

The International Comparative Legal Guide to: Merger Control 2007

A practical insight to cross-border merger control issues



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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The relevant authorities are:

- the Hellenic Competition Commission (“CC”), which is an independent authority enjoying both administrative and financial independence. It is regulated by the Minister of Development and is responsible for monitoring and enforcing local competition laws;
- the Administrative Court of Appeal in Athens and the Council of State, which hear appeals from the CC; and
- the domestic courts, which have jurisdiction in respect of actions brought in delict based on Articles 81 and 82 of the EU treaty, since these articles are now directly applicable in Greek law. (Art 18 (2) Law 703/1977) read with EC Regulation 1/2003.

The Ministers of Finance and Development may reverse decisions of the CC where:

- a) the concentration provides general economic benefits which outweigh the limitation on competition which will arise in the market; or
- b) it is considered as being necessary for the public interest and the general social welfare of society, especially when it contributes to the modernisation or rationalisation of the production and the economy, the attraction of investment, the strengthening of competition in either the European or world markets and the creation of jobs.

1.2 What is the merger legislation?

The legislative framework in Greece is set out in “Law 703/1977 on the Control of Monopolies and Oligopolies and the Protection of Free Competition”, as amended (“**the Competition Law**”).

Also, as an EU Member State, the provisions of EC Regulations 1/2003 and 139/2004 will also be of relevance to the Greek jurisdiction.

1.3 Is there any other relevant legislation for foreign mergers?

There is no other relevant legislation for foreign mergers.

1.4 Is there any other relevant legislation for mergers in particular sectors?

Under Greek law, there are special provisions for business combinations regarding credit institutions and insurance companies. More specifically:

Credit institutions

- The Ministry of Development will only grant its approval to the merger between two or more credit institutions, upon prior approval of the merger by the Bank of Greece (BoG).
- The prior approval of the BoG is required for the transfer of a sector or a part of the business or branches of an existing credit institution to another credit institution, where the transfer leads to the increase of the assets of the acquiring credit institution by 10%, or the increase of the total number of its branches and safe-deposit boxes.
- For mergers between banks the Competition Law contains certain specific provisions regarding the calculation of turnover and market share.

Insurance companies

- Any combination of one or more insurance company is subject to supervision by the Division for Insurance Companies and Actuarial Science of the Ministry of Development.
- Greek law requires the submission of an integrated utility and viability study (“business programme”).
- A merger of insurance companies requires that the companies considering merger are both authorised to offer the same insurance services and already provide such services. Significantly, insurance companies providing different insurance services cannot be merged into a new insurance company which provides general insurance services. However, any existing general insurance providers (established before 1998) may absorb, for example, a life insurance or a car insurance company, without the converse being permitted.
- For mergers between Insurance companies, the Competition Law contains certain specific provisions regarding the calculation of turnover and market share.

Besides the above, certain transactions may be exempted from the application of the Competition Law by a joint decision of the Minister of Development and the competent Ministers issued with the approval of the CC. These include the following:

- public undertakings or public utility undertakings that are of general importance to the national economy;
- undertakings or associations of undertakings involved in the production, treatment, transformation or trading of agricultural, livestock, forestry and fishery products; and

- undertakings or associations of undertakings involved in transportation.

With respect to any international commitments that Greece has undertaken, the provisions of the Competition Law do not apply to agreements, decisions and practices that are intended solely to ensure, promote and strengthen exports.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught - in particular, how is the concept of "control" defined?

In terms of Articles 4(2) of the Competition Law, a concentration will arise in circumstances where:

- two or more previously independent undertakings merge, regardless of the form of the merger; or
- one or more persons who already control at least one (or more) undertaking(s), acquire direct or indirect control of the whole or part of one or more other undertakings.

Article 4(3) of the Competition Law states that control derives from rights, contracts or other means which, either separately or in combination and taking into account the relevant factual and legal circumstances, provide the capacity to decisively control the activities of an undertaking and especially by:

- a) ownership or the right of use in respect of the whole or a part of the assets of an undertaking; or
- b) rights or contracts which provide the capacity to decisively control the composition, voting or decisions of the organs of an undertaking.

Control is deemed to vest in the person or persons or undertakings which hold the rights in question or have the right to exercise such rights.

2.2 Are joint ventures subject to merger control?

The Competition Law provides that the creation of a joint-venture, which performs on a lasting basis all the functions of an autonomous economic entity without giving rise to coordination of the competitive behaviour of the founding undertakings (which remain independent), constitutes a concentration and is therefore subject to merger control. In assessing the coordination of competitive behaviour resulting from the common enterprise, the Competition Commission will determine the markets in which the joint-venture and the entities that formed it compete and will assess whether the coordination will restrain competition in the relevant markets.

2.3 What are the jurisdictional thresholds for application of merger control?

In terms of the present statutory dispensation, a merger control filing (pre-merger notification) is required where the combined aggregate turnover of the participating undertakings amounts to at least €150 million worldwide and each of at least two of the participating undertakings have a turnover of more than €15 million in the Greek market. The previous requirement regarding the existing market threshold of 35% has now been abolished.

The obligation to make a post-merger notification has been reintroduced for concentrations where the combined market share of the participating entities in the product market represents at least 10% of the total market of the products or services concerned, or

where the aggregate turnover of at least 2 of the participating undertakings in Greece amounts to €15 million.

For purposes of the Competition Law, the turnover of an undertaking is considered after the deduction of sales rebates, VAT and other taxes directly related to turnover. Where the concentration takes the form of an acquisition of parts of an undertaking, only the turnover of the parts being acquired is taken into account.

2.4 Does merger control apply in the absence of a substantive overlap?

The new pre-merger notification requirements no longer have a market share criterion and so the question does not arise in respect of such notifications. In respect of post-merger notifications, merger control is triggered even when there is no overlap (i.e. where either of the turnover or market share thresholds are met).

2.5 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign to foreign" transactions) would be caught by your merger control legislation?

Concentrations which occur outside of Greece may be caught by Greek merger control legislation where the concentration has, or may potentially have, an effect on competition in the Greek market. The CC will consider that there is an effect on competition in the domestic market where the parties' turnover falls within the thresholds set out in question 2.3 above.

2.6 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

Where the deal has a Community Dimension the concentration should be referred to the EU Commission. The matter may be referred down to the Greek authorities and, in certain cases where the concentration does not have a Community Dimension, it could be referred up to the EU Commission in accordance with the EC Merger Regulation, which is directly applicable to the Greek jurisdiction.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Yes. The pre-merger notification must be made within 10 working days of the earliest trigger event, i.e. the conclusion of a merger agreement, the announcement of a public tender to buy or exchange, or the acquisition of a controlling interest, whichever occurs first. The CC has taken the view that a binding preliminary agreement which clearly describes the parties intended merger, acquisition, etc. constitutes a concentration and therefore triggers the notification requirements of the Competition Law.

A post-merger notification must be made to the CC within one month of completion of the concentration.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Where the jurisdictional thresholds are met, notification is compulsory.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing?

Where a party has negligently failed to make a pre-merger notification, the CC may impose a fine of at least €15,000 but not exceeding 7% of the aggregate turnover in Greece of the undertakings concerned.

Where a party has negligently failed to make a post-merger notification, the CC may impose a fine of at least €3,000 but not exceeding 5% of the aggregate turnover in Greece of the undertakings concerned.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

No. The CC would in such a case impose a fine for early implementation.

3.5 At what stage in the transaction timetable can the notification be filed?

The notifications should be made within the time periods provided by the law and as set out under question 3.1 hereof, failing which the CC will impose a fine.

3.6 What is the timeframe for scrutiny of the merger by the regulatory body? What are the main stages in the regulatory process?

Every notification filed with the CC must be confirmed as being subject to merger control within one month of the notification. If the transaction is found not to be subject to merger control, the President of the CC (the "President") issues a decision to this effect. If, on the other hand, the transaction is subject to merger control, the President refers the matter to the CC for investigation. In matters of extreme urgency, this first stage in the procedure may be shortened to 15 days by a decision of the President.

After referral of a concentration to the CC, the CC must issue its decision within 90 days of the notification, failing which the transaction is deemed to be approved.

The time limits specified above start to run from the time when the information contained in the notification is deemed to be complete and accurate. The parties may also agree to an extension of the time limit.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended?

Yes. As a general rule, where a pre-merger notification is required to be made, the concentration must be suspended pending clearance by the CC. Two exceptions exist to this general rule:

1) Public bids to acquire or exchange shares, or the acquisition of a controlling interest through a regulated stock exchange may be implemented provided that the concentration was duly notified to

the CC within the statutory 10 working-day deadline and the acquirer does not exercise the voting rights attached to the securities other than for the purpose of maintaining the value of his investment.

2) The CC may, upon the application of a party, allow a party to put a concentration into effect pending the outcome of its investigation, in order to prevent serious damage to any of the undertakings concerned or to any third party. Such an application may be made at any time, even prior to notification.

Where the parties implement the concentration prior to approval or contrary to a decision of the CC, the CC may order the separation of the undertakings or their assets, the cessation of joint control or any other action it deems necessary in order to ameliorate the restriction on competition resulting from the prohibited concentration. The CC may impose a fine not exceeding 15% of the aggregate turnover of the undertakings in Greece and a further penalty of €10,000 per day for each day of the undertakings' delay in complying with its order.

3.8 Where notification is required, is there a prescribed format?

Yes. The prescribed form for the notification is divided into ten sections and includes the following fields:

1. general information about the notifying party and the parties participating in the merger e.g. trade name, registered address, nature of business, representatives and management etc;
2. information regarding the nature of the merger, a list of the sectors of the economy concerned, previous year's domestic and worldwide turnover for each of the participating parties;
3. a list of all entities that belong to the same group of companies. This list should include all controlling and controlled entities in any of the affected markets;
4. a description of personal and financial links (shareholdings) and previous acquisitions of the participating parties and the entities mentioned in point 3 above;
5. copies of the final or most recent transactional documents, a copy of any public offering circular, copies of the parties' most recent annual financial statements, copies of any study, report or research that has been carried out at the parties' request regarding the evaluation of the intended merger and particularly in relation to competition and the prevailing market conditions;
6. a determination of all the affected domestic markets, description of the relevant product markets and the relevant geographical markets affected;
7. financial data and background information for each of the affected relevant markets;
8. general conditions in the affected markets, supply and demand structure of the markets (e.g. networks of distribution, domestic production capacity, major customers), market entry status and requirements, research and development in the relevant markets, co-operation agreements and unions to which the parties and the suppliers and customers of the parties belong to;
9. any ancillary restrictions; and
10. a declaration by the notifying parties verifying the accuracy of the information provided.

Article 22 of the Competition Law empowers the CC to call for further information if it deems necessary. The notification forms may be downloaded from the website of the CC in the Greek language only. <http://www.epant.gr/Entipa.htm>.

It should be noted that in terms of the new legislation currently in

force, it is envisaged that a simplified notification form will be used in the future. However, such form has not yet been made available by the CC.

3.9 Who is responsible for making the notification and are there any filing fees?

In the case of a merger, the obligation to notify is on both the parties. In the case of an acquisition of shares, control or assets the obligation to notify is on the persons, undertakings or groups of persons acquiring control. The fees payable to the CC in respect of a merger control filing are €1,050, for both pre-merger and post-merger notifications.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The CC will prohibit all concentrations of undertakings which are subject to pre-merger notification and which would significantly impede competition in the national market or in a substantial part thereof, in relation to the characteristics of the products or the services concerned, and in particular by the creation or strengthening of a dominant position. The test is in accordance with the EU merger control guidelines.

To evaluate whether a merger would significantly impede competition the criteria of particular relevance are: the structure of the relevant markets; the actual or potential competition by virtue of the businesses established in or outside Greece; the existence of legal or actual barriers to enter the market; the position of the parties concerned in the market and their financial and economic power; the alternatives available to suppliers and consumers to the parties concerned and to other competitive or potentially competitive businesses; their access to suppliers or product markets; the trend of supply and demand of the relevant products and services; and the interests or intermediary and final consumers and their contribution to technical and economic progress, provided that this progress is to the benefit of the consumer and does not impede competition.

A merger that has been prohibited by the CC could be cleared under certain circumstances by a decision of the Ministers of Economy and Finance and the Minister of Development (i.e. when it is considered that it presents general economic advantages or is necessary for the public good).

4.2 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Any natural or legal person is given the right to file a complaint for violations of the competition law; civil servants, employees of legal persons governed by public law and persons exercising public authority are obligated to file such complaint when they receive knowledge of a violation.

The CC seeks third parties' assistance to collect as much information as possible for the purpose of forming its decision during the merger control process and also to identify other parties that might be able to provide useful information.

Third parties may submit a memorandum of any case pending for assessment by the CC and may also be summoned to the hearing if

their contribution is considered necessary for the examination of the case by the CC. It should be noted, however, that third parties are not allowed to access the files of the cases.

4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

The CC may require undertakings, associations of undertakings, natural or legal persons, public or other authorities to provide all necessary information in writing, stating the legal basis of such a request, the time limits set and the penalties for failing to supply the information requested. Recipients of such a notice are obligated to provide immediate, full and accurate information. In cases of a failure or delay in supplying the information requested or when the information supplied is incomplete or misleading, the CC, notwithstanding any criminal sanctions that may be inflicted, such as imprisonment or pecuniary penalties, may impose a fine of up to €5,000 per violation but not exceeding 1% of the total turnover of the undertaking in the preceding business year. Fines may be imposed on undertakings, associations of undertakings, their managers and employees, as well as any natural or legal person governed by private law. Civil servants and employees of legal persons governed by public law may be subject to disciplinary proceedings.

Furthermore, the CC is granted powers similar to those of a tax auditor and may (subject to Article 9 of the Constitution) among other things:

- examine all books, data and other records of the undertakings or associations of undertakings, in any medium stored and wherever kept, and make copies or take extracts;
- search the offices or other premises and transportation means of the undertakings or associations of undertakings;
- seal to the extent necessary any business premises, books or records during the time of the inspection;
- search the homes of the directors, managers, administrators and in general any person involved in management including the employees of the undertakings or associations of undertakings, if there is reasonable suspicion that books or other records related to the business and to the subject-matter of the inspection are kept on such premises; and
- take sworn or unsworn statements, as necessary, or require any representative or member of staff of the undertakings or associations of undertakings to clarify any event or record related to the business and to the subject-matter of the inspection and record the answers.

The CC may impose a fine of between €15,000 and €100,000 on any person who impedes its investigation or refuses to provide the requested books, data and other records or their copies or extracts.

4.4 During the regulatory process, what provision is there for the protection of commercially sensitive information?

There is a general provision in the Competition Law that information collected for its investigations shall only be used for the purposes of the investigation, the regulatory process or the hearing. In a request for additional information, the purpose for which the information is sought, if different, will be stated in the CC's request.

When submitting a notification to the CC, the parties may request to be exempted from disclosing certain information that they consider unnecessary to provide, stating the reasons for such a request.

The Competition Law further provides that confidential

information which is irrelevant to the implementation of the Competition Law shall be kept confidential by the officials involved in the regulatory process. Confidential information that falls into the subject matter of the investigation shall be treated as confidential but will be communicated to the President of the CC in writing and with all relevant documents attached. The President will decide which information shall be included in or omitted from the proposal of the officer handling the case before it is brought for hearing to the CC.

Breach of the confidentiality obligation is punishable by both criminal and disciplinary sanctions. If certain information is considered by the CC to be commercially sensitive it is omitted from the decisions which are published.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The regulatory process ends formally by issuing a decision or act. If the notified transaction is found not to be subject to a merger control, the President of the CC issues an act to that effect, which is notified to the parties. If the transaction is subject to merger control but does not raise serious doubts as to its capacity to substantially impede competition in the relevant markets, the CC by a decision taken within a month from the notification of the merger, shall allow the merger.

If the notified merger falls within the scope of the Competition Law and raises serious doubts as to its compatibility with the competition requirements in the relevant markets, the President of the CC initiates the inspection of the merger. The CC then, by decision, may:

- clear the merger;
- allow it subject to certain conditions; or
- prohibit the merger.

All decisions of the CC shall be reasoned and are published in the Government's Gazette. The CC may also require that the undertaking or association of undertakings that has violated the competition law publish the CC's decision in a newspaper at their cost. The CC keeps a permanent public register of all such decisions.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

The CC may clear a merger subject to any conditions it deems appropriate to ensure that the parties will be bound by the commitments undertaken toward the CC in order to meet its concerns regarding the safeguarding of competition.

Where the CC prohibits the merger and a relevant decision has been issued the parties may challenge such decision by applying to the Minister of Economy and Finance and the Minister of Development, who by joint decision may approve the merger. This decision may also impose terms and conditions for the parties so as to guarantee effective competition in the market.

The right of the CC to impose structural or behavioural remedies, having regard to the principle of proportionality, has recently been established in Greek Law, following the model of the EC. However such power, as has been given to the CC, is considered not to apply to the merger control process but only when the CC is asked to confront distortions in certain sensitive sectors of the economy e.g.

pharmaceuticals or oil products (where such distortions would not appear if effective competition existed.)

5.3 At what stage in the process can the negotiation of remedies be commenced?

Negotiation of commitments by the parties will be commenced when competition problems are identified in the merger control process. To avoid a prohibition by the CC the parties will propose modifications to the transaction and undertake various commitments so as to achieve the clearance of the merger. These commitments may either be offered during the preparation of the proposal of the officer handling the case before it is brought for hearing to the CC or even after it is brought for discussion during the hearing.

5.4 How are any negotiated remedies enforced?

The parties should comply with the commitments undertaken and must inform the President of the CC of the actions they have taken to that effect.

Should the parties infringe any term or obligation imposed on them by the CC, the CC may revoke the decision allowing the merger.

There has not been any precedent of the CC taking any other action against the parties that infringed such terms. It has not yet been established whether the penalties described in Article 9 of the Competition Law apply to concentrations.

5.5 Will a clearance decision cover ancillary restrictions?

Should the parties participating in the merger or other involved parties accept ancillary restrictions which are directly linked and are necessary for the realisation of the merger, the Competition Law provides that these restrictions will be assessed together with the merger and decisions of the CC as its clearance will also cover these restrictions.

Parties must disclose in their notification any ancillary restriction along with the necessity and direct link to the merger.

5.6 Can a decision on merger clearance be appealed?

Decisions on merger clearance can be appealed before the Athens Administrative Court of Appeals by the parties participating in the merger, the person that submitted a complaint regarding an infringement of the provisions of the competition law, the State, and any third party that may have a legitimate interest. In order to avoid abuse of the right to appeal, the Competition Law has imposed the advance payment of 20% of any fines that may have been imposed by the CC, which, however, cannot exceed the amount of €100,000. The Athens Administrative Court of Appeals may either examine the case on the merits or dismiss it. The decisions of the Athens Administrative Court of Appeals may further be challenged in the Council of State by the litigants. A right of appeal also lies with the Ministers of Finance and Development.

5.7 Is there a time limit for enforcement of merger control legislation?

If the CC does not take a decision to prohibit the merger within the time limits set by law, and more specifically within 90 days from the notification of the merger, it is then considered that the merger

has been approved by the CC and it is obligated to issue the respective act/decision. However time limits can be extended where the parties to the merger agree, where the notification form is not complete and where the notification contains mistakes or misleading information and as a result the CC cannot evaluate the merger.



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Dimitris E. Paraskevas is the managing partner of Elias Paraskevas, a leading Greek law firm. The firm is ranked first in the section "Privatisation and Projects" by The European Legal 500 (2003) and rated one of the top ten law firms in Greece by both Chambers Global and the European Legal 500. Mr. Paraskevas also serves as the chairman of the Elias Paraskevas charitable foundation.

Mr. Paraskevas:

- has recently been named one of the two top Merger and Acquisition attorneys in Greece by the "International Who's Who of Business Lawyers," and one of only 312 international leaders in Merger and Acquisition law worldwide;
- ranks as one of the top ten Greek corporate lawyers by Chambers Global;
- practices in the areas of mergers and acquisitions, privatisations, corporate finance, equity capital markets, real estate and joint ventures; and
- has advised more than one hundred and fifty international companies, banks and investment banks with regard to transactions in excess of €40 bn.

Prior to returning to private practice, Mr. Paraskevas served as the Secretary for Privatisation of the Ministry of Development (July 1993-July 1999). During his service, the Greek Privatisation Programme raised approximately €10 bn. Mr. Paraskevas structured and led the negotiations in many successful complex privatisation transactions. For this work he was named by the Financial Times as Super Salesman (1999).

Mr. Paraskevas ranked first in the Bar Exams of September 1987, received a law degree from the Athens University Law School (January 1986 - first class honours), and holds an LL.M. in Commercial and Corporate Law from London University (September 1987 - London School of Economics and Political Science).

6 Miscellaneous

6.1 To what extent do the regulatory authorities in your jurisdiction liaise with those in other jurisdictions?

The CC together with the competition authorities of other Member States has created an informal information exchange network, the European Competition Authorities (ECA), so as to confront more effectively mergers subject to notification in more than one Member State.

In the recent amendment of the Competition Law a framework of constant and solid cooperation between the CC the European Competition Commission ("ECC") and the competition authorities of other Member States has been established. A new provision has been added regarding the functions of the CC providing that it will closely cooperate with the European Competition Commission and the competition authorities of other Member States for the implementation of the European Union competition legislation in accordance with the Competition Law and EU Regulation 1/2003. The ECC must be informed of all Greek Court decisions that implement national or EU competition legislation on a continuous basis.

6.2 Please identify the date as at which your answers are up to date.

October 2006.



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ELIAS PARASKEVAS ATTORNEYS 1933

Elias Paraskevas Attorneys is one of the leading and most commercially minded law firms in Greece. It was established in 1933 by Elias Sp. Paraskevas (1912-1991), who, in the course of nearly 60 years of legal practice, came to be referred to as the "Dean of Greek Lawyers" and who is cited throughout the legal case books.

Our clients include large corporations, financial institutions, governments, international organisations, large state-owned concerns, private foundations and high net-worth individuals. We have taken part in some of the most high profile transactions and cases in Greece and we have served our clients in several countries in collaboration with leading international law firms.

We provide a time efficient service based on international standards. The resources available to our lawyers include a comprehensive precedents database and a know-how databank, which reduce response times and allow us to provide a cost-efficient service by building on our market knowledge and in-depth experience in our areas of practice.

We are the first law firm in Greece that has been certified with an EN ISO 9001-2000 from the European Quality Assurance.