

1 November 2017

Impact of the new definition of the relevant market in the food retail sector on the clearance of the transactions by the Competition Council

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The Romanian Competition Council (“**Competition Council**”) updated the definition of the relevant geographic market in the food retail sector taking into consideration the conclusions of a study performed in this sector, meant to assess the changes in the behaviour of the consumer when he/she purchases consumer goods, study which has been published recently by the Competition Council for consultation.

As a rule, the economic concentrations that can raise significant concerns regarding the effective competition on the Romanian market or a part thereof, in particular as result of creating or consolidating a dominant position, are prohibited. There is a rebuttable presumption that an undertaking has a dominant position when its share on the relevant market exceeds 40%.

According to the findings of the aforementioned study, in the context of the assessment of the mergers and acquisitions on the food retail sector, for the purpose of definition of the relevant geographic market, the Competition Council will make a separation between two types of retail stores: proximity stores (under 400 sqm) and medium and large size stores (over 400 sqm) – supermarkets, hypermarkets, discount stores. As regards the proximity stores (under 400 sqm), the Competition Council will consider an area of up to 10 minutes of walking by reference to the offer of other proximity stores, respectively an area of up to 10 minutes of driving by reference to the offer of stores having their surfaces under and over 400 sqm. With respect to the medium and large size stores (over 400 sqm) – supermarkets, hypermarkets, discount stores, the Competition Council will consider the stores having their surfaces under and over 400 sqm situated within a geographic area of up to 10 minutes of driving. However, in any of the aforementioned two cases, the effective definition of the market can be subject to amendments depending on the local geographic markets, the territorial distribution of the stores, their different surfaces on each local market and any other relevant local elements.

Until the issuance of the study mentioned above, the assessment of the Competition Council in various cases dealt with during the last years, in this matter, has been made by reference to the definition of the relevant market resulting based on the findings of a similar study performed in 2008. At that time, the reference point for such assessment was the competition between supermarkets, hypermarkets, discount stores and neighbourhood stores situated within an area of 10-30 minutes of driving.

This tendency of reduction of the geographic area has been ascertained also by the decisions issued by the Competition Council in relation to the transactions carried out on this market during the last years, where the geographic dimension decreased from 30 minutes of driving (in the case Lidl/ Plus – year 2010) to 20 minutes of driving (in the case Auchan/ Real – year 2013), respectively to 10 minutes of driving in the most recent decisions of the Competition Council in the food retail sector (in the cases Mega Image/ Angst –year 2014, Carrefour/ Bila – year 2016).

The reduction of the geographic area is likely to have as main effect a higher concentration of the market which will trigger the fact that the dominance market share threshold will be easier to reach. If this threshold is reached, the conditions for authorising the economic concentrations on the food retail

market implying stores that are situated at the distance of less than 10 minutes of walking and respectively 10 minutes of driving will be more restrictive.

In fact, the Competition Council imposed conditions for the authorisation of the respective economic concentrations to the parties involved in all the aforementioned cases assessed during the last years.

This practice of the Competition Council reflects a tendency that it is likely to amplify in the future transactions that will be dealt by the Competition Council: more restrictive conditions for assessment and authorisation, notifications of economic concentrations settled by decisions of authorisation under condition or even by decisions of prohibition of the implementation of the economic concentration due to incompatibility with a normal competitive environment, in consideration of a market under evident development and with potential of serious concentration.

On the other hand, we deem that, in certain cases, there is a risk for such a limitation of the geographic market to lead to the exclusion from the control of the Competition Council of transactions having significant impact over competition at a wider level of the market.

In this context, the parties involved in future transactions on the food retail market have to perform a thorough prior assessment of the consequences that the transactions could have from a competition perspective and structure them accordingly for preventing their blockage in front of the Competition Council and the loss of significant resources involved in the conclusion and implementation of the related transactions.

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