MERGER CONTROL

INTERNATIONAL SERIES

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CONTENTS

CONTENTS

CONTENTS

FOREWORD

Jean-François Bellis and Porter Elliott | Van Bael & Bellis

The past several years have seen an increase in M&A activity, with tens of thousands of deals in 2016 alone, collectively valued at well over $3 trillion. Recent large transactions include Dow's acquisition of DuPont, Anheuser-Busch InBev's acquisition of SAB Miller and AT&T's acquisition of Time Warner, to name just a few. While not every deal is subject to merger control, more M&A activity inevitably means more merger control filings. Filings to the European Commission, for example, increased over 30% from 2013 to 2016, and 2016 marks the second highest number of EU filings ever in a single year.

Whether your company has been involved in a transaction that requires merger control approval or you are an outside counsel retained to assist in obtaining such approval, you are all too aware of the hurdles that stand in the way of closing the deal. Most merger control regimes worldwide require suspension of notifiable transactions until they have been approved, and as this can take months, obtaining merger control approval is typically the long pole in the tent. Buyers are eager to take control of what they have bought, sellers are eager to get paid, and nobody benefits from the uncertainty and turmoil of a long-drawn-out merger review. Aside from timing issues, it can be difficult to navigate the sometimes turbulent waters of obtaining required approvals in multiple jurisdictions, each of which has its own filing thresholds, its own procedure and, in some cases, even its own substantive test for determining whether the deal will be approved.

This book aims to help.

With contributions from leading law firms covering 52 of the most important jurisdictions worldwide, this third edition of *Merger Control* sets out to address the most common and critical questions of merging companies and their lawyers, including some which are less often addressed in other books of its kind, such as whether pre-notification consultations are customary in a given jurisdiction, whether "carve-out" arrangements may be implemented to allow for closing to take place in jurisdictions where approval is still pending, whether the jurisdiction at issue has a track record of fining foreign companies for failure to file and whether it has ever issued penalties for "gun-jumping" offences.

Adopting the reader-friendly Q&A format that has been used successfully in the first two editions of *Merger Control*, this book sets out to answer for each jurisdiction the key questions those on the front line are most likely to have, including:

- Is notification mandatory (as in most jurisdictions where the thresholds are met) or voluntary (as, for example, in Australia, New Zealand, Singapore and the UK)?
- If mandatory, is the requirement to file based purely on the parties' turnover (as in the EU and many other jurisdictions worldwide) or are there other factors that need to be considered, such as market share (for example, in Portugal, Spain and the UK), asset value (for example, in Russia and Ukraine) or the size of the transaction (for example, in the US)?
- Is there a filing deadline and/or a requirement to suspend implementation pending receipt of an approval decision? In most jurisdictions, there is no filing deadline so long as the deal is not closed until it has been approved, but there are exceptions.

FOREWORD

- How onerous is the filing? Most jurisdictions have detailed notification forms that must be completed (Germany being a notable exception), although some forms take far more time to complete than others. For example, although certainly not always the case, it is not unusual for notifications to the European Commission to exceed 100 pages (not counting annexes), and to include very detailed legal and economic analysis. By comparison, the US Hart–Scott–Rodino form is short and straightforward, and can usually be completed in a matter of days (although a second request in the US can be extremely burdensome).
- What factors are likely to be considered by the relevant authorities in assessing the legality of the transaction? While it must be assumed that every authority will focus first and foremost on whether the transaction would raise competition concerns in its territory, some authorities are more likely than others to consider theories of competitive harm that go beyond traditional concerns related to high combined market shares, such as the risks of vertical foreclosure. Similarly, non-competition issues, such as industrial policy or labour policy, may be more likely to be considered in some jurisdictions than in others.

Although by no means a substitute to seeking the advice of local counsel, this book aims to address these and other critical questions in a concise and practical way, and therefore to serve as a valuable resource to companies and their counsel as they negotiate their way through the twists and turns of obtaining the required merger control approvals worldwide.

As always, compiling the third edition of *Merger Control* has truly been a group effort. With this in mind, we would like to thank all the authors for their contributions, as well as the team at Sweet & Maxwell for their diligence in bringing this book to fruition. We also wish to express our gratitude to our colleagues at Van Bael & Bellis who assisted us on this project, in particular Veerle Roelens and Gwenda De Pril for their secretarial assistance.

Brussels, May 2017

FOREWORD

Carles Esteva Mosso | Deputy Director-General for Mergers, DG Competition, European Commission

Describing around 50 national and regional merger control regimes, this book provides an excellent illustration for the deep proliferation of merger control worldwide.

This proliferation of merger regimes and the related internationalisation of merger review is a positive development. It shows that a competition culture is expanding around the world and that a global level playing field is being established. On the downside, it increases administrative burden and costs for merging parties, as well as the risk of inconsistent merger review outcomes.

Convergence and effective inter-agency cooperation have to go hand in hand to tackle these issues. We have already made good progress in this regard within international forums, such as the International Competition Network, the OECD and UNCTAD. This does not, however, mean that no further efforts are needed.

Indeed, from a procedural point of view, divergence in merger control is still important and implies challenges for global transactions. Some of these divergences are linked to the differences in the institutional set-up of merger review systems (judicial/administrative systems). Other differences relate to the fundamental procedural characteristics of merger control systems (voluntary versus compulsory notification systems, ex ante and ex post review). Those differences obviously have a strong impact on the applicable timetables, which may be challenging to align in multi-jurisdictional transactions. Further differences may exist with regard to the procedural safeguards of due process and transparency.

However, from a substantive point of view, we have achieved broad agreement on how to assess mergers and what type of theories of harm should be in the focus of our investigations. Indeed, in its 2013 Report on Country Experiences with the 2005 OECD Recommendation on Merger Review, the OECD found a clear move away over the previous ten years from the dominance test. Many jurisdictions had changed and others were contemplating changing the legal standard for the review of mergers from a standard based on the creation or the strengthening of a dominant position to a "significant lessening of competition" (SLC) standard. It found that today the SLC test or hybrid tests are used in the vast majority of jurisdictions.

Moreover, the Recommended Practices for Merger Analysis by the International Competition Network (ICN) demonstrate common ground in the assessment of horizontal mergers. The ICN Recommended Practices set out very clearly that mergers that lead to high market shares for the merging firms and that result in significant increases to concentration levels are in general the mergers most likely to raise competition concerns. In other words, there is some international consensus that horizontal mergers tend to be the most likely to raise competition concerns under the mentioned conditions. Moreover, there is also consensus on the framework to assess the potential anti-competitive effects resulting from such mergers. The recommended practices state that the goal of competitive effects analysis in the review of horizontal mergers is to assess whether a merger is likely to harm competition significantly by creating or enhancing the merged firm's ability or incentives to exercise market power, either unilaterally or in coordination with rivals. As far back as 2006, the ICN Merger Guidelines Workbook clearly set out how to assess unilateral and coordinated effects that may result from a horizontal merger. The European

FOREWORD

Commission's and the US Federal Trade Commission's horizontal merger guidelines are based on those economic considerations, and so too are the merger control guidelines and practice in many other jurisdictions.

We constantly strive to further convergence. In 2017, the ICN has not only revised some of its existing Recommended Practices in the field of merger control, including on notification thresholds and local nexus, as well as remedies, but also elaborated new Recommended Practices on the types of transactions to be subjected to merger control and efficiencies.

The main challenge is making this convergence work in practice in the assessment of the substance and remedies of individual cases. At the Commission's Directorate-General for Competition, this is not a theoretical or rare challenge, but one that concerns our daily work. In fact, over the period 2014–15, at DG Competition, we cooperated with other competition authorities (outside the EU) in half of the complex merger cases (50%). We define 'complex merger cases' as those which are cleared in the first phase subject to remedies and those that require a second phase investigation. Aggregated data shows that this is representative for recent years: during the 2010–15 time frame, international cooperation in complex merger cases amounted to 53%.

Our cooperation extends from cooperation with well-established authorities to cooperation with younger authorities. During the period 2014–15, DG Competition cooperated with 16 non-EU competition agencies on complex merger decisions.

This is why, as former co-chairs of the ICN merger working group, we have promoted the "ICN Practical Guide to International Enforcement Cooperation". This ICN work product provides guidance on multilateral merger enforcement cooperation for agencies, as well as for merging parties and third parties. It sets out the overarching principles for successful cooperation, namely: (i) the voluntary nature of cooperation and required flexibility; (ii) the need for and utility of cooperation in a given case; and (iii) the role of the merging parties. The guide then explains how best to put those cooperation principles into practice. It emphasises the importance that the merging parties facilitate initial contacts between agencies through related information at an early stage. The guide also explains how information sharing between agencies can be facilitated by the merging parties through waivers; and how timing alignment can be facilitated by merging parties by taking into account the different procedural frameworks applying to multi-jurisdictional transactions. This relatively short document is worth reading, not only for agencies, but also for practitioners dealing with multi-jurisdictional merger filings.

In fact, the merging parties play a crucial role for the success of inter-agency enforcement cooperation in merger control. Importantly, they can facilitate that cooperation through timing alignment. Obviously, this requires substantive knowledge of the various merger control regimes applying to a specific transaction. The present book provides a very useful contribution in this respect, and can be of great assistance to corporations and their counsel who have to manoeuvre multi-jurisdictional merger notification requirements.

GREECE

Marina Androulakakis and Tania Patsalia | Bernitsas Law Firm

LEGISLATION AND JURISDICTION

1. What is the relevant merger control legislation? Is there any pending legislation that would affect or amend the current merger control rules described below?

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), is the main merger control legislation in Greece (in principle, Articles 5–10 of the Greek Competition Act).

The provisions of Greek Competition Act were introduced in order to align Greek law with EU competition rules and, as regards merger control, the obligation to file post-merger notifications provided for under former Law 703/1977 was abolished.

In addition, the Hellenic Competition Commission (HCC) has issued and follows a number of decisions and notices that further cover the field, such as Decision 588/2014 on the terms, conditions and procedure regarding commitments and the Notice of 22 October 2009 on the notification of concentrations with a community dimension. It has also issued Decision 558/VII/2013, by means of which the specific content of merger notifications according to Articles 5–10 of Greek Competition Act has been determined (the Notification Form Guidelines).

Apart from the above, the HCC also takes into account, in enforcing merger control rules, EU Regulation 139/2004 on the control of concentrations between undertakings (the EU Merger Regulation, EUMR), as interpreted by the Commission Consolidated Jurisdictional Notice (2008/C 95/01), as well as all relevant notices and guidelines issued by the European Commission and the EU case law.

There is no legislation pending that could affect or amend the current merger control rules described herein.

2. What are the relevant enforcement authorities, and what are their contact details?

The relevant enforcement authority is the HCC. The HCC is the national competition authority. It enjoys administrative and financial autonomy, and participates in judicial proceedings on its own right. The HCC has eight regular and two substitute members, who hold a five-year term of office with the possibility of renewal (once).

The HCC is empowered, without prejudice to the competence of other authorities designated by legislation (that is, sector regulators), with the administrative enforcement of the Greek Competition Act, including the issuance of decisions, within the context of a pre-merger notification, authorising or prohibiting the implementation of concentrations between undertakings, and forcing the dissolution of those mergers or acquisitions which have been implemented without the necessary clearance decision having been obtained.

In addition, the HCC is competent for the observance of the equivalent EU provisions (that is, Articles 101 and 102 TFEU), and may also handle mergers with a Community dimension that are referred to it by the European Commission pursuant to the provisions of the EUMR.

Apart from the HCC, separate national regulatory authorities, namely the Regulatory Authority for Energy (RAE) and the Hellenic Telecommunications and Post Commission (EETT), are competent for enforcing the Greek

Competition Act, including merger control provisions, in the sectors of energy and telecoms, respectively. In this regard, cooperation with or referral to the HCC is also possible. By way of example, in 2011, the RAE referred a case of specific importance for the energy sector to the HCC in relation to a complaint filed by Aluminium SA against the Public Gas Corporation (DEPA) as to whether DEPA's refusal to allow the use of captive capacity by Aluminium SA could amount to an infringement of Articles 1 and 2 of Greek Competition Act and Articles 101 and 102 TFEU (*RAE Decision 1175/2010*).

The contact details of HCC are:

Hellenic Competition Commission
1A Kotsika Street
104 34 Athens
Greece
f +30 2108809134 & 132
w www.epant.gr (contact form may also be found on the website)

The contact details of RAE are:

Regulatory Authority for Energy
132 Piraeus Street
118 54 Athens
Greece
t +30 210 3727400
f +30 2103255460
e info@rae.gr

The contact details of EETT are:

Hellenic Telecommunications & Post Commission
60 Kifissias Avenue
151 25 Maroussi
Athens
Greece
t +30 210 6151000
f +30 210 610 5049
e info@eett.gr

3. What types of transactions are potentially caught by the relevant legislation?

The types of transactions (referred to as "concentrations" under the Greek Competition Act) that are caught by the mandatory notification system applicable in Greece, when a change of control on a lasting basis arises, are:

(a) The merger of two or more previously independent undertakings (or parts thereof).

(b) The acquisition of direct or indirect control over the whole or part of one or more other undertakings by one or more persons that already control one or more undertakings.

(c) The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity (that is, a full-function joint venture).

Control shall be constituted by rights, contracts or any other means which, either separately or in combination, and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by (i) ownership or the right to use all or part of the assets of the undertaking (that is, direct control), or (ii) rights or contracts which confer decisive influence on the composition, meetings or decisions of the bodies of an undertaking (that is, indirect control).

Control is acquired by persons or undertakings that (i) are holders of the rights or entitled to rights under the contracts concerned, or (ii) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

In contrast, under the Greek Competition Act, a concentration shall not be deemed to arise where:

- Credit institutions, other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold, on a temporary basis, securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to influencing the competitive behaviour of that undertaking or provided that they exercise such voting rights for the sole purpose of preparing for the disposal of all or part of that undertaking or of its assets or the disposal of those securities, and provided that any such disposal takes place within one year from the date of acquisition; that period may be extended by the HCC on request for a reasonable period of time not exceeding three months where such institutions or companies can show that the disposal was not reasonably possible within the period set.
- Control is exercised by a person appointed under the law applicable to liquidation, bankruptcy and cessation of payments or other similar procedure.
- The operations referred to under (b) above are realised by portfolio investment companies, provided that the voting rights in respect of the holdings are exercised, in particular in relation to the appointment of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine, directly or indirectly, the competitive conduct of those undertakings.

4. Are joint ventures caught, and if so, in what circumstances?

Yes, under the Greek Competition Act and in accordance with the EUMR, as interpreted by the Commission Consolidated Jurisdictional Notice, all full-function joint ventures (that is, entities performing all functions of an autonomous economic entity on a lasting basis) are treated as concentrations and fall within the ambit of merger control rules.

To the extent that the creation of a joint venture, qualifying as a concentration, has as its object or effect the coordination of the competitive behaviour of companies which remain independent, such coordination will be appraised in accordance with the criteria of Articles 1(1) and 1(3) of Greek Competition Act on anti-competitive agreements (that is, the equivalent of Articles 101(1) and 101(3) TFEU).

In making this appraisal, the HCC will take into account, in particular:

(a) Whether two or more parent companies retain, to a significant extent, activities:

- in the same market as the joint venture;
- in a market which is downstream or upstream from that of the joint venture; or
- in a neighbouring market closely related to this market.

(b) Whether the coordination that is the direct consequence of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

5. What are the jurisdictional thresholds?

Parties to a concentration meeting the following threshold requirements are obliged to notify to and obtain clearance from the HCC prior to the transaction's implementation, in particular, where both:

- The aggregate worldwide turnover of the undertakings concerned amounts to at least EUR 150 million.
- At least two of the undertakings concerned each realise an aggregate turnover in Greece of at least EUR 15 million.

In calculating the aggregate turnover of the undertakings concerned, the turnover which is taken into account is that of those undertakings as well as the undertakings that they control (that is, their subsidiaries), the undertakings that exercise control over them (that is, their parent companies) and any other subsidiaries of their parent companies.

By way of exception, in the event that a transaction concerns the acquisition of a part of one or more undertakings, only the turnover of the transferred part is taken into account, in addition to the aggregate turnover of the acquirer's group, as defined above.

In practice, in case of acquisition of control, one takes account of the turnover of the acquiring entity, including its subsidiaries, its parents and any other subsidiaries of the parents, and, as regards the target, of the turnover of the acquired entity and of any of its subsidiaries forming part of the deal.

It is noted that special provisions for the calculation of turnover apply in the case of transactions involving insurance companies, credit institutions and other financial institutions.

6. Are these thresholds subject to regular adjustment?

From the entry into force of the Greek Competition Act on 20 April 2011, there has been no adjustment of the above-referred jurisdictional thresholds. However, pursuant to Article 6(7) of the Greek Competition Act, the above thresholds may be amended periodically by joint decision of the Minister of Economy and the Minister of Finance, following a recommendation by the HCC. The HCC recommendation shall be based on statistics collected by it every three years on the application of merger control rules and the state of competition over the previous three years.

7. Are there any sector-specific thresholds?

Yes, lower jurisdictional thresholds triggering the notification obligation apply in the media sector (consisting of TV, radio, newspapers and magazines). In particular, Law 3592/2007, as amended and in force, provides that notification of a concentration in this sector is required where the parties' aggregate worldwide turnover is at least EUR 50 million (instead of EUR 150 million) and at least two of the participating undertakings each have an aggregate turnover of at least EUR 5 million in Greece (instead of EUR 15 million).

8. In the event the relevant thresholds are met, is a filing mandatory or voluntary?

Filing of concentrations meeting the above jurisdictional thresholds is mandatory.

9. Can a notification be avoided even where the thresholds are met, based on a "lack of effects" argument?

No, a notification cannot be avoided if a concentration meets the above jurisdictional thresholds. That is, so long as the statutory thresholds are met, the transaction is considered as potentially having competition effects on the national market and is subject to notification and prior HCC clearance, even if it is implemented outside Greece or involves undertakings which do not have an establishment in Greece.

10. Are there special rules by which a notification of a "foreign-to-foreign" transaction can be avoided even where the thresholds are met?

There are no special rules relevant specifically to "foreign-to-foreign" mergers. Thus, a "foreign-to-foreign" concentration must be notified to the HCC where the statutory turnover thresholds are met, even in the absence of a local company or assets. In this case, however, the simplified (Phase I) merger clearance procedure is expected to be followed by the HCC.

In the case of *Trafigura Beheer BV/Alcotra SA* (*HCC 500/VI/2010*), the HCC imposed a fine of EUR 3,000 to entities with joint control over Alcotra SA for failure to duly notify the transaction, even though the target company was a foreign company with no presence in the Greek market.

11. Does the relevant authority have jurisdiction to initiate a review of transactions which do not meet the thresholds for a notification?

No, the HCC does not have the jurisdiction to initiate a review, from a merger control standpoint, of transactions that do not meet the notification thresholds.

NOTIFICATION REQUIREMENTS, TIMING AND POTENTIAL PENALTIES

12. Is there a specified deadline by which a notification must be made?

Pre-merger notification of a qualifying transaction must be filed within 30 (calendar) days of the occurrence of the first of the events triggering the concentration, namely the conclusion of the agreement or announcement of the bid to buy or exchange, or the assumption of an obligation to acquire a controlling interest in, an undertaking.

It is noted that, according to relevant case law, the HCC has considered that the deadline for pre-merger notification could be deemed to commence upon execution of any sort of binding preliminary document which could be deemed to trigger the concentration process (for example, pre-agreement, memorandum of understanding) (*HCC 383/V/2008, 632/2016 and 633/2016*).

The HCC makes an assessment of whether a binding preliminary document may be considered to trigger the merger process on a case-by-case basis.

13. Can a notification be made prior to signing a definitive agreement?

Pursuant to the Notification Form Guidelines, a notification may be submitted to the HCC prior to the conclusion of a binding agreement so long as the notifying parties demonstrate to the HCC their intention to enter into a definitive agreement or, in the case of a public bid, where they have publicly announced their intention to make such a bid.

This is also supported by HCC's case law (*see question 12*).

14. Who is responsible for notifying?

The obligation to notify lies with the party/parties acquiring control. Therefore, where a concentration consists in a merger, those responsible for notifying are the merging entities, whereas in case of acquisition of control, those responsible are the party/parties acquiring sole or joint control, as the case may be.

15. What are the filing fees, if any?

Pre-merger notifications must be accompanied, under penalty of inadmissibility, by a filing fee, currently set at EUR 1,100. The same filing fee applies with regard to applications for interim measures and requests for derogation (*see questions 16 and 17*).

16. Where a notification is necessary, is approval needed before the transaction is closed/ implemented (is there a waiting period or a suspension requirement)?

Yes, a transaction that is subject to pre-merger control may not be put into effect prior to clearance by the HCC (suspension), unless partial or whole derogation is granted.

The duty to suspend a concentration which is subject to merger control will not prevent the implementation of a public bid to buy or exchange, or the acquisition of a controlling interest through the stock exchange, where such transactions have been duly notified to the HCC and provided the acquirer does not exercise the voting rights attached to the securities in question or exercises them only with a view to maintaining the full value of its investment and on the basis of a derogation granted by the HCC (partial derogation).

17. If there is a suspension requirement, is it possible to apply for a derogation in order to close before approval is granted? If so, under what circumstances?

Departing from the general obligation to suspend a transaction, the HCC may, upon request, allow the implementation of a concentration pending completion of its assessment, in order to prevent serious damage to one or more undertakings concerned or to a third party (full derogation). In practice, the HCC has been reluctant to grant derogations in recent years.

Also, as mentioned under *question 16*, partial derogation may be granted in stock exchange transactions or acquisitions through public bids.

In assessing whether derogation should be granted, the HCC takes into account, among other things, the threat to competition posed by the concentration.

The decision to grant the derogation may be made subject to conditions in order to ensure that effective competition is maintained and to prevent situations that could hinder the enforcement of a possible prohibitive final ruling on the notification. The request for derogation may be made at any time, even before the notification or after the transaction, while the relevant decision granting the request may be revoked if founded on incorrect or misleading data, or if the conditions attached to it are not observed.

18. Are any other exceptions (for example, carve-outs) available to allow parties to close/ implement prior to approval?

The Greek Competition Act does not provide for any other exceptions, such as carve-outs, allowing the parties to implement a transaction prior to approval.

Thus, in practice, carve-out clauses whereby a concentration may be implemented elsewhere (that is, outside Greece) earlier on, even pending the outcome of the HCC's investigation, would not be welcomed by the HCC and would be considered to circumvent the suspension obligation. The HCC's approach is based on the reasoning that implementation abroad by the transfer of control to the acquirer inevitably confers upon the acquirer the possibility to control the activities of the target in Greece as well.

This was the position adopted by the HCC within the context of its decision issued in relation to the acquisition by SNIA SpA of the cardiac valves business of the Centerpulse Group, where it considered that the violation of the duty to suspend the implementation of the transaction until the issuance of the HCC's decision was not eliminated by the fact that the parties had agreed in writing not to implement in Greece and imposed a fine of EUR 35,000 on SNIA SpA (*HCC 243/III/2003*).

With regard to the implementation of a public bid to buy or exchange, or the acquisition of a controlling interest through the stock exchange, see the response to *question 16*.

19. What are the possible sanctions for failing to notify a transaction?

In case of a wilful failure to notify a concentration within the prescribed statutory deadline, the HCC may impose on those responsible for notification a fine ranging from EUR 30,000 up to 10% of their aggregate group turnover. In calculating the fine payable, the HCC takes into account the economic power of the undertakings concerned, the number of markets affected and the level of competition existing in those markets, as well as the likely effect of the transaction on competition.

Apart from the undertakings, natural persons may also be held liable (the undertaking's executives). In particular, the persons liable, by means of their personal assets, jointly and severally with the legal entity, for payment of the above sum are:

- In the case of sole proprietorship, the owners.

- In the case of civil law partnership/joint ventures, their managers and all general partners.
- In the case of *sociétés anonymes*, members of the board of directors and those responsible for implementing the relevant decisions.

The HCC may also impose administrative sanctions of between EUR 200,000 and EUR 2 million for failure to comply with the merger control rules of the Greek Competition Act (that is, Articles 5–10) on the above persons individually if there is evidence that they took part in preparing, organising or committing the infringement.

Finally, criminal sanctions ranging from EUR 15,000 to EUR 150,000 may also be imposed on the undertaking's executives for violation of the merger control provisions.

The HCC imposed one of its highest fines in the case of Minoan Flying Dolphins (*HCC 210/III/2002*). The case involved the realisation and failure to notify 21 concentrations in the domestic maritime sector, and attracted a fine of about EUR 6.3 million.

20. What are the possible sanctions for implementing a transaction prior to receiving approval (so-called "gun-jumping")?

The sanctions mentioned under *question 19* also apply in case of a breach of the obligation to suspend a concentration that is subject to notification until the issuance of the HCC's decision (unless derogation has been obtained).

In addition, where the concentration has been put into effect contrary to the provisions or decisions prohibiting its realisation, the HCC may:

- Order the separation of the undertakings concerned, in particular through the dissolution of the merger or the sale of the shares or assets acquired, with a view to restoring the conditions existing prior to the implementation of the transaction.
- Take any other appropriate measure in order to ensure the dissolution of the concentration or the adoption of other restoration measures.

In 2012, the HCC fined Advantage Capital Holdings PLC (formerly Aspis Holdings Company Ltd) EUR 30,000 for implementing the acquisition of control over Proton Insurance Company prior to receiving approval (*HCC 533/VI/2012*), whereas in 2014 the HCC ultimately decided not to impose a fine on Marinopoulos SA for the advance implementation of its acquisition of sole control over OK Anytime Market, as there were doubts as to whether the element of fault was fulfilled (*HCC 586/2014*). The same was ruled by the HCC in the *Atlantic/Masoutis* acquisition case (*HCC 595/2014*).

21. What are the possible sanctions for implementing a transaction despite a prohibition decision or in breach of a condition/obligation imposed by a conditional clearance decision?

As mentioned under *question 20*, where the concentration has been put into effect contrary to a prohibition decision, the HCC may order the separation of the undertakings concerned, and also take any other appropriate measure in order to ensure the dissolution of the concentration or the adoption of other restoration measures.

On default, the HCC also has the power to impose a fine not exceeding 10% of the aggregate turnover of the undertakings concerned and a penalty payment of EUR 10,000 for each day that compliance is delayed.

Finally, the HCC may take interim measures to restore or maintain effective competition where a concentration has been implemented and a decision has not yet been taken by the HCC or if a condition/obligation imposed by a conditional clearance decision has been breached.

22. What are the different phases of a review? Is there any way to speed up the review process?

To the extent that the transaction falls within the scope of the Greek Competition Act, the concentration may be examined in either one or two phases, similar to the merger review under the EUMR.

In particular, under the Greek Competition Act, following the submission of the notification, the case is examined by the HCC and the following decisions may be issued:

(a) If the concentration notified does not meet the thresholds for notification and, therefore, is not subject to pre-merger control, the HCC Chairman issues a decision to that effect within one month from notification. This decision does not limit the application to the transaction of Articles 1 and 2 of the Greek Competition Act.

(b) If the concentration notified, although meeting the statutory thresholds, does not raise serious doubts as to the possibility of significantly restricting competition in the relevant market(s), the HCC will decide, within one month from receipt of proper notification, to approve the transaction (Phase I clearance).

(c) If the concentration notified meets the statutory thresholds and raises serious doubts as to its compatibility with competition conditions in the relevant market(s), the HCC Chairman will decide, within one month from receipt of proper notification, to initiate proceedings for the full examination of the transaction by the HCC 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 from the initiation of Phase II proceedings. Upon being informed that proceedings will be initiated, the undertakings concerned may jointly proceed to adjust the concentration or to suggest commitments, in order to remove any serious doubts as to the compatibility of the transaction with the competition rules in the relevant market(s) and notify these to the HCC. Parties have 20 days from the introduction of the case before the HCC within which to submit their commitments.

(d) A decision prohibiting a concentration from taking effect must be issued within an absolute deadline of 90 days from the date on which the Phase II proceedings were initiated. If the 90-day deadline lapses without the issuance of a negative ruling, the transaction 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 deadlines under (b) and (c) above may be extended: (i) if agreed by the notifying undertakings; (ii) if the notification form is erroneous or misleading, so that the HCC is not able to assess the notified concentration; or (iii) as regards the deadlines for the issuance of Phase I clearance or the initiation of Phase II, if the notification form is not complete. In cases (ii) and (iii) above, the HCC is obliged to request from the notifying parties within seven business days from the date of notification the correction of the initial filing. The deadlines for the issuance of Phase

I clearance or initiation of Phase II proceedings are deemed to commence only upon submission of the complete and accurate data.

The statutory deadlines under (b), (c) and (d) above are suspended, exceptionally, where the undertakings fail to comply with their obligation to furnish information, provided they are advised accordingly within two days from the expiry of the deadline set by the HCC for the submission of said information; in this case, the deadlines under (b), (c) and (d) shall recommence from the date on which the undertakings provide full and accurate information.

23. Is there a possibility for a "simplified" procedure or shorter notification form and, if so, under what conditions would this apply?

A short notification form may be filed, pursuant to the Notification Form Guidelines, if any of the following conditions is met:

- None of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (no horizontal overlap), or in a market which is upstream or downstream of a market in which another party to the concentration is engaged (no vertical relationship).
- Two or more of the parties to the concentration are engaged in business activities in the same product and geographical market (horizontal relationships), provided that their combined market shares shall not exceed 15%.
- One or more of the parties to the concentration are engaged in business activities in a product market, which is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships), provided that their individual or combined market shares at either level shall not exceed 25%.
- When a party to the concentration is to acquire sole control of an undertaking over which it already has joint control.

In case of doubt as to whether or not a transaction will, in fact, significantly impact upon competition in the relevant market, it is usual for the long form of the notification to be filed, in order to avoid any delays and requests for further information in the event that the HCC takes a different view. In any event, the HCC will request that the additional sections of the long form be completed if a full examination of the transaction is finally initiated. In such a case, the starting point of the prescribed deadlines shall be the date when the additional information is submitted.

24. What types of data and what level of detail is required for a notification?

The level of detail required for a notification is similar to that required for completion of Form CO before the European Commission. More precisely, information typically required to complete the pre-merger notification includes:

- A description of the transaction.
- Information about the parties.
- Detailed information concerning the concentration, the structure of the parties' ownership and control.
- A detailed definition of the relevant and affected markets.

- Information on the affected markets (including the provision of analytical data on worldwide and national turnover, as well as the market shares of the parties for each affected market).
- The overall market context.
- Efficiencies expected to result from the proposed transaction.

In addition, in the case of full-function joint ventures, information for the assessment of its cooperative nature has to be supplied, while a special section also has to be completed for media-related transactions.

25. In which language(s) may notifications be submitted?

Notifications must be submitted in the Greek language, which is the official language of the proceedings.

26. Which documents must be submitted along with a notification?

The following documents, either in their original form or a certified copy, must accompany the notification form according to the Notification Form Guidelines:

- A copy of the concentration agreement or of the tender document in case of a public bid.
- Copies of the most recent annual reports of the undertakings concerned.
- Copies of all relevant market studies providing information of the structure of the affected markets (such as market shares, competition conditions, existing and potential competitors).
- A copy of the notification announcement as published in the newspaper (*see question 30*).

If the above documents are in a language other than Greek, an official translation in Greek must also be submitted.

In addition, appropriate legalisation documents must also be provided (for example, a notarised power of attorney for representation by legal counsel).

27. What are the possible sanctions for providing incorrect, misleading or incomplete information in a notification?

Where the information requested is being refused, obstructed or delayed, or the information furnished is inaccurate or incomplete and without prejudice to the criminal sanctions provided under the Greek Competition Act, the HCC has the power:

- To impose, in respect of each infringement, a fine ranging from EUR 15,000 to 1% of the turnover of the undertaking concerned.
- To refer the matter to the competent supervisory authority for disciplinary proceedings, where the person liable is a civil servant or an official of a public law legal entity.

By way of example, in 2003, the HCC imposed on the supermarket chain Carrefour Marinopoulos a fine of EUR 8,804 for delay in providing the requested information (*HCC 248/III/2003*), whereas in 2010, in assessing a late notification of concentration, the HCC imposed a fine of EUR 20,000 to Selonta Fish Farms SA for repetitive delay in

providing the requested information to the HCC, even though it was found that the concentration did not fall within the ambit of merger control rules as it did not reach the jurisdictional thresholds (*HCC 481/VI/2010*).

Those refusing to provide the information requested under the Greek Competition Act may further be criminally sanctioned by at least six months' imprisonment.

The HCC decisions issued on notified concentrations may be revoked where, among other things, they were issued on the basis of inaccurate and misleading information. In such a case, a new decision may be issued without a time limit.

28. To what extent is the relevant authority available for pre-notification discussions? Are pre-notification consultations customary?

Although, the Greek Competition Act does not provide for pre-notification consultations, the Directorate General for Competition is usually willing to provide non-binding oral informal guidance, especially in the context of complex transactions. This guidance is non-binding.

29. Where pre-notification consultations are possible, what measures does the relevant authority take to ensure that such discussions are treated confidentially?

No specific rules are laid out concerning the confidential treatment of such pre-notification discussions, considering that, as mentioned above, this is not a standard procedure provided for by the law. However, the HCC and the Directorate General's officials are, as a general rule, required to observe confidentiality and secrecy under the Greek Competition Act and the 2013 HCC Rules of Internal Procedure.

30. At what point and in what forum does the relevant authority make public the fact that a notification has been made?

Under the Greek Competition Act, the parties responsible for making the filing are also obliged to publish an announcement of the proposed transaction in a daily financial newspaper of national coverage. A copy of the published announcement must be submitted to the HCC within five working days from the filing of the notification, for publication on the HCC's website.

31. Once the authority has issued its decision, what information about the transaction and the decision is made publicly available?

Non-confidential versions of the clearance and prohibition decisions of Phase I and II of the HCC are published in the *Official Gazette* and posted on the HCC's website. A press release is usually posted on the HCC's website following the completion of Phase I or Phase II, as the case may be (which precedes the publication of the full non-confidential text of the decision).

SUBSTANTIVE ASSESSMENT OF THE MERGER, ROLE OF THIRD PARTIES AND REMEDIES

32. What is the substantive test for assessing the legality of a notified transaction?

The substantive test for assessing the legality of a notified transaction under the Greek Competition Act is whether the notified transaction is likely to significantly restrict competition on the national market or in a substantial part thereof, taking into account the characteristics of the products or services involved, particularly by creating or strengthening a dominant position. No specific threshold for dominance is set by the Greek Competition Act; the HCC follows the European Commission's guidelines in this regard.

The HCC, in assessing whether or not a concentration may significantly impede competition, will take into account:

- The structure of the relevant market(s).
- The actual or potential competition from undertakings located within or outside Greece.
- The existence of legal or actual barriers to entry.
- The market position of the undertakings concerned and their financial and economic power.
- The alternatives available to suppliers and users, and their access to suppliers or markets.
- The supply and demand trends for the relevant goods or services.
- The interests of intermediate and ultimate consumers.
- The contribution in the development of technical and economic progress, provided that such development is to the consumers' advantage and does not form an obstacle to competition.

As regards full-function joint ventures, the HCC shall examine whether the concentration gives rise to coordination issues (*see question 4*).

With regard to the mass media sector, special rules apply. In particular, concentrations in the mass media sector are prohibited if any of the participating undertakings holds a dominant position or the concentration leads to a dominant position being established. The dominance thresholds in the media sector range from 25% to 35%, depending on the number of mass media markets in which an undertaking is active (*Article 3 of Law 3592/2007*).

33. What theories of harm are considered by the authority in assessing the transaction? How concerned are the authorities with non-horizontal (for example, vertical or conglomerate) effects, and are any other theories of harm analysed (for example, coordination in the case of joint ventures)?

Although market dominance is a basic concern as regards the evaluation of mergers, the HCC follows European Commission's framework of analysis and is, hence, also concerned with unilateral, coordinated, vertical and conglomerate effects.

34. Are non-competition issues, such as industrial policy or labour policy, commonly taken into account in the assessment of the transaction?

To date, non-competition issues, such as industrial or labour policy, have not officially been taken into account by the HCC in the assessment of a notified transaction.

35. Are economic efficiencies considered as a mitigating factor in the substantive assessment?

Yes, as mentioned in the response to *question 32*, the HCC, in assessing whether or not a concentration may significantly impede competition, also takes into account economic efficiencies, including whether the concentration may contribute to the development of technical and economic progress. Such economic efficiencies will be taken into account only if they are to the consumers' advantage and do not restrict competition. Also, the HCC could be expected to follow the European Commission's guidelines on the assessment of horizontal mergers according to which economic efficiencies are taken into consideration so long as (i) they benefit consumers, (ii) are merger specific and (iii) can be verified.

36. Does the relevant authority typically cooperate/share information with authorities in other jurisdictions?

Yes, the HCC cooperates closely with the competition authorities of the other EU member states, as well as with the competition authorities of third countries, namely in the context of the European Competition Network and the International Competition Network. The HCC also participates actively in the Organisation for Economic Cooperation and Development (OECD).

37. To what extent are third parties involved in the review process?

Within 15 days from the publication of the announcement of the proposed transaction in a daily financial newspaper of national coverage by the notifying party, any interested third party may submit comments or provide information regarding the notified concentration to the HCC.

In addition, the Directorate General for Competition may address questions on the possible effects of the notified transaction to third parties, such as competitors, suppliers or customers.

Although third parties do not have access to the file of the case, they may be invited to the hearing before the HCC if the HCC decides that their participation will contribute to the examination of the case. Third parties may also intervene in the proceedings by submitting written pleadings at least 15 days before the hearing, which must be served to the interested parties at least five days in advance of the hearing.

38. Is it possible for the parties to propose remedies for potential competition issues?

Yes, the undertakings concerned may jointly make modifications to the concentration or propose commitments to the HCC in order to address any serious doubts as to the transaction's compatibility with the requirements of competition in the market(s) concerned. The proposed commitments must be submitted to the HCC within 20 days from the initiation of Phase II proceedings. The HCC may, however, accept commitments after the expiry of this

deadline in exceptional cases. In such a case, the deadline of 90 days for the issuance of the Phase II decision may be extended to 105 days by a decision of the HCC which is notified to the undertakings concerned.

39. What types of remedies are likely to be accepted by the authority (for example, divestment remedies, other structural remedies, behavioural remedies)?

Decision 524/VI/2011 of the HCC determines the content of the notification form on remedies. Overall, the HCC follows the European Commission's Notice on Remedies of 22 October 2008 and European case law in assessing merger remedies.

Parties wishing to propose commitments must complete and file the relevant form, which is available on the HCC's website. In this respect, the HCC's decision on remedies also includes a model text for divestiture commitments and a model text for trustee mandates.

In practice, commitments that are structural in nature are preferable as a rule as they prevent over the longer term the competition concerns which would be raised by the merger as notified, in accordance with European legislation and case law.

In the recently approved acquisition by Cosco Group Limited (COSCO) of sole control over Piraeus Port (OLP), the HCC gave clearance to the notified transaction under certain conditions, in particular, that (i) COSCO would withdraw any exclusivity terms and refrain in future from concluding or imposing any exclusivity conditions on the market for the provision of stevedoring and storage of domestic containerised cargo services and that (ii) COSCO would maintain OLP's currently applicable tariffs for any stevedoring and storage of domestic containerised cargo services to be provided on quay 1 by OLP until 31 December 2017, with the possibility to announce any tariff increase also before the second half of 2017 (*HCC 627/2016*).

Also, the HCC cleared the proposed acquisition by the Sklavenitis supermarket retail group of sole control over the core part of Marinopoulos's supermarket retail chain, subject to both structural and behavioural commitments, such as (i) the divestiture of 22 supermarket stores in the prefectures where there was a horizontal overlap and relatively high market shares of the combined entity at the level of relevant local markets and (ii) the obligation to retain local suppliers for three years (*HCC 637/2017*).

40. What power does the relevant authority have to enforce a prohibition decision?

In accordance with our response to *question 21*, where a concentration has been put into effect contrary to a decision prohibiting its realisation, the HCC is empowered to:

- Order the separation of the undertakings concerned, in particular through the dissolution of the merger or the sale of the shares or assets acquired, with a view to restoring the conditions existing prior to the implementation of the transaction.
- Take any other appropriate measure in order to ensure the dissolution of the concentration or the adoption of other restoration measures.

On default, the HCC has the power to impose a fine not exceeding 10% of the aggregate turnover of the undertakings concerned and a penalty payment of EUR 10,000 for each day that compliance is delayed.

The above penalties may also be imposed if the concentration has been implemented in contravention of proposed remedies attached to a decision by the HCC.

JUDICIAL REVIEW

41. Is it possible to challenge decisions approving or prohibiting transactions? If so, before which court or tribunal?

All decisions of the HCC may be appealed against before the Athens Administrative Court of Appeal and, ultimately, the Council of State, which is the Supreme Administrative Court of Greece.

Appeals to the Athens Administrative Court of Appeal must be submitted within 60 days from the date of service of the contested decision to the parties or its publication (as regards third parties). Court action does not suspend the execution of the HCC's decision unless the Appeal Court issues a relevant order, which it will only do if there are sufficient grounds. Appeals shall be heard by the Court on a priority basis following a summons to the HCC. Hearings may be adjourned only once, if there are sufficient grounds. The procedure before the Athens Administrative Court of Appeal is governed by the provisions of the Code of Administrative Procedure.

A judgment of the Athens Administrative Court of Appeal may be appealed before the Council of State within 60 days of its service to the parties. The Council of State is competent to examine only points of law and procedure.

42. What is the typical duration of a review on appeal?

Pursuant to the Greek Competition Act, appeals must be heard on a priority basis following a summons to the HCC and hearings may only be adjourned once, with sufficient cause, to the nearest possible date to the original hearing, unless there is cause to join several appeals. However, it would be reasonable to expect for a review on appeal to last approximately two to three years. The procedure before the Council of State may be expected to exceed three years.

43. Have there been any successful appeals?

Almost all cases that have been successfully appealed involve alleged violations of Article 1 and 2 of Greek Competition Act. The majority of merger control cases that have been upheld by appellate courts concern the interpretation of merger control thresholds (*see OECD Annual Report on competition policy developments in Greece for years 2015 and 2014*).

STATISTICS

44. Approximately how many notifications does the authority receive per year?

The number of notifications received by the HCC differs each year.

By way of example, based on data from the OECD and the HCC website, the following notification submissions took place before the HCC in the past five years:

- In 2012, the HCC received 15 filings, three of which led to an in-depth review (Phase II) and two were resolved with remedies (both in the banking sector).

- In 2013, the HCC received 19 filings, six of which led to an in-depth review (Phase II), whereas three were resolved with remedies.
- In 2014, the HCC received 16 merger filings, six of which led to an in-depth review (Phase II) and only one was resolved with structural and behavioural remedies.
- In 2015, the HCC received eight merger filings, three of which led to an in-depth review (Phase II) and were subsequently unconditionally cleared.
- In 2016, the HCC received 12 merger filings, eight of which have been published so far by the HCC. Of those, six led to an in-depth review (Phase II), one was resolved with remedies and the other was abandoned by the interested parties. The rest of the cases were cleared unconditionally.

45. Has the authority ever prohibited a transaction? How many prohibition decisions has the authority issued in the past five years?

There has been only one prohibition decision in the HCC's history, in 1996, and this was overruled by a decision of the competent ministers at the time (*HCC 40/1996*, conditionally reversed by Joint Ministerial Decision 56/17 February 1997). In recent years, and certainly within the last five years, no prohibition decision has been issued by the HCC, which prefers to impose conditions to ensure competition is not unduly restricted.

46. Over the past five years, in what percentage of cases have binding commitments been required in order to obtain clearance for a transaction?

For the period from 2012 to 2016, commitments were required in seven cases, as a pre-condition for clearance.

47. How frequently has the authority imposed fines in the past five years?

In the last five years, the HCC has imposed fines only in one published merger case for failure to notify as well as suspend a transaction (*HCC 533/VII/2012*).