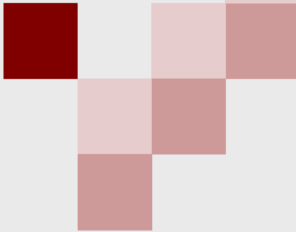
HERZFELD & RUBIN, P.C.
IN ASSOCIATION WITH / IN ASOCIERE CU
RUBIN MEYER DORU & TRANDAFIR
LAWYERS PROFESSIONAL CORPORATION
Str. Putul cu Plopi, Nr. 7, Sectorul 1, Bucharest, Romania
Phone: +40 21 311-1460 Fax: +40 21 311-1465

N E W S L E T T E R

The Romanian Digest™

Volume 12, Issue 5 - May 2007

INSIDE:



Merger Notifications: The European Commisison Versus Romania's Competition Authority... 1

The Romanian Digest™
Central and Eastern European Practice Group

Published by

Herzfeld & Rubin, P.C.
40 Wall Street
New York, New York 10005
(212) 471-8500
Fax: (212) 344-3333
E-Mail:
mmeyer@herzfeld-rubin.com

-and-

Rubin Meyer Doru & Trandafir
lawyers professional corporation, affiliated with Herzfeld & Rubin, P.C.
7, Putul cu Plopi
Bucharest 1, Romania
(40) (21) 311 14 60
Fax: (40) (21) 311 14 65
E-Mail: office@hr.ro

Visit our Web Site at:
http://www.hr.ro

MERGER NOTIFICATIONS: THE EUROPEAN COMMISISON VERSUS ROMANIA'S COMPETITION

General overview

Romania's accession to the European Union has brought a lot of changes to the competence that the national competition authorities have versus that of the European Commission as concerns the analysis and enforcement of competition legislation. With Romania's EU membership, there are now two applicable legal systems: the national law and EU law. So which of them is applicable in Romania and under what circumstances? Should notifications of economic concentrations be made directly to the European Commission in Brussels, to the national competition authority in Bucharest, or both?

EU law is governed by two very important principles with regard to its applicability: its primacy and its direct applicability with regard to national legislation. European case-law has described how the principle of the primacy of EU law applies: if there are any internal provisions that are incompatible or unenforceable with regard to European legislation, the national authorities have the obligation not to enforce them[1]. Therefore, any conflicts that might arise between the two legal systems will be resolved by the enforcement of EU law which has primacy over the national legislation.

The same principles apply in the area of competition. As a result, some matters may now face both an intervention from the European Commission and one from Romania's competition authority. Unchecked, this could lead to contradictory decisions and the necessity to pay two different clearance fees and to undergo two notification procedures. However, in order to avoid such a result, clearly delineated areas of application for EU law and for national law have been defined. The Treaty Establishing the European Community provides in Article 85 of the consolidated version that the Commission has the authority to investigate cases of suspected infringement of the principles provided in the Treaty with regard to competition, i.e., to the rules applicable to undertakings. They refer to

(Continued on page 2)

(Continued from page 1)

actions that are incompatible with the common market or with a substantial part of it, affecting the trade between Member States. Therefore, if the common market is not affected by the transaction, only the national legislation is applicable, even if the transaction concerns a Member State. Furthermore, if such condition, i.e., an effect upon the common market as a whole exists, the determination to be made is only whether the rules of the EU are applicable, or whether both national and European legislation apply.

In *Walt Wilhelm v. Bundeskartellamt*[2], the European Court of Justice found that the two legal regimes should be applied in a combined manner, i.e., "the theory of the double barrier". The Court found that a transaction may be the object of two parallel procedures. This means that if a transaction was cleared by the Commission, the national authorities may nevertheless intervene and sanction it, if they see fit to do so. However, a national authority may not clear a transaction that is prohibited by the Treaty.

Nevertheless, the principle of *"non bis in idem"* is applicable and the Commission has to take into consideration any sanctions that have been applied by the national competition authorities when establishing its own sanctions, so that there are no fines or fees accumulated for the same transaction, if a double investigation has taken place. Moreover, the right (together with its limitations) of intervention by the national authorities in the enforcement of EU legislation exists. Even if the Commission starts the investigation process with regard to a specific transaction, the national authorities still keep some of their competence in the field. They maintain a level of competence as long as the principle of the primacy of EU law and the principle of subsidiarity[3] are abided. First, the national authority must apply all EU legislation that is directly enforceable. Second, as the Court has found in *Delimitis v. Henninger Brau*[4], the national authorities should suspend their analysis of the transaction and not take any interim measures when a similar procedure is begun by the Commission in order to avoid contradictory decisions. The avoidance of contradictory decisions is also achieved by collaboration between the two authorities, i.e., the national authorities may request information from the Commission as to the status of the procedure, as well as economic and legal data regarding the transaction and the parties to the proceedings.

[1]Case T-106/77 Simmenthal II (1977) ECR
[2]Case 14/68 Walt Wilhelm v. Bundeskartellamt (1969), ECR
[3]Subsidiarity is the principle which states that matters ought to be handled by the smallest (or, the lowest) competent authority.
[4] Case C-234/89 Delimitis v. Henninger Brau (1991) ECR I-935

The European Competition Network

The European Competition Network is the generic name given to the European Commission together with all the national competition authorities from the Member States. All the parties to this network closely cooperate in order to prevent anticompetitive practices under the provisions of Regulation 1/2003[5]. In accordance with this regulation, the national competition authorities may decide upon the cessation of an anticompetitive practice or the non-clearance of a transaction, may take interim measures, may clear transactions or may apply sanctions provided by the national legislation.

Within the European Competition Network, it is considered that a national authority would better deal with a transaction if three cumulative conditions are fulfilled: the transaction has direct and immediate effects over competition and it is applied or it originates on the territory of that particular state; the national authority is able to take effective measures for the cessation of the anticompetitive practice; and the national competition authority is able to gather the evidence necessary to prove the abovementioned anticompetitive practice.

Therefore, there needs to be a material link between the anticompetitive practice and the territory of a state, i.e., it mainly affects the territory of that particular state. The Commission has competence over transactions that affect competition in more than three Member States and will also analyze transactions of great importance that require the Commission to adopt a decision in order to further develop EU law. Furthermore, the Commission will analyze transactions that are linked with other provisions of European legislation that are enforced, exclusively and effectively, by the Commission.

[5]Council Regulation (EC) No 1/2003 of 16 December 2002

What transactions should be notified?

Undertakings have the obligation to notify the competition authorities of those transactions that have the character of economic concentrations. In accordance with Article 11 of Romanian Competition Law 21/1996, economic concentrations are those transactions "realized by means of any legal act which, regardless of its form, either transfers the ownership or the right of possession over the whole or part of an undertaking's property, its rights and obligations, or has as an object or an effect enabling an undertaking or a group of undertakings to significantly influence, directly or indirectly, another undertaking or several undertakings".

There are several prerequisites that a transaction must fulfill in order to amount to a concentration under the above-quoted provision: two or more previously independent undertakings merge or one or more persons, already holding control over at least one undertaking, or one or more undertakings, directly or indirectly, acquire control over one or more undertakings or parts of them, either through acquiring share capital or through acquiring assets, by an agreement or by other means. The law also includes in the category of economic concentrations the joint ventures which function as joint economic entities, legal persons, constantly as autonomous economic entities, but without realizing a coordination of the competitive conduct between the founding undertakings or between the joint ventures and the founding undertakings. Law 21/1996 also defines the notion of control as being the possibility to exercise a decisive influence over an undertaking. Multiple transactions that are conditional on one another or are closely connected are regarded as a single concentration. This definition is in accordance with the European provisions regarding economic concentrations.

Where should a transaction be notified?

Economic concentrations are divided between concentrations with a community dimension, for which EU legislation is applicable and which should be notified directly to the Commission, and concentrations with a national dimension which should be notified directly to the national competition authorities.

Until 2004, EU legislation with regard to economic concentrations - the 1989 Merger Regulation[6]- was based on the "one-stop shop" principle, which gave the Commission the sole control over all major cross-border mergers. From 2004, the new Regulation[7] provides that the same merger need not be notified to several competition authorities in the European Union (EU). It also adopts the principle of subsidiarity, whereby a merger is examined by the lowest judicial authority best placed to do so.

The new regulation institutes the criteria used to determine whether the Commission is competent to analyze a certain transaction. The main ones are the "dominant position" criterion and the "substantial lessening of competition" criterion, which has been introduced in 2004. The "dominant position" criterion refers to the economic power to influence the terms of competition, in particular prices, production, product quality, marketing and innovation, and to restrict competition appreciably. The central element in this criterion is to establish that sufficient competition remains after the concentration to give consumers sufficient choice. This covers duopolies and collective dominant positions or oligopolies. From 2004 this criterion also applies to all anti-competitive effects on oligopolistic markets where the undertaking created by the concentration is not dominant within the strict meaning of the term. The scope of the Regulation has been extended to duopolies and oligopolies that are liable to cause competitive problems.

A concentration acquires a "Community dimension" when the combined aggregate worldwide turnover of all the undertakings concerned exceeds € 5 billion and where the aggregate turnover in the EU of each of at least two of the undertakings concerned is more than € 250 million, unless each of the undertakings concerned generates more than two thirds of its aggregate EU-wide turnover within a single Member State.

If the above-mentioned thresholds are not reached, a concentration nevertheless has a Community dimension if: the combined aggregate worldwide turnover of all the undertakings concerned is more than € 2.5 billion; in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than €100 million; in each of at least three Member States, the aggregate turnover of each of at least two of the undertakings concerned is more than € 25 million; and the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than € 100 million, unless each of the undertakings concerned generates more than two thirds of its aggregate EU-wide turnover in one and the same Member State. The application of another criterion, i.e. the "3+ criterion", entails exclusive Community jurisdiction exercised by the Commission where at least three Member States make a referral request to the Commission. There is also the criterion of the referral to the competent authorities of the Member States. Member States can now inform the Commission that a concentration, albeit with a "Community dimension", significantly affects, or threatens to affect significantly, effective competition on a specific market within a Member State The system of referral to the national competition authorities is intended to allow the concentration to be investigated at the most appropriate level for appraising its potential effects.

The aim of the investigation is to check whether a concentration with a European dimension is compatible with the common market, in other words, whether it creates or strengthens a dominant position that would significantly impede effective competition on the market. Under Article 15 of the Romanian Competition Law, an economic concentration must be notified to the Romanian Competition Council if the aggregate turnover of the undertakings concerned exceeds € 10 million and there are at least two undertakings involved in the operation which achieve, each in part, on the Romanian territory, a turnover exceeding € 4 million. Therefore, an economic concentration involving the Romanian market is to be notified with the European Commission directly if it has a “Community dimension”, i.e., it fulfils one of the abovementioned criteria. If the economic concentration affecting the Romanian market does not have a “Community dimension”, but nevertheless, exceeds the thresholds for notification provided by the Romanian Competition Law, it will not be notified to the Commission, but only to the Romanian Competition Council. In order to determine this, the turnover of the undertakings is calculated as follows: The aggregate turnover comprises the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State, as the case may be.

[6] Council Regulation (EEC) No. 4064/89 of December 1989
[7] Council Regulation (EC) No 139/2004 of 20 January 2004

When should a transaction be notified?

As a matter of principle, concentrations with a Community dimension must be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest. The 2004 Regulation allows notification before the conclusion of a binding agreement and abolishes the obligation to notify operations within a week of concluding an agreement. This not only makes the system more flexible but also facilitates coordination with other jurisdictions in investigations of mergers.

The Romanian national legislation provides that the parties must submit the notification to the Competition Council within 30 days. Within this time limit, the Competition Council, upon the written request of the parties, may prolong the time limit with another 15 days, when this request is reasoned. Within 7 days, the parties must inform, in writing, the Competition Council about the operation to be notified. The above-mentioned terms are counted as of the date when the merger agreement is signed or, as the case may be, the day the juridical act based on which the control was obtained is signed or the date when the involved parties are aware that the operation was made.

Bucharest 1920

In conclusion, the Romanian national law is more restrictive than European legislation, as it only allows the notification of transactions that have already been concluded and not of transactions that are just envisaged. Therefore, problems might arise if an economic concentration that has already been concluded is not cleared by the Competition Council.

Rubin Meyer Doru & Trandafir
Str. Putul cu Plopi, Nr. 7, Sectorul 1,
Bucharest , Romania
Phone: +40 21 311-1460
Fax: +40 21-311-1465

Visit our Web Site at
Http://www.hr.ro

New York Office - Main Headquarters
Herzfeld & Rubin, P.C.
40 Wall Street, New York, New York, 10005

Phone: (212) 471-8500
Fax: (212) 344-3333
Web: www.herzfeld-rubin.com
E-mail: info@herzfeld-rubin.com

California Office
Herzfeld & Rubin, LLP
1925 Century Park East,
Los Angeles, California 90076

Phone: (310) 553-0451
Fax: (310) 553-0648

New Jersey Office
Chase Kurshan Herzfeld & Rubin
354 Eisenhower Parkway, Suite1100
Livingston, New Jersey 07039-1022

Phone: (973) 535-8840
Fax: (973) 535-8841

Israeli Affiliated Law Firm
Balter Guth Aloni & Co.
96 Yigal Alon Street,
Tel Aviv, 67891, Israel

Tel: +972-3-511-1111
Fax: +972-3-624-6000

♦

Editors Note: It is our policy not to mention our clients by name in The Romanian Digest™ or discuss their business unless it is a matter of public record and our clients approve. The information herein is correct to the best of our knowledge and belief at press time. Specific advice should be sought from us, however, before investment or other decisions are made.

Copyright 2007 Rubin Meyer Doru & Trandafir, societate civila de avocati. All rights reserved. No part of The Romanian Digest™ may be reproduced, reused or redistributed in any form without prior written permission from the publisher.