

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Vertical mergers in the technology, media and telecom sector – Note by Romania****7 June 2019**

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More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/vertical-mergers-in-the-technology-media-and-telecom-sector.htm>

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1. Romanian Competition Council's legislation is fully harmonized with the European Competition Law, The Merger Regulation No. 139/2004, and Commission Guidelines: non-horizontal and horizontal guidelines, Notices on Relevant Market, Remedies and Ancillary restraints. As a result, RCC has the complete set of legislative tools in order to review vertical mergers, and also to consider all vertical effects in the assessment of a merger.
2. As most of the markets in Romania tend to concentrate more and more, many of our merger cases, although mainly horizontal, contain a vertical component. RCC always looks for any possible vertical effects in all merger notifications.
3. In assessing the vertical relations of merging parties, our Merger Regulation sets a limit of 30% combined market share. Anything above this threshold is considered to affect a certain market. In cases where this threshold is not met, RCC can apply a simplified procedure, which significantly decrease the time of waiting for notifying parties and also the depth of our analysis.
4. Recently, RCC dealt with a complex case, where both horizontal and vertical effects were assessed. The buyer was the biggest online seller and also marketplace in Romania named eMAG, and the target was one of its competitors, especially on IT and software products, named PC GARAGE. 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 a Phase I remedies decision. The remedies accepted in this case addressed both the horizontal and the vertical components. 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 a risk of delay of the implementation of the commitments. Other remedies 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 efficient enough a set of behavioral & structural remedies proposed by the purchaser. To address the concerns on the horizontal level, eMAG would divest 4 online stores (that were the propriety of PC GARAGE). That would ensure that the market share of eMAG will not exceed a warning level after the merger (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 will ensure that the activity of the divested stores will 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 will 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) will be addressed.

11. As a general rule, the assessment is on a case by case basis. In every 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. When we're talking about behavioral remedies, there are specific monitoring reports on a timeline set in the decision. Depending on specifics of each case, those reports may partially assess the effectiveness of those remedies.

12. Until now, the most important ex-post investigation on a merger case (without remedies) was in retail sector, a horizontal merger between Lidl and another supermarket chain. Also, all the mergers that are subject to remedies are monitored for up to 5 years.

13. 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.

14. 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.

15. Another problematic sector has always been Pharmaceutical markets. Also a highly regulated sector, with huge revenues and global undertakings, it has a sometimes very high impact on consumers.

16. Romanian Competition authority's approach is to identify forms of behavior that are anticompetitive from the perspective of economic theory and evidence that these behaviors foreclose competitors in practice.

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

18. 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.

19. In the eMAG case, RCC found that, as a result of the merger, eMAG, the purchaser, 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.

20. 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.

21. 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.

22. RCC's Merger Regulation does not set thresholds for the change in the 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.

23. 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.

24. The quantitative analysis of proposed mergers provides crucial information about structural demand characteristics (i.e. substitutability or complementarity of products, elasticity of demand etc). By 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.

25. 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 make inferences about whether such mergers will likely enhance the significant market power.

26. Similarly to the European Commission, RCC employs the so-called "classic" economic appraisal techniques as substantive tests both when it defines relevant markets and when it makes measurements of the concentration levels on affected markets.

27. 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.

28. 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.

29. Also, RCC has an Economic Department, which fully cooperates with the case team in complex mergers cases. RCC used GUPPI and UPP tests most frequently in our merger cases. But also, the economic impact of a merger is determined following the dynamic of the market (we ask for data from 3 years before the merger). Also, when the market shares post-merger are higher, we look 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).

30. 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.

31. 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.

32. 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.