The Merger Control Review

Twelfth Edition

Editor
Ilene Knable Gotts

The Law Reviews

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THE MERGER CONTROL REVIEW

TWELFTH EDITION

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This article was first published in August 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
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www.TheLawReviews.co.uk

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Enquiries concerning editorial content should be directed
to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-83862-803-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALTIUS

ANDERSON MŌRI & TOMOTSUNE

ASHURST

BAKER MCKENZIE

BERNITSAS LAW

BLAKE, CASSELS & GRAYDON LLP

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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 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 28 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),

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particularly involving digital or platform offerings, has been a driver in the expansion of jurisdiction and focus of investigations. Newly adopted laws have tried to vest jurisdiction on these transactions by focusing on the 'value of the consideration' rather than turnover for acquisitions of nascent firms, particularly in the digital economy (e.g., in Austria and Germany). Some jurisdictions have also 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 (see discussion of *Google/Fitbit* in the Japan chapter), and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time. To provide the ability to review acquisitions of nascent but potentially important rivals, the European Commission (EC) has recently adopted the potentially most significant change in its rules: to use the referral process from Member States to vest jurisdiction in transactions that fall below its thresholds but that could have Community-wide significance. Two recent referrals should provide significant guidance regarding the impact of this new referral process.

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., 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

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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 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.

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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

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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 US Federal Trade Commission 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

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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, Japan, the Netherlands, Norway, South Africa, Ukraine, Vietnam and the United States). This is particularly the case when non-compete or exclusive dealing relationships raise concerns (e.g., in Mexico and the United States). 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).

We are at a potentially transformational point in competition policy enforcement. This book should, however, provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2021

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Part II

Jurisdictions

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Chapter 14

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 (DGC).[2]

In October 2020, a new structure for the HCC and the DGC was implemented. The main features of this reform consist of the setting up of: (1) interdisciplinary 'mixed' sectoral directorates, which replace the old model of distinct legal service and economics directorates; (2) 'horizontal' units for economic research and documentation and for forensic investigation and detection; and (3) a chief legal officer directorate. Each sectoral directorate is formed of two units: one legal unit and one for economic analysis and impact assessment, which focuses on one or more adjacent economic sectors. The chief legal officer directorate is mainly tasked with the second-level legal review of draft acts and proposals for legal acts, including draft documents and legal acts in merger control cases. Finally, the new structure also includes directorates that report directly to the chair of the HCC and an office of the Legal Counsel of the State.

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 Online[3] and Cyta Hellas[4] by Vodafone).

As regards merger control, all other economic sectors fall within the competence of the HCC.

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

2 The DGC assists the HCC in its work, by identifying and documenting the practices of undertakings that restrict or distort competition and by ensuring that entry barriers to the market are removed, ensuring that it is free and open to all undertakings. To this end, the DGC is responsible for the control and legal documentation of business practices and concentrations of undertakings that fall within the ambit of the Greek Competition Act.

3 EETT Decision 733/047 of 18 September 2014.

4 EETT Decision 857/7 of 28 June 2018.

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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,[5] as amended and in force (the Greek Competition Act) (in principle, Articles 5 to 10), abolishing and replacing the former Greek Competition Act.[6] The Greek Competition Act mirrors, in essence, the provisions under the EU merger control regime.[7]

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.

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 a 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 establishment of the joint venture, may eliminate competition in a substantial part of the relevant market.

5 Official Gazette A' 93/20 April 2011.
6 Law 703/1977.
7 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.

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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, a turnover totalling at least €15 million in Greece.

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 a turnover totalling 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 between 2000 and 2017 was 373.[8] The number of decisions issued by the HCC, however, differs every year (usually between 10 and 20). According to its 2018 Annual Report, 18 merger control cases were notified before the HCC in 2018, out of which 13 were cleared during the year.[9] In 2019, 15 merger control cases were notified before the HCC, out of which 12 were cleared during the year.[10]

In 2020, the HCC issued 14 merger control decisions according to publicly available information. Of those:

a 11 cases were cleared by the HCC following a Phase I review;

b one case was taken to an in-depth review (Phase II);

c one case involved the revision of commitments that were undertaken under a former HCC conditional clearance decision;[11] and

d one case involved the review of compliance with the commitments that were undertaken under a former HCC conditional clearance decision.[12]

So far in 2021, according to publicly available information, the HCC has given unconditional clearance to six notified concentrations, out of which one has been cleared following an in-depth review (Phase II). In addition, the HCC has issued two decisions involving the extension of commitments that were undertaken under former HCC clearance decisions.

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

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

10 HCC Annual Activity Report for 2019, p. 83.

11 HCC Decision 665/2018.

12 HCC Decision 658/2018.

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ii Recent key cases

Below we set out some recent key merger control cases.

Skroutz (acquisition of negative sole control, online platforms, Phase I)

On 24 June 2020, the HCC rendered its clearance decision[13] to the notified acquisition of negative sole control of Skroutz Internet Services SA, a Greek company active in the e-commerce sector through the operation of a price comparison platform, an online marketplace and an online restaurant platform, and the provision of online advertising services, by SAIGA Sàrl, a holding company becoming the largest minority shareholder in Skroutz post-completion (Phase I review).

The HCC looked thoroughly into the issue of control. Based on the HCC's decision, although the parties held the view that the notified transaction would lead to a *de facto* joint control situation,[14] the authority focused on the fact that SAIGA would become the only (minority) shareholder with the ability to veto the strategic decisions in Skroutz, whereas the rest of the minority shareholders would not have such a level of influence in the company. Ultimately, the HCC concluded that SAIGA obtained negative sole control over Skroutz, irrespective of its minority shareholding therein. In reaching this conclusion, the HCC took into account that, inter alia, there were no strong common interests (e.g., economic or family ties) among other minority shareholders and, in particular, among Skroutz's founders that would *de facto* necessitate their common action, thus leading to a joint control scenario.

In terms of market definition, the HCC largely relied on the approach and argumentation of the European Commission in the *Google Search (Shopping)* case,[15] but ultimately left the matter of whether price comparison platforms and online marketplaces belong to the same product market, as supported by the parties, open. The HCC also identified a market for online advertising platforms (including display advertising, classifieds and directories and paid-for-search advertising), as well as a market for online restaurant platforms in line with the UK Competition and Markets Authority's *Just Eat/Hungryhouse* and *Amazon/Deliveroo* case law.

Masoutis (revision of commitments)

In 2020, Masoutis SA Supermarket, a company active in the supermarket sector, requested the revision of the commitments undertaken in the context of the HCC's 2018 decision clearing the *Masoutis/Promitheutiki* transaction.[16] In particular, Masoutis had undertaken the obligation to sell the target's store located in Agios Spyridonas on the island of Andros within nine months of the issuance of the HCC decision.

However, Masoutis was unsuccessful in completing the divestment and filed a request for the revision of the commitment before the HCC. To this end, Masoutis invoked material

13 HCC Decision 714/2020.

14 In particular, the parties stated that the founders would continue to play an important role in the operation of Skroutz post-completion due to the knowledge they possessed with respect to the operation of Skroutz, as they were the developers of Skroutz's software and business plan, and their envisaged participation in the day-to-day management of the company. Hence, there would be a strong motive for SAIGA to take into account the opinion of the founders as regards the target's strategic decisions. In addition, the parties submitted that the founders would act collectively post-completion.

15 AT. 39740.

16 HCC Decision 665/2018. See, in detail, Merger Control Review 2019, pp. 201–202.

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changes in market conditions as a result of the operation of a new supermarket store in Andros and the potential entrance of other competitors to the market in question. In view of the above, Masoutis proposed to divest a store located elsewhere, in the area of Anemomiloi on the island of Andros, instead of the store that formed part of the commitment.

The HCC accepted Masoutis' request,[17] although it considered that the market conditions did not materially change following the entrance of a new competitor on the market.[18] Instead, the HCC noted that, as result of the non-implementation of the undertaken commitment, the market shares of the new entity were still disproportionately high (i.e., above 50 per cent) on Andros. In this context, the HCC assessed two factors for satisfying Masoutis' request: (1) the need to limit the market shares of the new entity; and (2) the unprecedented financial and social circumstances as a result of the coronavirus pandemic. In light of these factors, the HCC considered that the proposed revision of the commitment was the most satisfactory solution for the decrease in the new entity's market share. It is interesting that the HCC reached this outcome, even though under its analysis, the revision of the divestment would result in a market share of over 50 per cent and, thus, it could only partially restore competition conditions in the market. Hence, the HCC took a rather pragmatic approach, taking into account the effects of the coronavirus pandemic and adverse economic conditions, thus favouring the most effective – under the circumstances – scenario addressing, even partially, its competition concerns.

Adama/Alfa (agrochemical products, Phase II without remedies)

In another recent case involving a merger in the agrochemical products sector[19] (the acquisition of sole control over Alfa by Adama BV), the HCC granted its unconditional clearance following a Phase II review.

The transaction consisted of the acquisition of sole control by Adama BV, a member of the Chemchina group active in the production and trade of agrochemical products (mainly, crop protection products), through the Adama and Sygenta groups, over Alfa, a Greek company active in the distribution of agrochemical products and the exclusive distributor of Adama group products in Greece. The concentration was found to give rise to horizontal effects, as the activities of the undertakings concerned overlapped in the Greek market for the wholesale distribution of the aforementioned agrochemical products, and vertical effects, as Chemchina group is active in the upstream market for supply and Alfa is active in the downstream market for distribution of said products.

It is interesting that the HCC distinguished between three different categories of affected markets: (1) the affected markets where the combined market share of the parties is high, with an increment of over 5 per cent; (2) the affected markets where the parties have a high market share, but the increment is under 5 per cent; and (3) the affected markets where the high combined market share is not the result of the concentration but rather of the exclusive distribution relationship between Adama and Alfa.

17 HCC Decision 713/2020.

18 In particular, the HCC noted that despite the market share of the new entity (formed as part of the *Masoutis/Promitheutiki* transaction) dropping after the entrance of the new competitor, it still exceeded 50 per cent, and, hence, Masoutis' position in the market did not significantly change.

19 HCC Decision 712/2020.

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The HCC's assessment mainly focused on the affected markets under (1), taking several factors into account, including the existence of strong competitors in the market (e.g., Bayer, BASF) and the existing relationship between the parties, as well as the parties' declining market shares. Finally, the HCC reviewed the potential conglomerate effects of the concentration as a result of the presence of Alfa in the Greek market for the distribution of fertilisers. In particular, the HCC dealt with the possibility of Alfa becoming a one-stop shop for end consumers (farmers) and proceeding to bundling practices (through bundled rebates for crop protection products and fertilisers). However, the HCC concluded that the concentration could not lead to market foreclosure and reserved its right to examine potential bundling practices *ex post*.

III THE 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).[20] This 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 to 10 per cent of their aggregate group turnover.

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 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 (approximately €6.3 million).[21] More recently, the HCC imposed fines amounting to

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

21 HCC Decision 210/III/2002.

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€110,000 against the media company Dimera Media Investments for failure to notify and violation of the standstill obligation.[22] In 2021, the HCC is dealing with two cases involving (1) failure to notify and gun-jumping,[23] and (2) late notification.[24]

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 chair of the HCC will issue a decision to that effect within one month of 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 of notification (Phase I clearance).

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 chair will decide, within one month of 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).

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22 HCC Decisions 652/2017 and 655/2018.

23 See HCC press release dated 16 December 2020, pursuant to which a hearing was scheduled for 8 January 2021 for the HCC to decide upon failure to notify and gun-jumping of the concentration involving the creation of a joint venture by PPC Renewables and TERNA Energeiaki in the market of production of electricity from renewables. Under the HCC Rapporteur's statement of objections, the required fault was not met in the present case, resulting in non-satisfaction of the conditions for the finding of the infringement of failure to notify. At the time of writing, no further HCC press release or decision has been issued.

24 Under an HCC press release dated 2 April 2021, the HCC scheduled a hearing for 9 June 2021 to decide, among other things, on the late notification of the concentration involving acquisition of sole control by OPAP over Greek and Cypriot activities of Kaizen Gaming International Ltd. Under HCC Rapporteur's statement of objections, it is recommended that a fine is imposed against OPAP for this violation. At the time of writing, no further HCC press release or decision had been issued.

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d A decision prohibiting the notified concentration must be issued within 90 days of the 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 above deadlines (except for the one-month deadline for issuance of the chair's decision archiving the notification as falling outside the Greek Competition Act) 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 HCC has a track record of meeting deadlines once notifications are deemed complete.

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 (*Vivartia/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. Control over Mevgal was later converted from sole to joint following the granting of the HCC's (third) conditional clearance.[25] 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:

> *[t]he 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).*

25 HCC Decision 650/2017.

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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.[26] 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 five days of the notification of the concentration, after which they may comment or provide relevant information to the HCC within 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.[27]

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.

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.[28] For example, in a recent acquisition of control case (*Vodafone/CYTA*),[29] 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

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

27 HCC Decision 524/VI/2011.

28 See Section I.i.

29 HCC Decision 656/2018.

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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.[30]

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.[31]

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.

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.[32] This aspect was, for example, looked into in the *Dimera/Radioteleoptiki* case,[33] in which the HCC 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.[34] 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

30 EETT Decision 857/7 of 28 June 2018.
31 Article 28 of the Greek Competition Act.
32 id. at Article 9.
33 HCC Decision 652/2017.
34 HCC Decision 427/V/2009.

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the only entity in a position to veto strategic decisions of the acquired entity.[35] Exercise of joint control by minority shareholders was recently touched upon by the HCC in the *GEK TERNA/Nea Odos* case,[36] in which it was stated that joint control may also occur in the case of inequality in votes:

> *[w]here 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

For the HCC, 2020 was arguably a fruitful year from a merger control standpoint, taking into account the number of concentrations brought before the authority, notwithstanding adverse covid-19 conditions. The majority of the cases did not undergo an in-depth review, as Phase II was initiated in only one case, without the undertaking of any remedies. In addition, the HCC also followed its long-standing practice in 2020 by not blocking any notified concentrations. Apart from typical merger control clearance procedures, the HCC also looked into other merger control issues, such as failure to comply with remedies, requests for lifting or revision of remedies and matters pertaining to failure to (promptly) notify, and gun-jumping issues.

From an organisational point of view, the internal structure of the HCC and DGC underwent changes reflecting a more market-oriented approach, which may also potentially affect merger enforcement. The trend of internal modernisation was also reflected in the HCC publishing its 'Manual of Operational Procedures' aimed at providing practical guidance to staff (and the public) on the conduct of procedures relating to the application of the Greek Competition Act, including its merger control provisions.

Finally, looking ahead, the adoption of an amended Greek Competition Act is hoped to occur later in 2021. By way of background, a legislative committee was set up in 2020 with the mandate to review and propose legislative amendments to the Greek Competition Act in an effort to modernise competition rules in the digital age by introducing structural changes to Greek competition legislation.

Although no changes are expected to occur in the merger control part of the Greek Competition Act, it remains to be seen whether the possibility of offering remedies during Phase I review will be introduced in line with expressed opinions and discussions held on this subject.

35 HCC Decision 308/V/2006. See also the aforementioned HCC Decision 714/2020 (footnote 13).

36 HCC Decision 673/2018.

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Appendix 1

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Tania Patsalia is a senior associate at the firm, which she joined in 2010. Her practice is focused on EU, competition and antitrust law, advising on all aspects of antitrust, merger control and state aid rules. Tania regularly assists clients with antitrust and competition law issues arising from their commercial arrangements and has been involved in high-profile cartel and merger control cases before the Hellenic Competition Commission. She provides clients with on-site assistance in dealing with dawn raids, including running workshops and mock exercises.

Tania also advises on the application of EU law in Greece and the regulatory requirements applicable to the telecoms, media and technology sectors, regularly liaising with regulators such as the National Telecommunications and Post Commission, the National Council for Radio and Television and the Hellenic Data Protection Authority. She provides guidance to telecoms operators on licensing requirements, compliance with their annual reporting obligations and telecoms issues relating to the use of new technologies and the launch of new products and services. Tania has broad experience in all aspects of EU and Greek data privacy rules and she routinely advises clients on the proactive identification, assessment and management of risks associated with their privacy practices. Tania assists clients in GDPR compliance steps, and advises extensively on how to identify compliance gaps and draft privacy policies, consent forms and data processing agreements.

Prior to joining the firm, Tania worked as a lawyer with Ashurst LLP in Brussels as a member of their EU and competition law team and as a trainee at the European Commission, Directorate-General for Competition, cartels unit.

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Vangelis advises on EU and competition law matters, including cartels, merger control and damages actions. He also acts in data protection projects, such as reviewing and drafting data processing agreements. Vangelis advises on the regulatory requirements under EU and Greek telecommunications rules and liaises with the National Regulatory Authority.

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ISBN 978-1-83862-803-1

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