MONOPOLIES

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Which is the Greek legislative framework on monopolies?

Law 3959/2011 (Government Gazette A 93/20.4.2011) (the "**Law**"), as amended, is the core competition law in Greece which deals with monopolies/dominant undertakings. Article 2 of the Law, which is the equivalent of article 102TFEU, prohibits the abuse of dominance by one or more undertakings, within the national market or in a part of it. In addition, article 2 of the Law provides for a non - exhaustive list of practices that are considered as abusive, in cases they are implemented by dominant undertakings. Namely, dominant undertakings should not:

- directly or indirectly impose unfair purchase or selling prices or other unfair trading conditions;
- limit production, distribution or technical development to the prejudice of consumers;
- apply dissimilar conditions to equivalent trading transactions with other trading parties, especially the unjustified refusal to sell, buy or otherwise trade, thereby placing certain undertakings at a competitive disadvantage; and
- make the conclusion of contracts subject to acceptance, by the other parties, of supplementary obligations which, by their nature or according to commercial practice, have no connection with the subject of such contracts.

As aforementioned, the foregoing list is merely indicative and includes practices that may be categorized as exclusionary and exploitative. Exploitative practices encompass all conducts by a dominant undertaking resulting in direct loss of consumer welfare (e.g. excessive pricing), whilst exclusionary practices deal with practices that foreclose competitors and limit effective competition (i.e. single branding obligations, fidelity and target rebates, tying/bundling, refusal to deal practices etc.). In practice, the Hellenic Competition Commission (the "**HCC**"), which is entitled to secure the public enforcement of competition law, focuses on exclusionary abuses and has dealt with anti-competitive practices that included individualised retroactive rebates schemes, discriminatory pricing, single-branding obligations, refusal to deal etc. In addition, HCC's decisions have mainly focused on practices that are implemented by dominant undertaking which are active in the industries of fast-moving consumer goods (e.g. baby diapers, beer, salty snacks, instant coffee, tobacco etc.) as well as in other industries (such as natural gas, electricity, satellite broadcasting services etc.).

Which authority is responsible for the enforcement of the Law?

As indicated above, the HCC is the competent authority for the enforcement of the Law. It should be noted that according to article 3(1) of the Council Regulation (EC) No 1/2003, the HCC is empowered to apply article 102TFEU where it applies national competition law to agreements and practices which may affect trade between Member States. The HCC is an independent administrative authority with procedural and decision-making autonomy. Its

dualist structure comprises of two bodies: the Directorate General for Competition which is conducting the investigations, and the HCC Board, which is the decision-making arm of the HCC. The HCC Board comprises of the following Members: 1 President, 1 Vice-President, 4 Full-time Commissioner-Rapporteurs and 2 Part-time Members (and their alternates).

Its powers may be either of consultative nature or of enforcement nature. More specifically, according to article 23 of the Law, the HCC may issue an opinion on the matters that fall within its competence, either on its own initiative or upon request by the Minister of Economy, Competitiveness and Shipping or another competent Minister. Furthermore, the HCC may express an opinion on laws and other regulations that may create barriers to the functioning of free competition in order to remove such barriers. With respect to its duties regarding public enforcement of competition law, the HCC has wide enforcement powers in abuse of dominance cases (e.g. conduct of dawn raids, request for information) and may take decisions, impose administrative fines, take interim measures etc. (see below under question sanctions/remedies).

Furthermore, the Hellenic Telecommunications and Post Commission, which is the competent authority for the supervision and regulation of the telecommunications as well as the postal services market is responsible for the enforcement of the antitrust legislation in the foregoing sectors. In addition, the enforcement of competition laws in the domestic energy market (electricity, natural gas, oil products, renewable energy sources, electricity cogeneration, heat, etc.) is entrusted to the Regulatory Authority of Energy, which is the competent authority to supervise this specific sector.

According to article 24 of the Law, the HCC may cooperate and assist the foregoing regulatory authorities upon request, on matters of application of articles 1 and 2 of the Law and articles 101 and 102 TFEU. Finally, the HCC may also request the assistance of the above supervisory authorities in cases where the responsibility of implementing the above articles in those specific sectors lies with it.

Which undertakings are caught by the Law?

In the context of competition law, the concept of an "undertaking" under the Greek jurisprudence, which is in line with the relevant EU jurisprudence, encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. Thus, the prohibitive scope of article 2 of the Law applies to individuals, partnerships, corporations, limited partnerships, charities, co-operatives, nationalised firms, state-owned commercial organisations and non-profit making organisations. It could also include government departments and agencies in respect of certain activities.

Which undertakings are considered as dominant under the Law?

The Law does not define the notion of dominance. According to the Greek and EU jurisprudence, a company enjoys a dominant position if it has such economic strength that it is able to impede effective competition in the relevant market by behaving to an appreciable extent independently of its competitors and customers. In addition, Greek jurisprudence in harmonization with the EU jurisprudence confers the notion of special responsibility to dominant undertakings, in the sense that a dominant undertaking should not allow its conduct to impair genuine undistorted competition.

Furthermore, the HCC takes into account the European Commission's Guidance on its enforcement priorities in applying article 102TFEU to abusive exclusionary conduct by dominant undertakings (the "**Guidance**") with respect to the factors that indicate that an undertaking enjoys market power. According to the Guidance, the assessment of dominance/market power requires the examination of the competitive structure of the market such as the market position of the dominant undertaking and its competitors, as well as the constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry) and the constraints imposed by the bargaining strength of the undertaking's customers (countervailing buyer power).

It should be underlined that article 2 of the Law does not prohibit dominance but only its abuse. Abuse of dominance has been interpreted by the HCC as an objective concept and the application of article 2 of the Law does not require a causal relationship between position of dominance and the committed abuse.

Is there any other legislation regarding specific market sectors?

In the media sector, Law 3592/2007 has introduced dominance thresholds ranging from 25% to 35%, depending on the number of the media sector markets (i.e. the markets of television, radio, newspapers, magazines), in which the natural person or undertaking concerned is active.

With respect to the energy sector, Law 4001/2011, which is the basic legislative regime regarding electricity and natural gas market entails rules that aim to liberalize such markets that were previously regulated exclusively by state monopolies. In addition, Law 4336/2015 that has amended Law 4001/2011 and has ratified the 3rd bail-out agreement between Greece and its lenders includes provisions that aim to further liberalise the foregoing energy sectors.

Are there any sectors in which state monopolies exist?

In the past, state monopolies were operating in Greece and their existence was justified due to public interest/public security reasons. It should be noted that the authorities were reluctant to apply competition law rules to state monopolies despite Greece's obligation to comply with the specific requirements of article 106(1) TFEU that regulates state monopolies and provides derogation from competition law rules only under the specific circumstances set out under article 106(2) TFEU. For instance, the Public Power Corporation, which was a state-owned former monopoly for electricity production, transport and supply, enjoyed monopoly for many years. Likewise, Olympic Airways, the former Greek national air-carrier, was a state owned monopoly in air-transport, ground-handling and maintenance services.

The existence of state monopolies due to foregoing reasons has now been challenged. A few legislative packages have been enacted in order to liberalise highly concentrated markets. For instance, with respect to the electricity market, Law 4336/2015 stipulates that from 1.01.2020 and onwards, no participant shall be allowed to put electricity into the grid-connected system and network, the quantity whereof exceeds 50% of the overall electricity stemming from local producers or imports, on an annual basis. In practice, this measure intends to reduce the market share of the ex-incumbent, Public Power Corporation, which still maintains a large market share of the generation and supply market in Greece. The HCC shall evaluate the progress towards achieving this target in the beginning of 2019 and shall propose alternative measures in case the HCC assesses that the foregoing target cannot be achieved. It should be underlined that such provision has been enacted in order to enhance

competition among players in the wholesale and the retail market as well as in order to reduce the cost of the competitive parameters of consumers' electricity bills. With regards to the natural gas market, the foregoing law provides for the abolishment of the existing exclusive rights of the natural gas suppliers to supply and operate their respective distribution systems. These suppliers will no longer have a distribution function and will spin-off and transfer their distribution function to new companies by January 2017.

Finally, the Hellenic Republic Asset Development Plan has approved an Asset Development Plan which describes the framework for the privatization of assets that fall under the management of the Hellenic Republic Asset Development Fund as of December 2014. Such plan includes the privatization of assets that belong to the Greek State such as ports, railways, hotels, regional airports etc.

On the other hand, it should be noted that OPAP keeps its monopolistic position in the gambling industry. Namely, the Council of State by the issue of its decisions no 3167/2014 and 3168/2014 rejected a long-standing judicial dispute initiated by rival sport betting operators and ruled that OPAP's betting monopoly in Greece, which has been conferred by national legislation, is in line with European law and does not violate EU rules on the freedom of services and establishment since it aims at fighting illegal betting and criminal activities in the gaming market.

What claims may be brought for breach of article 2 of Law?

Regarding public enforcement of the Law, article 36 of the Law provides that any person (individual/legal entity) may submit a complaint concerning antitrust violations before the HCC. The HCC has issued a special complaint form which should be completed and submitted before the HCC by the complainants.

Regarding the private enforcement (i.e. antitrust disputes between private individuals/legal persons) arising from the application of competition law the following claims may be exercised before the competent civil courts:

- A claim for declaring a contractual relationship as null and void (case no 928/2006 issued by Patras Court of Appeal);
- A claim for damages by persons who have suffered injury due to antitrust violations. Damages may be discerned into pecuniary and non-pecuniary/ moral damages. Following the seminal cases Courage (C-453/99) and Manfredi (C-295/04 – C-298/04) issued by the European Court of Justice, articles 101 and 102 TFEU are directly applicable and produce direct effects in the sense that any individual can claim compensation for the harm suffered due to antitrust infringements. Similarly, such right to damages is also recognized under Greek jurisprudence regarding violations of articles 1 and 2 of the Law (e.g. case no 1286/2011 issued by the Supreme Court); and
- According to the prevalent view of the Greek legal theory, an individual may ask from the competent civil courts to order the cessation and the non-recurrence in the future of an infringement of antitrust laws.

Which sanctions/remedies may be imposed by the HCC in cases of breach of article 2 of the Law?

In cases of breach of article 2 of the Law, the HCC may decide, either alternatively or cumulatively, to:

- address recommendations;
- require the undertakings concerned to bring the infringement to an end and refrain from it in the future;
- impose behavioral or structural remedies, which must be necessary and appropriate for cessation of the infringement and proportionate to its nature and gravity;
- impose a fine· the fine may be up to ten percent (10%) of the total turnover of the undertaking for the financial year in which the infringement ceased or, if it continues until issuing of the decision, the year preceding the issuing of the decision· in the case of a group of companies, calculation of the fine shall take account of the total turnover of the group; and
- threaten and impose a fine where the infringement is continued or repeated.

Moreover, article 44 of the Law provides for criminal sanctions in case of breach of article 2 of the Law. Thus, according to this article, a pecuniary penalty ranging between EUR thirty thousand (30.000,00€) and EUR three thousand hundred (300.000,00€) may be imposed to any person who breaches article 2 of the Law and/or article 102 TFEU.

It should be highlighted that according to article 30 of the Law, an undertaking may challenge HCC's decision by filing an application for annulment of any decision before the Athens Administrative Court of Appeal within sixty (60) days from the notification of HCC's decision. Finally, the judgements of the Athens Administrative Court of Appeal may be brought for judicial review (only points of law) before the Council of State.

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