THE MERGER CONTROL REVIEW

FOURTEENTH EDITION

Editor
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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions such as Malaysia are continuing to consider imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, the international business community had a wake-up call when, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is imperative, therefore, that counsel develop a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file a notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 25 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely developments.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers and 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 (China having consolidated its three antitrust agencies into one agency in 2018). Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany amended its law to ensure that it has the opportunity to review transactions in which, although the parties' turnovers do not reach the threshold, the value of the transaction is significant (e.g., social media, new economy, internet transactions). Other jurisdictions are also focused on ensuring that acquisitions involving smaller internet, online and data companies or, in other high-technology settings, a nascent competitor, do not escape review.

Newly adopted laws have tried to vest jurisdiction on these transactions by focusing on the 'value of the consideration' rather than turnover for acquisitions of nascent firms, particularly in the digital economy (e.g., in Austria and Germany). Some jurisdictions have also adopted a process to call in transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability to review and take action in non-reportable transactions (see discussion of *Google/Fitbit* in the International Merger Remedies and Japan chapters), and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time. To provide the ability to review acquisitions of nascent but potentially important rivals, the European Commission (EC) has adopted potentially the most significant change in its rules: to use the referral process from Member States to vest jurisdiction in transactions that fall below its thresholds but that could have Community-wide significance. In one such matter, *Illumina/GRAIL*, the EC invited national competition authorities to request a referral of the transaction, even though it did not meet the review thresholds of the EU Merger Regulation or any national merger control rules (in fact, GRAIL had no sales at all in the European Union). At the time of writing, according to reports, the EC has since accepted Article 22 referral requests in three other cases (*Meta/Kustomer*, *Viasat/Inmarsat* and *Cochlear/Oticon Medical*), although in each of these the transaction triggered the national merger control thresholds in at least one EU Member State.

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 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 any effect on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there is similarly no 'local' effect required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a self-assessment of whether the transaction will meet certain levels and, if so, should notify the agency to avoid a potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa have been in connection with these considerations. Notably, the current leadership at the US antitrust authorities have similarly suggested that their mandate under the antitrust laws is broader than the traditional focus on consumers and consumer welfare to include impact on labour, diversity and other considerations. It is unclear at this point how this shift will affect enforcement decisions and judicial challenges. Although a growing 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 the merger could potentially affect national security.

Some jurisdictions are exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands, where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing firm defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed owing to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even when 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 Patriarche 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. In 2021, Morocco similarly imposed a fine for failure to notify a transaction in excess of US$1 million.

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 worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

The United States and the EC both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as gun-jumping, even fining companies that are found to be in violation. For example, the EC imposed a €124.5 million fine on Altice and, in 2023, fined Illumina €432 million for its closing of the *Grail* transaction. Other jurisdictions have become increasingly aggressive in the imposition of fines. Brazil, for instance, issued its first gun-jumping fine in 2014 and later issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively

sensitive information before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority; however, in Canada – like the United States – the Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction; however, the KFTC continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. This list of jurisdictions is illustrative rather than comprehensive and is consistent with the overarching concerns expressed above regarding catching transactions that may have fallen below the radar but are subsequently deemed problematic. In the same spirit, the EC has fined companies on the basis that the information provided at the outset was misleading (for instance, it 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 on the size of the transaction; however, some jurisdictions determine the fee after filing or provide different fees based on the complexity of the transaction.

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

The role of third parties also varies across jurisdictions. In some (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 other 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 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 period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). In Hong Kong, the authority has six months post-consummation to challenge a transaction. Norway is also a bit unusual in that 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.

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

The impact of multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the US Federal Trade Commission and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other

jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have raised the size threshold at which filings are mandated (e.g., Austria), 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 an interest of only 10 per cent or less 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 effect 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 have also been the 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 behavioural remedies (e.g., China, the EC, France, Italy, Japan, the Netherlands, Norway, South Africa, Ukraine and Vietnam). This is particularly the case when non-compete or exclusive dealing relationships raise concerns (e.g., in Mexico and the United States). Some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers*

transaction, China's Ministry of Commerce remedy in *Glencore/Xstrata* and France's decision in the *Numericable/SFR* transaction). It is important to note, however, that one of the areas flagged for change by the new leadership at the US antitrust authorities is the willingness to consider behavioural remedies, or, for that matter, any remedies, rather than bringing enforcement actions to challenge the transaction itself.

In many of the key enforcement regimes (e.g., the United States, Canada, China and the United Kingdom), we are at a potentially transformational point in competition policy enforcement; however, this book should provide a useful starting point in navigating cross-border transactions in this changing enforcement environment.

Ilene Knable Gotts
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July 2023

Chapter 13

GREECE

Marina Androulakakis and Tania Patsalia[1]

I INTRODUCTION

i Authorities

The national competition authority that deals 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 10 members (including a chair, a vice chair, six rapporteurs, two regular members and their deputies),[2] each of whom serves a five-year term, and is under the administrative and financial supervision of the Minister of Development and Investments.[3]

The HCC is assisted in its tasks by the Directorate General for Competition (DGC).

Apart from the changes in the structure of the DGC that took place in 2021,[4] the composition of the HCC was recently renewed with the appointment of a new vice chair and rapporteurs.

In addition, the Hellenic Telecommunications and Post Commission (EETT), pursuant to the provisions of Law 4727/2020 on digital governance, electronic communications and other provisions, is competent for the enforcement of Law 3959/2011 on the protection of free competition,[5] as amended[6] and in force (the Competition Act), including merger control provisions, in the electronic communications sector and the postal services sector.

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

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2 The number of members of the Hellenic Competition Commission (HCC) was increased from eight to 10 by means of Law 4886/2022 (Government Gazette A' 12/24.01.2022). For more details, see also HCC's updated Rules of Internal Procedure and Management (Government Gazette B' 1790/21.03.2023).

3 And is subject to parliamentary control.

4 The main features of the reforms at the Directorate General for Competition (DGC) were the setting up of (1) interdisciplinary mixed sectoral directorates, (2) horizontal units for economic research and documentation and for forensic investigation and detection, and (3) a chief legal officer directorate. Each sectoral directorate is formed of a legal unit and an economic unit. The new structure also includes directorates that report directly to the chair of the HCC and an office of the Legal Counsel of the State. See, also, HCC Decision 749/2021 (Government Gazette B' 4757/14.10.2021).

5 Government Gazette A' 93/20.04.2011 (Competition Act).

6 The latest amendment to the Competition Act took place by means of Law 4886/2022.

ii Statutes, regulations and guidelines

The main legislation relating to merger control in Greece is the Competition Act (in particular, Articles 5 to 10). The Act mirrors, in essence, the provisions under the European Union's merger control regime.[7] Following the amendments to the Competition Act in 2022,[8] the HCC issued a number of merger control decisions, updating its formal merger templates, such as (1) Decision 779/2022 (Determination of the content of the commitments form in accordance with Article 6(5)(6) and Article 8(8) of Law 3959/2011), and (2) Decision 780/2022 (Determination of the specific content of the merger notification form in accordance with Articles 5 to 10 of Law 3959/2011).[9] In essence, the HCC's merger notification form is in line with the European Union's equivalent (Form CO).

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

Finally, concentrations in the media sector (television, radio, newspapers and magazines) are governed by both the Competition Act and Law 3592/2007, as amended and in force (the 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 in the 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 Competition Act, a change of control is deemed to arise when (1) two or more previously independent undertakings (or parts thereof) merge or (2) one or more persons already controlling at least one undertaking, or one or more undertakings, acquire direct or indirect control of the whole or parts of one or more other undertakings.

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

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

8 Amendments were also made to the provisions on merger control, including by enabling merger parties to offer remedies during the Phase I review period and providing a filing fee of €3,000 for the initiation of the Phase II merger review.

9 Among the few changes in its merger template, the HCC is now inviting merging parties to engage voluntarily in pre-notification contacts with the authority regarding the extent and type of information on which they plan to base their notification.

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

Guidance on turnover calculations is provided in the Competition Act (Article 10), although special rules apply to calculating the turnover of credit institutions, financial institutions and insurance companies.

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

When the above thresholds are met, 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

Based on publicly available statistics on concentrations that are notified and reviewed by the HCC, between a half and two-thirds of the HCC decisions each year concern concentrations, of which only a small number are concentrations that can create risks of distortion of competition (Phase II concentrations).[10] The number of decisions issued by the HCC, however, differs every year (usually between 10 and 20). According to publicly available information, the total number of notifications and cases examined by the HCC between 2000 and 2017 was 373.[11] Between 2018 and 2021, 68 merger control cases were notified before the HCC.[12]

In 2022, 19 cases were notified to the HCC.[13] Of these, one has been cleared following an in-depth review (Phase II) and two were conditionally cleared with remedies (one being the first case in which remedies were offered in Phase I as per recent changes to the Competition Act and one in Phase II).[14]

So far in 2023, the HCC has provided unconditional clearance to 10 notified concentrations. It has initiated a Phase II review in one case and will assess the effectiveness of undertaken commitments under a former HCC conditional clearance decision.

10 HCC Newsletter Issue 6, March 2023, p. 3.

11 Organisation for Economic Co-operation and Development, Peer Reviews of Competition Law and Policy: Greece, 2018, p. 48 (https://www.oecd.org/competition/oecd-peer-reviews-of-competition-law-and-policy-greece-2018.htm (accessed 2 June 2023)).

12 HCC Newsletter Issue 6, March 2023, p. 4.

13 id.

14 HCC Decisions 775/2022 and 803/2022.

ii Recent key cases

Prometheus Gas SA (HCC, derogation with remedies)

On 23 December 2022, the HCC rendered a derogation decision from the obligation to suspend the implementation of a concentration in the form of the acquisition of sole control by Pyrsos SA (Pyrsos) of the (jointly controlled) gas company Prometheus Gas SA (Prometheus) until issuance of its approval decision pursuant to the Competition Act.[15] In applying for derogation, Pyrsos invoked reasons relating to the economic and business insecurity caused by the conflict in Ukraine (owing to the participation of Gazprom Export in its share capital and inclusion of Gazprom Export's parent entity, PJSC Gazprom, and of other group subsidiaries in sanctions lists), further to which it experienced disruption to its business relations and either other difficulties or refusal of the necessary collaboration for its operation. In granting its derogation, the HCC considered the nature of the concentration (conversion of control from joint to sole), as well as the declining market share (less than 15 per cent) of Prometheus in the relevant market during the past three years, as well as the absence of any vertical aspects. The HCC derogation decision was subject to the undertaking of certain terms and commitments by Pyrsos involving the following:

a the non-realisation of any acquisition of shares, merger or of any exceptional transaction (including spin-offs and transformations) with any other party;

b the non-interruption of the operation of all or part of the business or the non-realisation of any material change in the nature or operation of the business, including the change of Prometheus's registered seat;

c the non-entering into a long-term supply agreement, apart from its normal business activities;

d the non-undertaking of any guarantee or other agreement to secure any obligation of a third party, apart from its normal business activities; and

e the non-realisation of a sale or impairment of Prometheus's assets.

Kritikos Anedik (HCC, Phase I with remedies)

Following the recent changes to the Competition Act, the HCC granted its first Phase I clearance decision with remedies.[16] The transaction consisted of the acquisition by Kritikos Anedik SA (Kritikos) of sole control over the supermarket stores of Synergazomeni Pantopols SA (the target). The case forms part of a series of merger control cases in the Greek supermarket sector that have been subject to scrutiny by the HCC this year.[17]

To address the HCC's concerns regarding two supermarket stores in the areas of Grevena and Rethymno, where it was found that the merger would have resulted in the strengthening

15 HCC Decision 804/2022. The case involved the conversion of joint control into sole control. See, also, the Competition Act, Article 9(3), based on which the HCC may, on request, grant (at any time, before notification or after the transaction) a derogation from the suspension obligation, to prevent serious losses to one or more undertakings affected by the concentration or to a third party. In deciding on the request, the HCC takes into account, inter alia, the threat to competition posed by the concentration, whereas the decision granting the derogation may set conditions and obligations to ensure conditions of effective competition and prevent situations that might hamper the execution of any final prohibiting decision.

16 HCC Decision 803/2022.

17 See, also, HCC Decision 813/2023, *Diamantis Masoutis SA/Family Supermarket* and HCC Decision 800/2022, *Diamantis Masoutis SA/Denaksa Ltd*.

of the dominant position of Kritikos (resulting in a total market share of between 85 per cent and 95 per cent), the acquiring entity, the target and the selling entity (Ellinika Market) undertook the following remedies:

a the obligation to cease to grant in any way and under any form the use of the transferred brands (as defined in the decision) to the stores, and to refrain from granting such use in the future;

b the obligation to refrain from granting in any manner and under any form whatsoever the use in the two stores of any trademark owned or managed by Kritikos; and

c the obligation to cease and refrain from the conclusion of any new cooperation (as defined in the decision) with the two stores, with the exception of the continuation of the store supply based on an existing or new wholesale supermarket supply relationship.

In addition to the above, the HCC decided to initiate an *ex officio* investigation to assess whether the conditions for the infringement of late notification of the notified concentration have been met, pursuant to the Competition Act.[18] For the sake of completeness, the notification was submitted to the HCC within 63 days of the signing of a preliminary share contract, which was binding in nature and found by the HCC to form the final agreement between the parties, thus triggering the 30-day filing deadline.

Delivery Hero (HCC, Phase II with remedies)

On 18 April 2022, the HCC unanimously approved the acquisition by Delivery Hero SA (Delivery Hero), the operator of a leading online food delivery platform (e-food) in Greece, of sole control over four companies active in the e-commerce food sector, namely Alfa Distributions SA, Inkat SA, Delivery.gr Single Member PC (Delivery.gr) and E-table Online Restaurant Reservations PC (E-table), subject to commitments offered by Delivery Hero following a Phase II investigation.[19]

The HCC found that the combination of the parties' activities in the market for online intermediation for restaurant reservations through E-table's platform and in the online intermediation market for food ordering, through Delivery Hero's online platform, e-food, would give rise to conglomerate effects. As a result of the parties' significant market power in the relevant markets in Greece, the HCC held that the merged entity would have both the ability and the incentive to bundle the services provided by e-food and E-table, thereby reducing E-table's competitors' ability or incentive to compete effectively on the market for online restaurant reservation services. In addition, the HCC was concerned that the combination of end-user data collected from e-food and E-table would allow the merged

18 Competition Act, Article 6 (4). According to its press release of 30 June 2023, the HCC will convene on 13 July 2023 to consider the late notification, whereas under HCC rapporteur's report (albeit not binding on the HCC) it is recommended that a fine be imposed on Kritikos.

19 HCC Decision 775/2022 (decision not yet published). The summary, above, is based on an HCC press release, according to which the activities of the four targets are as follows: (1) Alfa Distributions SA is active in the wholesale supply of consumer goods to supermarkets; (2) Inkat SA is active in the wholesale supply of groceries and operates the retail grocery store chain Kiosky's; (3) Delivery.gr operates the online platform delivery.gr, which provides online intermediation services (ordering) for restaurants, supermarkets, convenience stores and other local stores; and (4) E-table provides online intermediation services for reservations in restaurants, through the e-table platform.

entity to implement personalised promotion strategies, thereby giving it a competitive advantage to such a degree that the combined entity's competitors would no longer be able to compete effectively.[20]

To address HCC's concerns, Delivery Hero committed (1) not to bundle the online intermediation services for food ordering with the online reservation services in restaurants (through E-table) when offered to restaurants, and (2) not to combine user data drawn from the respective platforms without prior user consent in accordance with applicable data privacy rules.

The duration of these commitments was set for two years (from the date of acquisition of control over E-table) with the possibility of a one-year extension.

OPAP/Kaizen (HCC, late notification)

In 2022, the HCC's decision on the late notification of the concentration concerning the acquisition by OPAP SA (OPAP) of sole control over the Greek and Cypriot activities of Kaizen Gaming International Ltd (Kaizen) was made publicly available.[21] In particular, the HCC found that OPAP had breached the Competition Act owing to the late notification of its acquisition of sole control over Kaizen and imposed a fine of €500,000 on OPAP.[22] Under the HCC's decision, the concentration was filed within 245 days of the conclusion of the framework agreement, exceeding the statutory 30-day deadline for timely submission of the notification by 214 days. OPAP argued that it had not been under an obligation to notify owing to the absence of a legally binding agreement securing control over the target and, therefore, that the decisive event triggering the initiation of the 30-day deadline had not taken place. In particular, OPAP argued that the framework agreement forms a (non-legally binding) agreement in principle (a mere 'promise to agree'), which does not constitute a definitive agreement and does not provide for the details and mechanism for its implementation transaction, but merely provides a general statement of the parties' intention to enter into the transaction in good faith and a 'soft commitment by the parties to cooperate' to that end, without providing for a clearly defined and binding plan for its completion. It also argued that the implementation of the transaction was intended to take place by means of a separate implementation agreement without which the transaction would not have been possible. In light of the above, OPAP concluded that the 30-day deadline for notification was not triggered, as the decisive event for initiation thereof should have been the conclusion of the implementation agreement and not the conclusion of the framework agreement.

In rendering its decision, the HCC took into account OPAP's significant economic standing and market power (super-dominant position in the majority of relevant markets) and the target's significant economic and market power in the horizontally affected relevant market of online sports betting. Notwithstanding the above, the HCC also found that (1) the infringement was not intentional, (2) the infringement did not have as its object or effect to circumvent merger control by the HCC, as OPAP filed on its own initiative, (3) the

20 The HCC was also concerned about the combined entity's (e-food and delivery.gr) high market share in the market for online intermediation for the sale of groceries, but ultimately found that the merged entity will not be able to substantially restrict competition on the market, compared with the pre-merger situation, given the bargaining power of competitors (supermarkets).

21 HCC Decision 752/2021.

22 Competition Act, Article 6(1).

effect on competition of the merger was negligible, considering the nature of concentration (i.e., conversion from joint to sole control), and (4) the fact that OPAP cooperated sufficiently with the HCC by responding promptly and completely to HCC's requests for information.[23]

III THE MERGER CONTROL REGIME

i Waiting periods and time frames

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

In particular, pre-merger filings must be submitted to the HCC within 30 calendar days of the conclusion of the agreement or the announcement of the bid to buy or exchange, or the assumption of an obligation to acquire a controlling interest in an undertaking. According to HCC case law, this deadline may also be triggered by the execution of a preliminary document of a binding nature (e.g., memorandum of understanding).[24] This assessment is made by the HCC on a case-by-case basis.

If a wilful failure to observe the above statutory deadline occurs, the HCC may impose on the undertakings concerned a fine of at least €30,000, but no more than 10 per cent of their aggregate group turnover.[25]

In addition, a mandatory suspensory effect of the notified transaction is also provided for under the 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).[26]

The HCC imposed one of its highest fines to date in the *Minoan Flying Dolphins* case for realisation and notification failure of 21 concentrations in the domestic maritime sector (approximately €6.3 million).[27] More recently, the HCC imposed fines amounting to €110,000 against the media company Dimera Media Investments for failure to notify and violation of the standstill obligation.[28] In 2021, the HCC dealt with a case involving failure to notify and gun-jumping concerning the creation of a joint venture by PPC Renewables and TERNA Energeiaki in the market of production of electricity from renewables,[29] but no fines were imposed because it was deemed, inter alia, that the required degree of fault was not met.

23 Under Article 6(4) of the Competition Act: 'The Competition Commission shall impose on each person who is at fault for failing to notify in accordance with par. 3 of the present article, a fine of at least EUR thirty thousand (30,000) capped at ten per cent (10%) of aggregate turnover, as defined in Article 10. In fixing the amount of the fine, the economic power of the parties to the concentration, the number of the affected markets and the level of competition in those, as well as the estimated impact of the concentration on competition shall be taken into consideration.' The application of the provision is subject, therefore, to the cumulative fulfilment of three conditions, namely (1) the existence of an obligation to notify the concentration as per Article 6(1) of the Competition Act, (2) the infringement of the obligation, and (3) the infringement is attributed to the fault of the notifying person.

24 HCC Decisions 383/V/2008, 632/2016, 633/2016, 803/2022 and 752/2021.

25 HCC Decision 752/2021, analysed in Section II, above.

26 See HCC Decision 804/2022, analysed in Section II, above.

27 HCC Decision 210/III/2002.

28 HCC Decisions 652/2017 and 655/2018.

29 HCC Decision 729/2021.

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 a transaction is notified to the HCC and provided that the acquirer does not exercise the voting rights attached to the securities, or does so to protect the investment value and on the basis of a derogation granted by the HCC (partial derogation).

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

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

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

If the notified concentration, although meeting the statutory thresholds, does not raise serious doubts as to the possibility of significantly restricting competition in the relevant markets, the HCC will decide to approve the transaction within one month of notification (Phase I clearance). Under the provision introduced in 2022, it is now possible for the undertakings concerned to propose modifications to the concentration within 20 days of filing the complete notification, and the HCC may clear the transaction under Phase I if it considers that, following these modifications, relevant competition concerns have been lifted.[30] If the notified concentration meets the statutory thresholds and raises serious doubts as to its compatibility with competition conditions in the relevant markets, the HCC's chair will decide, within one month of notification, to initiate proceedings for an in-depth review of the transaction and will inform the undertakings concerned without delay (initiation of Phase II proceedings). In this situation, the matter will be introduced before the HCC within 45 days. Upon being informed that proceedings will be initiated, the undertakings concerned may jointly proceed to adjust the concentration or suggest commitments to remove any serious doubts as to the compatibility of the transaction with the competition rules in the relevant markets and notify these to the HCC (within 20 days of the introduction of the case before the HCC).

A decision prohibiting the notified concentration must be issued within 90 days of the commencement of the Phase II proceedings. If no negative ruling has 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 undertakings, (2) the notification is erroneous or misleading, so that the HCC is not able to assess the notified concentration, or (3) the notification form is incomplete. Regarding points (2) and (3), the HCC is obliged to request corrections to the initial notification from the notifying parties within seven business

30 The introduction of remedies during the Phase I merger review period was carried out by virtue of Law 4886/2022 and is in line with the European Union's merger control procedure.

days of the date of notification. The deadlines for the issuance of a Phase I clearance or for the institution of Phase II proceedings are deemed to commence only upon submission of complete and accurate data.

In exceptional cases, the above deadlines (except for the one-month deadline for issuance of the chair's decision archiving the notification as falling outside the Competition Act) are suspended if the undertakings concerned fail to comply with their obligation to provide information in accordance with the Competition Act, and under the condition that they are advised accordingly within two business days of the expiry of the time limit determined by the HCC for the provision of such information.

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

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

The Competition Act does not provide for the notifying parties' ability to accelerate the review procedure. In practice, the HCC has a track record of meeting deadlines once notifications are deemed complete.

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

In terms of hostile transactions, these are rarely dealt with by the HCC; however, one notable case was *Vivartia/Mevgal* in 2010. The transaction was cleared with conditions, by virtue of HCC Decision 515/VI/2011, but was dropped and notified again a few years later. In particular, by means of HCC Decision 598/2014, the notified concentration was cleared again but fulfilment did not take place. Control over Mevgal was later converted from sole to joint following the granting of the HCC's (third) conditional clearance.[31] Note, however, that the HCC, in Decision 780/2022 (Determination, in accordance with Article 6, Paragraphs 5 and 6 of Law 3959/2011, of the more specific content of the notification of a concentration of businesses, according to Articles 5 to 10 of Law 3959/2011), explicitly provides that:

> *[t]he parties obliged to notify may submit a written request to the HCC for the acceptance of their notification, even if they do not submit all the required information, if such information is not wholly or partially at their disposal (e.g., in the 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.[32] However, the HCC may invite third parties to act as witnesses in the hearing of a pending case if 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 controls, 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 a proposed concentration by means of the publication of the notified concentration in a daily financial newspaper with

31 HCC Decision 650/2017.

32 HCC, Rules of Internal Procedure and Management, Article 15(9).

national coverage, within five days of the notification of the concentration, which is also published on the HCC's website, following which they may comment or provide relevant information to the HCC within 15 days.

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

The HCC may clear the notified transaction subject to conditions so that the concentration may be rendered compatible with the applicable substantive test for assessing the legality of the merger (i.e., whether the notified transaction is likely to significantly restrict competition in the national market or a substantial part thereof, taking into account the characteristics of the involved products or services, 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 either within 20 days of notification of the concentration (Phase I clearance) or within 20 days of the date of introduction of the case before the HCC (Phase II clearance), and only in exceptional cases after the lapse of this period. Parties wishing to propose remedies must file the relevant form (which is available on the HCC's website), which also includes model text for divestitures and for trustee mandates.[33]

HCC decisions may be appealed 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 supplementary version of the notification if there is a change of conditions.

v Effect of regulatory review

Concurrent reviews of mergers by more than one body is not possible under Greek merger control rules. It is the same for transactions that also touch on the electronic communications sector.[34] For example, in an acquisition of control case (*Vodafone/CYTA*),[35] the HCC provided significant input regarding its interrelationship in terms of competence with other national authorities authorised by law to implement the Competition Act (i.e., the EETT). In this case, the HCC cleared the transaction only in respect of 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.[36]

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

33 HCC Decision 779/2022.

34 See Section I.i.

35 HCC Decision 656/2018.

36 Hellenic Telecommunications and Post Commission, Decision 857/7 of 28 June 2018.

IV OTHER STRATEGIC CONSIDERATIONS

i How to coordinate with other jurisdictions

Under the Competition Act, the HCC, being the national competition authority, is responsible for cooperation with (1) the European Commission, (2) the competition authorities of the Member States of the European Union, and (3) the competition authorities of other counties bilaterally and within the framework of international and regional cooperation networks.[37]

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

ii How to deal with special situations

If a party to the notified concentration faces financial distress or insolvency, the failing firm defence may be raised before the HCC as part of the merger review process. The HCC has not issued a decision clearing a transaction based on this defence; however, a HCC Plenary Session was convened on 12 July 2023 to assess the notified concentration concerning the merger of Anek Lines SA with Attica Holdings SA on the basis of the failing firm defence.[38]

The HCC may take into account the financial situation of the undertakings concerned when calculating the applicable fine in the case of violation of the standstill obligation.[39] This aspect was looked into, for example, in the *Dimera/Radioteleoptiki* case,[40] in which the HCC took into account for the calculation of the fine (1) the acquiring entity's low market shares in the relevant markets, (2) the limited economic capacity of the undertakings participating in the concentration, and (3) the absence of any affected horizontal and vertical markets.

With regard to minority ownership interests, the HCC takes the stance that these may also confer the possibility of control. In particular, the definition of 'control' in the Competition Act remains identical to that in the EC Merger Regulation,[41] and the HCC closely follows the European Union 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.[42] This has been ruled by the HCC in the *Folli-Follie/Duty Free Shops* case, whereby, although Folli-Follie held a minority stake in the acquired entity, it was deemed to be exercising control as it was the only entity in a position to veto strategic decisions of the acquired

37 Competition Act (as amended and in force), Article 28.

38 HCC press release of 21 June 2023: 'Assessment of the notified concentration ANEK-ATTICA GROUP'.

39 Competition Act, Article 9.

40 HCC Decision 652/2017.

41 See footnote 7.

42 HCC Decision 427/V/2009.

entity.[43] Exercise of joint control by minority shareholders was touched on by the HCC in the *GEK TERNA/Nea Odos* case,[44] in which it was stated that joint control may also occur in the case of inequality in votes:

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

V OUTLOOK AND CONCLUSIONS

For the HCC, 2022 was arguably a fruitful year in terms of merger control, considering the number of concentrations brought before the authority (establishing an upward trend compared with 2021). The majority of the cases did not undergo an in-depth review (Phase II was initiated in only two cases); the HCC also continued its long-standing practice of not blocking any notified concentrations. Apart from typical merger control clearance procedures, the HCC also dealt with other merger control issues, such as derogation, undertaking of remedies in Phase I and late notification.

Following various recent initiatives at both national and European levels, the HCC has declared its intention to promote environmental and social sustainability as a parameter of competition and facilitate the green transition of the Greek economy, undertaking a series of initiatives to that effect, such as the launch of the new platform Sustainability Sandbox (which is now live). The exact effect of the HCC's focus on sustainability on the merger control field (e.g., in terms of theories of harm, efficiencies or merger remedies) remains to be seen with interest.

43 HCC Decision 308/V/2006. See, also, HCC Decision 714/2020.

44 HCC Decision 673/2018.