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MERGER CONTROL IN DYNAMIC MARKETS – Contribution from Romania

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More documentation related to this discussion can be found at: oe.mcdym.

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Merger Control in Dynamic Markets

- Contribution from Romania –

1. As markets in Romania tend to concentrate more and more, many of RCC merger cases, although mainly horizontal, contain a vertical component. RCC always looks for any possible vertical effects in all merger notifications.

2. Technology, media and telecom do pose particular challenges. In technology, the R&D tends to be more and more important to any merger assessment, due to the rapid progress and the increased value of new ideas.

3. Romanian competition law does not provide for a maximum level for defining the geographical market. Nevertheless, the great majority of cases involve a market definition that is national or narrower in scope. There are also markets which are left open, due to a lack of competition concerns on the narrowest definition. RCC is continually assessing the need to define a broader scope of the market and takes in consideration all the relevant factors and relevant case studies. The online market is still restricted at national level due to language, cost of transportation, access to internet, paying methods etc., however rapid technological progress could change this situation in the future.

4. Recently, RCC dealt with a complex merger case, where both horizontal and vertical effects were assessed. The buyer company, eMAG was the biggest online seller and also marketplace in Romania named, and the target company, PC Garage, was one of its competitors, especially on IT and software products. The buyer was also vertically integrated with one of the most important distributor of IT and electronics - NOD.

5. The analysis raised competition concerns on the online sale of IT products. RCC cleared the merger subject to remedies (Phase 1). The remedies accepted in this case addressed both the horizontal and the vertical components. Also, the proposed remedies were both structural and behavioral, given the complex relation between the parties involved.

6. Considering that the basic aim of commitments is to ensure competitive market structures, behavioral commitments are more difficult to be considered acceptable, while structural remedies, such as commitments to sell a subsidiary, are generally preferable, also because no medium or long term control measures are needed.

7. However, it cannot be excluded that behavioral commitments could prevent the creation or consolidation of a dominant position, but this would need to be assessed on a case by case basis.

8. In case of divestiture commitments, the divested activities must consist of a viable business which, if operated by a suitable purchaser, can compete effectively and on a lasting basis with the newly created entity, and the purchaser must be suitable for the intended purpose (independent from the parties, with the necessary financial resources, confirmed abilities and incentive to maintain and develop the divested business as a competitive market force).

9. Furthermore, the acquisition of the business by the proposed purchaser must not be likely to create new competition problems or to pose a risk of delaying the implementation of the commitments. Other remedies may include: termination of certain existing exclusive supply and distribution agreements, commitments to ensure access to essential

infrastructures or technologies they control (including by way of intellectual property rights), or assignment or license of technologies. The parties could also propose a package of remedies, combining various measures, due to the particularities of the incompatibility situations in certain sectors.

10. So, in the *eMAG/PC Garage* case, RCC considered a set of behavioral & structural remedies proposed by the purchaser. To address the concerns on the horizontal level, eMAG should divest 4 online stores, propriety of PC Garage. This sale would ensure that the market share of eMAG will not exceed a warning level after the merger were to be implemented (mainly on IT products). Also, there were a set of behavioral remedies. eMAG (through NOD) should make sure that the divested stores have access to stocks of the same types of products as in the past, that would ensure that the activity of the divested stores would continue from those stocks for a minimum of 3 to 12 months. Also, for a minimum of 3 months, eMAG should supply products to the divested stores in non-discriminatory fashion. This bundle of remedies should ensure that the concerns regarding the vertical integration of eMAG with PC Garage (i.e. the strengthening of the power of NOD on the upstream market) is addressed.

11. In every merger analysis, RCC takes into account the market structure, the product specificity, and all the factors that may influence the functioning of a relevant market or market segment. There is no universal type of remedies to address competition concerns, and RCC always supervises the markets where remedies were accepted. For behavioral remedies, the merger decision sets specific monitoring reports on a certain timeline. Depending on specifics of each case, those reports may assess the effectiveness of those remedies.

12. In practice, RCC uses the approach taken in the EC guidelines when confronted with a case where the aggregate market shares come close to 40 per cent and looks at reduction of costs and prices, increase in innovation or improvement of supply when assessing efficiencies. A large importance is being granted to efficiencies that are passed on to the consumer.

13. In the above mentioned case, on the vertical aspect, RCC considered mainly the possible input foreclosure, fully addressed by the behavioral set of remedies. While the structural remedies consisted in divestiture of 4 online shops, the behavioral remedies were addressing the concern that the upstream provider (NOD) would discriminate those on-line shops after the divestiture.

14. The potential sources of efficiency gains from vertical mergers result from a variety of mechanisms and occur in a broad range of situations. As such, the potential for pro-competitive motivations for vertical integration is very large.

15. In the *eMAG/ PC Garage* case, RCC found that, as a result of the merger, eMAG was able to provide better services to the target’s clients. That is why RCC considered that a remedy focused on the continuity of supply to the divested stores was able to smoothen the transition and give the divested stores a better chance to survive.

16. The importance of economic analysis in the application of competition rules, especially in mergers, has increased over the last few years. Econometric techniques may help competition agencies to assess merger cases quickly and guide them towards better decision making when faced with the increasing complexity of markets. Agencies employ a lot of techniques, from very basic to sophisticated ones. Today it is widely accepted that the use of economics has improved the decisions of competition authorities when it is appropriate.

17. RCC has a Chief Economist Unit, which fully cooperates with the case team in complex mergers cases. RCC used GUPPI and UPP tests most frequently in the complex merger cases. But also, the economic impact of a merger is determined following the dynamic of the market (RCC asks for data from 3 years before the merger). When the market shares post-merger are higher, RCC looks on future developments of the market (opening/closing stores, exits etc). An important element is the use of economic forecasts, based on the historical data collected and other elements (such as area buyer power, salaries etc).

18. The HHI Test is relevant in cases of horizontal mergers in order to evaluate the potential effects of a merger on market concentration. The HHI Test gives a "before" and "after" snapshot of the competitive landscape on the affected markets.

19. RCC's Merger Regulation does not set thresholds for the change in HHI in order to determine whether a horizontal merger has the potential to generate market power and reduce competition. So, in its decisions, RCC refers directly to the HHI thresholds applied by the European Commission and detailed in the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings.

20. In ex-ante analysis, economic researchers try to evaluate possible anticompetitive effects of a proposed merger either by creating or strengthening a dominant position in a relevant market or by assessing the significant lessening of competition by unilateral or coordinated effects.

21. The quantitative analysis of proposed mergers provides crucial information about structural demand characteristics (i.e. substitutability or complementarily of products, elasticity of demand etc). Assessing whether the products of the merging firms are close demand substitutes can be critical to the application of the localized competition theory of unilateral competitive effects of mergers among sellers of differentiated products.

22. Accordingly, econometric estimates of demand elasticities are typically much more informative than descriptive economic facts (i.e. market shares, barriers to entry, cost structure etc) in helping to make inferences about whether such mergers will likely enhance the significant market power.

23. For relevant market definitions, RCC uses the re-formulated Significant Impediment to Effective Competition Test (SIEC Test). According to the substantive SIEC Test, an economic concentration will be cleared as being compatible with the normal competitive environment if it does not restrict effective competition. This translates into the envisaged operation not entailing risks of creating or consolidating a dominant position on the Romanian market or on a substantial part thereof.

24. Supplementary to the traditional test, RCC takes into careful consideration several other aspects directly linked to the relevant market(s): market structure; actual and potential competition; alternatives available to suppliers and users; access to supply sources or markets; legal and other regulatory barriers to market entry; supply and demand trends for the relevant goods or services etc.

25. The remedies RCC accepts are always tailored according to the specificities of a sector or industry under analysis. The most challenging issue is to anticipate the real effect of a set of remedies. Once implemented, it's difficult to make any changes at all.

26. That being said, RCC tends to accept those specific remedies which will address the narrowest affected segment of a market, so the final consumers would benefit of all efficiencies of a vertical merger.

27. There is no “recipe” for what remedies would be acceptable to RCC in a particular merger case. The type of commitments (behavioral and/or structural) will be determined on a case-by-case basis, because each transaction has its particularities that are shaped by the specific sector or industry, goods and services involved in the transaction.