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The International Comparative Legal Guide to:

Merger Control 2018

14th Edition

A practical cross-border insight into merger control issues

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the fourteenth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Three general chapters. These chapters are designed to provide readers with an overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control laws and regulations in 44 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Nigel Parr of Ashurst LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The competent merger control authority in Moldova is the Moldovan Competition Council (the "MCC").

1.2 What is the merger legislation?

The main enactments on merger control are:

- Competition Law no. 18 dated 11.07.2012 (the "Competition Law");
- Regulation on economic concentrations no. 17 dated 30.08.2013 ("Merger Regulation"); and
- Regulation on accepting the commitments offered by undertakings no. 2 dated 22.01.2015 ("Regulation on commitments").

1.3 Is there any other relevant legislation for foreign mergers?

The same rules provided under the merger legislation listed above apply to both local and foreign mergers.

1.4 Is there any other relevant legislation for mergers in particular sectors?

The same merger control rules apply across all sectors, as there is no particular legislation in place for specific industries or sectors.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

Competition Law and Merger Regulation define mergers ("*economic concentrations*") as operations which result in long-lasting changes in the control of the undertakings involved – *i.e.*, by the merger of two or several previously independent undertakings (or parts of undertakings) or through acquisition of (in)direct control of one or several undertakings (or parts of undertakings) by one or more persons already controlling at least one undertaking or by one or more undertakings, whether by purchasing shares or assets, by contract or any other means – and which lead to changes in the structure of the market.

Control is defined by reference to rights (such as ownership, full or partial use over assets pertaining to an undertaking), contracts or any other means which lead to exerting decisive influence over an undertaking (in particular over the structure, voting or management decisions).

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Yes, to the extent such acquisition means acquiring control (within the meaning described above) over an undertaking, including over certain assets belonging to said undertaking, to which a specific turnover may be allocated.

2.3 Are joint ventures subject to merger control?

Yes, in case the joint venture (i) is fully functional from an operational standpoint, ensuring daily management, financial resources, staff and assets (same as any other undertaking operating on the respective market), and (ii) is set up to operate on a long-lasting basis.

2.4 What are the jurisdictional thresholds for application of merger control?

The application of merger control rules is subject to the fulfilment of following cumulative threshold requirements:

- the aggregated turnover achieved cumulatively by the involved undertakings, as registered in the year preceding the merger, exceeds MDL 25,000,000 (approx. EUR 1,140,000); and
- at least two of the involved undertakings each achieved, on Moldovan territory, an aggregated turnover of no less than MDL 10,000,000 (approx. EUR 456,000) in the year preceding the merger.

2.5 Does merger control apply in the absence of a substantive overlap?

Yes, merger control rules apply in case the cumulative threshold requirements set out above are duly fulfilled (objective requirement;

no overlap needed); however, merger control filings may follow a simplified procedure in case there are no substantive overlaps on any relevant market(s).

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

The thresholds set out above are applicable to transactions, irrespective of whether these are purely local or "foreign-to-foreign" transactions. Therefore, to the extent there would be an indirect change of control over Moldova-based entities that meet the threshold requirements, the foreign-to-foreign merger would need to be notified in Moldova as well.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

There are no such mechanisms put in place under the local legislation.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

In case two or more transactions take place in stages during a period of two years and between the same parties, such are considered as a single merger and previous transactions become (re)notifiable, together with the new transaction (the involved undertakings are the acquiring party and the different acquired parts of the target – taken as a whole).

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Notification is compulsory prior to the implementation of the transaction (*i.e.*, concluding an agreement, announcing the public offer, taking over the control shareholding) in case the jurisdictional thresholds are met.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Such exceptions are expressly regulated under the law and regard the following scenarios:

- acquisition or exercising control by a liquidator or director appointed by the court or by any other person appointed by a public authority in order to conduct a liquidation, insolvency or other similar procedure;
- temporary acquisition of securities for resale purposes by banks and professionals on the non-banking financial market, provided voting rights are not exercised to determine competitive behaviour, but only in view of preparing for the full or partial sale of the undertaking or reselling such securities, within a 12-month period as of the acquisition date – the deadline may be extended by the MCC Board, in case the sale or resale is not reasonably feasible within the initial period; and
- internal or intra-group restructuring or reorganisation.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Not filing a merger triggers the application of fines, which may not exceed a maximum of 5% of the total turnover obtained by the undertaking in the previous financial year or the last previous year in which the undertaking registered a turnover, in case the first cannot be determined (several aggravating and mitigating circumstances may be applicable as well). In case of newly set-up undertakings which did not record any turnover for the year prior to sanctioning, fines are capped at MDL 5,000,000 (approx. EUR 228,000).

As per the MCC's 2016 annual report, eight cases of un-notified mergers have been investigated, and the MCC issued (i) three decisions for clearance, doubled by fines being applied for violation of the Competition Law, and (ii) two other decisions whereby the MCC found no infringement. The other three pending investigations are to be finalised during this year.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

Competition Law generally provides that filing is compulsory prior to the implementation of the transaction (which may, as mentioned above, refer to conclusion of an agreement, announcement of a public offer, take-over of control), without setting out a specific mechanism for carving out local completion to avoid potential delays in the overall timing of the transaction.

3.5 At what stage in the transaction timetable can the notification be filed?

Notification should be filed before implementation of the transaction (please see the answers to questions 3.1 and 3.4 as well).

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Preliminary stage: the parties may engage in a series of preliminary discussions with the MCC on the main legal and practical aspects of the transaction. To this end, the parties must provide the MCC, three working days prior to the anticipated meeting, with information regarding (i) the parties to the merger, (ii) markets on which they are active, (iii) a brief description of the merger and (iv) the envisaged take-over mechanism.

Notification stage:

- **Filing the notification**: the notification filed with the MCC must include (i) the notification form, duly filled in, together with all relevant attachments, (ii) a note mentioning the total calculated turnover, and (iii) proof of payment of the examination fee.
- **Formal confirmation**: within 10 working days, the MCC will confirm in writing whether the notification is validly submitted – strictly from a formal standpoint.

- **Requests for information**: if the case may be, the MCC may issue, within 10 working days as of submission, a request for providing or confirming certain information in the filing and the notifying party must provide its reply within 15 working days as of receiving such request (the deadline may be extended only based on the party's grounded request and only for a maximum of five working days).
- **Effective date**: the MCC will inform the parties on the effective date of the filing. In case no additional information is considered necessary by the MCC, the filing becomes effective as of the date of its submission.

MCC's assessment:

- **Phase I**: the MCC will issue a non-objection decision within 30 working days as of the effective date, if there are no serious concerns regarding the compatibility of the concentration with a normal competition environment or if such concerns have been removed by commitments put forward by the acquirer(s) and accepted by the MCC.
- **Phase II**: within the above mentioned 30-day period, in case of serious concerns, the MCC will issue a decision for opening an in-depth investigation and within 90 working days as of initiating such investigation, the MCC will issue a decision either (i) clearing the merger on an unconditional basis, (ii) clearing the merger subject to commitments, or (iii) prohibiting said merger.
- **Commitment proposals (if applicable)**: in case the MCC considers that a merger raises serious competition concerns, the parties have the possibility to submit proposals for commitments before the effective date of the notification or at least within the following two weeks. Also, during Phase II, parties may submit commitment proposals within 30 days as of the commencement of the investigation (deadline that may be extended for a maximum of 15 days, subject to party's grounded request). Irrespective of phase, the 30- and 90-working day periods shall be extended by an additional 30-working day period, in case the parties submit commitment proposals. The overall deadline extension, to the extent the parties require an extension, shall not exceed 20 working days.
- **Tacit approval**: in case the MCC does not issue its decision within the 30- and 90-working-day periods, the merger, as notified, may be considered as tacitly approved.
- **Suspending the timeframe**: such scenario may happen in case the MCC sends out requests for information or opens an investigation (and conducts dawn-raids) with respect to alleged anti-competitive conduct regarding one of the involved undertakings – in such case, the timeframe is suspended until parties provide to the MCC all requested information.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

Implementation of the transaction prior to receiving clearance from the MCC is prohibited; nonetheless, the parties may submit a justified request for derogation (even before submitting the filing).

The standstill obligation does not prohibit implementing a public bid or a series of transactions with securities traded on a stock exchange market, whereby control is acquired from different sellers, subject to (i) the merger being notified as soon as possible with the MCC, and (ii) the acquirer not exercising any voting rights or doing so only to maintain its investment at full value, based on a derogation granted by the MCC.

Completing the transaction before clearance may trigger the application of fines by the MCC, as detailed in the answer to question 3.3 above; also, the validity of measures taken in this context are subject to the MCC's assessment under the merger control procedure.

3.8 Where notification is required, is there a prescribed format?

The prescribed format is set out under the Merger Regulation; this may be:

- **a simplified form** – generally requiring information on parties and structure of the transaction, business, turnover, as well as certain market data; or
- **a complete form** – which additionally requires rather extensive data on parties' suppliers, customers and competitors as well as certain detailed information on the competitive effects of the anticipated merger on the market.

The MCC may require, while carrying out its substantive assessment on the notified merger, that the parties submit the complete form (in case a simplified form was submitted in such case).

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

Yes, a simplified procedure may be carried out in the event the transaction(s) under the merger control procedure consist of the following:

- acquisition of joint control, subject to the respective joint venture not carrying out any actual or potential business in Moldova, or in case such activities are insignificant on Moldovan territory, in case (i) the turnover of the joint venture and/or of the transferred business, as well as (ii) the total value of transferred assets to the joint venture does not exceed MLD 10 million (approx. EUR 456,000) in Moldova;
- the parties operate on non-related product and geographic, upstream and downstream markets;
- the parties operate on the same or on related markets that do not affect the respective markets (*i.e.*, in case of vertical overlaps, neither of the individual or combined market shares of the parties operating upstream or downstream to one another are in excess of 25%; in case of horizontal overlaps, the parties' combined market share is below 15%); and
- an undertaking acquires sole control over a target where it previously held joint control.

Engaging in preliminary discussions with the MCC may prove effective in understanding the authority's view on each specific transaction and generally streamline the entire process.

3.10 Who is responsible for making the notification?

Mergers should be notified by each of the involved parties, more specifically: acquisition of sole control is to be notified by the acquirer, while acquisition of joint control should be notified together by person(s) or undertaking(s) acquiring said joint control.

3.11 Are there any fees in relation to merger control?

Yes, the notifying parties must pay an examination fee (in Romanian, *taxă de examinare*), which represents 0.1% of the aggregate turnover obtained on Moldovan territory by the involved parties in the year prior to the notification and may not exceed MLD 75,000 (approx. EUR 3,400).

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

Merger control rules do not impede the application of a public offer for a listed business. Nonetheless, in the event merger control thresholds are met, filing with the MCC must be performed immediately and the party acquiring control must refrain from exerting its voting rights, save where it seeks and secures a derogation from the MCC in this respect (for the protection of its investment).

3.13 Will the notification be published?

The MCC will publish certain information regarding the merger on its website and in the Official Gazette – such information generally regards the parties' names, the nature of the merger and the economic sectors involved. The MCC is also to ensure protection of any confidential information, business or other commercial secrets belonging to the parties and may take into account the parties' requests for confidentiality, provided the legitimate interests of the parties are considered as justified in this respect.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The main substantive test against which the MCC will assess a merger is whether such transaction would lead to significant impediments to efficient competition on the Moldovan market or a substantial part thereof, especially by creating or strengthening a dominant position on the Moldovan market or any part of it thereof.

4.2 To what extent are efficiency considerations taken into account?

Merger rules contain only broad provisions as regards assessment of efficiency considerations – according to such, the MCC should consider, upon the assessment of every filing, criteria such as (i) the need to develop and maintain competition, market power, consumers' interests and alternatives, or (ii) economic and technical progress, to the extent that such represents a benefit to the end consumer and not an obstruction to competition.

4.3 Are non-competition issues taken into account in assessing the merger?

Any major economic or social matters underlying the merger, as such are flagged by the parties themselves or raised by the authority itself, if the case, may be taken into account by the MCC during its assessment; however, it is difficult to estimate their overall contribution to the substantive assessment carried out by the MCC.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Third parties, including other competent regulatory authorities (if parties are active on a regulated market) may be involved in the scrutiny process, by means of submitting comments or complaints (within 30 days), either following up on an invitation received from the MCC, or in case commitments are submitted during the merger control process, after publication on the MCC website of a case summary, together with a non-confidential version of the commitments.

4.5 What information gathering powers does the merger authority enjoy in relation to the scrutiny of a merger?

The involved parties may be required to provide the MCC with information and documents deemed relevant for the authority during the merger control assessment. These requirements may also be extended to third parties in some cases. Recorded interviews may be conducted as well, based on previous consent by the interviewed person.

Information and documents provided must be accurate – failure in providing such may lead to fines ranging from 0.15% to 0.5% of the aggregated turnover obtained in the year prior to sanctioning; parties cannot be forced into admitting to anti-competitive behaviour under any circumstance.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

When publishing a decision or granting third parties access to the case file, the MCC is bound to ensure the confidentiality of information such as business or commercial secrets. Additionally, the MCC case handlers are expressly bound by a legal obligation to keep confidentiality of all information and data handled during their daily job.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

Please also see the answer to question 3.6 above; the process is usually ended via a formal decision of the MCC – depending on the complexity of the case; rather exceptionally, the process may end by a tacit approval, after the expiry of the statutory deadlines.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Yes, parties may file proposals for remedies with the MCC such as divestments, termination or amendments to existing agreements to ensure competition compliance, price-reporting obligations and mechanisms designed to ensure prevention of potential customer discrimination, commitments not to increase prices or not to reduce product range, *etc*. It should be noted that, in the event that the MCC accepts such remedies, their implementation may be subject to monitoring by the authority, during a period which is deemed appropriate so as to ensure competition risks are removed or mitigated in a satisfactory manner.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

Recent practice shows that the MCC takes on a similar approach as the European Commission when assessing foreign-to-foreign mergers; for instance, the 2016 merger clearance decision in the "*AB*

InBev/SABMiller" case (beer manufacturers in Moldova) contained similar structural commitments as those accepted by the European Commission in the corresponding merger notified at EU level.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

Depending on an in-depth preliminary assessment of the anticipated merger, parties may file proposals for remedies even before the notification becomes effective, in order to save time, or at any time during the two-week period after the effective date. Alternatively, remedies may be filed within 30 days as of commencement of Phase II proceedings. Such deadline may be extended by the MCC, based on justified reasons provided by the parties, by up to 15 days. To the extent the MCC decides to accept the remedies put forward, it will issue a conditional clearance decision, enclosing a clear implementation calendar. Failure to comply with this calendar may ultimately lead to the clearance decision being simply revoked. The parties may equally abandon the proposed remedies altogether, in the event that the assessment carried out by the MCC turns out to be positive for the parties and the merger is considered compatible with the markets in the absence of any remedies.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

Rather recent practice shows that the MCC follows a very similar approach to that of the European Commission.

5.6 Can the parties complete the merger before the remedies have been complied with?

The parties may implement the transaction, pending full achievement of the remedies; however, this must be subject to them constantly complying with the implementation calendar set out under the conditional decision issued by the MCC. In case of divestments, the parties may be required to postpone implementation until a suitable buyer is identified, for example.

5.7 How are any negotiated remedies enforced?

The MCC may require the parties to appoint a representative in charge of monitoring compliance with implementing the remedies set under the conditional clearance, who shall keep the MCC regularly informed on the status of the implementation calendar. Nonetheless, the parties themselves warrant that they will properly and effectively implement the accepted remedies and cooperate with the MCC in order to allow the latter to determine that the remedies were properly addressed.

5.8 Will a clearance decision cover ancillary restrictions?

As a general rule, the parties themselves must perform an assessment on whether specific provisions may be considered as restrictions that fall within the ancillary restraints category. In the event such assessment is carried out by the MCC (*i.e.*, merger control rules provide the parties' possibility to request a special assessment of the ancillary restrictions by the MCC); this would imply that the merger cannot be assessed under the simplified procedure set out under the legal framework, and therefore the parties would need to submit the full-form merger notification.

5.9 Can a decision on merger clearance be appealed?

Yes, merger control decisions issued by the MCC may be appealed before the competent administrative court.

5.10 What is the time limit for any appeal?

Appeals before the competent administrative court may be filed within 30 days as of communication of the merger control decision issued by the MCC.

5.11 Is there a time limit for enforcement of merger control legislation?

Enforcement of merger control legislation becomes time-barred within a limitation period of five years, which generally starts to lapse as of the date when the unlawful practice has occurred or as of the date of the last and final unlawful act (in case of continued breaches). Purely procedural infringements become time-barred within a limitation period of three years.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

The MCC strives to monitor and assimilate relevant EU merger control rules; also, the Romanian Competition Council's practice ensures support in the activity of the MCC, by providing related assistance and guidance in respect to similar cases under scrutiny.

6.2 Are there any proposals for reform of the merger control regime in your jurisdiction?

The Moldovan merger control regime was subject to a fully-fledged review and update during 2013; nonetheless, the MCC is constantly monitoring and assimilating EU practice, in its efforts to ensure a proper application of competition rules.

6.3 Please identify the date as at which your answers are up to date.

Our answers are up to date as at 9 October 2017.

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