Romania

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Merger control, as well as the other main areas of competition law, is governed primarily by the Competition Law 21/1996 (the Competition Law), as republished and amended. The provisions of the Competition Law are further completed by the provisions of the Regulation on Economic Concentrations (the Merger Regulation) approved by RCC Order No. 431/2017, as well as the provisions of the Guidelines on the concepts of concentration, concerned undertaking, full-function joint ventures and calculation of turnover, approved by RCC Order No. 386/2010 (the Guidelines). Ancillary restraints are covered by the Guidelines regarding ancillary restraints approved by RCC Order No. 387/2010 (the Ancillary Restraints Guidelines). Remedies are covered by the Guidelines on remedies in the merger sector, approved by RCC Order No. 688/2010 and the relevant market by the Guidelines on the definition of the relevant market approved by RCC Order No. 388/2010.

The authority in charge of enforcing the merger control rules in Romania is the Romanian Competition Council (RCC). Furthermore, the approval of the Superior Council for National Defence (SCND) is required in the case of mergers that take place in sectors that may impact national security. The current FDI screening procedure is inbuilt in merger control procedure, with the RCC acting as the interface between the control aquirer that notifies the investment and the SCND. A reform of the current FDI screening regime is pending and it is expected that a new stand-alone procedure shall be enforced for non-EU investors.

Scope of legislation

2 | What kinds of mergers are caught?

A merger is defined, for the purposes of the Competition Law, as being a transaction that results in a change of control over an undertaking or undertakings, or parts of an undertaking or undertakings on a lasting basis.

As such, there are two types of mergers:

- a merger between previously independent undertakings or parts of undertakings; and
- the acquisition of control over one or more undertakings or parts of one or more undertakings by one or more natural persons already controlling at least one undertaking or by one or more undertakings.

3 | What types of joint ventures are caught?

The creation of a joint venture may amount to a merger, provided that the joint venture is a full-function joint venture (ie, an undertaking that carries out its activity on a lasting basis and that performs all functions of an autonomous economic entity).

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Control is defined by article 9(6) of the Competition Law as the possibility of exercising decisive influence on an undertaking. Control may arise on the basis of rights, contracts or any other elements that, either separately or taken together, and taking into account the legal or factual considerations involved, allow a party to exercise a decisive influence over the behaviour of an undertaking, in particular through:

- ownership or rights to use over all or part of the assets of an undertaking; or
- rights or contracts conferring a decisive influence over the structure of an undertaking, the voting process or the decision-making process of the management bodies of an undertaking.

The acquisition of a minority shareholding may amount to a notifiable concentration if – and only if – it is considered to amount to an acquisition of control, in particular through the existence of veto rights concerning certain strategic decisions of the respective undertaking. There are no plans made public to review legislation regarding review transactions that do not involve control acquisition.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The merger control provisions are applicable to concentrations where the undertakings concerned generated combined worldwide turnover exceeding the equivalent of €10 million in the previous financial year and each of at least two of the undertakings concerned achieved Romanian turnover exceeding the equivalent of €4 million in the previous financial year. There is no intention publicly anounced to set up alternative thresholds based on the transaction value.

Transactions falling below the above thresholds may only be scrutinised on national security grounds, based on the FDI screening mechanism.

6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing is mandatory and there are no exceptions.

7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign transactions are subject to merger control by the RCC, if the respective parties meet the turnover thresholds test. The lack of local effect, while not removing the requirement for notification,

may lead to the concentration being assessed under the simplified procedure.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Acquisition of control on undertakings active in a wide area of sectors that are considered sensitive trigger the review on national security grounds by the National Defence Superior Council, irrespective of whether the merger control requirements are met. The FDI screening regime is currently undergoing a reform, which is in line with Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the European Union. Specific notification and standstill obligations shall be applicable to non-EU investors (draft law as at 8 May 2021).

Also, concentrations in certain sectors, such as the financial sector, media sector, energy sector and telecommunications sector, may be subject to a notification obligation to the sector regulator.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Economic concentrations that meet the turnover thresholds mentioned above must be notified to the Romanian Competition Council (RCC). The notification may be submitted following the entry into a binding agreement concerning the transaction (for example, share or asset purchase agreement, but even a letter of intent, memorandum of understanding, etc, outlining the main points of the transaction, such as the parties, the object or the price) or, in case of an acquisition of control over traded companies, following the announcement of the public bid or the acquisition of a controlling interest.

There is no specific deadline for filing, as the Competition Law states that it must be made before implementing the transaction and, consequently, there are no sanctions for late filing.

10 Which parties are responsible for filing and are filing fees required?

The notification must be filed by the party or parties acquiring control. Should the transaction involve a merger or the creation of a full-function joint venture, the parties will file the notification.

An initial filing fee of approximately €1,000 is payable prior to the submission of the notification, and proof of payment must be submitted to the RCC together with the notification. An additional fee between €10,000 and €25,000, for Phase I or between €25,001 and €50,000 for Phase II, depending on the turnover of the target, is payable within 30 days after the RCC issues a clearance decision.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

An economic concentration that meets the thresholds outlined above cannot be implemented prior to clearance (standstill obligation). The RCC may, in particularly justified cases, upon request of the parties, grant a derogation from standstill obligation.

Pre-notification

According to the Merger Regulation, parties are advised to initiate pre-notification contacts with the RCC at least two weeks prior to the submission of the notification. While not mandatory, such informal discussions are useful to clarify certain aspects of the concentration with a view to expediting the process.

Completeness of filing

Within seven days of the filing, the RCC will inform the parties whether the notification meets the formal requirements.

Effective date

The notification shall become effective on the date of registration at the RCC. Where the notification is incomplete in any material respect, the RCC has 20 days from filing to request the parties to complete the notification. The deadline for submitting information is up to 15 days as of receiving the request. There may be several requests for information before a notification is effective.

The RCC can declare a notification effective either in an express manner – official letter – or tacitly, by not requesting additional information within the 20-day period. In practice, the effective date is always confirmed in writing.

Phase I proceedings

The RCC has 45 days from the effective date to either:

- issue a letter if the concentration notified does not fall within the scope of the law;
- issue a clearance decision authorising the merger if the transaction raises no competitive concerns or if those concerns have been removed through the commitments put forth by the parties; or
- launch a Phase II investigation if the transaction raises competitive concerns and those concerns have not been removed through the commitments put forth by the parties.

In accordance with the past reports of the RCC, the average duration of a Phase I merger notification, from filing to clearance, was approximately two months.

Phase II proceedings

Following the launch of a Phase II investigation, the RCC has five months from the effective date to:

- issue an unconditional authorisation decision;
- issue a conditional authorisation decision, subject to commitments; or
- issue a negative decision, prohibiting the merger.

Both the 45-day period and the five-month period mentioned above are mandatory and cannot be extended. Should the RCC fail to issue a decision within the said deadlines, the transaction will be deemed tacitly approved and closing is allowed.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

As a general rule, breaching the standstill obligation may result in a fine ranging from 0.5 to 10 per cent of the total turnover obtained in the previous financial year or, if the sanctioned company did not generate turnover in the previous year, of the last turnover registered by the company. If the offending company is a non-resident entity, the turnover on the basis of which the fines are assessed is replaced with the sum of the following:

- turnover achieved by each of the companies registered in Romania and controlled by the infringing party;
- turnover derived in Romania by each of the non-resident companies controlled by the infringing party; and

- any turnover obtained in Romania by the infringing party and accounted for in its financial statements.

Newly established companies that have yet to register turnover may be sanctioned with fines between approximately €3,100 and €515,000. In addition to the fines, the RCC may order, following the examination of the transaction, any interim measures aimed at restoring and maintaining the conditions of effective competition in the relevant market.

In practice, the RCC has a rich decisional practice of sanctioning companies for failure to comply with the standstill obligation.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions for implementing the merger before receiving clearance from the RCC are also applicable in foreign-to-foreign mergers.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

While the Competition Law does not expressly provide for carveout solutions, there are two potential solutions to the problem outlined above, as follows.

The RCC may, in particularly justified cases, upon request of the parties, permit certain limited actions relating to the implementation of the notified concentration before the expiry of the applicable waiting period. Whenever such occasional requests arise, the RCC will assess them on the merits and, provided that the requests are justified, prior implementation will be granted; as such, in 2015, in relation to a merger in the banking sector, the RCC allowed the acquirer to implement the concentration prior to obtaining clearance and to offer the retail customers of the target, which had entered into mortgage agreements based on loans in Swiss francs, certain customised solutions.

Otherwise, the Competition Law prohibits the implementation of the merger, rather than the corporate closing of the merger. Prohibited implementation measures of the buyer include, inter alia, the following:

- exercising voting rights in respect of the strategic business decisions of the target;
- changing the scope of the business or the commercial name of the target undertaking;
- causing the market entry or exit of the target;
- restructuring, dissolution or spin-off of the target;
- selling assets of the target;
- laying off of employees of the target;
- initiating the conclusion or termination of long-term or other important agreements between the target undertaking and third parties; and
- listing of the target undertaking on a stock exchange market.

In conclusion, it is conceivable that the acquirer could close the transaction prior to receiving approval from the RCC, provided that it refrains from undertaking any implementation measures until clearance is received. As this measure is not tested in practice, prior notification of the RCC would be advisable.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The merger filing in connection to a public bid must be submitted following the announcement of the public bid. Furthermore, the public takeover bid may take place and the securities may be acquired provided that the acquirer does not exercise its voting rights before the clearance decision or before it receives a special derogation from the RCC.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The standard notification form and simplified notification form are provided as an Annex to the Merger Regulation and are similar to the forms applied by the European Commission (EC).

Inter alia, the following needs to be provided:

- information on the parties to the concentration (eg, names, registered seats, excerpts from the commercial register, nature of the business, ownership and control; description of the undertakings' business; annual financial reports for the preceding business year);
- power of attorney;
- description of the intended concentration;
- certified copies or originals of all documents on the basis of which the concentration takes place;
- definition of the relevant markets;
- market shares held by the undertakings concerned in the relevant markets;
- information on main competitors and their market shares in the relevant markets;
- information regarding the top five suppliers and customers of the undertakings concerned;
- description of the distribution and retail networks in the relevant markets, relevance of research and development;
- economic rationale of the concentration;
- description of the benefits expected to result from the concentration for consumers; and
- (if available) copies of analyses, reports or studies related to the relevant markets.

Supplying inaccurate, incomplete or misleading information in the filing process, intentionally or not, may result in a fine ranging from 0.1 to 1 per cent of the total turnover obtained in the previous financial year.

The Competition Law also envisages the possibility of submitting a simplified notification in certain cases that usually do not give rise to competition law concerns, as follows:

- when parties acquire joint control over an undertaking that does not carry out any business in Romania or has only an insignificant business in Romania (ie, has a turnover below the €4 million threshold);
- transactions where there is no horizontal overlap or where parties are active on non-related markets;
- transactions where the horizontal overlap is limited (aggregate market share of less than 20 per cent) and neither party operating on an upstream or downstream market to another party has a market share exceeding 30 per cent; or
- when one of the parties holding joint control over an undertaking acquires sole control over the respective undertaking.

The RCC may, in specific circumstances, move from a simplified notification to a full-form notification.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

As a matter of principle, the vast majority of the concentrations are cleared in Phase I.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Pre-notification

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SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test applied by the Romanian Competition Council (RCC) in merger control proceedings is the same test applied by the EC (ie, whether a concentration leads to a significant impediment to effective competition on the Romanian market or a substantial part thereof, in particular through the creation or strengthening of a dominant position). The failing firm defence may be invoked in front of the RCC, but we are not aware of any cases where it has been successfully invoked.

20 | Is there a special substantive test for joint ventures?

There is no special test for joint ventures. Having said that, if the RCC finds that the effect or object of a full-function joint venture is not the creation of an autonomous economic entity performing on a lasting basis, but the coordination of the competitive behaviour of undertakings that remain independent, such coordination will be assessed in the context of anticompetitive agreements.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The RCC will evaluate all mergers to determine whether or not they are compatible with a normal competitive environment. Within this evaluation, the RCC will take into account the following:

- the need to protect, maintain and develop effective competition on the relevant market;
- the market position of the parties and their competitors, both actual and potential, as well as their economic and financial power;
- alternatives available to suppliers and users and their access to supply sources or markets;
- any barriers, legal or otherwise, to entry into the market;
- the development of offer and demand for the relevant goods and services;
- the interests of the intermediary customers and consumers; and
- technical and economic progress, insofar as it benefits the consumer and is not an impediment to competition.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

While the main factor taken into account in the assessment of a merger is the effect on competition of the said merger, non-competition related issues may also be taken into account, for example, when the implementing measures prior to clearance are mainly for the benefit of consumers.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

While economic efficiencies are not expressly provided for in the Merger Regulation, it is arguable that one of the theories of harm (technical and economic progress, insofar as it benefits the consumer and is not an impediment to competition) refers to efficiencies. In practice, the 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 it looks at reduction of costs and prices, increase in innovation or improvement of supply when assessing efficiencies.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Other than the Romanian Competition Council (RCC), only the Superior Council for National Defence can prohibit a merger based on national security concerns.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

If, during their analysis, the RCC representatives identify any competition concerns raised by the transaction, they may bring up the question of commitments. The parties are free to offer both behavioural and structural remedies, with structural remedies being preferred. According to the applicable regulations, the commitments proposed have to be sufficient to remove the competition concerns and contain sufficient information and data to allow an evaluation of their effectiveness (market test) to be carried out by the RCC. The parties are free to initiate preliminary contacts with the RCC before formally transmitting their proposed commitments to better understand the competition concerns raised by the transaction as well as to discuss the envisaged commitments.

Possible remedies encompass one or more of the following:

- divestments;
- termination or amendment of existing exclusive agreements;
- granting access to necessary infrastructure, networks or key technologies by way of licence agreements or otherwise; and
- behavioural remedies, such as price-reporting obligations and mechanisms designed to prevent customer discrimination.

The RCC, for example, imposed structural remedies in a case concerning the acquisition of a retail chain by a competitor, obliging the acquirer to divest two stores operated in a certain geographical area. In a separate transaction concerning the same market, the RCC imposed behavioural remedies and required the acquirer to refrain from increasing prices charged in a particular store above the prices charged in other stores, which were located in a more competitive geographical market.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Remedy proposals may be submitted in both phases of a merger control proceeding.

In Phase I, remedies should be submitted before the notification becomes effective or, at the latest, within two weeks of the effective date.

In Phase II, remedies should be summited within 30 days after the opening of the Phase II proceedings. In exceptional circumstances, the parties may request an extension up to 15 days to find an acceptable solution.

Should the remedies be accepted, the RCC will issue a conditional clearance decision expressly stating the commitments and the time frame for implementation.

Failure to properly implement the commitments may result in the revocation of the decision by which to restore the situation prior to the implementation of the merger or the levying of a fine between 0.5 and 10 per cent of the total turnover.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Foreign-to-foreign transactions, which do not have effects on the Romanian market but become subject to notification given the parties' turnover, should not require remedies.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

As a matter of principle, in accordance with the Merger Regulation, a clearance decision covers the related ancillary restraints. Having said that, the parties will carry out an individual assessment as to what amounts to an ancillary restraint, taking into account the Ancillary Restraint Guidelines.

In practice, the RCC will usually inform the parties as to the existence of any restrictions that, prima facie, do not qualify as ancillary restraints.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

As a matter of practice, the Romanian Competition Council (RCC) will publish a short press release on its website stating that they are currently analysing or investigating a merger and anyone interested is free to submit observations. In particular, in cases that raise competition concerns, the RCC may actively request the opinion of the competitors, clients, suppliers or other relevant authorities, such as the sector regulators, regarding the merger.

Furthermore, should the parties propose commitments and those are accepted by the RCC, these are published on the RCC website and all interested parties can submit observations within a set time frame.

Plus, competitors or undertaking affected by a merger clearance decision may challenge such decision before the administrative courts.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The RCC and its representatives are under an obligation not to disclose business secrets, namely, information that is defined as a business secret by law or by the undertakings concerned. Business secrets, inter alia, encompass any business information that has actual or potential economic and market value, and the disclosure of which could seriously harm the interests of undertakings concerned.

To ensure the effective protection of commercial information, it is advisable to mark such information as confidential in all documents sent to the RCC. The RCC will publish a non-confidential version of the clearance decision on its website. Also, other documents published by the RCC (ie, press releases, proposals for commitments) do not contain any business secrets or other confidential information.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The RCC is a member of the International Competition Network and the European Competition Network and can therefore request documents and information from other national authorities regarding merger cases. In addition, the RCC may provide confidential information

to other competition authorities in merger cases that are notifiable in more member states based on the Waiver Form, annex to the Merger Regulation.

The RCC, as a national competition authority of an EU member state, has all the rights and obligations pursuant to the Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation). The RCC has an active contribution and cooperation role within the European Competition Network, in the form of informal and formal exchange of information between national competition authorities depending on the merger cases at issue.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

All Romanian Competition Council (RCC) decisions, including those in merger cases, can be challenged in front of the Bucharest Court of Appeals within 30 days of being served. The judgment of the Bucharest Court of Appeal can be further challenged by means of a final appeal before the High Court of Cassation and Justice.

To the best of our knowledge, there have been no recent cases challenging a merger decision of the RCC.

Time frame

33 | What is the usual time frame for appeal or judicial review?

The actual duration of the judicial proceedings can vary significantly depending on the complexity of the case and the procedural steps employed (ie, naming an expert, requesting the intervention of the EC as an amicus curiae and requesting that a preliminary ruling procedure in front of the European Court of Justice is initiated). Usually, the appeal proceedings in front of the Bucharest Court of Appeals last between three and nine months from the first hearing, while the proceedings before the High Court of Cassation and Justice last between three and six months from the first hearing. However, because of the high number of cases pending in front of the High Court of Cassation and Justice, the first hearing may take place only 12 to 18 months after filing the appeal.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The number of merger cases in Romania has seen a steady increase, from around 45 cases per year between 2011 and 2015 to 62 cases in 2016, 60 cases in 2017 and 57 cases in 2018, as a direct result of the encouraging economic growth experienced by Romania. Similar to other years, the vast majority of the cases were cleared unconditionally in Phase I, with a few cases being cleared subject to commitments. There has been a significant drop in standard procedure clearances of approximately 30 per cent compared to 2012; conversely, simplified procedure clearances have seen an increase of roughly 35 per cent compared to 2012. In 2019, the Romanian Competition Council (RCC) cleared 75 mergers, only one of which was cleared subject to conditions and obligations.

Reform proposals

35 | Are there current proposals to change the legislation?

There is no publicly discussed initiative to amend the merger regulation rules. In the area of FDI screening, the new law is expected to be adopted in 2021.

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UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In 2020, the RCC has cleared 54 mergers, out of which three were cleared subject to conditions. One merger case involved the acquisition by the dominant player on the fixed electronic communications market of a regional competitor (*RCS&RDS/Akta*), which was cleared with behavioural commitments related to the future pricing and content policy of the acquirer.

A second case cleared with behavioural remedies related to a cash management joint venture set up by three commercial banks (BRD – Groupe Société Générale SA, Raiffeisen Bank SA și Banca Comercială Română). The parties committed to specific internal procedures preventing sensitive information exchanges and to maintain a non-discriminatory and fair pricing policy towards third parties. This case is in line with the increasing trend in the RCC policy to address problematic merger cases with behavioural commitments, in recognition of the fact that specific market circumstances might dictate that structural remedies are not always a choice.

In a third case, the RCC proposed structural remedies in a merger involving retail pharmacies (*Help Net Pharma/Remedia*). Given the increasing consolidation trend of large retail pharmacy chains, the RCC had proposed, at the end of the year, specific guidance aimed at narrowing down the geographical size of the market in the retail pharmaceutical sector in the urban areas, based on market surveys indicating specific circumstances of the Romanian market. This is likely to impact the competitive assessment of future mergers in this sector and thus the increased use of divestment remedies can be expected.

Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Romania	
Voluntary or mandatory system	The filing of a notification with the RCC is mandatory, provided the thresholds are met.
Notification trigger/ filing deadline	The notification has to be submitted to the RCC prior to the implementation of the concentration.
Clearance deadlines (Stage 1/Stage 2)	Phase I – 45 days as of the effective date. Phase II – five months as of the effective date.
Substantive test for clearance	The RCC assesses whether the intended concentration would significantly impede effective competition in the market, in particular as a result of the creation or strengthening of a dominant position.
Penalties	In case a merger is implemented before a clearance decision is received, the RCC may impose a fine of between 0.5 and 10 per cent of the undertaking's total annual turnover in the preceding financial year. In addition, the RCC may order measures aimed at restoring efficient competition in the relevant market.