

Economic Concentrations vs State of Competitive Space

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Abstract

Achieving market performance is the main objective of companies in business transactions. Developing competitiveness and gaining a large market share is conditional on achieving the proposed objectives. A way to increase the market power is to do mergers or takeovers. They can be vertical or horizontal, depending on the type of activity realized by the parties. Effects resulting from the economic mergers made under certain conditions, can distort the competitive environment on the market, with a serious damage. This leads to the need to analyze them in the compatibility with the competitive environment. Permission to achieve a merger occurs after a comprehensive study of cases considering the peculiarities on each of them. The avoidance of obtaining the competition authorities permission to make the economic concentration before its implementation, is sanctioned.

The paper presents an analysis of the impact of the effects of economic concentrations on the facilitation or worsening of sanctions provided by the legislative framework.

Key words: merger, abuse of dominant position, merger notification, remedies

J.E.L. classification: K21, K49

1. Introduction

The development of the market economy requires a constant change for the market players. They have to survive in a fierce competition. The ways of developing and touching performance indicators are varied, and the merger of two or more forces facilitates this process for market players. A concentration of two or more companies can create the opportunity to develop their business line by using a higher percentage of resources for innovation and new product creation. On the other hand, it may reflect an anticompetitive action if the effects of the concentration distort the competitive environment on the market. Increased market power as a result of the concentration may create or strengthen a dominant position. The dominant power can condition the market on which it operates, which affects both market players and the consumer. Establishing a dominant position reduces competitors' market power, contributes to creating barriers to entry, and may condition the final consumer's decision. This determines the need for a complex analysis of economic concentration cases in order to determine the possible effects of this operation.

The analysis of the economic concentration operations takes place on the basis of the notifications, which are mandatory in case of fulfillment of certain conditions stipulated by the competition law. Failure to comply with this obligation leads to tough sanctions. The amount of these sanctions, however, is determined by the complex analysis of each case in particular, where an important factor is the impact of the effects of the economic concentration on the competitive environment and on the final consumer. The beneficial effects on the economic environment resulting from a merger can serve as a mitigating factor in setting sanctions. Accordingly, the concentration that damages competitive environment, affecting the final consumer, is considered as an aggravating factor in setting sanctions.

2. Legal Frame

As described in the Competition Law (Article 20 (2)), an economic concentration takes place where the lasting change in control results from the merger of two or more previously independent undertakings or several parts of undertakings previously independent. Or the taking over by one or more persons, already controlling at least one company or one or more companies of direct or indirect control, over one or more companies or parts thereof, including the creation of a company in jointly fulfilling all the functions of an autonomous economic entity.

Notification of mergers, under competition law, must be made before the transaction is implemented. In order to carry out the transaction, the economic concentration must be declared compatible with the competitive environment. This provision in the law helps to manage the avoidance of market distortions[1].

A notification of the merger must inform the competition authorities of the particularities of the transaction by fully describing it as well as of the parties involved in the transaction and their positioning on the market.

The main condition for identifying the need for notification of the economic concentration operation is when the total cumulative turnover of the enterprises involved, registered in the year prior to the operation, exceeds 25,000,000 lei and there are at least two enterprises involved in the operation which have been carried out on the territory of the Republic Moldova, each with a total turnover exceeding 10 million lei in the year prior to the operation [2].

In particular, the criteria for assessing the effects of the transaction are:

- The ability of significant retain of the activity on the same market, on a upstream or downstream market or on a neighboring market closely related to the market;
- The possibility of eliminating competition for a significant part of the products analyzed.

Economic concentrations that may significantly impede effective competition in the market or in a significant part of it, in particular as a result of the creation or strengthening of a dominant position, will be declared incompatible with the competitive environment and unauthorized. In the case of mergers which do not impede effective competition on the market, they are declared compatible with the competitive environment and authorized. At the same time, in some cases, economic concentrations liable to raise significant barriers to competition may be authorized if the parties involved in the economic concentration demonstrate the cumulative fulfillment of the following conditions:

- The merger operation should contribute to increasing economic efficiency, improving the quality of production and distribution, technical progress or increasing export competitiveness;
- The favorable effects of the merger offset the adverse effects of competition restraint;
- Consumers benefit to a reasonable extent from the resulting advantages [2].

Criteria for establishing the compatibility of the merger with the competitive environment, described in the Competition Law, are:

- The need to maintain and develop competition on the relevant market, taking into account the structure of all the markets concerned by the concentration and the existing or potential competition from undertakings located in or outside the Republic of Moldova;
- The market position of the involved companies, their economic and financial strength;
- The alternatives available to suppliers and users, their access to markets and supply sources, as well as any legal or other barriers to entry;
- Demand and supply tendency for relevant products;
- The interests of intermediate and final consumers;
- The evolution of technical and economic progress.

Non-notification of the economic concentration, or its late application, provides for harsh sanctions in the form of fines or, in particularly serious cases, the termination of the transaction and the restoration of the competitive environment prior to its implementation.

The prescription period of law appliance is 5 years, and all the infringement cases, identified during this period, fall under the scope of competition law and are subject to analysis, with the sanctions set out in the legislation.

3. Infringement of the provisions of art. 22 of Competition Law, on the Republic of Moldova market

The market of the Republic of Moldova is very common in non-notified or late notification cases, often unintentionally. This is due to factors such as:

- The relatively new application of the Competition Law, having a period of only 10 years;
- Promoting competitive culture at an early stage;
- • Poor documentation of company specialists about the provisions of the competition law.

Non-notification or late notification of economic concentration operations is sanctioned by law. However, when issuing the decision fixing the amount of the fine, account is also taken of the factors and conditions in which the infringement was committed, as well as the cooperation of the companies sanctioned in order to remedy the breach [3].

3.1. Case studies

Below are described real cases of several companies that have achieved the economic concentration without submitting the notification to the Competition Authorities, in order to obtain the permission to complete the transaction.

Case I

A travel company X, operating as a tour operator, which forms and sells tourist packages, took over another company Y, which achieve the same type of activity. Company Y was taken over with the customer base and contracts.

Prior to the merger, Company X had a 42% market share and Company Y – 18%. Thus, as a result of the economic concentration, the companies of the newly created group of companies have gained a dominant position on the market for the development of tourist packages bound for A. This raises significant obstacles to effective competition in that market. Given the dominant position on the market, these companies have created barriers to market entry for other operators due to difficulties in providing air travel to form tourist packages destined for A. At the same time, the consumers suffered due to the considerable price increase for travel to that direction.

This operation is a horizontal merger incompatible with the competitive environment. For the serious violation of the economic concentration incompatible with the competitive environment, and without notification, the Competition Council's Decision was to impose a fine of about 21 million lei (turnover based amount), and require the undertakings involved to dissolve the concentration so as to restore the situation existing prior to the implementation of the concentration.

The effect of concentrating on the competitive environment in the relevant market of the described case, reflects two very important criteria for distorting normal competition. This concentration has strengthened X's dominant market power, resulting in the creation of market entry barriers and influencing the final consumer's decision [4].

Case II

Another case of strengthening the dominant position is the case of a company that sells French cosmetics and perfumery. This company, O, took over M, the only competitor on this market. The takeover operation was not notified to analyze its compatibility with the competitive market environment. Subsequently, company M was liquidated, thus O company created a monopoly on the wholesale market of French perfumery products on the territory of the Republic of Moldova.

This case presents a serious infringement which distorts the competitive environment on the market, and thus affecting the final consumer [4].

Case III

A light clothing manufacturing company for women and children H has taken over another outerwear manufacturing company for women and children T. Both companies have been operating under the LOHN manufacturing process. Company T was in a state of insolvency, having many payroll and maintenance duties. Company H paid the company's internal and external debts, keeping employees at work, and keeping it active on the market. The non-notification of this transaction for the compatibility analysis with the normal competitive environment constituted a breach of the competition law provisions regarding the conditions for notification of takeover transactions. However, in the course of the investigation, when the Competition Authority notified the infringement, Company H has shown receptivity and openness to co-operation by presenting the late notification. The situation created in this case demonstrates that in this case, the company unknowingly violated the law. This does not exempt the company from imposing the fine for the infringement. However, the peculiarities of this transaction demonstrate the benefit of the final consumer as a result of the economic concentration. This allows the Competition Authorities to deviate from the provisions of the legislation, and not to charge a fine [4].

Case IV

A Company that has a trademark for unique coffee production I took control of a coffee shop F. Particular for this case, is a collaboration agreement, a franchise contract between these two companies, agreed one year before the takeover transaction. In fact, these companies already had a business relationship before taking over, and did not alter the market situation after the takeover. The non-notification of this operation led the Competition Authorities to initiate an investigation. Company I, following the notification by the Competition Authorities, submitted a late-notification of the takeover operation, being open to collaboration and providing further information on the case. In this case, as in the previous one, the infringement occurred unknowingly. Furthermore, F's activity did not change as a result of the transaction because it already operates under the trade name of Company I under the franchise agreement. So this operation did not create negative effects for the competitive environment [4].

3.2. Aspects of worsening and facilitating sanctions

Based on cases presented in p. 3.1., it can be made a classification of determinants, aggravating and facilitating the enforcement of sanctions based on violation of art. 22 of Competition Law.

Aggravating points:

- Refusal to cooperate with competition authorities due to obtain information on the investigated case;
- Creating adverse effects on the competitive environment by eliminating competition on the market;
- Creating adverse effects on the competitive environment by creating an opportunity for unjustified price increase;

Attenuating points:

- Collaborating with competition authorities to obtain information on the case under investigation;
- Tracking the benefit of the economic environment as a result of transactions;
- Tracking the benefit of the final consumer as a result of transactions;

4. Conclusions

Promoting competitive culture in the economic environment is essential to preventing violations. Due to lack of information, often they are made violations resulting in sanctions. Late notification or non-notification of an economic concentration may be exempted from sanctions in

certain circumstances. This factor can be mitigated in the case of open cooperation with competition authorities and depending on the effects of the merger. The rewarding of the final consumer's benefits as a result of an economic concentration may lead to a decision to derogate from the sanction.

However, economic concentration, which significantly distorts the competitive environment, with the aggravating factors such as eliminating competitors in the market or strengthening the dominant position, with the power to restrict competition, is strictly sanctioned and restoration of the pre-concentration competitive environment is required.

5. References

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