

THE MERGER
CONTROL
REVIEW

ELEVENTH EDITION

Editor
Ilene Knable Gotts

THE LAWREVIEWS

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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, such as Malaysia, are currently considering imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). Also, the book includes chapters devoted to such ‘hot’ M&A sectors as pharmaceuticals, high technology and media, as well as a chapter on merger remedies, to provide a more in-depth discussion of recent developments. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company’s proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is, therefore, imperative that counsel develop a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 30 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency in 2018. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany has amended its law to ensure that it has the opportunity to review transactions in which the parties’ turnovers do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). The focus on ‘killer acquisitions’ (i.e., acquisitions by a dominant company of a nascent competitor), particularly

involving digital or platform offerings, has been a driver in the expansion of jurisdiction and focus of investigations. Some jurisdictions have adopted a process to 'call in' transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability of reviewing and taking action in non-reportable transactions, and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time.

There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there is similarly no 'local' effect required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., in Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

Covid-19 and the current economic environment have provided new challenges to companies and enforcement agencies. Many jurisdictions have extended the review times to account for covid-19 disruptions at the agencies. At the same time, some of the transactions are distress situations, in which timing is key to avoid the exit of the operations and termination of employees. Regardless of the speed at which the economic recovery occurs, it is very likely that for the next couple of years the agencies will be faced with reviews of companies in financial distress, if not at the point of failure. Some jurisdictions exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing company defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the

transaction to proceed due to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US\$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

The United States and the European Commission (EC) both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as 'gun-jumping', even fining companies that are found to be in violation. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice. Other jurisdictions have more recently been aggressive. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. In addition, the EC has fined companies on the basis that the information provided at the outset

was misleading (for instance, the EC fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the JFTC announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Even within the EC, there remain some jurisdictions that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the antitrust authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm, in large cross-border transactions raising competition concerns, for the US, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential

of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's competition authority, which, in turn, has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the EC in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including, most recently, Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has 'material influence' (i.e., the

ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an ‘acquisition’ subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the ‘International Merger Remedies’ chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute, to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that ‘structural’ remedies are preferable to ‘behavioural’ conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada’s decision in the *Loblaw/Shoppers* transaction, China’s MOFCOM remedy in *Glencore/Xstrata* and France’s decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts

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July 2020

Part II

JURISDICTIONS

GREECE

*Tania Patsalia and Vangelis Kalogiannis*¹

I INTRODUCTION

i Authorities

The national competition authority dealing in principle with mergers in Greece is the Hellenic Competition Commission (HCC). The HCC is an administratively and financially independent authority with a separate legal personality. The HCC consists of eight regular members with a five-year term and is under the supervision of the Minister for Development and Investments. The HCC is assisted in its tasks by the Directorate General for Competition, which is headed by the Director General and is comprised of four Directorates and one Department.

In addition, the Hellenic Telecommunications and Post Commission (EETT) is competent for the enforcement of the Greek Competition Act, including merger control provisions, in the electronic communications sector. The EETT has provided its clearance in two notable merger control cases in the electronic communications market (namely, the acquisitions of Hellas Online² and Cyta Hellas³ by Vodafone).

All other economic sectors fall within the competence of the HCC.

ii Statutes, regulations and guidelines

The main piece of legislation relating to merger control in Greece is Law 3959/2011 ‘on the protection of free competition’ (Official Gazette A’ 93/20 April 2011), as amended and in force (the Greek Competition Act) (in principle, Articles 5–10), abolishing and replacing the former Greek Competition Act (Law 703/1977). The Greek Competition Act mirrors, in essence, the provisions under the EU merger control regime.⁴

In addition, the HCC has rendered a number of decisions and notices covering the merger control field, such as (1) Decision 524/VI/2011 ‘establishing the form for the submission of commitments in merger cases’, (2) Decision 558/VII/2013 ‘determining the specific content of merger notifications pursuant to the Greek Competition Act’, and (3) Notice ‘on the notification of concentrations with a community dimension (of 22 October 2009)’.

The HCC also takes into account the relevant EU principles, guidelines and case law as guidance on substantive assessment in merger control review.

1 Tania Patsalia is a senior associate and Vangelis Kalogiannis is a junior associate at Bernitsas Law Firm.

2 EETT Decision 733/047 of 18 September 2014.

3 EETT Decision 857/7 of 28 June 2018.

4 See Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), as amended and in force.

Finally, concentrations in the media sector (TV, radio, newspapers and magazines) are governed by both the Greek Competition Act and Law 3592/2007, as amended and in force (the Greek Media Law).

iii Pre-merger notification or approval

Under the current merger control regime, a mandatory notification system applies to certain categories of transactions (referred to as ‘concentrations’ under the Greek Competition Act) before their implementation, provided that a change of control on a lasting basis arises and specific jurisdictional thresholds are met.

In particular, under the Greek Competition Act, a change of control is deemed to arise where (1) two or more previously independent undertakings (or parts thereof) merge; or (2) one or more persons already controlling at least one undertaking or one or more undertakings, acquire direct or indirect control of the whole or parts of one or more other undertakings.

In addition, the establishment of a full-function joint venture (i.e., of a joint venture performing on a lasting basis all the functions of an autonomous economic entity) is also treated as concentration, therefore falling within the ambit of Greek merger control rules. To the extent that the establishment of a joint venture constituting a concentration has as its object or effect the coordination of the competitive behaviour of companies that remain independent, such coordination is examined under Paragraphs 1 and 3 of Article 1 of the Greek Competition Act (equivalent to Paragraphs 1 and 3 of Article 101 of the Treaty on the Functioning of the European Union). For this purpose, the HCC shall take into account, in particular, (1) whether the parent companies retain, to a significant extent, activities in the same market or in a downstream, upstream or closely related market; and (2) whether the coordination, which is the direct consequence of the joint venture, eliminates competition in a substantial part of the relevant market.

Concentrations shall be notified to the HCC (and not be fulfilled prior to the HCC’s decision) where (1) the combined aggregate worldwide turnover of the undertakings concerned amounts to at least €150 million, and (2) at least two of the undertakings concerned realise, separately, an aggregate turnover in Greece of at least €15 million.

Guidance on the turnover calculations is provided under the Greek Competition Act (Article 10), whereas special rules apply with regard to the calculation of turnover of credit institutions, financial institutions and insurance companies.

Lower jurisdictional thresholds apply in the media sector. In particular, under the Greek Media Law, a concentration must be notified to the HCC where (1) the parties involved have achieved a combined aggregate worldwide turnover of at least €50 million, and (2) each of at least two of the undertakings concerned generate an aggregate turnover of at least €5 million in Greece.

Where the above thresholds are met, the notification of the transaction before the HCC is compulsory and subject to the authority’s prior clearance, even if it is implemented outside Greece or the undertakings involved are established outside Greece (foreign-to-foreign transactions).

II YEAR IN REVIEW

i Statistics

According to publicly available information, the total number of notifications and cases examined by the HCC during 2000–2017 was 373.⁵ The number of decisions issued by the HCC, however, differs per year (usually between 10 and 20). According to its 2018 Annual Report, 18 merger control cases were brought before the HCC in 2018, out of which 13 were cleared during the year.⁶

In 2019, the HCC issued 17 merger control decisions according to publicly available information. Of those:

- a 12 cases were cleared by the HCC following a Phase I review;
- b four cases were taken to an in-depth review (Phase II), of which three were unconditionally cleared and one was resolved with remedies; and
- c one case involved the extension of remedies that were undertaken under a former HCC conditional clearance decision.⁷

So far in 2020, according to publicly available information, the HCC has given unconditional clearance to eight notified concentrations, out of which one was cleared following an in-depth review (Phase II).

ii Recent key cases

Below we set out some recent key merger control cases.

EPALME/Mytilineos (acquisition of sole control, Phase II, commitments)

On 3 April 2019, the HCC rendered its clearance decision⁸ to the notified acquisition of sole control⁹ of EPALME, a company active in the market for the production and trade of secondary aluminium as well as the market for the reprocessing of scrap aluminium, by Mytilineos SA, the sole producer of primary aluminium in Greece.

By way of derogation from the relevant European Commission case law,¹⁰ the HCC relied on its past case law¹¹ in finding that a single market for the production and trade of primary and secondary aluminium existed. The relevant geographic market for the production and trade of primary and secondary aluminium was defined as being worldwide, whereas the market for the reprocessing of scrap aluminium was limited to Greece.

Under the above market definitions, the HCC considered that EPALME and Mytilineos were competing in the single market for the production and trade of primary and secondary aluminium; however, due to the geographic segmentation of the market on a global scale, the aggregate market share of the parties was particularly low and, hence, the HCC found that the transaction did not give rise to horizontal effects.

5 Organisation for Economic Co-operation and Development Peer Reviews of Competition Law and Policy, Greece 2018, p. 48.

6 HCC Annual Activity Report for 2018, p. 84.

7 HCC Decision 650/2017.

8 HCC Decision 682/2019.

9 By acquisition of 97.8723 per cent of the company's share capital.

10 Cases COMP/M.1003 (*Alcoa/Inespal*) and COMP/M.1161 (*Alcoa/Alumax*).

11 HCC Decisions 36/II/1999, 276/IV/2005 and 604/2015.

The HCC, however, expressed its concerns about the vertical dimension of the notified concentration, due to the dominant position of EPALME in the downstream market for the reprocessing of scrap aluminium (75 to 85 per cent). In particular, the HCC considered that it was likely that the combined entity would be able to exploit its dominant position in the downstream market by offering the reprocessing service only as a tying service, along with the purchase of primary aluminium from Mytilineos, thus foreclosing competitors in the upstream market (i.e., that of the production and trade of primary and secondary aluminium) and allowing the combined entity to establish higher prices in the markets where it operated.

In light of the above concerns, the HCC accepted certain behavioural commitments offered by the participating entities for a three-year period, and, in particular, the undertaking of commitments:

- a* not to make the offering of reprocessing services to EPALME's customers conditional upon the supply of these customers with the primary aluminium produced by Mytilineos;
- b* not to make the supply of primary aluminium produced by Mytilineos conditional upon the provision of reprocessing services by EPALME;
- c* to maintain the provision of reprocessing services to EPALME's existing creditworthy clients under the condition that agreements between them are kept;
- d* not to bind participating entities' clients by means of a written or oral agreement with an exclusivity clause regarding the supply of secondary aluminium and the provision of reprocessing services; and
- e* to publish a press release in participating entities' websites and to send information letters to all their clients, notifying them of the above commitments.

With regard to the last commitment, the HCC noted that the communication and notification of commitments is a substantial behavioural measure because the provision of information to both customers and the market in general ensures an imperative condition for competition and consumers (i.e., that of information), particularly with regard to such critical commitments in terms of type and degree that are undertaken by companies with significant presence and position in the market.

Opel Hellas/G and P Singelidis (acquisition of indirect sole control by a natural person, single economic entity)

In another recent case involving a merger in the automotive sector¹² (the acquisition of indirect sole control over Opel Hellas by P Singelidis), the HCC granted its unconditional clearance following a Phase I review.

The transaction consisted of the acquisition of the total share capital of Opel Hellas by G Singelidis (acquirer),¹³ father of P Singelidis, with the latter being appointed to the board of directors and taking over the role of CEO within the target. The HCC, essentially following European Commission case law,¹⁴ found that G Singelidis did not qualify as a concerned undertaking for the purpose of assessing the notified concentration as the latter did not carry out any other economic activity outside the target (i.e., Opel Hellas).

¹² HCC Decision 691/2020.

¹³ Control was acquired following conclusion of a share and purchase agreement between G Singelidis and OPEL Europe Holdings SLU (seller).

¹⁴ Case COMP./M.3762 (*Apax/Travellex*).

In addition, P Singelidis was found to exercise indirect sole control over the target despite not having acquired any shares thereof. The HCC based its conclusion on the existence of close family ties between G Singelidis (acquirer) and P Singelidis (CEO of Opel Hellas), the position planned to be held by P Singelidis in Opel Hellas following the completion of the transaction, and the power of P Singelidis to adopt the target's strategic business decisions.

It is also interesting that, in calculating the turnover of the undertakings concerned for jurisdictional purposes, the HCC found that all companies controlled by the Singelidis family formed a *de facto* group wherein the leading figure was considered to be that of P Singelidis. In this context, the HCC stipulated that, due to the existence of family and economic (structural) ties, there was a considerable centralisation of management in said companies, which formed, in essence, a single economic entity. As such, the total turnover of the single economic entity was attributed entirely to P Singelidis.

Alpha (media sector, acquisition of joint control, Phase II)

Earlier in 2019, the HCC cleared the acquisition of joint control over Alpha Satellite Television SA, Alpha Radio SA and Alpha Radio Kronos SA by Motor Oil (Hellas) Corinth Refineries SA, Alpha Media Group Limited and a natural person, through holding company Nevine Holdings Limited.¹⁵ In this context, the HCC took the opportunity to clarify the interface between the Greek Competition Act and the Greek Media Law.

In assessing the transaction, the HCC implemented the provisions of both the Greek Media Law and the Greek Competition Act for those relevant markets falling within their ambit. In particular, the authority considered three relevant markets in its assessment, particularly: (1) the market of informative TV media, excluding pay-TV (Alpha Satellite Television SA); (2) the market of informative radio media (Alpha Radio SA); and (3) the market of non-informative radio media (Alpha Radio Kronos SA). In assessing the relevant markets under (1) and (2) above, the HCC applied the criteria under the Greek Media Law (i.e., holding of a particular market share), whereas for the relevant market under (3), the HCC applied the criteria under the Greek Competition Act (i.e., not to significantly impede competition in the national market or substantial part thereof).

The HCC found that the proposed transaction fell below the applicable thresholds in the relevant markets as set out in the Greek Media Law, namely below 35 per cent in each of the markets under (1) and (2), thus excluding the possibility for the notifying parties to establish a dominant position in these relevant media markets, while, on the other hand, the HCC established that it did not significantly impede competition in the national market or parts thereof, under the meaning of the Greek Competition Act.

Note that the HCC recently rendered a clearance decision over the proposed acquisition of sole control over the operations of Alpha Satellite Television SA, Alpha Radio SA and Alpha Radio Kronos SA by Motor Oil (Hellas) Corinth Refineries SA.¹⁶ As per its previous decision (of acquisition of joint control), the HCC also found that the notified transaction raised no doubts with regard to its compatibility with the rules under the Greek Media Law and the Greek Competition Act.

¹⁵ HCC Decision 679/2019.

¹⁶ HCC Press Release of 10 February 2020 (at the time of writing, the HCC decision was not publicly available).

III MERGER CONTROL REGIME

i Waiting periods and time frames

Specific deadlines apply with regard to pre-merger notifications of qualifying transactions and HCC scrutiny of the notified concentrations under the Greek Competition Act.

In particular, pre-merger filings must be submitted to the HCC within 30 calendar days of the conclusion of the agreement or the announcement of the bid to buy or exchange, or the assumption of an obligation to acquire a controlling interest in an undertaking. According to HCC case law, the above deadline may also be triggered by the execution of a preliminary document of a binding nature (e.g., memorandum of understanding).¹⁷ Such assessment is made by the HCC on a case-by-case basis.

Where a wilful failure to observe the above statutory deadline occurs, the HCC may impose on the undertakings concerned a fine of from €30,000 up to 10 per cent of their aggregate group turnover. The HCC imposed one of its highest fines in the *Minoan Flying Dolphins* case for realisation and notification failure of 21 concentrations in the domestic maritime sector (i.e., approximately €6.3 million).¹⁸ More recently, the HCC imposed fines amounting to €110,000 against the media company Dimera Media Investments for failure to notify and violation of the standstill obligation.¹⁹

In addition, a mandatory suspensory effect of the notified transaction is also provided for under the Greek Competition Act. This means that the consummation of the transaction is suspended until the HCC decides to clear or prohibit the notified concentration. Derogation may be granted upon request for the reason of prevention of serious damage to one or more undertakings concerned or to a third party (full derogation).

The duty to suspend a concentration will not prevent the implementation of a public bid to buy or exchange, or the acquisition through the stock market of a controlling interest, when such transaction is notified to the HCC and provided that the acquirer does not exercise the voting rights attached to the securities or does so to protect the investment value and on the basis of a derogation granted by the HCC (partial derogation).

In the case of gun-jumping (violation of suspensory effect), the HCC may impose the same sanctions as above. In addition, if the concentration is realised contrary to a prohibitive provision or decision, the HCC may order (1) the separation of the undertakings concerned, through the dissolution of the merger or the sale of the shares or assets acquired, and (2) any other measure appropriate for the dissolution of the concentration or any other restorative measures.

As regards review of the notified concentration, the HCC may examine it in one or two phases as follows.

- a If the notified concentration does not meet the statutory thresholds and, therefore, does not fall within the ambit of the Greek Competition Act, the chairman of the HCC will issue a decision to that effect within one month from notification.
- b If the notified concentration, although meeting the statutory thresholds, does not raise serious doubts as to the possibility of significantly restricting competition in the relevant markets, the HCC will decide to approve the transaction within one month from notification (Phase I clearance).

17 HCC Decisions 383/V/2008, 632/2016 and 633/2016.

18 HCC Decision 210/III/2002.

19 HCC Decisions 652/2017 and 655/2018.

- c If the notified concentration meets the statutory thresholds and raises serious doubts as to its compatibility with competition conditions in the relevant markets, the HCC's chairman will decide, within one month from notification, to initiate proceedings for the full examination of the transaction and will inform, without delay, the undertakings concerned (initiation of Phase II proceedings). In this case, the matter will be introduced before the HCC within 45 days. Upon being informed that proceedings will be initiated, the undertakings concerned may jointly proceed to adjust the concentration or suggest commitments to remove any serious doubts as to the compatibility of the transaction with the competition rules in the relevant markets, and notify these to the HCC (within 20 days of the introduction of the case before the HCC).
- d A decision prohibiting the notified concentration must be issued within a deadline of 90 days of commencement of the Phase II proceedings. If such negative ruling has not been issued upon expiry of the above deadline, the concentration will be deemed to have been approved and the HCC will have to issue an act to that effect. The HCC may attach conditions to the decision approving the merger.

The above statutory deadlines for the issuance of a decision by the HCC may be extended when (1) this is agreed by the notifying parties; (2) the notification form is incomplete; or (3) the notification is erroneous or misleading so that the HCC is not able to assess the notified concentration. Regarding points (2) and (3), the HCC is obliged to request corrections to the initial notification from the notifying parties within seven business days of the date of notification. The deadlines for the issuance of a Phase I clearance or for the institution of Phase II proceedings are deemed to commence only upon submission of complete and accurate data.

In exceptional cases, the deadlines under points (b), (c) and (d) are suspended if the undertakings concerned fail to comply with their obligation to provide information in accordance with the Greek Competition Act, and under the condition that they are advised accordingly within two days of the expiry of the time limit determined by the HCC for the provision of such information.

Ancillary restrictions that are directly connected to and necessary for the implementation of a concentration are also covered by HCC clearance decisions (although the HCC may require the restriction of any such ancillary restrictions in terms of scope or time, if deemed appropriate, in accordance with the relevant EU guidelines).

ii Parties' ability to accelerate the review procedure, tender offers and hostile transactions

The Greek Competition Act does not provide for the notifying parties' ability to accelerate the review procedure. In practice, the more complete and accurate the information submitted, the less time the review period will last.

With regard to the possibility for partial derogation in public bids, see Section III.i.

In terms of hostile transactions, these are rarely dealt with by the HCC. A notable hostile transaction that has undergone HCC scrutiny extends back to 2010 (*Vivartial/Mevgal*). The transaction was cleared with conditions, by virtue of HCC Decision 515/VI/2011, but was dropped and notified again a few years later. In particular, by means of HCC Decision 598/2014, the notified concentration was cleared again, but fulfilment did not take place. Currently, control over Mevgal has been converted from sole to joint following

the granting of the HCC's (third) conditional clearance.²⁰ Note that the HCC, in its Decision 558/VII/2013 'determining the specific content of merger notifications pursuant to the Greek Competition Act', explicitly provides that:

the parties obliged to notify may submit a written request to the HCC for the acceptance of their notification, even if they do not submit all the required information, if such information is not wholly or partially at their disposal (e.g., in case of an undertaking forming a hostile acquisition target).

iii Third-party access to the file and rights to challenge mergers

In general, third parties are not granted access to pending case files, including merger control cases.²¹ However, the HCC may invite third parties to act as witnesses in the hearing of a pending case, where their involvement is considered to contribute to the case review. In addition, third parties may also submit a memorandum to the HCC in the context of a pending case, including merger control, which is made available to the notifying parties. In limited cases, the HCC may allow third parties to obtain access to the non-confidential version of parties' memoranda and records of the proceedings.

In essence, third parties obtain official knowledge of the proposed concentration by means of the publication of the notified concentration in a daily financial newspaper with national coverage, within a period of five days of the notification of the concentration, after which they may comment or provide relevant information to the HCC within a period of 15 days.

iv Resolution of authorities' competition concerns, appeals and judicial review

The HCC may clear the notified transaction subject to conditions so that the concentration may be rendered compatible with the applicable substantive test for assessing the legality of the merger (i.e., whether the notified transaction is likely to significantly restrict competition on the national market or in a substantial part thereof, taking into account the involved products' services characteristics, particularly by creating or strengthening a dominant position). Therefore, the notifying parties may offer remedies to alleviate any concerns of the HCC, which are to be negotiated between the notifying parties and the authority. In particular, remedies are offered within 20 days of the date of introduction of the case before the HCC, and only in exceptional cases after the lapse of this period. Parties wishing to propose remedies must file the relevant form, which also includes a model text for divestitures and for trustee mandates, and which is available on the HCC's website.²²

HCC decisions may be appealed against before the Athens Administrative Court of Appeals and, ultimately, the Council of State. The right to appeal lies with the notifying parties, the Greek state and any third party with a legitimate interest.

If an HCC decision is partially or wholly annulled by the administrative courts, the HCC shall re-examine the concentration in light of existing market conditions. To this end, the notifying parties shall submit a revised or supplemental version of the notification if there is a change of conditions.

20 HCC Decision 650/2017.

21 Article 15, Paragraph 9 of HCC's Rules of Internal Procedure and Management.

22 HCC Decision 524/VI/2011.

v Effect of regulatory review

Concurrent review of mergers by more than one body is not possible under Greek merger control rules. This would be the same for transactions that also touch upon the electronic communications sector.²³ For example, in a recent acquisition of control case (*Vodafone/CYTA*),²⁴ the HCC provided significant input regarding its interrelation in terms of competence with other national authorities, authorised by law to implement the Greek Competition Act (i.e., EETT). In this case, the HCC cleared the transaction only with respect to the media aspect of the concentration (i.e., pay-TV services), whereas it decided to abstain from the assessment of the aspect of the concentration for which the EETT had already initiated a relevant review (multiple play services). In turn, the EETT cleared the transaction later in the year.²⁵

As regards limitation suspensory effect of review and periods for completion of the review, see Section III.i.

IV OTHER STRATEGIC CONSIDERATIONS

i How to coordinate with other jurisdictions

Under the Greek Competition Act, the HCC, being the national competition authority, is responsible for cooperation with: (1) the competition authorities of the European Commission, rendering any necessary assistance to their designated bodies for the conduct of investigations provided under EU law; and (2) the competition authorities of other EU Member States.²⁶

In practice, the HCC cooperates closely with the competition authorities of other EU Member States, as well as with the competition authorities of third countries, through the European Competition Network and the International Competition Network. The HCC also participates actively in the Organisation for Economic Co-operation and Development (OECD).

ii How to deal with special situations

If a party to the notified concentration faces financial distress or insolvency, the failing firm defence may be raised before the HCC as part of the merger review process. Although the HCC has not dealt per se with this defence, in the sense that it has not rendered any clearance decision on this basis to date, it could be reasonably expected to follow relevant EU precedents in similar future cases.

The HCC may take into account the financial situation of the undertakings concerned when calculating the applicable fine in the case of violation of the standstill obligation.²⁷ This aspect was, for example, looked into in the *Dimeral/Radioteleoptiki* case,²⁸ in which the HCC

²³ See Section I.i.

²⁴ HCC Decision 656/2018.

²⁵ EETT Decision 857/7 of 28 June 2018.

²⁶ Article 28 of the Greek Competition Act.

²⁷ *id.* at Article 9.

²⁸ HCC Decision 652/2017.

took into account for the calculation of the fine (1) the acquiring entity's low market shares in the relevant markets, (2) the limited economic capacity of the undertakings participating in the concentration and (3) the absence of any affected horizontal and vertical markets.

With regard to minority ownership interests, the HCC takes the stance that these may also confer the possibility of control. In particular, the definition of control under the Greek Competition Act remains identical to that of the EC Merger Regulation, and the HCC heavily follows the EU paradigm. Essentially, control is associated with the possibility of exercising decisive influence over an undertaking's activities. Accordingly, a finding of acquisition of control is possible even in relation to the acquisition of a minority interest if the surrounding circumstances are such as to confer actual control in the sense of being able to block actions relating to the strategic commercial policy of an undertaking.²⁹ This has been ruled by the HCC in the *Folli-Follie/Duty Free Shops* case, where, although Folli-Follie held a minority stake in the acquired entity, it was deemed to be exercising control as it was the only entity in a position to veto strategic decisions of the acquired entity.³⁰ Exercise of joint control by minority shareholders was recently touched upon by the HCC in the *GEK TERNA/Nea Odos* case,³¹ in which it was stated that joint control may also occur in case of inequality in votes:

where minority shareholders have additional rights which allow them to veto decisions which are essential for the strategic commercial behaviour of the joint venture. . . . The veto rights themselves may operate by means of a specific quorum required for decisions taken at the shareholders' meeting or by the board of directors to the extent that the parent companies are represented on this board.

V OUTLOOK AND CONCLUSIONS

There are currently no pending changes in merger control legislation. The HCC is in the process of completing a Code of Procedures with regard to the examination of anticompetitive practices (horizontal and vertical agreements, abuse of dominance), mergers and competition advocacy.³²

In recent years, the HCC has proved to be active in ensuring compliance with the Greek merger control regime. The authority's vigilance is undoubtedly evidenced by its recent gun-jumping investigations.³³

In addition, practitioners' discussions appear to be focusing on the possibility of offering remedies during the Phase I review period, considering that under the wording of the Greek Competition Act, such possibility appears not to be applicable.

Another issue that has proved to form the basis of discussions in the Greek merger control field would be whether the 30-day deadline for filing of a notification should be relaxed to be in line with the OECD Merger Recommendation of 2005.

29 HCC Decision 427/V/2009.

30 HCC Decision 308/V/2006.

31 HCC Decision 673/2018.

32 HCC Press Release of 1 June 2020.

33 HCC Decisions 652/2017 (*Dimera/Radioteleoptiki*), 655/2018 (*Dimera/Pigasos*) and 665/2018 (*Masoutis/Promithefiki*).

Finally, and as a matter of ongoing concern, it also remains to be seen whether a change in the current notification criteria (jurisdictional thresholds) will be introduced, to deal with the low number of merger notifications filed with the HCC per year and as a response to the tendency discussions and practices identified in other EU Member States.

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