

COMPETITION POLICY IN EU AND ROMANIA DURING THE ECONOMIC CRISIS

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Abstract:

The article focuses on the most important aspects of Competition Policy as a guarantor of an undistorted Single Market and on the harmonization of Romania's legislation regarding Competition to the European corresponding acquis. Furthermore, for a better understanding of the mechanisms involved in Competition Policy, a study case is brought to attention, concerning one of the most recent decisions of the Competition Council on issues related to an economic concentration on the market of financial leasing.

Keywords: Competition Policy, European Integration, Competition Law, Economic crisis

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Introduction

One of the main objectives for European Union is to create an undistorted Single Market within an open market economy. Effective competition is crucial to an open market economy. It cuts prices, raises quality and expands customer choice. Competition allows technological innovation to flourish. The Treaty of Rome recognized that a common competition policy was essential if the consumer was to enjoy the benefits of European Economic Integration. In fact, this is the real aim of EU Competition Policy: to guarantee an undistorted Single Market.

The rules apply to all companies operating in the Single Market, irrespective of their ownership. While Member States have their own bodies to enforce national competition laws, the European Commission investigates breaches of the competition rules. The Commission has significant powers including imposing fines, forcing changes in merger agreements and blocking state aid. Decisions can always be challenged in the European Court of Justice. The question rising is how, if is the case, do these powers work during economic crisis.

Comprehension of Competition policy

The main issues covered by EU competition policy are: abuse of a dominant position, anti-competitive agreements between companies, mergers and takeovers, state aids [Baldwin R., Wyposz C,(2006)].

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Abuse of a dominant position [art. 82 of EU treaty] appears whenever enjoying a large share of the market, brings an economic operator into conflict with competition rules. There are many examples of ways in which companies abuse a dominant position. These include making customers pay unfairly high prices or squeezing out smaller competitors through predatory pricing. Equally, dominant positions can be abused through distribution arrangements such as exclusive dealerships or imposed customer “loyalty” contracts.

Anti-competitive agreements between companies [art. 81 of the Treaty] means that companies in a given sector may choose to co-operate rather than compete with their rivals. They may collude in cartels to try to fix prices or carve up markets. Selective distribution systems are also potentially anti-competitive - although agreements between manufacturers and dealers can be justified in the interests of efficiency or through the provision of high quality after-sales service. They should not prevent consumers in one EU Member State buying a product in another where the price is cheaper.

Mergers and takeovers are dealt by the Commission entrusted with the role of controlling mergers and takeovers which could restrict competition in the Single Market. This is limited to companies over a certain turnover size – though this is irrespective of ownership, and can even cover mergers between two non-EU companies. The Commission has the power to block mergers, or to impose conditions such as the sale of assets to prevent creation of a dominant position [Gavrilă I., Gavrilă T. (2008)].

State aids also known as decisions of Member States' Governments can also restrict or distort competition in several ways. Member States may be tempted to subsidize national firms to help them face competition from other parts of the Single Market, or, in particular, to subsidize state own companies that compete with private sector rivals. In most cases, state aid is deemed justifiable. This includes promoting the economic development of disadvantaged areas, culture and heritage conservation and projects of common European interest . Here is where the Commission role comes especially in a time of crisis: it has the power to block, or to enforce the repayment of aid.

Legal framework of Competition Policy and European Integration

One of the most important tasks for Romania's accession to the European Union regarded “Competition Policy” (Chapter 6 in negotiations).

The legal framework for Competition Policy is Competition Law No. 21/1996, amended and completed by the Government Emergency Ordinance no. 121/2003, approved by the Law no. 184/17.05.2004. The adoption of this law, which came into effect on 01.02.1997, represented an important step to normalize the behaviors in the economy by defining the rules of acting and establishing the methods of defense. The obligations of the Association Agreement between Romania and European Union regarding the policy in the field of competition were fulfilled through Law no. 21/1996 and the secondary legislation issued in its application. Thus is ensured a

high degree of compatibility that refers to the way of approaching and regulating the agreements, concerted practices, abuse of dominant position and the control of the economic concentrations [Popescu-Cruceru A. (2004)].

The legislation on competition policy followed in general the provisions of the Community legislation. The provisions of the art. 81 and 82 of the Amsterdam Treaty [Regulation no.1/2003] have been taken over by the articles 5 and 6 of the Competition Law No. 21/1996. The provisions of the Regulation no. 4064/1989 and no.3384/1994 of the European Communities' Council regarding the control of the economic concentrations were taken over by the Regulation regarding the authorization of the economic concentrations, Regulations and Guidelines. This Law is aimed at protecting, maintaining and stimulating competition to the benefit of consumers, and at creating the conditions to assess the behavior of economic agents based on uniform principles. It must be specified the fact that this Law ensures the protection of competition, not of the competitors. The incidence of the regulations is general and non-discriminatory [Popescu-Cruceru, (2004)]. The Law is applicable to undertakings defined, broadly, as “individuals or legal entities - Romanian or foreign - irrespective of nationality or citizenship”, irrespective of their organization form or the nature of their social capital. As well, the Law applies to the central and local public administration bodies to the extent in which they intervene on the market, influencing directly or indirectly the competition.

The Law prohibits the anticompetitive practices that include the monopolist behaviors, “economic concentrations which, having the effect of creating or consolidating a dominant position, lead to or are likely to lead to a significant restriction, prevention or distortion of competition on the Romanian market or on a part of it”[Berinde M.,(2003)].

Starting with the principle of the general economic interest, which prevails, the Law grants exemptions on criteria that compare the anticompetitive effects with those in the benefit of consumer and the national economy, as regards both the accords and agreements and the economic concentrations. It must be specified that not all agreements or concerted practices are, by themselves, illegal or generators of prejudices, some of them could benefit of exemptions from the prohibition provided as general rule, because they could contribute at the improvement of the production or distribution, at the promotion of technical progress, at the improvement of the products quality and the competitiveness degree of those on the internal and external market, at the strengthening of the competitive positions of SMEs.

The authorities involved in the well-function of Competition Policy are the Competition Council and Competition Office.

The Competition Council is a nongovernmental structure aimed at protecting and stimulating the competition, in order to ensure a normal competitive environment and to promote customers' interests. The role of the Competition Council as an autonomous administrative authority has two aspects: one aspect is corrective relating to its interventions to restore and maintain normal, competitive

environments, and a second, preventive aspect, related to its interventions that significantly prevent unfair competition on the market.

The Competition Office is a governmental structure having responsibilities concerning prices and state aids and it applies legal measures regarding competition in general, including Competition Council's measures.

As we mentioned before, not all agreements or concerted practices are illegal or generate prejudices and it is the Competition Council's main duty to identify which ones can benefit of the exemptions of the law. Following, we will analyze one of the most recent decisions of the Competition Council concerning economic concentration.

Study case: Economic concentration realized by Raiffeisen Landesbank Oberösterreich

AG through achieving the sole control over Impuls Leasing International AG, Impuls-Leasing Romania IFN SA and Impuls-Leasing Services SRL. This case is based on the acquisition by Raiffeisen Landesbank Oberösterreich AG of sole control directly over Impuls Leasing International AG (hereinafter referred to as „ILI AG”), and indirectly over IMPULS-LEASING ROMANIA IFN SA and IMPULS-LEASING Services SRL, on the ground of a convention (hereinafter referred to as “The Convention”) concluded on 31.10.2008.

Raiffeisen Landesbank Oberösterreich AG (hereinafter referred to as ROÖ) is an Austrian legal person, which is active in banking sector. In Romania ROÖ develops, especially lending operations, refinancing lease and interbanking deposits, on short term. ROÖ does not provide services for Romanian customers, but only for Austrian and German people who develop economic activities in Romania, activities strongly deteriorated by the economic crisis.

Impuls Leasing International AG, the acquired company is a Swiss legal person, which does not develop commercial activities, being a holding company.

Impuls-Leasing Romania IFN SA (hereinafter referred to as “IL RO”) is a Romanian legal person, controlled in proportion of 90% by ILI AG in Romania. IL RO is a financial institution and its main activity refers to financial leasing.

Impuls-Leasing Services SRL (hereinafter referred to as „IL RO Services”), a Romanian legal person, is a company owned 100% by IL RO, founded in 2008 and intended to become operational in December 2008, having as the main business, activities of rental cars and road vehicles and also operational leasing, so this company has not obtained turnover until now.

The facts are that on 31.10.2008 was concluded a shares sale-purchase contract (hereinafter referred to as “The Contract”) between Raiffeisen Impuls Holding GmbH (hereinafter referred to as „RIH”), an Austrian company, as buyer and BGLM AG, a Swiss company, as seller, through The Contract were sold shares representing 85% of ILI AG's share capital. RIH belong to RBG Holding GmbH's group. RIH is 100% a holding company with no commercial activity. The Convention concluded on 31.10.2008 between ROÖ, BGLM AG, holding 85% of ILI AG's share capital

and Raiffeisen-Impuls-Holding GmbH. Pursuant the provisions of The Convention, ROÖ acquires the right to appoint more than half of the members of the board of ILI AG, including the right to appoint the chairman of the board of directors. Consequently, after the economic concentration is realized, although ILI AG would be owned in proportion of 85% by RIH, it will be controlled directly by ROÖ, on the basis of the right to appoint more than half of the members of the board of ILI AG, including the right to appoint the chairman of the board of directors.

The notified operation through which ROÖ would acquire the sole control directly over Impuls Leasing International AG and indirectly over Impuls Leasing Romania IFN SA and IMPULS-LEASING Services SRL, on the basis of The Convention is an economic concentration. Furthermore, the economic concentration meets cumulatively the threshold conditions laid down in art. 14 of the Law, respectively the aggregate turnover of the involved undertakings exceeds the equivalent in lei of 10.000.000 Euro and there are at least two undertakings involved in the operation who achieve, each in part, on the Romanian territory a turnover that exceeds the equivalent in lei of 4.000.000 Euro. According to the art. 1 from the Regulation (EC) no. 139/2004 from 20 January 2004 regarding the control of economic concentration between undertakings, this economic concentration doesn't have community dimension, unfulfilling the threshold conditions in order to be notified at the European Commission [Conventionally, is considered a community dimension concentration whenever worldwide turnover of the involved firms is at least 5 billion Euro, and at least 2 of the involved firms has a turnover of more than 250 million Euro in EU; or the turnover is at least 2.5 billion Euro, and the involved firms have a turnover of more than 100 million Euro in each of the European Union states. These concentration must be notified to the European Commission].

The relevant market of product/service for the notified economic concentration is the market on which the acquired undertaking (Impuls Leasing International AG) and the undertaking that are controlled by (IMPULS-LEASING ROMANIA IFN SA and IMPULS-LEASING Services SRL 2), respectively market of financial leasing.

According to the information received from the acquirer the market share of Impuls-Leasing Romania IFN SA is insignificant, and the acquirer group does not activate on the relevant market. In addition, there is no overlap between the acquirer and the acquired, the economic concentration, therefore there is no issue of significant impact on competition on the relevant market.

Through the operation of economic concentration under discussion, it is not created or consolidated a dominant position on the relevant market.

Considering all the above mentioned aspects the Competition Council issued an authorization Decision regarding the economic concentration realized by Raiffeisen Landesbank Oberösterreich AG through acquiring the sole control over Impuls Leasing International AG, Impuls Leasing Romania IFN SA and Impuls-Leasing 2. IMPULS-LEASING Services SRL did not develop any activity until now. The market share of ROÖ on the Romanian market is not justifying the allegations.

In conclusion, the Council established that although the notified economic concentration operation falls within the scope of the Law, there are no serious doubts as regards the compatibility with normal competitive environment. Nevertheless, pursuant the provisions of the Art.32 par.(1) of the Law, Raiffeisen Landesbank Oberösterreich AG. must pay the authorization fee of the notified economic concentration. The amount of the fee is based on the turnover and is to be paid, within a term of maximum 30 days from the communication of the Decision, to the State budget, through a treasury payment order, with the mention: “for the authorization of the economic concentration”. If this decision would be questioned in a normal economic environment, in a time of crisis is easy to understand why the Council didn’t apply a greater penalty.

Conclusion

In conclusion the compatibility of a economic concentration and a normal competitive environment is analyzed by criteria similar to the EU ones, as a normal consequence of Romania’s integration to EU. During the economic crisis the competitive environment is no longer normal and, for this reason authorities must be very careful when making a decision, not to disturb more the economic equilibrium and, in the same time to respect all the legal and economic principles. As well as in any other EU state, in normal as well as in crisis times, a economic concentration is authorized if three cumulative conditions are complied. Synthesizing, the conditions can be easily understood from the study case presented above and refer to: a greater economic efficiency, a better distribution or technical development; positive effects of concentration outnumbering the negative effects; the consumers benefiting from the advantages, especially from the lower real prices. As it can be seen al these conditions are in fact economic means for recovery during and after an economic crisis.

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