



Is reconciliation of divergences with the Competition Council near?

By Carmen Peli, Partner

Georgeta Harapcea, Associate

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The last years have revealed significant divergences between the Romanian Competition Council and the High Court of Cassation and Justice regarding certain merger notification aspects. A recent High Court of Cassation and Justice decision seems however to indicate a potential reconciliation of the positions of the two authorities.

The Competition Law no. 21/1996 and the Economic Concentrations Regulation provide for the obligation to notify an economic concentration within 30 days from “the signing date of the act on the basis of which the acquisition of control is achieved”, while “omission” to notify an economic concentration represents an administrative offence and may be sanctioned with a fine of up to 1% of the turnover in the previous year.

These two aspects, namely (1) the actual date from which the 30-day notification term starts in case of transactions where the sale-purchase agreement is signed, but its entry into force is subject to the fulfillment of certain conditions precedent, and (2) the content of the administrative offence (can the delay in notification be assimilated with a failure to notify?) were the cause of divergences between the Romanian Competition Council and the High Court of Cassation and Justice within the past years.

The starting date for the 30-day notification term in case of sale-purchase agreements affected by conditions precedent

According to the Competition Council’s practice¹, the 30-day notification term starts from the date of signing the act on the basis of which control is acquired, irrespective of whether the parties initially sign the act and submit its entry into force to certain conditions precedent. The effect of a condition precedent, under Romanian law, is the inexistence of the right or obligation subject to such condition, until the condition is realized. The right to acquire control over an undertaking is thus inexistent, until all conditions precedent are fulfilled.

While in some decisions, the Competition Council argued that the acquisition of control effectively takes place at the date of signing the shares sale-purchase

¹ See Competition Council Decisions 148/03.07.2006 (for the sanctioning of Global Vehicles USA Inc, former Cross Lander USA Inc – GV – for omission to notify the acquisition of control over ARO), 263/16.09.2004 (for the sanctioning of International Railway Systems – IRS – for omission to notify the acquisition of control over Romvag), 233/03.06.2003 (for the sanctioning of International Business Machines Corporation – IBM – for omission to notify the acquisition of control over Rational Software Corporation).

agreement, as it leads to creating a legal relation between the parties and exteriorizes the parties' meeting of minds, in other decisions, it is considered that the law does not take into account for calculating the 30-day term the moment control is effectively acquired and transfer of ownership occurs, because, by effect of conditions precedent, it is possible that this moment does not coincide with the signing date.

However, irrespective of the Competition Council arguing that effective control is acquired at signing or not, even if the conditions precedent were not fulfilled, it is constant practice of the competition authority that the starting date for calculating the 30-day notification term is the signing date of the respective agreement.

The High Court of Cassation and Justice annulled in 2004 and 2005 the Competition Council's decisions in IBM and IRS cases², on the basis that the date on which effective control was acquired was the one when all the conditions precedent were fulfilled, as the existence of the legal relation being subordinated to certain conditions precedent, and the "act on the basis of which control is acquired" should be determined in the light of the legal principles regarding the effect of the conditions precedent.

The High Court of Cassation and Justice considered therefore that the act affected by the condition precedent does not produce any effect; the mere signing did not give any rights over the shares, did not make the evidence of control over the undertaking in cause. The High Court of Cassation and Justice decisions determine that no effective control is obtained from the signing date, but only after the fulfillment of the conditions precedent affecting the existence of the agreement.

However, in a recent decision³, issued in November 2007, the High Court of Cassation and Justice rejected the request for annulment of the decision of the Bucharest Court of Appeal upholding the Competition Council's GV decision issued in the same terms as the IBM and IRS decisions, even if GV argued, same as IBM and IRS, that the 30-day notification term should have been calculated from the date all conditions precedent were fulfilled, not from the date of the signing of the sale-purchase agreement affected by conditions precedent. The High Court of Cassation and Justice upholds the Bucharest Court of Appeal decision, which gives the legal reasoning, but the latter has not yet been reported with a view to allow an analysis of the court's reasoning.

This may indicate a reconciliation of the divergences between the Competition Council and the High Court of Cassation and Justice regarding the starting date for calculating the 30-day notification term in case of economic concentrations performed by acts affected by conditions precedent, in which the effective control is only acquired when all conditions precedent are met.

Is the delay in notifying assimilated with the omission to notify?

The Competition Law provides that it is an administrative offence the "omission" to notify an economic concentration, and makes no mention regarding the "delay". It is constant Competition Council practice⁴ to assimilate the delay in submitting the notification within the legal deadlines to the omission to notify, despite the parties

² See High Court of Cassation and Justice Decisions 1714/04.05.2004 (IBM) and 5504/16.11.2005 (IRS).

³ See High Court of Cassation and Justice Decision 4535/23.11.2007.

⁴ See Competition Council Decisions 49/16.11.2007 (for the sanctioning of SC Dafora SA for omission to notify the acquisition of control over Condmag), 148/03.07.2006 (for the sanctioning of Global Vehicles USA Inc, former Cross Lander USA Inc – GV – for omission to notify the acquisition of control over ARO), 263/16.09.2004 (for the sanctioning of International Railway Systems – IRS – for omission to notify the acquisition of control over Romvag), 233/03.06.2003 (for the sanctioning of International Business Machines Corporation – IBM – for omission to notify the acquisition of control over Rational Software Corporation).

arguing that the law sanctions the “omission” to notify, and not the “delay” in notifying the operation.

The High Court of Cassation and Justice annulled the Competition Council’s decisions in IBM, ruling that the delay in notifying cannot be sanctioned on the basis of a legal provision sanctioning the omission to notify, as the content is not the same. However, the same recent High Court of Cassation and Justice quoted above, in GV case, rules that due to the fact that the notification should have been submitted within a certain deadline, the omission to notify implies an omission to notify within the legal deadlines.

While it is true that the content of the conduct sanctioned should be very clearly determined (namely, by adding to “omission” the “delay” in submitting the notification, with a view to clarify the content of the administrative offence), and it could be argued that the law does not expressly provide the sanction of the delay in notifying, but only the omission, the Competition Council’s practice, also supported recently by the High Court of Justice, is based on the correlated interpretation of the obligation to notify within a certain deadline and the sanctioning of the omission to notify.

While some courts may interpret the content of the administrative offence in a strict manner (omission, not delay is sanctioned), it seems that the courts are beginning to acknowledge the correlated and more flexible interpretation proposed by the Competition Council.