at any time after the announcement of the offer and, potentially, after the commencement of the procedures regarding such public offer.

Exceptionally, a concentration resulting from a public offer can be implemented before obtaining the clearance from the RCC if the concentration is notified without delay to the RCC and the entity obtaining control does not exercise its relevant voting rights or exercises the same only to maintain the value of its investment or based on a derogation awarded by the RCC.

3.13 Will the notification be published?

The RCC usually publishes a non-confidential summary of a notification on its website and/or in the press. The press release usually contains the names of the undertakings concerned, their countries of origin, the nature of the concentration, the main activities of the undertakings concerned as well as the date of the receipt of the notification. Changes occurring throughout the process with respect to these categories of information shall also be published.

Upon request, the RCC may, however, decide in justified cases that no information shall be published until a decision is issued. This does not apply where the complexity and effects of the transaction require observations from third parties.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

Concentrations meeting the jurisdictional thresholds are analysed in view of determining their compatibility with a normal competitive environment.

To this end, the RCC assesses whether an economic concentration can raise significant obstacles in the way of effective competition, especially as part of the creation or consolidation of a dominant position on the Romanian market or a significant part thereof.

In view of the above, the RCC examines the structure of all relevant markets and the actual/potential competition on same.

4.2 To what extent are efficiency considerations taken into account?

With a complete notification form, the parties are to provide detailed explanations concerning the efficiencies arising as a result of the transaction, the calculation methodology for same, benefits to consumers and customers from the increase in efficiency and the reasons why such increase cannot be obtained by other means.

These categories of information are not required to be provided with simplified merger forms. However, in practice it may be useful to provide information regarding efficiencies nonetheless.

4.3 Are non-competition issues taken into account in assessing the merger?

Should a transaction involving the acquisition of control over an undertaking or its assets pose risks for national security, CSAT will become involved in the assessment process. According to the Decision of CSAT no. 73/2012 on the application of article 46 paragraph (9) of the Law on Competition no. 21/1996, it is established that transactions concerning certain industries should be analysed by CSAT from the perspective of their effects on national security: citizens security; border security; energy security; transport security; and critical infrastructure security, etc. In case of such a transaction, the RCC is bound to inform CSAT. The RCC may not clear a transaction unless it has CSAT's confirmation that the transaction concerned does not threaten national security.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Third parties may be involved in the regulatory scrutiny process as follows:

- at the RCC's initiative (for example, when the RCC sends requests for information to competitors, suppliers, customers and other public authorities for the purposes of the competition assessment);
- where required by the competition legislation (for example, 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);
- at third parties' own initiative (for example, parties who are directly and substantially affected by the implementation

of a concentration prior to its authorisation may submit a complaint with the RCC);
- parties who can prove an interest may challenge the RCC's decision authorising the concentration; and
- parties who have sustained a prejudice due to an infringement of the competition legislation may claim compensation in court.

4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

The RCC may impose fines for the parties' failure to provide the information requested as well as when parties supply incorrect, incomplete or misleading information.

In practice, notifying parties usually tend to collaborate with the RCC in order to ensure a smooth process and to avoid such sanctions.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

Access to the file is usually allowed only to the notifying parties. Although the decision of the RCC will be published at the end of the regulatory process, parties are entitled to request that sensitive information be removed from the public version of the decision.

If there is an investigation on the compatibility of the concentration with a normal competition environment or for jumping the gun (implementing the merger ahead of clearance), other undertakings concerned (such as the seller and the target) may have access to the file upon request, following the circulation of the investigation report.

Such access is allowed only when the RCC considers that it is required by said parties in order to formulate their observations on the investigation report. In any case, access to information marked by the notifying party as sensitive and deemed by the RCC as such will not be permitted.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

There are multiple outcomes possible at the end of the regulatory process:
- within 30 days from the effective date of the notification, the RCC informs the notifying parties in case the economic concentration does not fall within the scope of the Competition Law;
- if the transaction does fall within the scope of the Competition Law, the RCC issues a non-objection decision within 45 days from the effective date of the notification if:
  (i) there are no serious concerns regarding the compatibility with a normal competition environment; or
  (ii) there are serious concerns regarding the compatibility with a normal competition environment but the concerns have been removed based on the commitments assumed by the concerned parties.

In case of a Phase II assessment, within a maximum of five months from the effective date of the notification the RCC issues:
- a decision declaring the economic concentration incompatible with a normal competition environment, since it raises significant obstacles to effective competition on the Romanian market or a part thereof;
- a decision authorising the economic concentration; and/or
- a conditional authorisation decision establishing the obligations and/or conditions of the concerned parties aimed at ensuring the compliance of the parties with the commitments assumed.

If a decision is not adopted within the said timeframe, the economic concentration may be implemented.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

In case a concentration is found to raise significant obstacles in the way of effective competition, the parties may attempt to provide commitments (remedies) in view of eliminating the competition concerns and to obtain the merger clearance.

As a rule, it is the parties who propose remedies, while the RCC assesses whether the remedies offered effectively lead to the removal of obstacles in the way of effective competition.

Usually, the RCC and the parties collaborate throughout the procedure to identify, adjust and finalise the remedies to ensure that they are both feasible and effective.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

The RCC can impose remedies on foreign-to-foreign transactions in order to address concerns related to the Romanian market.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

During Phase I, the parties can present remedies before the notification becomes effective or within two weeks thereafter.

Usually the RCC informs the parties of the potential competition concerns before the notification becomes effective, thus allowing sufficient time for negotiations.

However, during Phase I, remedies are only accepted provided that the competition concerns can easily be determined and addressed.

During Phase II, the proposed remedies are to be submitted to 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. If the proposed remedies are considered insufficient, the RCC will accept limited amendments only where it can be clearly established that the remedies shall resolve the competition concerns completely and without ambiguities once implemented.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

The terms and conditions of the divestment must not threaten the independence, viability (full functioning) and competitiveness of the parts to be divested.

For instance, all divested parts must be assigned together with the staff and assets required to ensure the viability and competitiveness thereof. This is to include all staff deemed as essential to this end, even if, at the date of the commitments, the said staff were deployed both for the activity to be divested and other parts of the business.

Likewise, all supply relationships between the divested activity and the concerned undertakings must be so configured that they may not affect the independence of the divested parts.

For the same reason, the assignment (fully-fledged transfer) of intellectual property rights as part of the divestment will in principle be preferable to the mere licensing of such rights. When licensing is nonetheless accepted, there are various rules which would in principle be applied to the terms and conditions of the licensing.

Furthermore, the terms and conditions of the divestment must expressly ensure that the seller would not be able to repurchase the divested parts before a 10-year period has expired.

5.6 Can the parties complete the merger before the remedies have been complied with?

Once the decision imposing the remedies and authorising the transaction is issued by the RCC, the transaction may be safely implemented irrespective of the completion of the remedies at such time.

However, the parties are under the obligation to comply with the remedies. If the parties fail to do so, the RCC may apply fines ranging between 0.5%–10% of the turnover obtained during the preceding financial year.

5.7 How are any negotiated remedies enforced?

The remedies negotiated by the RCC and the parties are included in the decision issued by the RCC with respect to the merger.

Usually, the enforcement of the remedies takes place after the decision is issued.

The actual implementation of the remedies largely depends on the nature thereof. Monitoring obligations may exist in certain cases.

5.8 Will a clearance decision cover ancillary restrictions?

Restrictions that are directly connected to and necessary for the implementation of a transaction are automatically covered by an authorisation decision and are not subject to individual assessment by the RCC.

Conversely, if such restrictions are not deemed to be directly connected to and necessary for the implementation of a transaction, antitrust rules (regarding anti-competitive agreements and the abuse of a dominant position) may be applicable.

The criteria regarding the direct connection and necessity are, by nature, objective, regardless of whether the parties deem the restrictions as such.

More details are specifically covered by the Instructions on ancillary restraints approved by Order no. 387/2010 of the President of the RCC.

5.9 Can a decision on merger clearance be appealed?

Decisions adopted by the RCC regarding concentrations can be challenged by both the parties concerned and third parties in front of the Bucharest Court of Appeal and thereafter in front of Romania's Supreme Court (the High Court of Cassation and Justice).

5.10 What is the time limit for any appeal?

Decisions adopted by the RCC regarding 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 at the Supreme Court within 15 days from its communication.

5.11 Is there a time limit for enforcement of merger control legislation?

The right of the RCC to apply sanctions becomes time-barred five years from the date of the infringement or from the date of the last act or from the cessation of the infringement, respectively, in case of repeated or continuous infringements.

The time limit for applying sanctions to infringements related to procedural aspects is three years.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

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

The RCC may also co-operate with competition authorities from third-party states, within the framework of the International Cooperation Network. The notification form requires the parties to specify whether the transaction will be notified in other jurisdictions as well.

As a matter of practice, the parties may need to follow up with the RCC concerning consultations with authorities in other states.

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

As per the newsletter regarding the activity of the RCC in 2019, the RCC issued 75 decisions on concentrations.

Out of the 75 concentration cases, remedies were required in only one case.

6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

There are currently no proposals for reform of the merger control regime.

6.4 Please identify the date as at which your answers are up to date.

These answers are up to date as of August 28, 2020.

7 Is Merger Control Fit for Digital Services and Products?

7.1 Is there or has there been debate in your jurisdiction on the suitability of current merger control tools to address digital mergers?

At EU level, competition in the context of the digital economy has been a topic of interest and assessment, as shown by the recent report on Competition Policy for the digital era.

The subject of competition in the digital era is currently part of the discussion topics tackled by the RCC. However, there have not been further noteworthy developments on the specific topic of merger control.

7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

There have been no changes to the law related to digital mergers, and no such changes are being considered.

7.3 Have there been any cases that have highlighted the difficulties of dealing with digital mergers, and how have these been handled?

Recently, there have been several cases involving players involved in e-commerce activities, but these did not raise specific issues.

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