

## The Romanian Competition Council clears the meaning of "group" for the purposes of merger turnover calculation (CRH Denmark- Ferrobeton Dunaujvarosi Beton)

### Romania, Mergers, Notification (mergers), Construction

#### 1. The law

Under the Romanian Competition Law n° 21/1996 [1], as amended and supplemented (the "Romanian Competition Law"), an economic concentration must be notified to the Competition Council in case certain thresholds are met, namely :

(i) the aggregate worldwide turnover of the undertakings concerned achieved during the previous year exceeds the RON equivalent [2] of 10 million Euro ; and

(ii) at least two undertakings concerned have each achieved, in Romania, during the previous year, a turnover exceeding the RON equivalent of 4 million Euro.

The undertakings concerned, in the case of a sole-control acquisition over an undertaking, are :

(i) the acquirer and its group ;

(ii) the undertaking acquired and the undertakings it controls.

The term group, defined in Art. 3(4) of the Guidelines regarding the calculation of turnover in cases of anti-competitive conduct and mergers (the "Guidelines"), has the same meaning as the one assigned to it by the EU Competition legislation, thus including the undertakings in which the concerned undertaking owns more than half of the capital or business assets or has the power to exercise more than half of the voting rights or has the power to appoint more than half the members of the administrative board or bodies legally representing the undertakings or has the right to manage the undertakings' affairs (the "Conditions").

Under the Romanian Competition Council's (the "RCC") Regulation regarding the authorization of economic concentrations (the "Merger Regulation"), the parties must submit a notification within 30 days from "the date of the signing of the act on the basis of which the acquisition of control is achieved".

The failure to notify an economic concentration represents a minor offence sanctioned by up to 1% of the turnover achieved by the respective undertaking in Romania, during the year prior to the issuance of the RCC's decision.

#### 2. The facts

On December 13th, 2007, CRH Denmark A/S ("CRH"), entered into a Sale-Purchase Agreement (the "SPA") (the "Signing"), acquiring a shareholding stake of over 60% in Ferrobeton Dunaujvarosi Beton ("Ferrobeton") (the "1st

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Transaction"). The SPA contained provisions to the effect that the 1st Transaction would be executed at a future point in time (the "Closing"), subject to the fulfilment of certain Conditions Precedent ("CPs"). At that time, the CRH Group had not met the turnover threshold required for notification, i.e. it had not achieved a turnover of at least 4 million Euro in Romania during 2006. Even though Ferrobeton had met the turnover threshold, the lack of two undertakings concerned who had met the respective threshold meant that the 1st Transaction was not notifiable.

On December 17th 2007, another member of the CRH Group, CRH Rumania BV ("CRH [3]") signed and acquired a shareholding stake of 100% in SC Elpreco SA Craiova ("Elpreco") (the "2nd Transaction"), in this instance the Closing having taken place on the same day as the Signing. The turnover derived by Elpreco in Romania during 2006 exceeded the 4 million Euro threshold.

The situation gave rise to the following question: which, if any, of the two Transactions was notifiable to the RCC ? At a first glance, the 1st Transaction appeared not to be notifiable, since, on the 13th of December, 2007, when the SPA was signed, the threshold conditions were not met by at least two undertakings concerned. As such, the 2nd Transaction could be notifiable, if one considered that the turnover achieved by CRH would be adjusted to include the turnover derived by Ferrobeton, or not notifiable, if one considered that the turnover achieved by Ferrobeton would only be added to the turnover achieved by CRH only once the 1st Transaction was closed. However, in the latter case, the 1st Transaction, even though initially, not notifiable, could presumably become notifiable once Closing occurred, since, following the 2nd Transaction, the turnover of CRH would be adjusted to include the turnover of Elpreco.

In order to avoid taking any chances, CRH decided to play it safe and notify both Transactions to the RCC. Both transactions were notified on the 15th of April 2008.

### 3. The outcome

Following its analysis of the two notifications mentioned above, the RCC issued two Decisions, as follows :

Decision n° 30/15.05.2008 of the RCC, stated that the 1st Transaction was not notifiable, since, at the moment of the Signing of the SPA, there were not two undertakings concerned that would clear the 4 million Euro threshold.

Decision n° 50/16.07.2008 of the RCC (the "Decision") stated that the 2nd Transaction was notifiable, since, at the moment it took place, the CRH Group had achieved a turnover of more than 4 million Euro in Romania during 2006, thus implying that the turnover achieved by Ferrobeton had been allocated to CRH at the moment of the Signing of the SPA. Consequently, CRH was fined for failure to notify the acquisition of Elpreco.

CRH argued that, in accordance to the legal provisions in force both in Romania and in the EU, the turnover achieved by a group includes the turnover achieved by the concerned undertaking and the undertakings that are actually controlled by the concerned undertaking. Since, following the Signing, none of the Conditions was met and CRH was not controlling Ferrobeton (due to the existence of the CPs), CRH argued that Ferrobeton was not, in effect, a member of the CRH Group when the 2nd Transaction took place and, as such, its turnover should not have been taken into account when determining the turnover of CRH.

The RCC answered that, since the obligation to notify an economic concentration stems from the date of the signing of the act on the basis of which the acquisition of control is achieved, the same is to be said about the moment when the turnover is allocated to the acquiring undertaking. Furthermore, since the existence of the CPs does not, in any way, modify the moment in which the obligation to notify the concentration comes into existence, the same was held to be true in relation to the moment in which the turnover of the target is transferred to the acquirer.

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It should be noted that, insofar as the source of the turnover is concerned, the general rule states that the turnover taken into account is the turnover reflected in the financial statements for the previous financial year, excluding any turnover derived from exports and intra-group operation. However, in accordance to Art. 3(1) of the Guidelines, if, following the adoption of the latest financial statements, the undertaking concerned acquires any assets, the turnover attributable to those assets should be added to the turnover resulting from the financial statements. Consequently, it could be argued that the RCC found that Art 3(1) applies here - however, no such argument was not put forth by the RCC in the Decision.

#### 4. Legal and factual concerns

The Decision 50/16.07.2008 raises a number of implications, from both a legal and a practical perspective.

The main legal implication is a new, wider definition of what constitutes a group for competition law purposes. Thus, following the signing of the SPA, the target undertaking would, presumably, stop being part of the group of the seller and become part of the group of the acquirer, even though, pending the closing of the respective transaction, the seller would be the one exercising control over the target undertaking, and even though the taking place of the Closing would be by no means certain. As a direct result, any anti-competitive conduct of the target undertaking would be reflected against the group of the acquirer. This goes against both the spirit and the letter of both the Romanian competition legislation and the EU competition law legislation, and, as such, must be departed from as soon as possible.

The main practical implications arise from the events that might take place between the Signing and the Closing of a transaction, when the transaction is notified after Signing and the Closing never happens. In this scenario, the following events would lead to potentially insurmountable difficulties :

(i) In accordance with the Decision, the turnover of the target undertaking is added to the turnover of the acquirer immediately after signing, thus implying that it is deducted from the turnover of the seller also immediately after signing. Let's suppose that, following the Signing, the seller's turnover is reduced to below the 4 million EUR threshold, and the seller acquires another target, and the second transaction is not notifiable due to the seller-turned-acquirer not meeting the threshold. Should the closing of the first transaction never occur, could the seller be liable for not notifying the latter transaction ? Presumably, the turnover of the target undertaking would be re-added to the turnover of the seller and would be considered as never having been part of the turnover of the acquirer, so it is possible that the RCC would see the seller as being guilty of the late notification and / or unauthorized implementation of an economic concentration.

(ii) If, following the signing, the transaction is notified and approved, the acquirer will have to pay an authorization tax in amount of 0.1% of the turnover achieved by the concerned undertakings during the previous year in Romania, on the relevant market. Should the acquirer pay the authorization tax and should closing not occur, it is debatable whether or not the authorization tax could be recouped and, even if it could, this would entail considerable expenses.

#### 5. Conclusion

In conclusion, it is submitted that the RCC Decision does not reflect either the Romanian competition law or the EU competition law, going against the definition of a group in both these regimes. As such, it is to be hoped that either CRH will appeal the Decision or, failing that, that it will remain an isolated point of view from which the RCC will depart at the first opportunity.

Insofar as the desired course of conduct to be adopted by the RCC is concerned, we submit that the RCC should have acted in the spirit of the law and, taking into account the definition of a group, decide that the 1st Transaction became notifiable once the 2nd Transaction was completed. While not completely satisfactorily, this solution would have been, to these authors, the most desirable one. Of course, the best solution to this problem would be for the RCC to amend its

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secondary legislation so as to reflect the ECMR and the Commission's Jurisdictional Notice insofar as the notification of a concentration and the transfer of turnover are concerned, thus requiring a concentration to be notified before any irreversible measures have been taken and the turnover being transferred only once a transaction has been completed, i.e. closing has occurred.

[1] The following section has been inserted in order to ensure a better understanding of the legal issue at stake. This is a brief, non-comprehensive overview of the most relevant legislative texts applicable to the respective legal issue and does not purport to cover all the legislation needed for the analysis of the case in its entirety. Should you require more information, do not hesitate to contact the authors.

[2] Calculated at the official rate of exchange communicated by the National Bank of Romania for the last day of the fiscal year in the year previous to the operation.

[3] Distinguishing between the various entities of the CRH Group is irrelevant for the purposes of this article. Consequently, any entity belonging to the CRH Group will be addressed to as CRH.

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