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# The Hellenic Competition Commission unanimously approves merger in the oil products and lubricants market (Motor Oil and Cyclon)

**Greece, Mergers, Barriers to entry, Thresholds, Change of control, Clearance Phase I (merger), Energy**

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On December 2, 2013 the Hellenic Competition Commission (hereinafter: HCC) unanimously approved the acquisition of a controlling stake in CYCLON HELLAS S.A. (hereinafter: CYCLON) by MOTOR OIL HELLAS S.A. (hereinafter: MOH).

MOH is a Greek company mainly active in the markets of oil refining; production of heating oil, diesel, maritime fuel, basic oils for lubricants, asphalt, gas and gasoline; wholesale and retail of oil products in Greece and abroad; production, wholesale and retail of lubricants; energy; chemicals; maritime. CYCLON is also a Greek company mainly active in the production and sale of basic oils and lubricants in Greece and abroad; wholesale and retail of fuel and oil; management of storage facilities for oil products; oil waste recycling; sale of aviation fuel.

The aforementioned acquisition of a controlling stake in CYCLON by MOH, which at the time of the transaction held a 26,71% shareholding in CYCLON, was effected through an amendment in the latter's Articles of Association, pursuant to which: i) CYCLON's Board of Directors would consist of 6 members (instead of "*3 to 11 members*", as previously provided); ii) MOH would be entitled to appoint 1/3 of the BoD members, so long as its shareholding is at least 10%; and iii) the strategic decisions of the company (e.g. *approval of business plan or budget; appointment of Managing Director; expansion of the company's scope* etc) would require an increased BoD majority of 5/6. Thus, despite being a minority shareholder, MOH acquired negative exclusive control on CYCLON, since it became the only shareholder able to veto CYCLON's decisions.

In order to appraise the aforementioned change of control, the HCC first sought to define the relevant product markets, taking into account national Law 3054/2012, which regulates the oil

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products market, the HCC Opinion No 29/VII/2012 on the removal of the impediments to competition in the oil products market, as well as the relevant national and EU case-law [1]. Accordingly, the HCC held that the case in question concerned two market sectors: oil products and lubricants.

With regard to the oil products sector, the HCC held that it concerned three stages: i) refining; ii) wholesale; and iii) retail, and that in each of these stages the relevant product markets are identified: 1) gasoline; 2) diesel; 3) heating oil; 4) gas; 5) fuel oil; 6) asphalt/tar; 7) autogas; 8) aviation fuel; and 9) storage facilities for refined products.

As far as the geographic markets were concerned, the HCC defined them per market and/or market stage and concluded that: i) in the refining stage the relevant geographic market must be Greece since, the demand is mainly satisfied from the (only) two Greek refining companies, MOH and ELPE SA (hereinafter: ELPE) ; ii) in the *wholesale stage*, the relevant geographic market must be also *Greece*, since the swapping activity of wholesalers between the two refining companies facilitates the expansion of their activities nationwide; iii) in the retail stage different prefectures could be used as a proxies, but the geographic market(s) need not be defined in further detail, because, according to the HCC, the transaction does not give rise to competition concerns in this stage; iv) in the *aviation fuel* market, the relevant geographic market must be *each airport*, since the fuel distribution infrastructure is customized to each airport and this differentiates the respective competitive environment; and v) in the *storage facilities* market, the geographic market should be defined at a local level, on the basis of a maximum distance from each storage facility, determined by the relevant transport costs; however, due to the absence of competition concerns in this product market, the HCC again decided not to define the geographic market in further detail.

Finally, the HCC defined the affected markets, according to the combined market share thresholds of 15% for *horizontally affected markets* and 25% for *vertically affected markets*, and concluded that the markets of i) gasoline retail; ii) diesel retail; iii) heating oil retail; iv) aviation fuel retail in the Athens airport; v) gasoline wholesale; vi) diesel wholesale; vii) heating oil wholesale; and viii) storage facilities for refined products, were horizontally affected, while the markets of ix) oil products refining [2]; x) gasoline, diesel and heating oil wholesale; and xi) gasoline, diesel and oil retail [3] were *vertically affected*.

After defining the relevant and affected markets in the oil product sector, the HCC proceeded to examine the relevant competitive environment. It held that the market of oil products was generally *mature* with a *downward trend* over the last years due to the recession; that there were *barriers to entry* on both the refining stage and the retail stage due to the high sunk costs and low profit margins respectively, as opposed to the wholesale stage, where no significant barriers were observed; that the refining stage and the retail stage markets were *transparent* due to the legal obligation to publish the sale prices, as opposed to the wholesale stage, where no transparency was observed; that *buyer power* was low in the refining stage, due to the fact that the supply was almost entirely satisfied by the Greek refining duopoly, while imports were scarce; that buyer power was also low in the retail stage, due to the fragmentation of the market (15 wholesalers supplied 5.500 gas stations), while in the wholesale stage the buyer power was proportional to the buyer size; finally, that there were *low switching costs* at both the wholesale level (the wholesalers did not have any exclusive agreements with either the refining companies or the gas stations/retailers) and the retail level.

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Then, the HCC examined the effects of the transaction per market stage.

First, it examined the stage of **wholesale** and the possibility of *horizontal, non-coordinated anti-competitive effects* (creation or strengthening of dominant position) and held that, after the transaction, MOH would maintain the second position in the market of gasoline and diesel and the first position in the market of heating oil, with ELPE being its major competitor. Due to the low barriers to entry, the buyer power of big customers, the different options for supply due to the plethora of wholesalers, and the low switching costs, the HCC concluded that no impediment to competition was expected. As far as *horizontal coordinated anti-competitive effects* (creation or strengthening of collective dominant position) were concerned, the HCC held that, although the transaction would lead to the elimination of one competitor [4], this competitor did not exert significant competitive pressure [5], and thus the transaction did not give rise to anti-competitive effects of coordinated behaviour; all the more so, since the structure of the market would not change post merger, the market is not transparent and the existence of many market players impedes the attempt to monitor coordinated behaviour.

Then, the HCC examined the **refining** stage in conjunction with the wholesale stage to conclude whether *vertical, non-coordinated, anticompetitive effects* (input/customer foreclosure) arose. It held that such effects are generally expected when a vertically integrated undertaking has significant power in an upstream market, but this was not the case here, since MOH's market share in refining was significantly lower than that of ELPE [6] and the latter would be able to satisfy the entire demand, should MOH decide to foreclose the wholesale market. Besides, customer foreclosure could neither be expected, since the merged entity will not constitute a strong buyer in the downstream market of wholesale, and thus it will be unable to foreclose ELPE from "access to customers".

Finally, the HCC held that *vertical coordinated anticompetitive effects* (creation/strengthening of a collective dominant position) were also unlikely to arise in the refining and wholesale markets, since the transaction would not eliminate any competitor in the refining market, the market share of neither duopolist would change post merger, and, despite the fact that one competitor would be eliminated in the wholesale stage market (CYCLON), this competitor did not exert any significant competitive pressure due to its low market share.

Next, the HCC examined the effects of the transaction on the **retail** market stage. With regard to the retail of aviation fuel in the Athens airport, the HCC held that the transaction would have no *horizontal anti-competitive effects*, since MOH would maintain the second position in the market, while any increase in its market share would be minimal (1%-10%). The absence of any *horizontal anti-competitive effects* was confirmed also with regard to the retail of gasoline, diesel and heating oil, since the cumulative market share of the merged entity would not exceed 20%-30% in any market and ELPE would constantly be the market leader (*absence of non-coordinated effects*); furthermore, retail prices were determined by each of the numerous retailers, intra-brand price competition was significant and thus price coordination appeared difficult (*absence of coordinated effects*). Finally, the HCC held that the transaction neither gave rise to *vertical anti-competitive effects*, since the transaction did not change price transparency, did not create a vertically integrated entity and did not increase the barriers to entry in the market (*absence of coordinated effects*); furthermore it did not allow the merged entity to foreclose wholesalers and thus retailers, since wholesalers could easily create a retail network or attract existing retailers to their network (*absence of non-coordinated effects*).

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Finally, the HCC examined the possible effects of the transaction on the market of **storage facilities** and held that it did not bring about changes in the market structure, that MOH would maintain the second position in the market, that any change in its market share would be minimal and that no symmetry would be created as a result of the transaction. Thus, no *horizontal anti-competitive effects of coordinated behavior* could be expected.

After concluding that the transaction in question would not impede competition in the oil product market sector, the HCC examined its expected effects on the lubricants sector.

It held that the lubricants sector comprises five different *product markets*, namely i) *production and sale of Group I Basic Oils* (oils for automotive, industrial and maritime applications); ii) *production and sale of automotive lubricants; iii) production and sale of industrial lubricants*; iv) *production and sale of maritime lubricants; and v) collection of waste oils*.

Then, the HCC analyzed statistical data about the production, imports and exports of lubricants in Greece, as well as relevant econometric studies, in order to define the relevant *geographic markets*. Accordingly, it concluded that the relevant geographic market for **Group I Basic Oils** is uniform and *wider than Greece, since the same oil types are sold and used worldwide, these oils can be easily transferred* and there are many relevant transactions within the EEA [7], while the relevant geographic market for the **production and sale of final lubricants** and the **collection of waste oils** is *Greece*, since, final lubricants are sold all over Greece and, similarly, the companies active in the waste oil collection are active in the whole of Greece.

Finally, the HCC defined the *affected markets* by the transaction and held that due to a combined market share exceeding 15% in the i) *production and sale of automotive lubricants*; ii) *production and sale of industrial lubricants; and iii) production and sale of maritime lubricants, these markets were horizontally affected, while the markets of* i) *production and sale of Group I Basic Oils; ii) collection of waste oils; and iii) production and sale of industrial and maritime lubricants*, were *vertically* affected, since the merged entity's market share would exceed the 25% threshold in the respective downstream and/or upstream markets [8].

After defining the relevant and affected markets, the HCC examined the conditions of demand, the pricing, the buyer power, the transparency, the barriers to entry, as well as the position of the parties in each of the relevant and affected markets, in order to appraise the anticipated effects of the transaction.

The HCC held that in the vertically affected markets of the **production and sale of Group I Basic Oils** and the **collection of waste oils**, no anticompetitive effects were expected, since the combined European market share of the parties in the basic oils market was almost nil, while in the market for the collection of waste oils, CYCLON's market share would not change as a result of the transaction, while MOH was neither a competitor nor a customer in this market [9], there is generally no symmetry in the competitors' market shares, the market is not price transparent, barriers to entry are low, many customers enjoy buyer power, switching costs are relatively low and a sufficient number of undertakings are active in the market which impedes any monitoring efforts of a common policy. Besides, although the transaction shall eliminate one competitor (MOH) in the wholesale market, its market share is low [10] and thus any effects on competition shall be negligible.

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In view of the foregoing, the HCC unanimously approved the merger.

As a general comment, the decision in question must be praised for the thorough legal and economic analysis of the respective market sectors and its consistency with the relevant EU and national case-law.

One particularly interesting point is the HCC analysis, appraisal and conclusions with regard to the market of industrial lubricants, where one of the undertakings concerned (CYCLON) was expected to increase its market share by 10-20%, the market share of the merged entity was estimated at 30%-40%, the share of the next competitor would be only 1%-10% and that of the remaining players below 1-10%, while the difference in market concentration (HHI Δ) post merger would significantly exceed the safe haven of 150 (708).

Despite these factors, which could seemingly lead to the presumption that a dominant position would be created in the market of industrial lubricants, the HCC decided not to act formalistically, but adhere to the position that the market shares alone are not sufficient to indicate dominance but the market conditions in which these shares appear must be analyzed. Indeed, the HCC held that the absence of significant barriers to entry, the option of imports as an alternative source of supply and the relatively low degree of concentration among the four largest market players ($CR_4$) were sufficient to exercise effective competitive pressure on the new entity and ease any associated concerns.

This flexible position of the HCC regarding the appraisal and the significance attributed to market shares and market concentration may be invoked in the future in cases, where a merged entity may approach or even exceed the 40% market share threshold, but there are particular market conditions and/or countervailing factors which exert sufficient competitive pressure on the merged entity and are thus eliminate any competition concerns.

[1] See indicatively Case M.4348-PKN/MAZEIKIU, paras 6-17; Case M.1628 and HCC decisions No. 491/VI/2010; 471/VI/2009; 421/V/2008; 334/V/2007; 242/III/2003; and 4/II/1998.

[2] The combined market share of the undertakings concerned exceeded 25%in the **downstream** stream markets of gasoline, diesel and heating oil wholesale.

[3] The combined market share of the undertakings concerned exceeded 25%in the **upstream** market of gasoline, diesel and heating oil wholesale.

[4] Following the transaction CYCLON will not be present in the markets of gasoline, diesel and heating oil wholesale.

[5] CYCLON's market share in all three markets (gasoline, diesel and heating oil wholesale) was 1%-10%

[6] MOH's market share in refining generally ranges form 10% to 30% and ELPE's share from 50% to 70% depending on the fuel.

[7] See also COMP/M.1383-Exxon/Mobil and COMP/M.1891-BP AMOCO/CASTROL.

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[8] The merged entity would have a market share exceeding 25% in: a) the market of production and sale of industrial and maritime lubricants, which is the **downstream** market of the production and sale of Group I Basic Oils; and b) the market of collection of waste oils, which is the **upstream** market of the production and sale of Group I Basic Oils.

[9] MOH produces the necessary basic oils through refining and not through recycling] and thus no market share could be attributed thereto.

Then, the HCC went on to examine the *horizontal anti-competitive effects of non-coordinated behavior* in each of the remaining markets and held that no such effects could be expected, since, i) in the market of **automotive lubricants**, the market share of the merged entity would not exceed 20%-30%, the HHI Δ would be below the safe haven of 250 (129) and many customers enjoyed buyer power; and ii) in the market of **maritime fuel**, the market share of the merged entity would not exceed 20%-30%, the market has low barriers to entry and the customers have various sources of supply with low switching costs. As far as the market of **industrial lubricants** was concerned, the HCC held that the market share of the new entity would be 30%-40%, that CYCLON would remain the market leader and that the HHI Δ would exceed the safe haven of 150 (708). However, it concluded that these facts do not in themselves create a presumption of dominant position, because the combined market share of the parties had a declining trend over the last five years, with an average annual decline of 1-10%, there are competitors with significant market power, the $CR_4$ is not particularly high (57%), there are low barriers to entry and the imports constitute an alternative source of supply which exerts and shall continue to exert competitive pressure on the merged entity. Thus, the HCC, despite the market share and HHI indeications, concluded that no impediment to competition was expected as a result of the transaction.

Finally, the HCC examined the *horizontal anti-competitive effects of coordinated behavior*, and held that such effects were not expected to arise, mainly because the market structure would not significantly change as a result of the transaction [[CYCLON shall maintain the 1st position in the market of industrial lubricants and take the 1st (from the 2nd) position in the markets of automotive lubricants and maritime lubricants.

[10] MOH had a market share of 1%-10% in the market of automotive lubricants; 1%-10% in the market of maritime lubricants and 10%-20% in the market of industrial lubricants.

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