How effective are remedies in merges cases? A European and national assessment

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Abstract

Remedies form an essential tool of any enforcement action and need to be devised with great caution from National Competition Authorities (NCAs). If the remedy is ineffective, the enforcement action does not reach the desired objective and resources will have been wasted. If the remedy is disproportionate, the decision is put at risk in a possible subsequent appeal. Remedies either behavioural or structural imposed by competition authorities seek to eliminate unilateral or/and coordinated effects as a result of the merger and restore competition on the relevant market(s) to the *status quo ante*. Moreover, remedy packages have typically included extensive structural divestments to remove competition concerns. The scope of this paper is to examine various issues relating to the imposition of remedies in merger cases focusing on the gas and electricity sectors (commodity and capacity release programmes, customer release schemes, network related remedies). This paper relies on the energy sector with a view to developing general principles for imposing effective remedies in other sectors as well. Given the nature of competition in energy markets, particularly effective remedies are those that involve gas release programmes, the sale of price-setting generation plants, network assets, and controlling stakes in merging parties' competitors.

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Keywords: Merger remedies; competition; energy sector; Gas release programs; European Union

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1. Introduction

Merger remedies have been adopted by the European Commission ("*Commission*" hereafter) and many other NCAs with a view to addressing significant competition distortions generated by a merger. Concerning the legal provisions for merger remedies, it is noted that the EC Regulation 139/2004, as well as other relevant EU Regulations and Notices describe in much detail the merger remedy procedure, which should be viewed as an important step in making the process of using merger remedies more transparent, while increasing legal certainty as well as achieving convergence towards EU practice. Under the competition rules, remedies can be imposed in the context of a prohibition decision or accepted as part of a commitment decision. Merger remedies can also be imposed by regulatory authorities, if national law provides for it. While it is not considered possible to identify an exhaustive list of remedies for specific market distortions, it is useful to consider what remedies may be particularly effective and appropriate to address a significant lessening of competition in a relevant market.

NCAs are responsible for ensuring that remedies are necessary, clear, enforceable, effective, sufficient in scope and capable of being effectively implemented within a short period of time. The purpose of a remedy is to maintain or restore competition otherwise lost due to the merger, while permitting, if possible, the realization of efficiencies and other benefits (ICN, 2016).[1] To accomplish this goal, a NCA determines the nature and scope of competitive harm within its own jurisdiction before requiring remedies or agreeing to proposed remedies. If competitive harm resulting from the merger is found and thus the need for a remedy has been

[1] International Competition Network (2016). Merger Remedies Guide.

determined, the type of the remedy (i.e. structural, non-structural, or a hybrid of both) is likely to depend on the nature of competitive harm.

The review of the recent energy mergers considered by the Commission illustrates the fact that transactions in the gas and electricity sectors can give rise to multiple and complex competition effects. The Commission has tended to adopt a strict approach to the evaluation of these effects and consideration of the relevant remedies, in light of the incipient nature of deregulation in some of the national markets affected by the mergers and specific features of energy markets that may exacerbate market power and merger effects. Remedies have also been required to address these non horizontal effects of the proposed mergers (Federico, 2011).[2]

The objective of this paper is to survey the recent practice of merger remedies imposed by the Commission and the Hellenic Competition Commission ("HCC" hereafter) on energy sectors, highlighting the key elements of the decisions from the perspective of economic analysis, and compares their approaches. The scope of this paper is twofold. On the one hand it aims to cast light on the role of merger remedies as a means to eliminate several competition distortions. On the other hand, it delves into discussions of Greek competition law matters, as an example of emerging merger regime model.

The rest of this paper is organised as follows. Section 2, critically discusses the mechanism of the merger remedies in the energy sector. Section 3 provides insights into the merger remedies cases in the EU, while Section 4 presents the merger control procedures under the auspices of the HCC. Section 5 concludes the paper.

[2] Giulio Federico (2011). The economic analysis of energy mergers in Europe and in Spain. Journal of Competition Law & Economics, 7(3), 603–629.

2. Merger remedies in the energy sector

The introduction of competition in the European energy market is quite recent, as it dates back to the early '90s, when the first legislative measures were proposed by the Commission. From that time the EU authorities have strived to gradually reform this important sector of the economy, with the aim of lowering the increasing price of energy which consumers and undertakings have to pay, improving the quality of service and, more generally, making the whole industry more efficient and ready to face the economic challenges brought by globalization. Substantially, in the past 20 years, there was a slow but clear shift from a public integrated monopoly to a private and competitive liberalized sector: this process, besides being incredibly complex and burdensome, has requested a joint action of the EU legislative power and of competition enforcement.

Competition's problems have arisen in the energy markets in two ways, in connection to liberalization, when competition had to be introduced in the industry through new rules, and in relation to the restructuring of the industry, when the former monopolists had to reorganize their activities to tackle competition. In other words, on the one hand the market had to be opened to competition and to new entrants, who were firms entering a specific market for the first time, taking advantage of the liberalization process: this category of problems was faced through antitrust law. On the other hand the already existing firms (mostly the former monopolists) had to reposition on the market in order to stay competitive: this repositioning triggered a wave of mergers throughout the EU Union and was adjusted through merger regulation.

In order to deal with possible anti-competitive effects in the energy markets raised by the merger, the Commissions and the NCAs have implemented various remedies. Two of the most important energy merger remedies involve virtual power plant (VPP) and gas release programs.[3] More specifically, VPP coupled with energy release programs have been accepted as sufficient commitments in certain merger EU-wide cases:

a) in Czeck Republic (acquisition of control by ČEZ over SME, VČE, STE and SČE); In Finland (acquisition of joint control by Fortum Power and Heat Oy over E.ON Finland Oyj);

b) in Netherland (acquisition of control by Nuon over Reliant) and

c) in European Commission (a joint control of ESB and Statoil over Synergen and exclusive control of EDF on ENBW).

In all the above cases remedies affect the electricity generation and wholesale markets competitive conditions (see Figure 1 & 2). In merger cases, VPP coupled with energy release programs have been applied as an equivalent measure for structural divestiture of capacity. The aim was to compensating for the elimination of potential competition, creating the necessary liquidity for potential competitors and facilitating new entry. In all experiences the measure has a temporary nature and volumes allocated strictly assessed on the ground of expected increase in capacity or transmission:

a) whenever there is no realization of those conditions, duration might show up to be too short with respect to the objective

b) whenever conditions are met, a long duration can leave the incumbent with an advantage

[3] Damien Geradin, (2004). Remedies in Network Industries: EC Competition Law vs. Sector-Specific Regulation, p. 57.

Figure 1: Incentives without long-term capacity release (VPP)

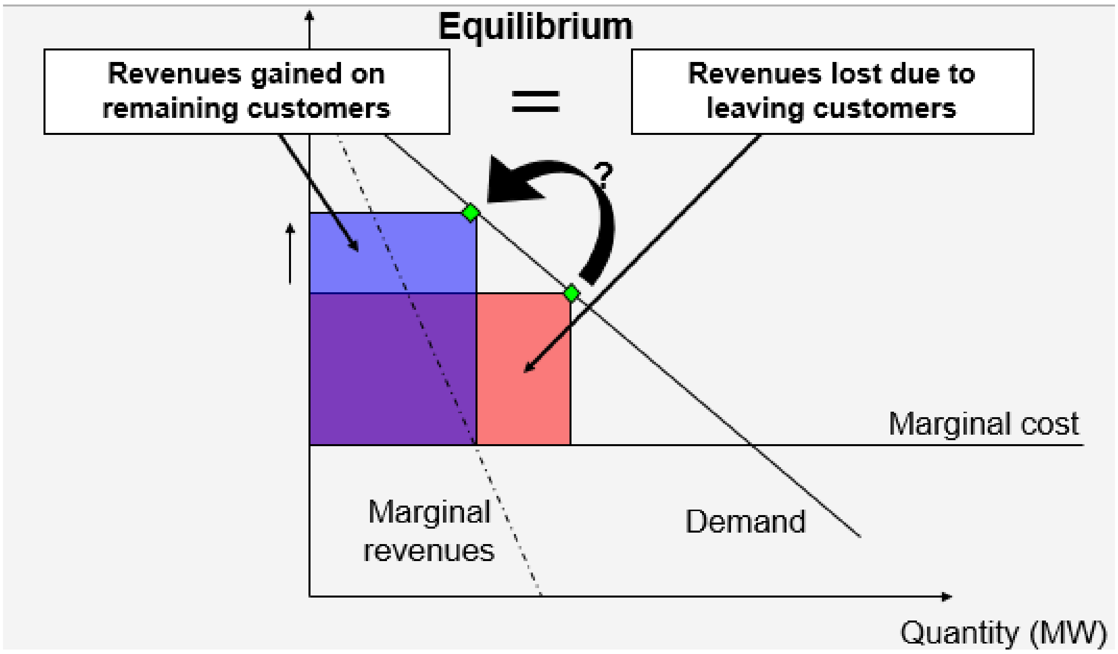
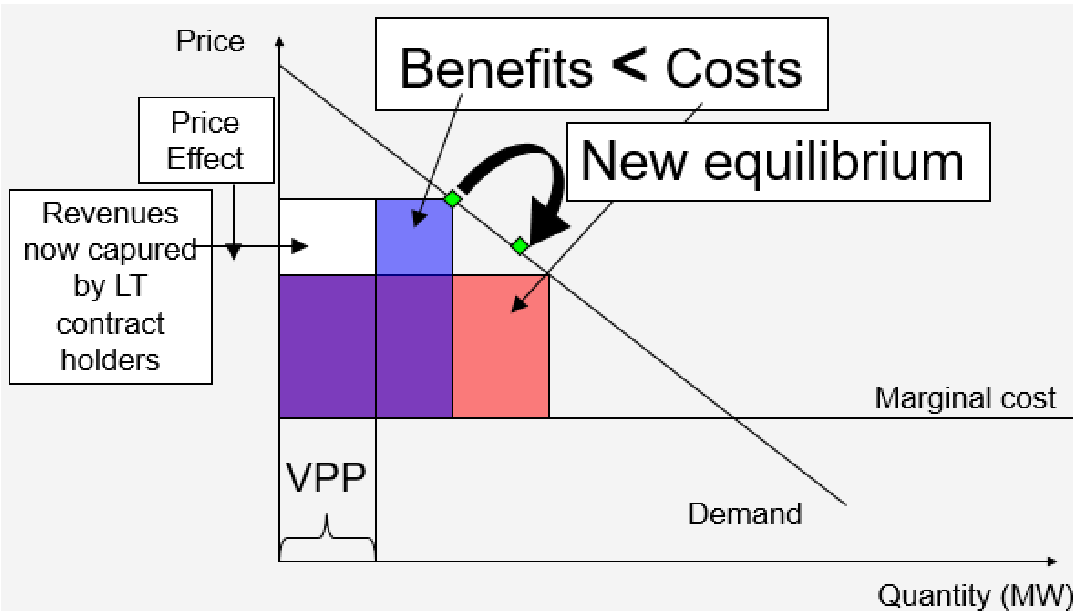


Figure 2: Incentives with long-term capacity release (VPP)



On the other hand, gas release programmes involve the incumbent gas wholesaler making available gas to increase liquidity in the gas markets; reduce the market share of the incumbent; facilitate new entry into the gas markets. For competition to develop new entrants require access to gas supply, flexibility services and easy of transportation. However, it is noteworthy that volumes released need to be significant and the incumbent must not be allowed to unduly restrict participation. In other words, sufficient criteria for participation such as bank guarantees or allocation of volumes must be satisfied along with the possibility of gas suppliers to exit their take-or-pay arrangements. This means that gas must be available at several entry points.

Based on the above, it is worth mentioning that gas release programmes will unlock gas held by the incumbent that otherwise has no incentive to release it if significant amount of gas is released and sufficient participation is met. However, gas release programs may not lead to sustainable competition unless new entrants also have access to transportation and flexibility services. Moreover, the following prerequisites are necessary to be fulfilled in order to ensure that the gas release programs are successful:

- Gas priced to encourage entry and sufficient transparency
- Regular review of the gas release programme
- Access to transportation
- Access to flexible gas- storage or swing gas through the release programme;

Lastly, Table 1, encapsulates the most representative energy merger remedies imposed by several national EU jurisdictions.

Table 1: Implementation of gas release programmes across some EU countries

Country	Reason	Amount of gas	No. of companies with >5% available gas
United Kingdom	Competition inquiry into British Gas price discrimination	- 10% of all new gas fields- 2 years and gas swaps - 500m therms/year for 4 years/ 250 therms 1 year	6
Germany	E.ON/Ruhrgas merger	200 billion KWh in 6 annual auctions until 2009	11
Austria	Econgas merger OMV & 4 regional gas companies	250 mcm/year for 1 year	4
Italy	Anti-trust (Italy) ENI/ Snam Rete Gas/ GNL Italia (Access to LNG)	2.4 bcm for 2 years (2.2% of total gas consumption)	3
Denmark	DONG/Elsam/ Energi E2 merger	400mcm/year for 5 years (10% of total consumption)	3
Hungary	EON/MOL merger	- 1 bcm/year over 8 years - 50% of EON/MOL supply contract Total 16 bcm until 2015 (14% of gas consumption)	2
Spain	-	43.5 bn therms/year for 3 years (9% of total gas supply)	5

Source: Various decisions; author's analysis.

3. Competition assessment of European energy merger remedies

The European Commission has imposed significant remedies on energy merger cases since 2000, involving the implementation of several behavioural and structural measures (divestitures, capacity release programs, customer release programs, etc). In the first of these mergers (EDF / ENBW) the Commission imposed a VPP remedy in order to mitigate possible anti-competitive effects raised by the transaction. The next three cases (DONG/Elsam/E2, E.ON/MOL, Suez/GDF, in chronologically order) were all approved subject to remedies after in-depth Phase II investigations. It is also worth mentioning that there are some other energy cases (EDF/British Energy, RWE/Essent, Vattenfall/Nuon, and EDF/Segebel) that were approved with remedies after Phase I investigations.[4]

A. EDF / ENBW

In August 2000, the Commission received a notification pursuant to Article 4 of the Council Regulation (EEC) No 4064/89 of a proposed concentration whereby the undertaking Electricité de France ("EDF"), France, alongside Zweckverband Oberschwäbische Elektrizitätswerke ("OEW") acquires within the meaning of Article 3(1)(b) of the Merger Regulation joint control of the undertaking Energie Baden-Württemberg AG ("EnBW"). 2. On 2 October 2000, the Commission decided, in accordance with Article 6(1)(c) of the Merger Regulation and Article 57 of the EEA Agreement, to initiate proceedings in this case.

The Commission, decided that the elimination of potential competitors (Watt (CH) and ENBW (D)) will result in the French incumbent to strengthen its dominant position in its domestic market. The major aim of the commitments was to create the

[4] For a brief representation of these cases, see Federico, (2011), p. 628.

necessary liquidity as a starting base for a functioning wholesale market in order to lower entry barriers for entrants. One of the remedies imposed by the Commission was the withdrawal of the merged entity from CNR (F producer) and WATT (CH producer) and the introduction of 6000 MW virtual power plant (VPP). The VPP initially knew three products: a base-load contract (4000 MW), a peak load product (1000 MW), and a power purchasing agreement (PPA) product (1000 MW) available in maturities from 3 months up to 3 years. The PPA product was available only in winter months and modelled on the power purchasing agreements of EDF with co-generators. The base load and peak load products are essentially options to call electricity on the capacity bought during the auction. Once acquired, the product owners can call (part of) the energy on the capacity on Day-1. This product design seeks to emulate a dispatchable power plant.

Bidding during the auction is on a price for the capacity within each of the one of the three product groups. Energy is called at a strike price set in advance to the auction by EDF (and testified by the Trustee). Maturities within each product group are sold simultaneously with the distribution of the capacity between various maturities being established with the help of an indifference curve established before the auction by EDF (and verified by the Trustee). A trustee was appointed to supervise the implementation of the remedies. Trustee controlled withdrawal from CNR and WATT and design of VPP. He still monitors and controls each auction as well as provided support when remedy was modified in 2006 (evolution of auctioning rules, modification of auctioning products)

The VPP was well implemented and designed in general. The contracts are arbitraged against other wholesale market products and, consequently, the price set during the auction is close to the wholesale market price. For EDF the VPP therefore probably constitutes an alternative wholesale market sales channel. A report based on an inquiry by the CRE found that producers and traders see the VPPs to be an effective tool for their purchases of electricity alternative to EDF.

The VPP substantially contributed to the creation of a liquid electricity wholesale market in France and thereby lower entry barriers, the main aim of the remedy. The optional nature of the base and peak load products is however less effective. In reality, the rights on energy on the capacity bought are nearly always exercised and, thus, the VPP products resemble *de facto* closely the standard contracts traded on Powernext and OTC contracts and do not emulate a dispatchable power plant. The effects that the optional effects of the products may have had on mitigating market power are therefore probably limited.

Certain modifications to the VPP were carried out. These primarily reflected the need to up-date the auction rules in view of the development of the French electricity wholesale market since the adoption of the decision. The two more important modifications concerned the replacement of the capacity for the PPA product by baseload VPP contracts and the introduction of a 4 year base load VPP contract.

The PPA product concerned capacity, only available during winter months, based on EDF's commitments to off-take electricity originating from co-generation. These products were not popular with VPP buyers. This was probably due to the fact that the nature of the product, and in particular, its time definition, did not closely resemble other wholesale market products; rendering it more difficult to integrate this product in an electricity traders/suppliers' portfolio and to establish its market value.

This was remedied in 2006 by replacing this product by an equivalent amount of more standard base load VPP product.

Another modification was the introduction of a four year base load VPP product. The development of the French wholesale market and the perceived need to provide for more market depth led EDF to request the introduction of a longer base-load product. After a successful test phase of one year, this product will become part of the standard products offered in the VPP. Finally CNR developed well as a separate generation and supply business. SUEZ, acquired an important minority stake shortly after EDF's divestiture. CNR increased its market share in French supply markets and generation since it acquired independence from EDF. The effects on the downstream markets remain however restricted by the fact CNR sell the larger part of its output to EDF.

B. DONG / Elsam / Energi E2

On September 2005, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 whereby the Danish gas incumbent DONG acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of two important Danish power generators (Elsam in the West; Energi E2 in the East) and of two electricity distribution companies, namely København Energi and Frederiksberg Elnet. At the end of the first phase of the investigation, the Commission concluded that the concentration raised serious doubts as to its compatibility with the common market and with the EEA Agreement. On 18 October 2005, the Commission therefore initiated proceedings in accordance with Article 6(1)(c) of the Merger Regulation.

The transaction, as notified, would have significantly impeded effective competition on several natural gas markets. In particular, the Commission found that the transaction would have resulted in horizontal concerns, namely through the removal of actual and potential competition on the gas wholesale and retail markets. It would also have raised entry barriers on these markets and strengthened DONG's ability to raise its rivals' costs for storage and flexibility. The transaction also entailed vertical concerns, as it would have foreclosed an important segment of the Danish demand for natural gas.

The Commission cleared the notification only after a Phase II investigation and a package of remedies offered by DONG. The commitments compose of two parts: (i) storage divesture and (ii) a gas release program. Specifically, to address the competition concerns in the storage/flexibility markets, DONG offered full divesture of the gas storage facility in Lille Torup, which was the larger of DONG's two storage facilities. The Lille Torup facility has a working volume of at least 400 million m3 (mcm) and a total storage gas volume of 710 mcm. Its daily injection and withdrawal capacity amounts to 3.6 and 7 mcm, respectively. The Divestiture Business encompasses the personnel and all assets related to the Lille Torup storage facility. These assets include all tangible and intangible assets (including intellectual property rights), all licenses, permits and authorizations, and all contracts, leases, commitments and customer orders as well as all customer, credit and other records.

Furthermore, DONG commited to enter into an Interconnection and Operating Balancing Agreement with the Danish TSO (Energinet.dk) with a view to ensuring that conditions for use by Energinet.dk of DONG's storage facilities at both Danish storage facilities are not made less favourable compared to the pre-merger situation.

As part of the divestiture, the purchaser will, as far as the Divestiture Business is concerned, enter into DONG's position in that agreement with Energinet.dk.

DONG committed to enter into a final sale and purchase agreement with an appropriate purchaser for the Divestiture Business, within six months from the date of the adoption of this decision. If, by the end of that period, DONG has not entered into such an agreement, the Divestiture Trustee will have an exclusive mandate to sell the Divestiture Business within the following three months. The purchaser has to be approved by the Commission. The closing of the sale of the Divestiture Business must take place no later than 1 May 2007. Once a final binding sale and purchase agreement has been concluded, only the purchaser will be entitled to sell storage capacity in the Lille Torup storage facility for the gas storage year 2007/2008 which runs from 1 May 2007 to 30 April 2008. DONG commits not to acquire, for a period of ten years from closing of the sale to the purchaser, direct or indirect influence over whole or part of the Divestiture Business unless the Commission has previously found that the market structure has changed to such an extent that a re-acquisition should no longer be excluded.

To further address the competition concerns in the Decision, DONG committed to a gas release program in order to make natural gas available to third parties. The amount of gas to be released will be 400 mcm per year, (a total of 2,400 mcm) to be auctioned in the years 2006 through 2011. According to the amended Commitments, the volumes released will, each year, be divided into ten lots of 40 mcm to be delivered equally over two delivery periods. The volumes correspond to a significant proportion of DONG's sales in Denmark in 2005 and approximately 10% of total Danish consumption. In the event that market conditions change significantly, e.g. DONG's upstream supplies will fall below a certain level during the course of the Gas Release Programme, DONG may, under certain conditions, apply to the Commission to have the Gas Release Programme terminated.

The Gas Release Programme foresees a two-step auction process: "Primary Auctions" to be held no later than April (for 2006: August) and "Secondary Auctions" to be held in June (for 2006: October) of the same year. In the "Primary Auction", DONG will make available gas at the virtual trading point/hub in Denmark (GTF) and, as in a swap, successful bidders will make available the same volume of gas to DONG at one of the specified gas hubs in Germany (Emden), the Netherlands (TTF), Belgium (Zeebrugge) or the United Kingdom (NBP). The "Primary Auction" determines the swap fee at which demand meets the number of auctioned lots. With a view to attracting bidders, DONG pays a separate "compensation" fee of at least 0.33 EUR/MWh to every successful bidder, which may be offset in the swap fee achieved by the auction. The "compensation" fee is intended to "compensate" for any price differences between the GTF and the other hubs. The gas will be divided into ten identical lots of 40 mcm each and auctioned with reference to the swap fee. No single bidder can bid for more than half of the lots auctioned in one year (Primary and Secondary Auction combined). The Gas Release Programme provides (both for the Primary and Secondary Auction) flexibility to the market with a take-or-pay obligation of 90% of the annual contract quantity and with daily minimum and maximum rates of 50% and 110%, respectively, of the daily contract quantity. It should provide further flexibility to the market by allowing the successful bidders to choose to swap flexibility by providing DONG with the same flexibility terms at the respective re-delivery point as they wish to obtain from DONG at the GTF.

Any quantities not sold in the Primary Auction, will be sold in a Secondary Auction to be held later in the same year. In the Secondary Auction, DONG makes gas available to third parties in Denmark against payment in cash instead of re-delivery of gas. Lots that have not been sold in the Secondary Auction will be carried forward to the Primary Auction of the following year. In the Secondary Auction, a minimum price is to be set as a certain percentage of an indexation reflecting the structure of the indexation of DONG's contracts for purchase of gas from the Danish sector of the North Sea.

In addition, the Commitments include a customer release clause according to which existing direct customers of DONG which participate in the auction process or which purchase gas from a trader/wholesaler who was awarded lots in the auction, are entitled to reduce their contractual purchase obligation vis-à-vis DONG by the amount of gas they will have purchased as a result of the Gas Release Programme (i.e. themselves or from a successfully participating wholesaler). (716) In the event that a third party has reason to believe that DONG has not complied with the commitments a mediation procedure will be put in place. The mediation procedure will be overseen by the Monitoring Trustee, who will be entitled, under certain conditions, to appoint additional professionals to assist in the mediation process.

DONG submitted a first package of remedies January 30th 2006. The market test indicated the need for a number of improvements (e.g. regarding the flexibility provisions of the gas release, lot sizes, auctioning provisions, pricing issues). The commitments were amended on March 1st when DONG submitted a final package. Two trustee functions were required: (1) a storage divestiture monitoring trustee and

(2) an auction monitoring trustee. DONG proposed the same firm for both and the Commission accepted. Trustee mandates were agreed and signed.

The Trustees report regularly to the Commission on the implementation of the Commitments (orally and in writing). A considerable number of meetings between DONG, the Trustee and the Commission was necessary to agree on the "nitty-gritty" of the gas release programme (auction rules, auction prospectus and procedure). It is probably fair to say that this intensive monitoring, while time-consuming, is likely to have safeguarded (and has certainly not impeded) the correct and successful implementation of the remedies. After the auctions, the trustees furthermore sought the views of the interested bidders on the conduct of the auction in order to spot possible weaknesses. The result of that exercise, too, was satisfactory. For late 2007, a market monitoring report is foreseen, which is to be prepared by the Trustee. In view of that, the Trustee has so far sent questionnaires to market participants. (It has however, indicated some difficulties regarding the response rate.) The report is expected to lead to further clarity on what effect the released volumes actually have had on the Danish wholesale and retail gas markets. What can be said so far is that while some of the successful bidders in the auction have had no prior gas wholesale or retail activities in Denmark, others have already had such activities. Prior to the report, we are not in a position to assess how much of the gas released was resold in Denmark (at wholesale or retail level) or how much was exported. The storage divestiture was carried out within the timeframe foreseen. This process was supervised by the divestment monitoring trustee. As yet, no design flaw of the remedies is apparent. The Commitments were sufficiently clear to allow for their successful implementation. The storage divestment was carried out within the divestment period foreseen and both gas release auctions scheduled so far have been a success with all volumes being sold. In conclusion, the Commission considered the commitments sufficient to remedy the competition problems identified in the assessment of the impact of the notified concentration.

C. EON / MOL

In June 2005, the Commission received a notification pursuant to Article 4 of Regulation (EC) No 139/2004 of a proposed concentration by which the undertaking E.ON Ruhrgas International AG ("ERI") acquires, within the meaning of Article 3(1)(b) of the Merger Regulation, control of the whole of the undertakings MOL Földgázellátó Rt. ("MOL WMT", Hungary) and MOL Földgáztároló Rt. ("MOL Storage", Hungary), currently solely controlled by MOL Hungarian Oil and Gas Rt. ("MOL", Hungary), by way of purchase of shares. ERI will also acquire MOL's shareholdings in Panrusgáz Magyar-Orosz Gázipari Rt. ("Panrusgáz", Hungary), a joint venture company between OAO Gazprom ("Gazprom", Russia) and MOL. (2) After examination of the notification, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation and raises concerns as to its compatibility with the common market.

The transaction, as notified, would significantly have impeded effective competition on the identified markets. In particular, the Commission found that after the transaction E.ON would have been in a position to use its control over gas resources in Hungary to increase its ability to determine prices and other trading conditions on the downstream markets for: the supply of gas to industrial, commercial customers and residential customers, the generation/wholesale supply of electricity and the supply of electricity to industrial, commercial customers and residential customers.

To address the concerns identified by the Commission, E.ON offered remedies. Most notably, the remedies will achieve full ownership unbundling of gas production and transmission activities, which are retained by MOL, from gas wholesale and storage activities which are acquired by E.ON, through the divestiture by MOL of its remaining minority interest in MOL WMT and MOL Storage. The commitment package was divided into five groups: (i) ownership unbundling, (ii) put option related to MOL Transmission, (iii) a gas release program, (iv) contract release and (v) access to storage.

The objective of the ownership unbundling remedy was to alleviate the competition concerns raised by the Commission as regards MOL's incentives (in particular through its subsidiary MOL Transmission and its branch MOL E&P) to favour MOL WMT (for access to the transmission network) and MOL Storage (for access to future storage sites). The parties committed that MOL would divest its remaining shareholdings of 25% + 1 share in MOL Storage and MOL WMT within six months following the transaction. The buyer of the shares would be subject to the Commission's approval. In addition, MOL will not acquire direct or indirect minority stakes in MOL WMT and MOL Storage for a period of 10 years as long as E.ON is a majority shareholder of those companies.

The objective of the undertaking related to the put option for MOL Transmission was to ensure that any acquisition of a share interest in MOL Transmission by E.ON would be subject to merger control review by the relevant competition authority. Under the agreements concluded between MOL and E.ON, MOL would be granted a 2-year put option under which it can require E.ON to purchase a 25% + 1 share or a 75% - 1 share interest in MOL Transmission. Pursuant to the undertakings, MOL will not exercise the put option for the 25% + 1 share interest in MOL Transmission. In addition, MOL will not sell to E.ON or any of its affiliates, for a period of 10 years as long as E.ON is a majority shareholder of MOL WMT and MOL Storage, a share interest in MOL Transmission that would not result in the acquisition of sole control over MOL Transmission by E.ON or of joint control over MOL Transmission by E.ON and MOL.

The objective of the gas release programme was to ensure sufficient competitive alternatives for access to gas on the Hungarian gas and electricity markets (independently of the parties and at competitive conditions) so as to prevent the new entity from foreclosing the access to gas resources for its downstream competitors in the gas and electricity markets.

E.ON will implement an 8-year gas release program (1 billion cubic meters ("bcm") per year) and divest half of its 10-year gas supply contract with MOL E&P through a contract release, se below. These two measures will release 16 bcm until 2015, up to 2 bcm per year, equivalent to 14% of Hungarian consumption.

The gas release programme started in 2006 and had a duration of 8 years. Auctions will be held in 2006, 2007, 2008, 2009, 2010, 2011, 2012 and 2013. The necessity of continuing the programme for the last three years can be reassessed upon request by the parties at the end of 2010. 1 billion m^3 of gas will be released at each annual auction. The annual quantities to be released will be divided in 5 lots of 100 million m^3, 5 lots of 50 million m^3 and 10 lots of 25 million m^3 each. E.ON's affiliates will be excluded from participating, directly or indirectly, in the auctions.

The successful bidders will enter into gas supply contracts with E.ON under the following terms and conditions. The contracted gas will be equally split over two years and delivered at the two Hungarian entry points (80% at the Eastern entry point and 20% at the Western entry point). The gas supply contracts will provide for the same flexibility as MOL WMT's upstream gas supply contracts, namely an annual flexibility of 85% to the effect that the purchaser will have to purchase and pay only 85% of the annually contracted gas quantity. In addition, the daily and quarterly flexibility shall not be lower than the weighted average daily and quarterly flexibility of all purchase contracts of MOL WMT. In any event, the daily flexibility shall be at least 50% of the daily contracted quantity.

The auctions will be carried out by an international IT service provider, and the auction procedure will be handled so as to ensure that MOL WMT does not gain knowledge of the intermediary bids placed by participants to the auction. The starting price for each annual auction will be 95% of the weighted average cost of gas of MOL WMT ("WACOG"). The calculation of the WACOG will be verified by the Hungarian Energy Office ("HEO"). Quantities that are not sold in a given auction shall be reoffered with one third of the quantities each in the following three auctions, but no auction for unsold quantities will take place after 2014.

The HEO and a Monitoring Trustee will supervise the auctions and the implementation of the gas release programme. E.ON undertakes to grant the existing direct customers of MOL WMT and E.ON (KÖGÁZ and DDGÁZ) who participate in the auction or who purchase gas from a trader/wholesaler participating in the auction the right to reduce their obligation to purchase natural gas from MOL WMT and E.ON by the amount of gas that they will purchase directly or indirectly from the gas release programme. E.ON also undertook to grant to those purchasers access to storage at regulated prices and conditions. Furthermore, E.ON undertook to modify and/or improve the implementing regime on the basis of the experience gained from the yearly auctions with a view to improving the effectiveness of the gas release programme.

As for the gas release programme, the objective of the contract release programme was to ensure sufficient availability of gas on the Hungarian gas and electricity markets (independently of the parties and at competitive conditions) so as to prevent the new entity from foreclosing the access to gas resources for its competitors in the gas and electricity markets.

E.ON undertook to assign to a third party (the “Third Party”) half of the contract between MOL WMT and MOL E&P for the supply of domestic gas (“Supply Contract”) within 6 months. Once the contract assignment becomes effective, the Third Party will take over all the rights and obligations of MOL WMT under the Supply Agreement for the part assigned to it. The assignment will become effective at the beginning of the gas year 2007 (July 2007) and will be valid for the whole duration of the Supply Contract, until 2016.

According to the parties, the part of the Supply Contract to be assigned represented approximately 7.6-10 bcm of gas in total, with the volumes to be released in the first year amounting to 1.2 bcm.

ERI will procure MOL to approve the partial transfer of the Supply Agreement. In addition, MOL will grant equal treatment to MOL WMT and the Third Party as regards the Supply Contract flexibility provisions. The assignment to the Third Party of half of the contract will be subject to the HEO’s and the Commission’s approval. The Third Party must not be the purchaser of MOL’s minority interests in MOL WMT and MOL Storage.

In case E.ON (and subsequently the Divestiture Trustee) does not succeed in finding a Third Party for the partial assignment of the Supply Contract for the start of the gas year 2007 (or for a subsequent year), the gas quantities that would have been released in that given gas year will be added to the gas release programme for that year. In this case, E.ON (and the Divestiture Trustee) shall seek again to find a third party interested in the partial contract transfer until 50% of the Supply Contract has been effectively assigned.

The objective of the access to storage capacities at regulated price and conditions was to ensure that successful bidders in the gas release programme and the Third Party assignee of the contract release will be able to structure the purchased gas quantities according to their own or their customers' needs.

E.ON undertook to grant access to storage capacities at regulated price and conditions to end users and wholesalers that purchase gas directly through the gas release programme or the contract release. In particular, E.ON undertook to offer access to sufficient storage capacities for those end users and wholesalers even if they purchase gas for the first time or develop an increased demand for storage when buying gas quantities through the gas release programme or the contract release.

E.ON undertook to report any issue related to storage capacity constraints to the HEO. In any event, in accordance with the HEO resolution, E.ON is under an obligation to implement a storage development plan.

E.ON submitted a first package of commitments 20 October 2005, which, following the market testing, was amended twice: 15 November and 8 December. The final commitments were substantially improved compared to first package offered by

E.ON, in particular as regards the duration of the gas release program and the price mechanism of the gas release auctions.

The first auction for the Gas Release Programme took place on 4 May 2006. Almost half of the gas to be released was sold. It appears that not all volumes to be released were sold because the auction price was not competitive with the low public utility prices in Hungary, and the Hungarian gas market is not yet fully liberalised. The Commission cooperated closely with the Hungarian Energy Office (HEO) to assess E.ON's implementation of the auctions. The second auction was held on March 1 and was very successful as all gas was sold.

As to the Contract Release, sale contracts were signed between EFT (new name of MOL WMT), MOL (the gas producer MOL E&P) and Tigáz on 27 September, within the deadline set by the commitments. The Commission has approved the candidate purchaser. Ownership unbundling was implemented in full compliance with the Commitments when E.ON acquired MOL's remaining 25% shareholding in MOL WMT and in MOL Storage on 31 March 2006.

The implementation of the remedy has been relatively successful since all gas was sold at the second auction of the GRP. In addition, we have no indication that the gas has been purchased by traders for exports (which would have undermined the remedies' effectiveness). Buyers on the GRP are mainly companies active in the gas sector in Hungary.

D. Suez / GDF

In May 2006, the Commission received prior notification of a concentration, in accordance with Article 4 of Regulation (EC) No 139/2004, whereby the Gaz de France group ('GDF', France) would merge, within the meaning of Article 3(1)(a) of the said Regulation, with the Suez group ('Suez', France) via an exchange of shares. 2. After a preliminary examination of the notification, the Commission considered that the transaction as notified fell under Regulation (EC) No 139/2004 and raised serious doubts as to its compatibility with the common market and the operation of the EEA Agreement.

The relevant markets for the purpose of this case, were delineated as the market for electricity (i.e generation, imports, supply, ancillary services, transmission, and distribution) and natural gas (i.e import, trading, supply, storage, LNG, transmission, distribution). The main concern of the Commission was the strengthening/creating dominant positions in Belgian and French gas supply markets by elimination of most important (potential) competitor. Moreover, regarding the relevant markets in the electricity sector, the Commission argued that the merger would strengthen/create dominant positions in Belgian electricity import/generation market, the market for balancing energy and ancillary services, and the electricity supply markets by eliminating the most important (potential) competitor. The Commission in its preliminary assessment argued that:

a) Vertical effects between gas and electricity markets in Belgium were prevalent (e.g dual fuel offers, raising rivals costs via gas supplies for electricity generation, access to information on pricing and production plans generators, raising rivals costs via market for balancing energy and ancillary services).

b) There was significant lessening of competition in French heat market due to non-coordinated effects of the proposed merger.

Therefore, the Commission, adopted a divestiture of Distrigaz (gas incumbent) in order to eliminate the horizontal overlaps in Belgium and France. Moreover, a divestiture of SPE (second electricity supplier) was implemented in order to eliminate the horizontal overlaps in Belgium. The above divestitures also eliminated conglomerate and vertical effects as a result of the proposed merger. The Commission, has also adopted a relinquishing control over Fluxys (gas transmission system operator). It is worth mentioning that other various commitments related to the Belgian and French gas infrastructure have also been imposed such as creating unique entry point for the ZeeBrugge gas hub, a divestiture of Cofathec (French heat market), the LNG terminal, IZT and Zeepipe gas pipes, investments in gas storage in France etc. The initial remedy package, were market tested and significantly altered as a result of the outcome. A trustee was nominated that ensured conservatory measures and monitors the engagements.

Based on the above, the most extensive and demanding structural remedy was implemented in this case, where the parties divested the larger element of the overlap brought by transaction (that is, the incumbent's wholesale gas subsidiary, Distrigaz) in order to address both horizontal concerns in the wholesale gas market, and related input foreclosure effects in electricity.

4. Merger control in Greece

A. General Framework

Proceedings in merger review by the HCC resemble the ones before the European Commission. Specifically, within a month of the notification, the HCC Directorate-General (HCC-DG) estimates whether the merger under review may be expected to result in a substantial lessening of competition in the relevant markets affected. In case of such concerns, the HCC-DG notifies the HCC Chairman, who issues a decision launching an in-depth investigation (Phase II). A Phase II merger hearing before the HCC would then be held within two months of the notification, while the HCC's decision is reached within 90 days thereof. Whereas the vast majority of mergers notified to the HCC have been cleared in Phase I, it is Phase II merger decisions that concern complex competition issues.

In the course of recent years, the HCC has increasingly been using quantitative research techniques (such as econometrics) coupled with extensive qualitative market research in Phase II merger control, in order to assess pre-merger market conditions, as well as to forecast, as precisely as possible, the post-merger environment. By way of increasing scrutiny, accountability and consistency, the HCC is more than ever capable of identifying the competition issues arising from a particular merger. Better understanding of market forces has in turn led to more certainty in assessing whether a merger should be allowed or whether action should be taken to prevent it or mitigate its negative consequences.

The Greek Competition Act (L. 3959/2011) streamlined the merger-review deadlines, while reflecting more closely the corresponding provisions of Regulation (EC) 139/2004 (EU Merger Regulation). According to Article 6 of the Competition Act (L. 3959/2011), the jurisdictional thresholds for notifying mergers before the HCC are as follows: "A*ll concentrations of undertakings (mergers and acquisitions) shall be notified to the Hellenic Competition Commission (HCC) within thirty (30) days of the conclusion of the agreement or the announcement of the bid or acquisition of a controlling interest, where turnover by all undertakings in a concentration within the meaning of Article 10 totals at least EUR one hundred and fifty million (150,000,000) on the global market and each of at least two of the undertakings involved generate turnover totalling over EUR fifteen million (15,000,000) on the*

Greek market. It is worth mentioning that, the period of thirty (30) days shall commence on the date of the first of the acts referred to in the previous paragraph".

The HCC examines the notified merger as soon as the relevant notification is submitted. At the end of the Phase I process, the HCC decides one the following:

- If it is established that the notified concentration does not fall into the scope of jurisdiction of the Hellenic Competition Act, the Chairman of the HCC issues an act to that effect, within one (1) month from the notification.

- If it is established that the notified concentration, although falling into the scope of jurisdiction of the HCC, does not raise serious doubts as to whether it restricts competition in the relevant markets concerned, the HCC clears the concentration, by decision issued within one (1) month from the notification.

- If it is established that the notified concentration falls into the scope of jurisdiction of the present law and raises serious doubts about the concentration's compatibility with the requirements of the functioning of proper competition in the relevant markets concerned, the Chairman of the HCC initiates an in-depth investigation (Phase II), by decision issued within one (1) month from the notification.

B. Procedure of Remedies

Merger remedies have been adopted with a view to addressing significant competition distortions generated by a merger. Concerning the legal provisions for merger remedies, it is noted that the Greek Competition Act (Law 3959/2011) streamlines merger-related remedial action, reflecting more closely the corresponding provisions of EC Regulation 139/2004, as well as of other relevant EU Regulations and Notices. Article 8(8) describes in much more detail (compared to the equivalent provisions of the recently abolished Law 703/1977) the merger remedy procedure, which should be viewed as an important step in making the process of using merger remedies more transparent, while increasing legal certainty as well as achieving convergence towards EU practice.

As soon as the HCC-DG envisages a risk of a significant lessening of competition as a result of a merger, it is required to demonstrate to the merged parties that the proposed concentration raises competition concerns. The parties would then be expected to formulate appropriate and corresponding remedy proposals that would effectively address the above concerns referring to the risk of a significant lessening of competition and the resulting adverse effects. In line with the EU system, Law 3959/2011 clearly states that only the merged parties can put forward commitments; the HCC is not in a position to impose unilaterally and attach any conditions to an authorisation decision.

In practice, the HCC-DG will also gather information on possible remedies and consider relevant options as a starting point for the rigorous discussions with the parties that follow the communication of the HCC-DG's concerns, which take place in order to clarify the competition problems arising and to assist the parties in formulating their proposed remedies. The HCC's official position prior to the decision-making stage is reflected in the statement of objections (SO), which communicates to the parties the competition concerns and indicates the likely way to address such concerns, if any. Based on the SO and further to any possible commitments given by the parties, in order to address the HCC's competition concerns, the HCC Board eventually reaches a decision either clearing the merger unconditionally, or accepting the parties' commitments (on the condition that they are proportionate to the competition problem they purport to address), or prohibiting the merger.

The HCC policy towards remedial action closely follows EU guidelines and case law. In that respect, the EC Merger Regulation, the Implementing Regulation, the various Notices, Best Practice Guidelines and Model Texts have to date been reference points for the HCC. At the same time, they provide significant guidance to the domestic business and legal community concerning the general framework on the types of acceptable remedies and the requirements for their implementation.

The HCC also takes into account valuable relevant contributions from other international organizations such as the OECD and ICN. The HCC fully acknowledges the OECD's principles on the use of remedies, as expressed in its background note to the Roundtable on Merger Remedies (2004):

- A remedy should not be applied unless there is in fact a threat to competition;
- Remedies should be the least restrictive means to effectively eliminate the competition problem(s) posed by a merger;
- The HCC typically does not use merger review to engage in industrial planning and
- The HCC must be flexible and creative in devising remedies.

Thus, the HCC, in its recent decisions involving merger remedies, has explicitly mentioned that its objective is to apply the most effective remedial action, which would ideally:

- Be proportional to the competition problems arising and have a comprehensive impact addressing the expected harm;
- Act swiftly in addressing the competition concerns; such remedies should be preferred to the ones that are expected to have an effect only in the long run or to the ones whose timing is uncertain;

- Where applicable, have a carefully-calculated duration, in order to offset the competition harm but not excessively hamper competition via over-regulating the affected markets;
- Be practical, in the sense that it should be capable of effective implementation, monitoring and enforcement;
- Be demonstrated to be necessary, i.e. it has to been proven by the HCC that the merger might impede or reduce competition; enhanced pre- and post-merger market analysis by the HCC-DG helps meeting this criterion;
- Have an acceptable risk profile. The effect of any remedy is always likely to be uncertain to some degree. In evaluating the effectiveness of remedies, the HCC will seek to approve remedies that have a high degree of certainty in achieving their intended effect.

B. Type of Remedies in the Greek Merger Cases

Structural remedies, especially in the form of divestitures, are thought to be preferable, inasmuch as they durably and permanently prevent the competition problem and do not, moreover, require medium or long-term monitoring measures. Indeed, in recent cases, the HCC has shifted its decisional practice from accepting behavioural remedies to the use of divestitures, as the main instrument of remedial action against foreseeable competition problems (mainly of horizontal nature).

For example, in its February 2011 decision that dealt with the notified concentration between MEVGAL and VIVARTIA,[5] both companies active in a range of dairy product markets, whereby the latter acquired control over the former, the HCC considered that the proposed transaction, as originally notified, could have raised competition concerns, *inter alia*, in the market for the procurement of chocolate

[5] HCC Decision 515/VI/2011.

milk, due to the fact that VIVARTIA's product "Milko" already had a considerable market power. Therefore, the merged entity, by virtue of the HCC's decision, would be expected to divest MEVGAL's chocolate milk business, currently operated under the brand name "Topino", in order to remove the horizontal overlap between the parties. Currently, VIVARTIA is searching for a "suitable purchaser" for the business and is expected to notify the HCC of its efforts within the coming weeks, whereby the HCC will assess the prospective buyer's ability to become an "active competitive force in the market".

It should be noted that in that decision, the use of econometrics has proven to be crucial in defining the markets, calculating efficiencies and simulating post-merger prices and general market conditions, resulting in increased confidence of the necessity of remedies, their proportionality, their nature, as well as the containment of their risk profile to an acceptable level. Despite that confidence, it should also be noted that, since the divested asset does not constitute a stand-alone business, there is an inherent risk that may not be viable or competitive. However, the HCC, in its appraisal of the suitability of the purchaser, is expected to address that concern.

Structural remedies other than divestitures have also been employed by the HCC. For example, since 2009, the HCC has issued two merger decisions concerning the oil industry, i.e. the takeover of Shell Hellas SA (Shell) by Motor Oil Hellas S.A. (MOH) in 2010[6] and of British Petroleum Hellas SA (BP) by Hellenic Petroleum S.A (ELPE) in 2009.[7] In both of them, Phase II proceedings were initiated and remedies were accepted. In contrast to other EU countries, like Germany, France, and the United Kingdom, the Greek oil industry is divided into three distinct market segments; refining, wholesale and retail. Two domestic companies, MOH and ELPE,

[6] HCC Decision 491/VI/2010.
[7] HCC Decision 465/VI/2009.

are active in the refining segment, covering approximately 90% of the total Greek oil demand, while the remaining 10% is imported by a few wholesalers. Wholesalers (Shell, BP, EKO, AVINOIL, Jetoil, etc.) are legally separated from the refining operations and sell domestically produced or imported products to end consumers and retailers (petrol stations), with whom they sign multi-year exclusive purchasing agreements. Thus, wholesale companies actually control the retail segment of the market.

Whereas both mergers were inherently vertical in nature (as the refining companies MOH and ELPE acquired wholesalers Shell and BP respectively), there were strong horizontal elements too, as both refineries had owned wholesale companies prior to the mergers (AVINOIL and EKO respectively). Therefore, the analysis focused on the retail markets for petrol and diesel in certain prefectures of Greece (each constituting a separate geographic market), where the merged entity would obtain considerably high market shares. In both cases, the remedy proposed and ultimately accepted by the HCC was that, in the problematic prefectures, the refining companies would dispose of a number of service stations from their network, equivalent to a reduction of volume-based market share below 55% in each prefecture. This would be achieved within a 6-8 month period either by non-renewal or by termination of contracts with petrol station owners. To supplement this remedy, a non-reacquisition clause was included, namely that the refining companies were expected not to re-acquire the released service stations for a period of 6 years thereafter.

The abolition of long-term exclusive contracts was viewed as the best tool to limit the merged companies' considerable market power attained in the wholesale level and exerted in the downstream retail segment of the market. It is worth mentioning that since the divested contracts are numerous (concluded between the wholesalers and about 100 businesses in each of the affected prefecture), a single-buyer solution which would have been preferable. However, in practice, such a solution was not possible because, in Greece, unlike in other EU Member States, the vast majority of the service stations are dealer-owned and dealer-operated (DODOs), as opposed to company-owned and company-operated (COCOs) or company-owned and dealer-operated (CODOs). Therefore, it was not feasible to opt for an *en bloc* single-buyer solution, due to the numerous third parties concerned (the dealers).

In addition, the remedy, albeit structural, imposes a monitoring burden on the HCC, as the companies concerned would be expected to submit to the HCC lists of service stations, which they intend gradually to dispose of, while making reference to the annual consumption of each retail station, so that it might be possible for the HCC to approve of the intended release and to monitor compliance with the commitments assumed.

Not inconsistent with the general consensus of preference for structural remedies, the HCC will, more often than not, employ a combination of structural and behavioural remedies. Indeed, the HCC's experience has shown that certain behavioural remedies, when complementing a core structural remedy, may be effective, particularly if used during a transitional or bridging period, until a competitive market structure develops. Therefore, an effective structural remedy may require behavioural measures for a specified period in order, for example, to secure supplies of an essential input or service from the merged parties to the divested unit or other rivals. Such was the case in the ELPE/BP merger discussed above, whereby ELPE further committed to grant access to third parties (wholesalers) to its storage facilities/depots in Crete, under fair, reasonable and non-discriminatory terms (FRAND).

However, behavioural remedies are considered particularly appropriate in mergers with vertical elements, mainly with a view to preventing foreclosure risks, but also preserving the merger's potential efficiencies. In the VIVARTIA/MEVGAL merger, for example, apart from the market for chocolate milk, competition concerns were also raised as to the merger's impact on the upstream and downstream markets of fresh milk. For the upstream market, the remedy was that the merged entity shall continue to purchase milk, under current volumes and general trading terms, from producers situated in five prefectures in Northern Greece for a transitional period of three years, at the producers' choice and freedom. For the downstream market, the remedy was that the merged entity shall refrain, for a total period of five years, from any practice which may directly or indirectly result to exclusivity at retail outlets, including freezer-cabinet exclusivity. Finally, since the merged entity is also active in the production of milk, there was an additional commitment that competitors shall be able to purchase raw milk from the merged entity for a maximum yearly volume of 30,000 tn at cost basis and pursuant to an objective, transparent and verifiable set of criteria, for a total period of five years following completion of the merger.

5. Conclusion

This article has reviewed the recent practice of merger control in the European and Greek energy markets. Transactions in the energy sector provide an interesting example of the application of merger control, since they can give rise to a variety of complex horizontal and non-horizontal issues and the need for carefully designed remedy packages. The analysis of the Commission's decisions since late 2000 shows that, in the energy sector, fairly demanding remedies have been required in circumstances where the merging parties have had limited combined market share.

Remedy-related literature often blurs the boundaries of distinction between structural and behavioural remedies. Remedies that are basically behavioural but also contain structural elements are difficult to be subjected to a strict classification. Such remedies, often called "quasi-structural" have also been employed in the HCC decisional practice. In general, the exact classification of a remedy is of small practical use to merger enforcers; if an appropriate stand-alone divestiture that addresses the competition problem is not available, any "package" of remedies (which may consist of structural, quasi-structural or behavioural remedies, or a combination thereof) will suffice, as long as it is appropriate to eliminate the expected substantial lessening of competition and complies with the above general principles that the Commission or the HCC have set.

Indeed, as sophistication in analysing market conditions grows and as recent experience has shown, the sole use of structural remedies by no means guarantees that all competition issues stemming from a merger will be addressed. Rather, a mix of structural remedies and ancillary measures or behavioural remedies is, more often than not, the ideal solution. Therefore, for classification purposes, in order to assess the appropriateness and to facilitate helpful research on remedies, it is probably more appropriate to view them by adopting the following distinction based on the *scope* rather than the nature of the remedy:

(a) Package of remedies that are used to transfer a market position,

(b) Package of remedies that induce exit (e.g. market exit via the withdrawal of a brand from the market) and

(c) Package of remedies that grant access.

Naturally, any remedy must be put in relation to and address the specific competition problem it is intended to resolve. In general, structural remedies are often to be preferred to non-structural remedies. This since a structural remedy has lasting effects on the actual structure of the market and after implementation, normally, requires less monitoring than a non-structural remedy. Remedies should also be set-up in a way that avoids complicating the interpretation of the remedy when the remedy is to be implemented and/or evaluated. Lastly, foreseeable future changes such as amendments to legislation should be taken into account in the optimum design of the remedy.