



# IMPLEMENTATION OF COMPETITION LAW. ECONOMIC CONCENTRATIONS - CASE STUDIES IN THE PRACTICE OF THE REPUBLIC OF MOLDOVA

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## **Abstract**

*Maintaining a normal competitive environment is the basis of competition policy. The process of identification, analysis and sanctioning of law breaches is very complex. During this process, there are identified the particularities of parties involved and the global situation of the relevant market. Impact factors for the analysis of infringement cases are the effects they produce on the competitive environment as well as on the final consumer. At the same time, the legislation provides for the anticipation of violations through rules for the coordination of actions that could raise the concerns of the competition authorities, before their implementation. Usually, the frequently encountered infringements of competition law regulations are those relating to mergers. This easy way to increase market power is seen as a method of developing competitiveness by companies. Moreover, achieve performance on market is the main objective of companies in business. In this context, often, the economic concentrations made by economical agents infringe the law due to the danger of their effects on the competitive environment, but also because they are not coordinated with the competition authorities before their implementation. The paper presents an analysis of the application of the provisions of the competition law particular to the economic concentrations, their analysis, as well as the impact of the effects of the economic concentrations on the facilitation or worsening of the sanctions. The case study presents real cases on the Moldovan market.*

**Keywords:** merger, dominant position, remedies, merger effects, merger notification

## **1 INTRODUCTION**

Subjectivity manifested by market players in their tendency of economic development may lead to restriction of the freedom of action of other market

participants. This is evidenced by the growth methods chosen by some economic agents. Economic concentrations, used as a tool for the development of economic activity, are of a dual nature. On the one hand, the increase in market power contributes to achieving the economic objective of the parties involved and can lead to the development of the innovation sphere by the possibility of allocating an additional budget for it.

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In addition, on the other hand, it can create effects on other market players as well as on the final consumer by distorting the normal competitive environment.

The dimension of the impact of the concentration, or lack thereof on the relevant market is identified by a comprehensive analysis by competition authorities under the Competition Law no. 183 of 11.07.2012 (hereinafter "Law" or "Competition Law"). Determining the gravity of the Law violations in achieving an economic concentration depends on the particularities of each case. The decisive factor in determining the gravity is the size of its effect on the competitive environment on the market.

At the same time, violations of the Merger Act are often procedural. Moreover, although they do not create effects on the competitive environment or the effects are minimal, they are subject to sanctioning measures for lack of coordination and obtaining approval from competition authorities. The amount of these sanctions is determined by identifying the impact of the economic concentration on the competitive environment. The beneficial effects on the economic environment resulting from a merger can serve as a mitigating factor in setting sanctions. However, in case of non-notified economic concentrations, the effects of which distort the competitive environment, harsh sanctions are imposed. By case, the authorities can also impose to cancel the concentration operation, as a remedy to restore the competitive environment. In addition, the effect created by the merger is mentioned as an aggravating factor in setting sanctions.

## 2 MERGER REGULATION

At both European and national level, the economic concentration is defined as the lasting change in control resulting from the merger of two or more previously independent enterprises or several parts of previously independent enterprises. Also, the taking over by one or more persons already controlling at least one undertaking or one or more undertakings of direct or indirect control over one or more undertakings or parts thereof, including the creation of a company in jointly fulfilling all the functions of an autonomous economic entity is considered being a merger operation.

The first regulations to capture anticompetitive practices at an early stage by banning certain types of behavior that are not considered to be in the interest of a competitive marketplace with reference to mergers appear in the Clayton Antitrust Act of 1914. This document discusses in detail four principles of economic and business trade: price discrimination if it substantially reduces competition or leads to the formation of a monopoly; sales contingent on exclusive contracts that reduce competition; mergers and acquisitions where their effect may substantially reduce competition; persons holding two or more competing companies, if those companies would violate antitrust criteria by merger (FTC, 2017) (DoJ & FTC, 2010).

Currently, under the Hart-Scott-Rodino law, a federal pre-notification program is set up to provide the FTC and the Department of Justice with information on mergers and acquisitions before it occurs. Under this regulation, parties to certain proposed transactions must submit a prior notification to the FTC and the DOJ. The Premerger announcement involves completing a "Notification and Reporting Form for Mergers and Acquisitions" with information about each company's business. The parties cannot close the transaction until the waiting period provided for in the law has passed, or the government has given early withdrawal during the waiting period. (FTC, 2017)

As in the European space, the Republic of Moldova presents the necessity of the analysis by the competition authorities of the economic concentrations fulfilling certain conditions, according to art. 22 of the competition law. 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 undertakings involved in the operation that have performed on the territory of the Republic Moldova, each with a total turnover exceeding 10 million lei in the year prior to the operation (Lupu, 2012).

According to the law, the economic agents must carry out the notification of the merger before the transaction is finished, and after concluding of the agreement, the announcement of the public offer

or after taking over the control package. However, the notification may be also made where the undertakings concerned demonstrate competition authorities in good faith intention to conclude an agreement. The same in the case of a public offer, if they have publicly announced their intention to do so offer, provided that the planned agreement or offer results in a concentration that meets the conditions for the necessity of the notification (Lupu, 2012).

Non-notification or late submission of the notification of an economic concentration leads to the initiation of the investigation followed by the application of the sanctions. If non-notified economic concentration does not create effects on the competitive environment, penalties will be imposed for non-observance of the notification procedure for the merger. If the competitive environment is affected by the non-notified economic concentration, the sanctions will be determined according to the gravity of the case. And in some particularly serious cases, the competition authorities may, in addition to sanctions, set the parties' obligation to restore the competitive environment by terminating the transaction (Knyazeva, 2013).

At the same time, a late application of the economic concentration notification indicates the interest of the parties involved, in remedying the violation, and may, depending on the particularities of the case, benefit from a reduction in the amount of the fine. In exceptional cases, the parties may obtain an exemption from the sanction.

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

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 position on the market.

If the economic concentration has no effect on the competitive environment, it is declared compatible with the competitive environment, and it is approved. Economic concentrations that may significantly impede effective competition on the market or on a significant part thereof, in particular

as a result of the creation or strengthening of a dominant position, will be declared incompatible with the competitive environment and unauthorized. The assessment of the effects of economic concentration operations is achieved by considering criteria such as the possibility of eliminating competition for a significant part of the analyzed products and the possibility of retaining to a significant extent the activities on the same market. Also, it is considered the possibility of retaining to a significant extent the activities in an upstream or downstream market, or on a neighboring market closely related to the analyzed one. (Competition Council of the Republic of Moldova, 2013).

In the case of economic concentrations likely to raise significant obstacles to competition, they may be authorized if the parties involved in the economic concentration demonstrate the cumulative fulfillment of conditions such as:

- Increasing economic efficiency, improving the quality of production, distribution or technical progress increasing export competitiveness;
- Offset the adverse effects of restricting competition through the favorable effects of the merger;
- The reasonable reward of consumers for the benefits of the merger (Lupu, 2012).

Establishing the compatibility of the economic concentration within the competitive environment is based on criteria such as:

- 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.

In the practice of the Moldovan competition authorities, cases of non-notified or late notification of economic concentration are frequently encountered. Often, these violations occur due to lack of information. Although the promotion of competitive culture is widely used, it is at an early stage. In addition, the relatively new application of the Competition Law, having only 10 years and the poor documentation of the specialists within the companies on the provisions of this law, leads to the violation of the provisions referring to notifications of the economic concentration operations.

Thus, when issuing the decision fixing the amount of the fine for sanctioning the non-notification or late notification of the concentration, are considered the factors and conditions under which the infringement was committed, as well as the cooperation of the companies sanctioned in order to remedy the breach.

### 3 CASE STUDY

The cases presented below are from various business areas on the market that have made procedural violations regarding the need to notify the economic concentration operation and have achieved the economic concentration without obtaining the permission to complete the transaction.

**Case I** is the case of the concentration of two market-leading tourism companies, which severely distorted the competitive environment, affecting the final consumer.

According to the investigation, a tourism company (X), which operates as a tour operator, which forms and sells tourist packages, has taken over another company (Y), which has the same type of activity. Company (Y) was taken over by the customer base and contracts.

Prior to the merger, Company (X) had a 42% market share and (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 destined for location (A). This raises significant obstacles to effective competition in that market. By benefiting from a dominant market position, these companies have created barriers to entry to other operators through difficulties in providing air travel

to form tourist packages destined for location (A). At the same time, as a result, the final consumer also suffered, by considerably increasing the prices for the tourist sheets for the respective direction.

Based on art. Article 5 (3), Art. 20 and art. 22 of the competition law, it was established that this operation constitutes a horizontal economic concentration, incompatible with the competitive environment. For the serious breach of the economic concentration incompatible with the competitive environment, and without notification, a fine of about 21 million lei (amount based on turnover) was imposed. In addition, the companies involved in the transaction were forced to dissolve the concentration to re-establish the situation prior to the implementation of the merger.

The effect of concentrating on the competitive environment in the relevant market in 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 barriers to market entry and in influencing the final consumer's decision. In this situation, in addition to the breach of the prior notification procedure, the effects on the competitive environment have served as aggravating factors: elimination of competition on the relevant market segment and damage to the final consumer through unjustified price increases. The amount of the fine was established by considering these factors.

**Case II** presents the situation of creating a monopoly on a market segment of the sale of perfumes and cosmetics.

The subject of the investigation is a company that sells French cosmetics and perfumery products. This company (O) took over the company (M), which carried out the same kind of activity. In this market sector, these companies were active without other competitors. The takeover operation was not notified to analyze its compatibility with the competitive market environment. Subsequently, the company (M) was liquidated, so the company (O) created a monopoly on the wholesale market of French perfumery products on the territory of the Republic of Moldova.

In addition to art. 22's infringement, meaning this operation was made without notification to gain

competition authorities approval, based on art. 5 (3) and art. 20 of the competition law, it was established that this operation constitutes a horizontal economic concentration, incompatible with the competitive environment. Moreover, the subsequent liquidation of the company determined the establishment of the monopoly position for the company (O).

As in the case of tourism companies, during the investigation of the breach of the notification procedure, have been identified aggravating factors as the effects of the economic concentration, namely the elimination of competition on the market and the creation of an unjustified price increase. As a result, this case presents a serious infringement, which distorts the competitive environment of the market, thus affecting, in particular, the final consumer (DoJ & FTC, 2010).

**Case III** illustrates the case of a merger of two light industry companies operating in the same market segment.

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 LOHN manufacturing. Before the concentration, 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.

Based on art. 22 of the competition law, 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.

During the investigation, on the basis of art. 5 (3) and art. 20 of the competition law, it was established that this operation constitutes a horizontal economic concentration compatible with the competitive environment. In this case, during the investigating process of the violation of notification procedure, when the Competition Authority notified the breach, the company (H) has shown receptivity and openness to collaborate, presenting the late notification. As a result of the investigation, were identified mitigating factors

such as collaboration with competition authorities to obtain information on the case under investigation, the benefit of the economic environment, and the benefit of the final consumer. The prevailing of the benefits from the economic concentration transaction allowed the Competition Authorities to deviate from the provisions of the legislation and not to charge a fine.

**Case IV** is a case of the merger of a coffee-making company and a café.

A trademark holder coffee company (I), which is part of a group of companies operating in different areas, has taken control of a café (F).

Based on art. 22 of the competition law, 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.

During the investigation, based on art. 5 (3) and art. 20 of the competition law, it was established that this operation constitutes a vertical economic concentration compatible with the competitive environment. At the same time, particular to this case is a collaboration contract between parties. A franchise contract was concluded between these two companies one year before the takeover transaction. In fact, these companies already had a business relationship before taking over took part, and the market situation after the takeover did not modify. The Company (I), following the intimation by the Competition Authorities, submitted a late notification of the takeover operation, being open to collaboration and providing further additional information on the case. As a result, working with the competition authorities to obtain information on the case under investigation, the benefit of the final consumer, and the fact that (F)'s business did not change as a result of the transaction, because it already acts under the trade name of Company I within the franchise contract served as mitigating factors. So the fine imposed was minimal.

The cases described above fall within the scope of competition law in violation of art. 22 of the competition law. That is, the obligation to notify the operation for assessment by the competition authorities to determine its compatibility with the

competitive environment. The initiation of investigations based on this article may or may not lead to the incompatibility of the operation with the competitive environment under Art. 5 and 20 of the competition law. In the process of the investigation of each case particularly, the effects of the economic concentration are important, so they can be presented as aggravating or facilitating factors by case.

For the described cases, was made a classification of the determinant factors, of aggravation and facilitation of sanctions, following a violation of art. 22 of Competition Law.

**Aggravating:**

- Refusal to cooperate with competition authorities to obtain information on the case under investigation;
- 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;

**Mitigating:**

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

As a result, the determination of the number of sanctions for violation of art. 22 of the competition law is influenced by individual factors, aggravation or attenuation.

A decrease in the number of cases in violation of art. 22 of the competition law is possible by developing the informational aspect of the economic environment regarding the competition law. The continuous development of the promotion of the competitive culture, as well as the advocacy activities, contribute to the education of compliance with the procedural regulations of the

competition law among the economic agents. These actions lead to the disappearance of situations such as breach of procedural rules unwittingly, which is subject to investigation as well as cases of intentional violation and are sanctioned.

## 4 CONCLUSIONS

Notification of the economic concentration operation is necessary to prevent the distortion of the competitive environment. Thus, non-notification or late notification leads to the initiation of the case investigation. When analyzing cases, it is of major importance that the parties involved cooperate with the competition authorities. An open collaboration and the presentation of the requested information, or, by case, the initiative to remedy the breach committed, contributes to the reduction of sanctions. At the same time, the commitment initiative, in order to comply with the law, together with the remedy of the violation committed, can lead to the exemption of sanctions. Competition law primarily pursues the benefit of the final consumer. Therefore, if a beneficial effect on the final consumer is identified in the investigation, it may be presented as a mitigating factor in setting sanctions.

Cases investigated following non-notification, determined with adverse effects on the competitive environment, from which the final consumer has to suffer, are mentioned as incompatible with the competitive environment. Moreover, sanctions are set according to the factors that aggravate the case, showing the size of the effects produced.

After 10 years of application of the competition law in the Republic of Moldova, many violations have been identified regarding the breaches of the procedural aspects, stipulated in the law. A significant part of these violations is due to a lack of information. Developing competitive culture is a key point in changing this situation. Sanctions for procedural violations of law regulations can be avoided in the case of prior notification of legislation.

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