Company Mergers and Acquisitions on the Edge of Unlawful Competition

Elena - Mădălina Rotaru
Moldova State University
madalina.rotaru@rotarulawyers.ro

Abstract

In the field of economy, transactions represent one of the fastest means available for improving any company's commercial and strategic position in the market. The context of technological developments in recent years and the trend of globalization have largely influenced work in the fields of goods and services. Currently, geographical factors are no longer an obstacle and companies can expand their production without being influenced by state frontiers. International mergers and acquisitions are, most often, joined by a true "cultural shock" [1] and must comply with regulations on competition both nationally and internationally. Since the penalties imposed by authorities in charge of competition regulations are substantial, both internationally and nationally, this means that, when making mergers, one should be very cautious.

Keywords: Merger, acquisition, lucrative companies, penalty, competition
J.E.L. classification: K21

1. Introduction

When considering its origins, the concept of competition was formed and is being used in any social relation. Legal regulations have taken it over from lay discourse, adding specific meaning to adapt it to the features of economic life. In general, competition entails a confrontation between opposing trends that actually converge towards the same goal.

Socially, there are extremely varied forms of competition. They display, inter alia, a situation of vital competition, meaning the interpersonal conflict in which each individual tends to preserve and develop themselves. There can also be a competitive opposition between individual and social interests, between rights and obligations between selfless and selfish actions [2].

The term competition is prone to having several meanings. More broadly, competition may be regarded as an essential component of the concept of market economy, designating both the state entailed by the collective competitive behavior of economic operators in the market, and the competitive behavior of each one. Narrowly, competition should be seen as the free competition between economic operators in a given market. Their products or services tend to satisfy similar or identical needs of consumers, and competition is developed with the aim of ensuring the existence or expansion of their trade.

In the field of trade, there is an increasingly urgent need to monitor competitive activity, at national, European and global levels.

In most cases, the authorized bodies that monitor their compliance with legal regulations in the field of competition also get involved in the economic cycle, more precisely in terms of the methods used by each trader, this being a generic name, in order to make profit.

How can we protect the competitive environment in Europe in the field of company mergers and acquisitions?

The European Council Regulation no. 1/2003 is extremely important in this field, as it establishes a new set of rules for aligning national legislations to that of the European Community. Before Romania's accession to the European Union, this Regulation was not implemented, but

national legislation transposed Community legislation and did contain elements needed for the implementation of the provisions of the Regulation. However, since accession to the EU, according to art. 249 of the EC Treaty, the regulations became directly applicable and binding, entailing rights and obligations just like any national law [3] .

In this context, one of the most important principles set out in Regulation 1/2003, following earlier decisions of the European Court of Justice, is that art. 81 and art. 82 of the EC Treaty are directly applicable not only by the European Commission, but also by national authorities in charge of competition practices and national courts, according to internal procedures.

Regarding the connection between national law and EU Community law, especially given the fact that national authorities can apply both the Community law and the national law, the Regulation establishes that national law must not lead to the prohibition of agreements, decisions by associations of economic agents or concerted practices which do not fall under art. 81 par. 1, or which may be exempted under Art. 81 par. 3. However, national authorities in the respective states may apply stricter rules to stop unilateral behaviors of economic agents.

This Regulation introduces the procedure of commitments, meaning that, in case the Commission identifies an agreement that violates art. 81, it can accept, from the respective traders, their commitment to eliminate anticompetitive provisions, highlighted in the Commission's preliminary assessment. In case of failure to observe the commitment, of changes in circumstances, of discovery of other piece of information, the Commission may reopen the procedure. This procedure does not affect the prerogatives of national competition authorities and of law courts in Member States.

National authorities, including courts of law and the European Commission [4] are each bound to exchange information, including confidential data, being obliged to keep the secrecy and to use the data exclusively for the purpose for which they were requested. Regarding national courts of law that decide in cases referring to competition, Member States must send copies of their decisions, after such decisions were communicated to the parties. National authorities in Member States, as well as the European Commission, may submit written opinions and, with the permission of the court, they can intervene orally. Also, courts may request information and the opinion of the European Commission. Given the jurisprudence of the European Court of Justice, Art. 16 of the Regulation provides that national courts cannot make, when implementing art. 81 and 82 of the EC Treaty, decisions that are contrary to those of the European Commission. If investigations are ongoing within the Commission, courts may decide to suspend decisions in cases whose solution could entail the risk of issuing contradictory decisions.

The relation with national authorities in charge of competition:

Regarding the relation with national authorities in charge of competition, the EU Commission's prerogatives have precedence. Thus, national authorities must inform the European Commission no later than 30 days before the date of adoption of a decision under Articles 81 or 82. It is also important to note that the initiation, by the Commission, of procedures for the adoption of a decision under Articles 81 or 82, leads to the loss of competence of the national authorities to apply Community law in the respective case; if the cause is pending a solution from national authorities, the Commission can take over the case only after consulting the respective authorities.

Limited to presenting key aspects of Regulation no. 1/2003, it should be noted that all these provisions were established to ensure a uniform interpretation of Community law at EC level, given that, according to the previous provision of this Regulation, the European Commission held the monopoly for the implementation of art. 81 and 82. In addition, the European Commission, national authorities in charge of competition and national courts form, according to the Regulation, a European network for the implementation of the competition law and they must work together in order to create a competitive environment and a competitive internal market, according to the objectives set forth and agreed upon in the EC Treaty.

The Competition Council plays an active role in that it makes decisions where it concludes, after an analysis, that concerted actions were implemented although they are incompatible with a normal competitive environment, and it may make any decision to return to the previous situation.

The legal solutions in case of company acquisitions:

Mergers refer to the absorption of a firm by another firm. The acquiring company can decide to keep their name and identity, taking over all assets and liabilities of the acquired company. After a merger, the acquired or absorbed company ceases to exist as a separate business entity. Consolidation is similar to merger, except that, by this operation, a new company is born. In the process of consolidation, both the acquired company and the company that makes the purchase end their legal existence and thus become parts of a new firm. When referring to these two concepts, it is easily observed that there are similarities between them, and, for this reason, these types of corporate reorganizations will simply be considered mergers. The advantage of a merger lies in the fact that it is not necessary to transfer the property title for each asset individually from the acquired company to the acquiring one. In addition, shareholders of both companies need to approve a merger, noting that 2/3 of votes are necessary for the approval of a merger.Another way to purchase a firm is by buying its shares. This process can begin with the purchase of smaller lots of shares and may end with a public offer for purchasing the shares of the targeted company. The public offer is made directly by the firm to the shareholders of the targeted company.

There are several factors that may influence the decision to purchase shares or a merger:

- In the case of share purchase, the shareholders' assembly (GAS – General Assembly of Shareholders) is neither necessary, nor do their votes matter. If the targeted company's shareholders do not agree with the offer, they are not asked whether they accept it and they do not have to sell the shares they hold.
- During a purchase of shares, the buying firm can deal directly with the targeted company's shareholders through a public offer, without considering the option to get in touch with the management or the board of the targeted company.
- In some cases, managers of the targeted company display a certain opposition and this behavior will increase the cost of share acquisition. Thus, costs are higher than the costs of a merger.
- Frequently, a small number of shareholders will hold an important lot of shares and thus the targeted company may not be completely absorbed. The complete absorption of a firm by another is accomplished through a merger.

Policy of the management in case of mergers and acquisitions: A firm may acquire another firm by buying all its assets. The formal vote of the shareholders of the targeted firm is required when their assets are bought. One advantage of this operation is that, although the firm that acquires the shares must still face a minority of shareholders (in the case of purchase of shares), this is not the case when buying assets. However, asset purchase entails the transfer of ownership of each asset and this practice makes the transaction more expensive. A more general, but less precise concept is the takeover. This operation refers to the transfer of control of a firm from a group to another group of shareholders. Takeovers can occur through acquisitions, through exerting control in the Board of Directors (BD) and through the privatization of public companies. Managers of the targeted companies frequently seek solutions to oppose the takeover. These actions against the takeover can be beneficial to the shareholders of the targeted firm if the buying firm makes a tempting offer. Thus, the managers of the targeted firm will fight to preserve jobs. Sometimes, the management can prevail if they improve the economic policies of the firm. Thus, shareholders may have an advantage even if the takeover did not take place. There are several ways in which the managers of the targeted firm oppose takeovers. One option is by changing the statuses of the firm so that conditions for the approval of a takeover are as hard as possible to fulfill, such as the obligation to have a large number of votes. In case of hostile takeovers, there are several variants of defense.

The best option for preventing such hostile attitudes from the management is to set forth very generous benefit packages for the management of the targeted firm, in the event of a takeover. The disadvantage of this method, called "golden parachutes" in the literature, is that it will make the takeover more expensive, and thus less attractive. However the costs entailed by the golden parachutes represent only a fraction of the costs for acquiring a firm. There are cases when another

tactic is used: in the literature, it is called the "poison pill" and is a sophisticated defensive tactic. When a firm intends to make a purchase by buying shares amounting to approximately 20% of the targeted firm, the latter will issue shares that will be distributed to shareholders at half price, except to the firm that intends to purchase them.

Enforcement of competition policy within the European Union developed together with the integration process. The transfer from a customs union to the single internal market was accompanied by a fine tuning of the tools used in the competition policy. [5]

Also, Art. 82 of the Treaty [6] on the Functioning of the European Union states that any abuse by one or more economic operators, who find themselves in a dominant position within the common market or in a substantial part thereof, is prohibited as long as it may affect trade between Member States. Such an abuse may consist of:

- imposing, directly or indirectly, the purchase or selling prices, or other unfair trade conditions;
- limiting production, distribution or technical development to the prejudice of consumers;
- in the case of trading partners, applying unequal conditions for similar transactions, thereby putting some of them at a competitive disadvantage;
- conditioning the signing of contracts upon the acceptance, by the partners, of clauses that entail supplementary obligations which, by their nature or according to commercial usage, are not connected to the subject of such contracts. [7]

Romania's Competition Law is in line with European legislation in the field and it extensively refers, in Article 5 of the Competition Law no.21 / 1996, to the following types of anti-competitive practices. As far as agreements between firms are concerned, from the legal point of view, there are two categories:

> Legally structured agreements, which refer to agreements expressly or tacitly concluded between operators;

> Not legally structured agreements, including concerted practices that refer to the conduct of economic agents in order to adapt to the competitive environment.

Removal of competitors from the market, limiting or preventing their access to the market and the free exercise of competition by other companies, as well as agreements not to buy or sell from / to certain economic agents without a reasonable justification, is an anticompetitive practice repelled at European and national level, both in Romania and in Moldova.

These competitive practices can be committed only intentionally, and it is then that they are punishable by law. There are times when they can be committed by fault, such as limiting the production, distribution, technical development or institutions (Art. 5 par. (l) letter (b)) according to Law no. 21/1996 amended and supplemented. There are cases when deeds referred to in the Competition Law and described as "anticompetitive" practices are punished by law as offences, if such practices do not significantly affect the competitive environment. Agreements between two or more economic agents may refer to the activity of supply of raw materials, conditions of production, business activities or any other element of the market. In fact, by these agreements, the aim is to increase profits by eliminating competition between the participants in the following ways: restricting production, rising prices, dividing sale areas, etc. The **concerted practice** is that conduct of economic competitors who adopt a similar behavior in the relevant market and this leads to restricting, limiting or distorting competition, with no prior agreement between them.

As far as economy is concerned, agreements can be "horizontal" and "vertical".

➔ Horizontal agreements are made between economic competitors operating in the same market or in the same market segment.

➔ Vertical agreements are made between economic agents that are operating in different markets or in different segments of the same market.

As a rule in the practice so far, we note that horizontal agreements may affect normal competitive environment more than vertical agreements, which may also lead to economic efficiency, as well as to beneficial effects on consumers. Accordingly, vertical agreements may be included in the category of agreements that are exempted from the provisions of art. 5 paragraph (l) of Law no. 21/1996, amended and supplemented. Other categories of agreements exempted from the category of anti-competitive practices are: "agreements for exclusive distribution", "agreements

for exclusive purchase", "research and development agreements","specialization agreements", "agreements for transfer of technology and / or for the transfer of know-how", "franchise agreements", " agreements for distribution, servicing and parts during the warranty and post warranty period for motor vehicles"," agreements in the insurance sector".

Economically concerted operations and the need to declare them at the Competition Council:

Economically concerted operations would significantly impede effective competition in the Romanian market or in a substantial part thereof, in particular by creating or developing a dominant position. An **economically concerted operation entails a lasting change** of control. This would stem from transactions such as the merger of two or more firms or parts thereof which were independent before, getting direct or indirect control by one or more firms over another / several other firms by acquiring shares / assets / contracts / etc. The internal restructuring within a group of companies / firms is not an economically concerted action in terms of the Competition Law.

Economically concerted operations exceeding certain limits of turnover must be declared at and assessed by the Competition Council. The current limits in Romania are:

- The RON equivalent of EUR 10,000,000 for the aggregate turnover of the respective firms and
- The RON equivalent of EUR 4,000,000 for the turnover in Romania, generated by each of and at least two of the firms involved in the operation.

International transactions which take effect in Romania must also be declared at the Commission if the turnover limit criteria are met.

Notification procedures to be undertaken before the Council of Competition can be simplified when the transactions intended by the parties do not raise questions, as far as competition is concerned. These procedures can be also extended, entailing certain investigations when the problems to be analyzed are complex both in terms of operation and of affected markets.

After the Romanian Revolution in 1990th, the merger has been widely used as a way of reorganizing of the companies. From the beginning, it was taken al the legal measures in order to ensure a legal protection of companies associates participating in the merger. [8]

Conclusions

Mergers and acquisitions represent an important alternative to the strategies of internal development of a firm, as this allows a speedy entry of firms in foreign markets, resulting in an economy of "scale". They also allow the purchase of the needed know-how to enter a new field in a short time. At the same time, these operations of business expansion provide the opportunity to immediately have in place skilled and experienced staff [9].

As a general rule, the concerted operation that fulfills the criteria regarding the level of turnover cannot be implemented until the Competition Council has issued a favorable decision.

An economically concerted action can be authorized provided that it does not impose significant obstacles to competition in the market in Romania or parts thereof.

Economically concerted actions can be approved under certain conditions, especially if they refer to certain agreements assumed by the parties, such as the lease of a business to a suitable buyer, removal of connections to competitors, adding or modifying clauses of acceptance in certain contracts.

References:

1. Anastasiei, B., 2000 - *Fenomene culturale in achizitiile si fuziunile internationale* (Cultural Phenomena in International Acquisitions and Mergers) - Intercultural Management - Volume II, Issue 3/2000, ISSN 1454-9980, Cross Cultural Management Journal, p.45 [online];
2. Eminescu Y., 1993 - *Concurenta neleală. Drept român şi comparat* (Unfair Competition. Romanian and Compared Law), Lumina Lex, Bucharest;

3. Regulation of the (EC) Council no. 1/2003 of December 16 2002 on the implementation of competition rules as laid down in Articles 81 and 82 of the EC Treaty, the Official Jurnal of the European Union L 1 / 04.01.2003.
4. The European Commission is the EU institution having the most important prerogatives in ensuring compliance with competition rules. According to art. 230 of the EC Treaty, the Commission's decisions can be reviewed, in terms of legality, by the European Court of Justice.
5. http://competition.md/uploads/files/legi/concurenta/Lege%20Nr183%20din%2011.07.2012.pdf Article 81 of the Treaty on the Functioning of the European Union is made of three parts; http://www.mmediu.ro/app/webroot/uploads/files/2015-02-26_Tratatul_privind_funct_UE.pdf
6. Paragraph (1) establishes the rule, that is the general prohibition applied to collusive, anti-competitive actions. Paragraph (2) refers to the common law consequences of the practices prohibited under the previous paragraph, namely that any such decision or practice is automatically void and may not be used or it cannot entail effects. Paragraph (3) states that some agreements or practices that fall under Art. 81 (1) may still entail beneficial effects, either in terms of competition, or in relation to other matters, and that positive effects may have precedence over anticompetitive effects;
7. http://www.mmediu.ro/app/webroot/uploads/files/2015-02-26_Tratatul_privind_funct_UE.pdf - Art. 82 of the Treaty on the Functioning of the European Union;
8. Hinescu A., 2016 - *Fuziunea societatilor* (Company Mergers), Editura Hamangiu, Bucuresti pp.9;
9. Anastasiei, B.,- *Fenomene culturale in achizitiile si fuziunile internationale* (Cultural Phenomena in International Acquisitions and Mergers) - Intercultural Management - Volume II, Issue 3/2000, ISSN 1454-9980, Cross Cultural Management Journal, p.45[online];