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“Merger Control in the Balkans”

Greece

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1. INTRODUCTION

Mergers and acquisitions (together, **the Concentrations**) are subject to merger control under Law 703/1977 “on the control of monopolies and oligopolies and the protection of free competition”, as amended repeatedly and for the last time by Law 3373/2005 (**the Competition Law**), provided the thresholds imposed by the Law are met.

The Competition Commission (**the CC**) is the authority responsible for enforcing the Competition Law. The CC is an independent authority supervised by the Minister of Development. The proceedings before the CC are regulated by the “Operation and Management Regulation of the Competition Commission” (**the CC Regulation** – Common Ministerial Decision No 8275 of December 15, 2006).

In specific cases the Ministers of Development and of Economy and Finance can approve concentrations already prohibited by the CC.

The decisions of the CC are subject to judicial review by the administrative courts. Also, the civil courts have competence to declare a breach under the Competition Law and award damages after a lawsuit filed by an interested party, eg. one that suffered damages.

2. DEFINITION AND THRESHOLDS

2.1 DEFINITION OF A CONCENTRATION

Concentrations include:

- Any kind of merger (by absorbing or creating a new undertaking) between two or more undertakings which were previously independent.
- An acquisition, by one or more persons or undertakings already controlling at least one undertaking, of direct or indirect control of the whole or part of one or more other undertakings.

Regarding the kind of **control**, the definition of the Law is identical to same of the EU Merger Regulation No. **139/2004** in force as from May 1, 2004 (and accompanied by its implementing legislation). In particular and in short, control is acquired by rights, contracts or other means that confer the possibility of exercising decisive influence on the activity of another undertaking.



Credit-financial institutions and insurance companies are subjected to special regulation as to whether certain business actions of them are considered concentrations or not.

2.2 JOINT VENTURES

The distinction is drawn on whether the joint venture is established to meet all functions of an **autonomous economic entity** on a permanent basis, or not. In the first place, it is regarded as a Concentration and subjected to the respective rules analysed herein below.

To the extent the joint venture aims or results to a **co-ordination** of the competitive behaviour of the independent undertakings establishing it, it is determined under the criteria taken into account for the consideration of restrictive agreements and practices under the Competition Law.

2.3 THRESHOLDS

The Competition Law distinguishes between pre- and post-merger notifications.

- a. **Pre-merger notification.** Under this category fall Concentrations where:
- The participating undertakings have a total **worldwide** turnover of at least EUR150 million; **and**
 - Each of at least two participating undertakings has a total turnover of at least EUR15 million in **Greece**.

Pre-merger notifications are dealt with below in detail.

- b. **Post-merger notification.** Such a notification regime applies to Concentrations where:
- The market share of the respective products /services is at least 10% in the relevant **Greek** market or in a substantial part of it; **or**
 - The participating undertakings have a total turnover of at least EUR15 million in **Greece**.

The post-merger filing aims at allowing the CC to collect information on the structure and the conditions of competition in the Greek market and no decision is issued about it.



In all cases, where the **part** of one or more undertakings is acquired, only the turnover and market share relating to that part are included to calculate the seller's turnover.

The basic rules on the **turnover calculation** include:

- a. the last financial term is taken into account,
- b. sale deductions, VAT and any other tax imposed on the turnover are deducted, and
- c. transactions among group companies are not counted, the Competition Law defining these companies.

3. BASIC – GENERAL TOPICS

3.1 MANDATORY - VOLUNTARY

A Filing is **mandatory only** for Concentrations that meet the thresholds noted above.

3.2 TIMING

Concentrations being subject to **post-merger** notification must be notified to the CC within one **(1) month** from their implementation.

Pre-merger notification Concentrations have to be notified to the CC within ten **(10) working days** from concluding the relevant agreement or announcing a public bid or acquiring a controlling interest.

3.3 PRE-NOTIFICATION GUIDANCE

There are **no** standard rules neither procedure for pre-notification guidance. The General Directorate of Competition of the CC (the CC Directorate) does usually provide non-binding oral informal guidance.



3.4 RESPONSIBILITY FOR NOTIFICATION

If the Concentration is made in an agreement, all the parties to the same have an obligation to notify it to the CC. In other cases, the person(s) or undertaking(s) that acquire control must notify.

3.5 FORM OF NOTIFICATION

- a. **Pre-merger** notification: the parties must submit a form almost identical to the EU Form CO (see Annexes to EU Regulation No. **802/2004**). This is either a Short Form CO or a Full Form CO (CC decision **No 303/V/2006**). The **Short Form** CO is submitted if it is considered that the concentration does not lead to a significant restriction of competition in the relevant market. If the concentration is referred to the CC for full investigation, the parties must submit a **Full Form** CO, which expands basically on the ownership status and control of the parties involved, the market data and the justification on why the Concentration should be permitted. The deadlines for CC's decision commence on the filing of the Full Form CO.
- b. **Post-merger** notification: The standard Form CO requires in this case less information (CC decision **No 302/V/2006**). Especially for post-merger notifications relating to an acquisition of a non-Greek undertaking that is not active in the Greek market, a very simple Form CO is used (CC decision **No 306/V/2006**).

In all cases, two copies of Form CO must be submitted, accompanied by all supporting documents. All documentation must be in Greek, either originally or by translation. If the notifying parties are not Athens residents they must appoint an Athens resident as an attorney for service of process.

3.6 FILING FEE

The filing fee is EUR 300 for **post-merger** notifications and EUR 1,050 for **pre-merger** notifications.



3.7 OBLIGATION TO SUSPEND

- a. **Post-merger** notification: There is no obligation to suspend.
- b. **Pre-merger** notification: the Concentration cannot be implemented until the CC issues its decision on it. **Exceptionally**, the Concentration may proceed:
 - i. if it concerns a public bid or the acquisition of a controlling interest in a company listed on the Stock Exchange under the pre-requisites that the buyer does not exercise any voting rights of the acquired securities (an exception is provided) **and** the transaction has been duly notified to the CC; or
 - ii. if the CC allows a **derogation** to prevent serious damage to one or more undertakings concerned or to a third party, also imposing conditions to ensure effective competition or to avoid making a final decision prohibiting the concentration difficult to be implemented.

The parties can request a derogation at any time before notification or after the transaction, whereas the CC can revoke it if it was based on inaccurate or misleading information or if the participating undertakings did not comply with any of the conditions or obligations imposed.

The validity of any transactions pursued in breach of the suspension obligation depends on the CC decision to be issued. In any case, Stock Exchange transactions are not affected by this rule, provided the parties were not in bad faith.

4. PRE-MERGER NOTIFICATIONS

4.1 INVESTIGATION

4.1.1 Preliminary Investigation

A rapporteur of the CC Directorate starts a preliminary investigation that can involve requesting additional information from the parties and contacting third parties such as public authorities, customers, suppliers or competitors within the deadline set (not shorter than ten days from receipt of the request). The CC Directorate can, among other things:



- a. Examine the undertakings' books and records and take copies or extracts.
- b. Conduct searches.
- c. Take statements.

Within **one month** from notification, one of the following decisions is issued:

- a. The CC Chairman **clears** the Concentration if it does not fall within the scope of pre-merger control.
- b. The CC **clears** the Concentration if it considers that, although the Concentration falls within the scope of the pre-merger control, it does not lead to a significant restriction of competition in the relevant market.
- c. The Concentration is referred by the CC Chairman for a **full investigation**, if there are serious doubts as to whether it is compatible with effective competition in the relevant market.

4.1.2 Full Investigation

After the investigation is completed, the CC Directorate issues a reasoned recommendation to the CC and the parties are notified.

Subject to the proceedings under **4.1.1**, a hearing before the CC has to be fixed within **45 days** from the notification (can be extended up to **14 days**). The parties are invited to the hearing, during which they can present oral and written statements and examine witnesses. The CC must determine whether the concentration substantially restricts competition.

Within **90 days** from the notification (can be extended), the CC must issue a decision either:

- a. Clearing the concentration, possibly subject to conditions; or
- b. Prohibiting the concentration.

If no decision is issued, the Concentration is considered cleared.



4.1.3 CC Own-Initiative Investigation

The CC can investigate on its own initiative whether a Concentration subject to notification has been duly notified to it or, in relation to completed concentrations subject to pre-merger control, whether clearance has been obtained prior to the concentration's implementation. Sanctions are be imposed if a breach took place.

4.2 PUBLICITY

The notifying parties must publish an announcement of their notification in one daily financial newspaper circulated throughout Greece, within five working days from filing the Form CO (CC decision **No 305/V/2006**).

The CC publishes its decisions in the Government Gazette and on its website (www.epant.gr).

4.3 CONFIDENTIALITY

4.3.1 Automatic Confidentiality

The CC officials the Directorate are under a duty of confidentiality and breach of it may lead to criminal liability and fines.

Trade and industry secrets are kept confidential. Third parties do not have access to the documents included in the case file (the CC Regulation).

As a rule, confidential data are not included in official documents. Upon completion of the CC Directorate recommendation, the parties can access the file's non-confidential data. Should a legal interest exists, a person may get access to the file's confidential data after a decision of the CC Chairman.

4.3.2 Confidentiality upon Request.

The parties may indicate to the CC Directorate which information consider to be confidential and the reasons for this. A specific procedure will have to be followed in that case (the CC Regulation).



4.4 THE COMPETITION CRITERIA

A Concentration is prohibited if it may lead to a substantial restriction of competition in the whole or a substantial part of the Greek market, especially by creating or strengthening a dominant position. The criteria considered **include** the:

- Structure of the markets concerned.
- Actual or potential competition from within or outside Greece.
- Barriers to market entry.
- Market position and economic - financial strength of the participating undertakings.
- Available sources of supply and demand.
- Interests of consumers.
- Contribution to technical and economic progress.

The **market share** is merely taken into account and in the past the CC has cleared concentrations with high market shares (even 80%-90%) based on criteria including:

- Potential competition.
- Competitors' economic strength.
- Lack of barriers to market entry.

5. PENALTIES

5.1 FAILURE TO NOTIFY

The CC can impose on each undertaking obliged to notify the following amounts for wilfully failing to notify:

- a. **Post-merger** notification: EUR 3,000 with a maximum threshold the 5% of the undertaking's turnover;
- b. **Pre-merger** notification: EUR 15,000 which cannot exceed the 7% of the undertaking's turnover.



The breach of the Competition Law's merger control provisions in general and specifically of those regarding the notification obligations is also a **criminal** offence of the undertakings in breach. In such a case, fines are provided by the Competition Law ranging between EUR 3,000 and EUR 30,000. The persons representing the undertakings at issue are personally and jointly liable for paying any such fines imposed against the undertakings.

5.2 EARLY IMPLEMENTATION

Regarding **pre-merger** notifications, the implementation of a Concentration before same is approved by the CC in breach of the suspension obligation imposed by the Competition Law (above under **3.7**) may result to a fine ranging between EUR 30,000 and up to the 15% of the aggregate turnover of the undertakings in breach.

In addition, the CC can order:

- separation of the undertakings or assets merged; and/or
- disposal of any assets or shares acquired; and/or
- other measures so that the situation prior to the implementation of the Concentration is restored.

5.3 FAILURE TO OBSERVE

Further, the CC can fine undertakings for failure to comply with its orders during a **pre-merger** notification with amounts up to 15% of the aggregate turnover of the participating undertakings. An additional fine of EUR 10,000 for each day of non compliance can be imposed by the CC.

6. JUDICIAL RECOURSE

6.1 A Concentration prohibited by the CC may be nevertheless approved by the **Ministers** of Development and of Economy and Finance due to reasons of its general economic or public interest overriding a restriction on competition. To that extent, the undertakings interested have to apply within **one month** from service on them of the CC decision.



This exceptional procedure leading to an approval on a Ministerial level was the case only once before.

6.2 The interested parties can **appeal** against a decision of the CC or of the competent Ministers of Development and of Economy and Finance to the Athens Administrative Appeal Court, within **60 days** from the service of the decision at issue. Any third party establishing a legal interest in the decision can also appeal.

The appeal does not suspend the original decision, but the Appeal Court may issue a relevant temporary order after a special petition is filed before it and an injunctions procedure is followed.

6.3 The decisions of the Athens Administrative Appeal Court can be further brought before the Supreme Administrative Court (in Greek, **StE**) after filing of an annulment petition on points of law and procedure, within **60 days** from service of the decision of the appellate Court and in any case no later than three (3) years from the publication of the same.

6.4 Lastly, the **civil courts** retain their own competence to deal with Competition Law issues, primarily to declare a breach under the Competition Law and award damages after a lawsuit filed by an interested party, injunctions proceedings being also allowed.

7. TELECOMMUNICATIONS

Although the Competition Law applies in all sectors and the CC is the body enforcing it, telecommunications are especially regulated regarding competition law and the National Commission for Telecommunications and Postal Services (**the EETT**) is a special authority monitoring competition law in the specific sectors.



The early liberalization in the telecommunication field initiated by EU regulation resulted into significant developments and activities of the various players which tried to take a stake from the ex- monopoly (in Greek, **OTE**). A significant body a case law was developed in the recent years due to judicial actions pursued by all players in the respective sector against others.