THE MERGER CONTROL REVIEW

Tenth Edition

Editor
Ilene Knable Gotts

THE LAWREVIEWS

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TENTH EDITION

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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, most recently in South America, have added pre-merger notification regimes. In our endeavour to keep our readers well informed, we have expanded the jurisdictions covered by this book to include the newer regimes as well. Also, the book now includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals, and high technology and media, in key jurisdictions to provide a more in-depth discussion of recent developments.

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. It is, therefore, imperative that counsel for such a transaction develops 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 32 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving media, pharma and high-technology companies, we have included chapters that focus on the enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter that discusses the various economic tools used to analyse transactions. 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.

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 this year. 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 recently amended its law to ensure that it has the opportunity to review transactions

in which the parties' turnover do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). Please note that the actual monetary threshold levels can vary in specific jurisdictions over time. There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there similarly is no 'local' effects 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 this year 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.

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

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia, and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for

closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

The United States and the European Commission 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 who are found to be in violation. For example, the European Commission (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. The Korea Fair Trade Commission (KFTC) has imposed fines on over 50 transactions in the past two years that it deemed were not reported, were reported late, or were properly reported but implemented before the end of the waiting period. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. In Korea, Microsoft initially filed a notification with the 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 European Commission 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 Japan Federal Trade Commission (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. Some jurisdictions even within the EC remain that differ procedurally

from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

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

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

It is becoming the norm, in large cross-border transactions raising competition concerns, for the US, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, 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 European Commission in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including most recently Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau

cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. This past year, for instance, many jurisdictions coordinated on the *Linde/Praxair* and the *Bayer/Monsanto* transactions. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute, to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a

number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata* and France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

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Wachtell, Lipton, Rosen & Katz
New York
July 2019

Part II

Jurisdictions

Chapter 17

GREECE

Tania Patsalia[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 of Economy, Competitiveness and Shipping. The HCC is assisted in its tasks by the Directorate General for Competition (DGC), which is headed by the Director General and is comprised of four Directorates and one Department.

In addition, the Hellenic Telecommunications and Post Commission (EETT) is competent for the enforcement of the Greek Competition Act, including merger control provisions, in the electronic communications sector. To date, the EETT has provided its clearance in two merger control cases in the electronic communications market (namely, the acquisitions of Hellas Online[2] and Cyta Hellas[3] by Vodafone).

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

ii Statutes, regulations and guidelines

The main piece of legislation relating to merger control in Greece is Law 3959/2011 'on the protection of free competition' (Official Gazette A 93/20 April 2011), as amended and in force (the Greek Competition Act) (in principle, Articles 5-10). The Greek Competition Act abolished and replaced the former Greek Competition Act (Law 703/1977), under which a post-merger notification requirement applied. The Greek Competition Act mirrors, in essence, the provisions under the EU merger control regime.[4]

In addition, the HCC has rendered a number of decisions and notices covering the merger control field, such as (1) Decision 588/2014 'on the terms, conditions and procedure for the acceptance of commitments', (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)'.

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1 Tania Patsalia is an associate at Bernitsas Law Firm. The author would like to thank Vangelis Kalogiannis for his valuable contribution to this article.

2 EETT Decision 733/047 of 18 September 2014.

3 EETT Decision 857/7 of 28 June 2018.

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

The HCC also takes into account the relevant EU principles, guidelines and case law as guidance on substantive assessment in merger 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, full-function joint ventures (i.e., joint ventures performing on a lasting basis all the functions of an autonomous economic entity) are also considered as concentrations, therefore falling within the ambit of Greek merger control rules. To the extent that the creation 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 TFEU). 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 market or closely related market; and (2) whether the coordination, which is the direct consequence of the joint venture, eliminates competition in a substantial part of the relevant market.

Concentrations shall be notified to the HCC (and not be put into effect pending the HCC's outcome) where (1) the aggregate worldwide turnover of the undertakings concerned amounts to at least €150 million, and (2) at least two of the undertakings concerned realise, separately, an aggregate turnover in Greece of at least €15 million.

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

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

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

II YEAR IN REVIEW

i Statistics

According to publicly available information, the total number of notifications and cases examined by the HCC during 2000–2017 was 373.[5] The number of decisions issued by the HCC, however, differs per year (usually between 10 and 20).

In 2018, the HCC issued 13 merger control decisions. Of those:

a eight cases were cleared by the HCC following a Phase I review (one of which also involved imposition of a fine for failure to notify and early implementation);

b four cases were led to an in-depth review (Phase II), of which two were unconditionally cleared and the remaining two were resolved with remedies; and

c one case involved the amendment of remedies that were undertaken under a former HCC conditional clearance decision.[6]

So far in 2019, the HCC has given its unconditional clearance to eight notified concentrations, and one was resolved with remedies.

ii Recent key cases

Below we set out some recent key merger control cases.

Dimera/Pigasos (acquisition of sole control, failure to notify, gun-jumping)[7]

On 30 March 2018, the HCC assessed the belated notified acquisition of control over assets (trademarks) of the publishing entity Pigasos Ekdotiki Anonymi Eteria by the media entity Dimera Media Investments Ltd (Dimera) and simultaneously decided upon the *ex officio* investigation over the alleged wilful failure to notify and infringement of the standstill obligation by Dimera. It is worth noting that the matter arose during the HCC's review over another notified concentration by the same company in 2017.[8]

The case at hand evidences the interrelation between merger control criteria under both the Greek Competition Act and the Greek Media Law, in the sense that the notified transaction was assessed against the relevant provisions of both sets of rules. In particular, the HCC provided its unconditional clearance (Phase I review) as it found that the belated notified transaction did not raise any serious doubts regarding its compatibility with competition rules on the markets concerned because it did not reach the dominance thresholds (i.e., 35 per cent in the relevant markets of TV and press and 32 per cent in total in both markets) provided by Paragraph 3, Article 3 of Greek Media Law. As such, concentration of control was not anticipated to occur in the said markets.

With regard to the failure to notify aspect, the HCC found that DIMERA – being an active company – was reasonably expected to be aware of and be diligent in complying with merger control legislation. The fact that another notification of concentration had already occurred by the same company back in 2017, which was cleared by virtue of HCC Decision 652/2017, was found to constitute proof of the fact that DIMERA was in complete knowledge of its notification obligation. As such, the HCC imposed a fine of €50,000 against

5 OECD Peer Reviews of Competition Law and Policy, Greece 2018, p. 48.

6 HCC Decision 637/2017.

7 HCC Decision 655/2018.

8 HCC Decision 652/2017.

Dimera. In reaching this outcome, the HCC took into account (1) the lack of intent on the side of Dimera to conceal the transaction, (2) the duration of the infringement, (3) the good cooperation between the DGC and Dimera, and (4) the low market shares and group turnover generated in the Greek market.

With regard to the standstill obligation, the HCC ruled that Dimera had been engaged in certain implementing acts and exercise of control over the trademarks. In particular, following finalisation of the acquisition of the trademarks, Dimera proceeded with the notification of acquisition and registration of said trademarks to the competent trademark office or registry. In addition, Dimera granted to its subsidiary an exclusivity licence for the use of said assets before receiving the HCC's clearance. The above acts were treated as acts of exercise of control over said trademarks by Dimera in violation of the standstill obligation,[9] resulting in the imposition of a fine of €30,000 against the company. It is interesting to note that in this case the HCC decided to deviate from its previous rulings on the matter of presumption of lack of liability.[10]

Attica/Hellenic Seaways (acquisition of sole control, Phase II, remedies)[11]

By means of Decision 658/2018, the HCC granted its unanimous clearance to the notified concentration regarding the acquisition of sole control over Hellenic Seaways by Attica Group on the basis of remedies offered by the notifying entity.

The transaction was cleared following an in-depth investigation (Phase II review) for having raised serious concerns as to its compatibility with the requirements of the functioning of competition, especially by creating or strengthening a dominant position in the relevant ferry market of passengers, vehicles and heavy vehicles, both at a national level and at a port pairs level (definition of the relevant market on the basis of the origin-destination method). In this respect, Attica Group offered certain appropriate commitments, with the objective of releasing space for the entrance of new competitors in the port pairs where the acquiring entity would hold a dominant position and to maintain the frequency of the itineraries and level of fares at the same levels.

In particular, and as per the commitments undertaken, Attica Group would limit the frequency of its approaches to certain island destinations (Cyclades and North Aegean), provided that its competitors would cover these destinations with suitable vessels offering adequate service and at the same time add itineraries connecting islands in Greece, which were either not serviced at the time or were serviced sporadically.

Masoutis/Promitheutiki (acquisition of sole control, divestments, gun-jumping)

In another recent case, involving a merger in the supermarkets sector, and in particular, the acquisition of sole control over Promitheftiki Trofimon Anonymi Eteria by the company Diamantis Masoutis Anonymi Eteria – Supermarket (Masoutis), the HCC granted its conditional clearance following a Phase II review.[12]

In particular, the HCC found that although Masoutis was not expected to significantly increase its market share at a national level in the relevant market (i.e., retail sale of supermarket products market), the combined market share of the new entity would significantly increase at a specific region (i.e., in the mainland of the island of Andros), raising serious concerns as

9 Article 9 of Greek Competition Act.

10 HCC Decision 586/2014 and 595/2014.

11 HCC Press release of 26 April 2018 (decision not published yet).

12 HCC Decision 665/2018.

to its compatibility with the requirements of the functioning of competition. In this specific area of the island (mainland), the undertakings concerned operated three supermarkets, while their combined market share post-merger was expected to range between 85 per cent and 95 per cent based on turnover, and between 75 per cent and 85 per cent based on square metres. The HCC took into account that there were only three competing (mini) markets in the area, that did not have the power to effectively compete with the new entity. It is noted that the supermarkets sector constitutes a market that has been very narrowly delimited geographically on a radius basis (which makes concentration findings more likely) in accordance with relevant EU precedents. It is also interesting that, in this case, store size was also considered.

In light of such concerns, Masoutis undertook the obligation to sell one of the target's stores located in the mainland of the island of Andros within an overall nine months' period from issuance of the HCC decision and not buy-back same for a period of 10 years.

It is also interesting that in assessing whether a gun-jumping infringement had occurred, the HCC invoked the recent European paradigm[13] and investigated whether an exchange of information between the two entities or other acts of exercise of control had occurred before clearance of the proposed transaction. According to the HCC, for the finding of a (prior) implementation of concentration the possibility of control over the acquired entity by the acquiring entity would suffice. In the case at hand, the HCC found, in majority, that no gun-jumping had occurred owing to the inclusion of an explicit clause, according to which the fulfilment of the transaction would be subject to the competition authority's prior approval in the memorandum of understanding and the supplementary agreement, which was signed a day following the signature of the SpA. According to the authority, there was doubt as to whether Masoutis had obtained the possibility of control, considering that the company did not exercise in practice any managerial acts or voting rights in the Shareholders' Meetings of the acquired entity, and as such, the early implementation of the concentration would not be considered likely. However, two HCC members dissented (including the chairman). In their view, certain acts (e.g., failure to include a 'subject to' clause in the SpA, and the acquiring entity's access to the target's management through the submission to Masoutis of the target's BoD members' resignations and access to the target's financial and other information) were deemed as acts of transfer of management and property rights to Masoutis, conferring to the latter the possibility of control over the acquired entity.

TRAINOSE/EESSTY (acquisition of sole control, super-dominant position)

By virtue of a unanimous decision, the HCC recently approved the proposed acquisition of sole control over EESSTY SA (the Greek railway rolling stock maintenance entity) by TRAINOSE SA (Greek railway operator and subsidiary of the Ferrovie Dello Stato Italiane Group).[14] According to the HCC's press release, the competition on the relevant market will not be restricted significantly through the creation or strengthening of a dominant position as a result of the proposed merger, and the merger will not have a vertical effect on the affected markets, such as foreclosure of competitors' access to the market of freight rail transport or customers, through the rolling stock maintenance services of the new entity, even though both companies hold a super-dominant position (TRAINOSE in the passenger and freight rail transport market and EESSTY in the repair and maintenance of railway rolling stock market).

13 European Commission's Decision of 24 April 2018, M.7993 *Altice/PT Portugal* and Decision of the CEU in C-633/16, Ernst & Young P/S, ECLI:EU:C:2018:371.

14 HCC Press Release of 28 February 2019 (decision not published yet).

According to the HCC, this finding is based on the fact that the current regulatory framework and the competent regulatory authority (i.e., the Regulatory Authority for Railways) safeguard equal access for all railway undertakings to rolling stock maintenance services from EESSTY, with transparency and non-discrimination obligations for all existing or potential TRAINOSE competitors.

III MERGER CONTROL REGIME

i Waiting periods and time frames

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

In particular, pre-merger filings must be submitted to the HCC within 30 calendar days from 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 previous HCC case law, the above deadline may be also triggered by the execution of a preliminary document of a binding nature (e.g., memorandum of understanding).[15] Such assessment is made by the HCC on a per case basis.

Where a wilful failure to observe the above statutory deadline occurs, the HCC may impose on the undertakings concerned a fine from €30,000 up to 10 per cent of their aggregate group turnover. Apart from HCC's recent relevant decision in the *Dimera/Pigasos* case mentioned above, the HCC imposed one of its highest fines in the *Minoan Flying Dolphins* case for realisation and notification failure of 21 concentrations in the domestic maritime sector (i.e., approximately €6.3 million).[16]

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

The duty to suspend a concentration will not prevent the implementation of a public bid to buy or exchange, or the acquisition through the stock market of a controlling interest, when such transaction is notified to the HCC and provided that the acquirer does not exercise the voting rights attached to the securities or does so in order 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.

15 HCC Decision 383/V/2008, 632/2016 and 633/2016.

16 HCC Decision 210/III/2002.

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

a If the notified concentration does not meet the statutory thresholds and, therefore, does not fall within the ambit of the Greek Competition Act, the chairman of the HCC will issue a decision to that effect within one month from notification.

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

c If the notified concentration meets the statutory thresholds and raises serious doubts as to its compatibility with competition conditions in the relevant markets, the HCC's chairman will decide, within one month from notification, to initiate proceedings for the full examination of the transaction and will inform, without delay, the undertakings concerned (initiation of Phase II proceedings). In this case, the matter will be introduced before the HCC within 45 days. Upon being informed that proceedings will be initiated, the undertakings concerned may jointly proceed to adjust the concentration or suggest commitments in order 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 from the introduction of the case before the HCC).

d A decision prohibiting the notified concentration must be issued within a deadline of 90 days from 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 from the notifying parties within seven business days from the date of notification of the correction of the initial notification. The deadlines for the issuance of a Phase I clearance or for the institution of Phase II proceedings are deemed to commence only upon submission of complete and accurate data.

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

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

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

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

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

In terms of hostile transactions, it is noted that these are rarely dealt with by the HCC. One of the most published hostile transactions that has undergone HCC scrutiny extends back to 2010 (*Vivartia/Mevgal* case), whereas the acquisition of sole control over Mevgal was fulfilled only in 2014, by virtue of the HCC's conditional clearance decision.[17] Currently, control over Mevgal has been converted from sole to joint following the granting of the HCC's conditional clearance.[18] It should be also noted that the HCC, in its Decision 558/VII/2013 'determining the specific content of merger notifications pursuant to the Greek Competition Act', explicitly provides that:

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

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

In general, third parties are not granted access to pending case files, including merger control cases.[19] 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 to a daily financial newspaper with nationwide coverage, following which they may comment or provide relevant information to the HCC within a period of 15 days.

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

The HCC may clear the notified transaction subject to conditions so that the concentration may be rendered compatible with the applicable substantive test for assessing the legality of the merger (i.e., whether the notified transaction is likely to significantly restrict competition on the national market or in a substantial part thereof, taking into account the involved products' services characteristics, particularly by creating or strengthening a dominant position). Therefore, the notifying parties may offer remedies to alleviate any concerns of the HCC, which are to be negotiated between the notifying parties and the authority. In particular, remedies are offered within 20 days as 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), which is available on the HCC's website. In practice, remedies that are structural in nature are preferable as they are deemed to prevent over the longer term the competition concerns that would be raised by the merger as notified, in accordance with European legislation and case law.

17 HCC Decision 598/2014.

18 HCC Decision 650/2017.

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

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 (see Section I.i). For example, in a recent acquisition of control case (*Vodafone/CYTA*), 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).[20] In this case, the HCC cleared the transaction only with respect to the media aspect of the concentration (i.e., pay-TV services), whereas it decided to abstain from the assessment of the aspect of the concentration for which the EETT had already initiated a relevant review (multiple play services). In turn, the EETT cleared the transaction later in the year.[21]

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 Commission of the EU, 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.[22]

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 Cooperation and Development (OECD).

ii How to deal with special situations

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

20 HCC Decision 656/2018.

21 EETT Decision 857/7/26.11.2018.

22 Article 28.

It should also be noted that the HCC may take into account the financial situation of the undertakings concerned when calculating the applicable fine in case of violation of the standstill obligation.[23] This aspect was, for example, looked into in the *Dimera/Radioteleoptiki* case,[24] 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 participating in the concentration undertakings 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 EUMR, 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.[25] This has been ruled by the HCC in the *Follie-Follie/ Duty Free Shops* case, where although Follie-Follie held a minority stake in the acquired entity, it was deemed to be exercising control as it was the only entity in a position to veto strategic decisions of the acquired entity.[26] Exercise of joint control by minority shareholders was recently touched upon by the HCC in the *GEK TERNA/Nea Odos* case, in which it was stated that joint control may also occur in case of inequality in votes:

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

V OUTLOOK AND CONCLUSIONS

There are currently no pending changes in merger control legislation.

In recent years, the HCC has proved to be active in ensuring compliance with the Greek merger control regime. The authority's vigilance is undoubtedly evidenced by its recent gun-jumping investigations (see the *Dimera* and *Masoutis* cases discussed above).

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

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

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

23 Article 9 of the Greek Competition Act.

24 HCC Decision 652/2017.

25 HCC Decision 427/V/2009.

26 HCC Decision 308/V/2006.

Appendix 1

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Tania is an associate at Bernitsas Law 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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