

Unclassified

English - Or. English

27 November 2023

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Serial Acquisitions and Industry Roll-ups – Note by Greece

6 December 2023

This document reproduces a written contribution from Greece submitted for Item 11 of the 141st OECD Competition Committee meeting on 5-8 December 2023.

More documents related to this discussion can be found at
www.oecd.org/competition/serial-acquisitions-and-industry-roll-ups.htm.

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08.

JT03532685

Greece

1. Introduction

1. The risks of consolidation through serial acquisitions and industry roll ups, the need for increased scrutiny of such transactions, as well as the adequacy of the toolkits of competition authorities to deal with such matters has been in recent years a subject of concern of competition authorities, including the Hellenic Competition Commission (HCC).
2. The HCC has not dealt with a case exactly fitting the scenario of serial or roll up acquisition strategies (i.e. gradual acquisition by one firm of small businesses in the same industry and consolidation into a possibly dominant entity). Concentration rates are in most industries not very high compared to EU averages, but there exists in many industries a trend towards concentration. Also, the fact that in most industries there is a large number of small and medium sized companies results in weak competitive constraints.
3. The HCC is monitoring issues of increased sectoral concentration and common ownership issues. Merger control is based on a turnover threshold and does not allow for other considerations to establish a notification obligation (eg market shares or value of the transaction) and would therefore not allow for the direct assessment of serial acquisitions not meeting the notification thresholds. Merger control considers the impact of a specific transaction and not the role of the transaction as part of a broader acquisition strategy composing of transactions that do not meet the turnover thresholds.
4. This being said the HCC considers the ECJs recent decision¹ confirming that EC national competition authorities may assess acquisitions by dominant firms not notifiable under merger control provisions under abuse of dominance provisions, which may give some room for assessing non notifiable mergers, however the relevant substantial test remains difficult to establish. Further, substantive assessment in line with EC guidelines on merger control enables the HCC to review concentrations on a case by case basis, based on the specific circumstances of each case, which gives some room for flexibility in assessment.
5. However, in this context the HCC should and indeed has been looking beyond merger control, towards ex post enforcement powers and market studies to identify and where necessary to deal with anticompetitive issues that may arise from serial acquisitions and common ownership.
6. This has been the case in the construction sector through the use of the tool of regulatory intervention and in the healthcare sector through the use of a sector inquiry tool. These are examined in turn.

2. Regulatory Intervention

7. National Law on Competition and the Functioning of the HCC gives the HCC a wide choice of tools, other than antitrust enforcement and merger control, to map and investigate markets and intervene where necessary. These tools may provide solutions to address serial acquisitions and their risks where merger control rules may not be applicable.

¹ Judgment of 16/03/2023 – Towercast Case C-449/21

Most prominently article 11 of the National Competition Law No 3959/2011 on the “Protection of Free Competition” allows the HCC to take all necessary measures to create conditions of effective competition in a sector, if it finds that there is a lack of effective competition and considers that the application of the provisions on antitrust (including abuse of dominance) and merger control not sufficient to create conditions of effective competition². The HCC has broad ranging powers to intervene in these cases.

8. The procedure commences with a decision by the HCC to launch the procedure, followed by the publication of a reasoned opinion on the lack of conditions of effective competition in the specific sector of the national economy in question, specifying the relevant markets. The reasoned opinion is open to public consultation (first public consultation) for at least 30 days.

9. After the end of the first public consultation, if the HCC still holds that there are no conditions of effective competition in this sector of the economy, it announces specific measures which it considers necessary, appropriate and in accordance with the principle of proportionality, to create conditions of effective competition. The views of the HCC regarding the proposed measures are then open again to public consultation (second public consultation) for at least 30 days. The HCC after the end of the second public consultation and after considering its results, imposes, the specific measures which it considers necessary, appropriate and in accordance with the principle of proportionality in order to create conditions of effective competition.

10. This procedure has been recently used (a) in the press distribution sector (completed) (b) in the construction sector (final decision not yet published) and (c) in the energy sector. (ongoing). Issues relating to non-notifiable minority shareholdings of a private equity fund in the two largest constructions companies in Greece were dealt with in the regulatory intervention in the construction sector.

2.1. HCC Regulatory Intervention in the Construction Sector

11. On January 2021 the HCC launched a regulatory intervention on the conditions of competition in the construction sector³. The interim report issued in April 2021 found that in the market for public works, there is a lack of effective competition, which cannot be remedied with the application of antitrust or merger control legislation. The report focused on the market structure of the sector and found that the joint horizontal participation of a specific fund in the two largest construction undertakings in Greece may lead to unilateral and coordinated effects. It also found that there has been a significant concentration of the construction industry in the last decade with increasing barriers to entry in some of its submarkets. Also using quantitative estimates on the effective number of firms and a dataset of large public works tenders, the HCC examined the impact of eliminating common ownership, as measured by the number of discounts/offers, submitted in the context of each tender, was substantiated.

12. Other potential issues to competition were identified in the existing legal framework, taking into account the concerns expressed by companies in the industry and the preliminary investigation of HCC, such as: regulating abnormally low offers, allowing a construction joint venture after the selection of the bidder, changes in contract award criteria, the classification criteria of the Register of Contractors of Public Works

² Art. 11 of L. 3959/2011 available in English at Protection of Free Competition (epant.gr)

³ More details on this regulatory intervention including the reasoned opinions can be found at <https://www.epant.gr/en/enimerosi/investigation-construction.html>

(MH.EE.Δ.E), joint bidding and the more intensive and the wider use of Public Private Partnerships and concessions and prior analysis of their impact on competition.

13. According the second interim report, despite the significant reduction of the scale of horizontal common ownership in the two largest construction companies, the remaining common ownership and the structural conditions of the market for the construction of large public works which is an oligopoly with high barriers to entry, remains favourable - in line with the theory of horizontal common ownership - to competitive distortions. In addition, there is a relative symmetry of market shares in the construction of large public works as well as a symmetry of cost structure and production capacity between competing companies, in this sub-sector. These characteristics are factors that contribute to possible parallel common interests, due to horizontal joint shareholding and to possible joint market power of the associated companies, distorting competition in the relevant oligopolistic market. The report also finds that the partial disinvestment of the specific fund in one of the two companies, limits, but does not effectively neutralize, the negative effects of the horizontal common ownership in the two most important companies in the sector. According to the econometric analysis, as well as the relevant model of competition under asymmetric common ownership (which affects competition both between the commonly owned undertakings and between the latter and non-commonly owned enterprises), the risks for theories of harm, related to possible, uncoordinated anti-competitive effects, as well as coordinated anti-competitive effects, have been identified. The second interim HCC report proposes the following remedies for the examined sector:

1. Independent Management – Chinese Walls – Code of conduct, in cases of horizontal common ownership of competing companies, concerning the members of the management and the shareholders of these companies, as well as the manner and type of information (sensitive and not) that will be transmitted by the common Shareholders to competing businesses and vice versa.
 2. Imposing a notification obligation to the HCC, to carry out a relevant economic analysis of competitive effects, in cases of an increase in the percentage of horizontal common ownership, when any legal entity, acquires a percentage of more than 5% in the share capital of more than one competing company in the examined industry.
 3. Additional obligations to "active common shareholders" present in the examined sector, and the specific sub-sector/markets involved.
14. The second interim report also proposes to establish a procedure for formulating an opinion by the HCC regarding the effects of each infrastructure PPP project on competition, at the stage of designing the project, as well as in its implementation and development stage. In relation to construction consortia (joint ventures), the second interim report proposes for the HCC to provide specific guidance, in collaboration with the Hellenic Single Public Procurement Authority (HSPPA).

3. Sector Inquiries

15. Another important tool available to the HCC for investigating sectors of the economy is through “sector inquiries”. According to art. 40 of Law 3959/2011 where prices or other circumstances give cause to suspect that competition is being restricted or distorted, the HCC may investigate a particular sector of the economy or certain types of

agreements or methods of shaping commercial behavior, including algorithmic methods⁴. The HCC may ask business to provide all the necessary information and may carry out any inspection needed for the purpose. In practice, the HCC publishes two interim reports, organizes public consultations after each publication and publishes its final report. Although sector inquiries do not lead to sanctions or regulatory interventions, they allow the HCC to accurately describe a sector where competitive harm may be present and to identify problems and solutions. Sector inquiries have been launched in various industries, including basic consumer goods, e-commerce, fintech and waste management. Below we set out issues investigated in the sector inquiry in health services which touch upon issues of serial acquisitions and industry roll ups.

3.1. Sector inquiry in health services

16. The sector inquiry was initiated in July 2021 taking into consideration significant rearrangements in the sector of health and insurance services due to strategic cooperations - acquisitions to enhance the economic efficiency of undertakings but also to meet strategic goals⁵.

17. The inquiry found that the private health services industry shows a moderate degree of concentration. The major private providers of Primary and Secondary Healthcare services are: a) HELLENIC HEALTHCARE GROUP (member of the CVC group), b) ATHENS MEDICAL GROUP, c) EUROMEDICA group, d) BIOIATRIKI group, e) IASO group and f) EUROCLINIC. As set out in the interim report there is a trend towards higher market concentration. In the period 2017-2022, several horizontal mergers in the health sector were notified and examined by the Hellenic Competition Commission. Those merger notifications were mainly by the investment fund under the name CVC Capital Partners (CVC) through its subsidiary under the name Hellenic Healthcare S.A.R.L (HHG). These concentrations led to the creation of a strong group with a presence in the Greek health market (mainly in Attica) and led to an increased market concentration. Also of particular interest is the vertical integration of health service providers, through their expansion into adjacent markets of health insurance services. In this context, the acquisition of Ethniki Asfalistiki by CVC investment fund, which was approved by the European Commission (2022)⁶, offered the possibility to examine possible anti-competitive effects of non-horizontal mergers in the health sector. The investigation so far does not include information on the existence of common ownership or common management (interlocking directorates) between the major healthcare providers, however this issue will be further investigated in the Final Report of the Sector Inquiry. Overall description and identification of consolidation trend has not so far led to the definition of a specific issue relating to serial acquisitions; however this is an issue to be addressed in the final report.

⁴ Art 40 of L. 3959/2011 is available in English at Protection of Free Competition (epant.gr)

⁵ More information on the sector inquiry in health services can be found at <https://www.epant.gr/en/enimerosi/health.html>

⁶ Commission Decision M.10301 - CVC / ETHNIKI (24.2.2022)