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Interactions between Competition Authorities and Sector Regulators

Competition and Regulation: Friends or Foes?

- Contribution from Greece [*] -

1. Competition law and regulation have often been viewed as mutually exclusive sets of norms. In some jurisdictions, such as the United States, regulation may in some instances entirely remove sectors from the ambit of competition law[1]. On the other hand, in Europe, the constitutional supremacy of competition has in principle led to the prevalence of competition law norms even in the presence of sector-specific regulatory intervention. In the EU, competition law is applicable ex post to both regulated and non-regulated markets, whereas undertakings, encouraged by regulation to adopt an anti-competitive behavior, remain subject to competition law and are liable for breaches thereof. In the same vein, Member States may also be held liable for the enactment of state measures distorting competition. Nevertheless, the combination of ex post competition enforcement and ex ante regulation may often be the optimal means to achieve well-functioning markets. In the latter case, however, care should be taken to address possible conflicts of competences as well as issues of substantive law, stemming from the concurrent application of regulatory and competition law enforcement often by different institutions.

2. In this note, we shall examine the interplay between competition law and regulation from a normative and institutional standpoint, focusing on the EU example and Greece in particular.

1. Introduction: competition and regulation as antagonistic fields

3. Competition law and economics literature has always conceived the relation between the principle of competition and government action in antagonistic terms, based on the assumption that the "state" is juxtaposed to the "market," the two forming different conceptual categories[2].

4. However, this approach fails to understand the operation of the different branches of power, the intersection of politics with scientific expertise in policy-making as well as the particularities of specific societies. It is important to acknowledge the different disciplinary and cultural identities of bureaucracies and/or "technocracies" involved in governmental decision making and their evolution, in particular as competition law can also be envisioned as having evolved to a technocratic discipline. The traditional antagonistic conception of the interaction between competition law and State regulation may be challenged if one examines in depth the nature of

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[1] See, for instance, in the United States, Credit Suisse Securities v. Billing, 551 U.S. 264 (2007).

[2] For a discussion, see N. Dunne, *Competition Law and Regulation: Making and Managing Markets* (CUP. 2015); I. Lianos & J. Tapia, Generalist Judges, Specialised Tribunals, Sector Specific Regulators and Competition Authorities: Encounters of the third kind, (January 2010), available at http://www.law.nyu.edu/sites/default/files/ECM_PRO_064266.pdf ; J. Tapia & D. Mantzari, The regulation/competition interaction, in I. Lianos & D. Geradin (ed.), *Handbook on European Competition Law*, (Edward Elgar, 2013), 588-628.

government bureaucracies involved in decision-making and their respective claims for expertise and legitimacy[3].

5. Bureaucracy was initially conceptualized as based on a hierarchical and functional organization, clearly defined areas of expertise, standard operating procedures and fixed roles descriptions. In the same vein, τhe concept of bureaucracy was viewed as pre-supposing by essence a primacy for politics and a clear dichotomy between politics and scientific expertise. However, as a result of a greater recourse to social sciences in public policy, the erosion of traditional divisions of labour and the emergence of risk society, the role of bureaucracy has been gradually transformed from a rigid structure performing merely tasks of execution to a more pro-active technocracy, assuming tasks of forecast, knowledge gathering/sharing and communication with the public. Technocracy pre-supposes the systematic integration of scientific expertise in policy-making, not only at the level of the policy conception but also at the implementation level. The assumption is that the realm of politics and that of scientific expertise have convergent logics and that politics and policy-making are driven by scientific consensus, thus inversing the primacy of politics approach that characterized the bureaucratic form of organization. The incorporation of specialised scientific personnel (e.g. economists, policy analysts) in public bureaucracies (e.g. ministerial departments, regulatory agencies) exemplifies this new relationship between the political and the scientific realm.

6. In this regard, it should be noted that, although ministerial departments and regulators may in some instances possess superior expertise on the characteristics and problems of the industries they supervise than competition authorities or courts, however, competition authorities have been one of the first venues in government bureaucracy, at least in Europe and in the United States, where a high level of economic expertise has been progressively developed, and they may claim, on average, more expertise than other government departments in competition law analysis. This configuration should lead to an expansion of the scope of competition law and advocacy, with the exception of instances where the specific industry requires some superior form of economic expertise, which antitrust authorities do not possess, in view of the specific characteristics of the industry.

7. On the other hand, in the ordoliberal version of neo-liberalism, which is quite influential in the EU, considerations about the superior technical expertise of government departments and regulators have little place in the analysis of the appropriate scope of competition law intervention versus some other regulatory action. The fact that the principle of free competition, as laid down in the EU Treaties, is a primary objective, governing all action of the Union, implies that in the presence of a conflict between regulation enacted by the Union or its Member States and the principle of free competition, the latter should take precedence. As already mentioned, EU competition law applies to state intervention in markets as well as to state undertakings. More specifically, Article 4(3) TEU imposes on Member States and the Commission an obligation of 'sincere cooperation', designed to ensure that state rule-making, which has an impact on market dynamics, does not have the effect of distorting competition by creating situations where anticompetitive agreements or practices are encouraged. Moreover, Member States, when acting as market players through public undertakings, must abide by the obligations set forth in Article 106 (1) TFEU, according to which Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, including, inter alia, in Articles 101 and 102 TFEU [4]. Furthermore, the EU Courts have affirmed the absence of any competition law

[3] See, I. Lianos, Toward a Bureaucracy-Centered Theory of the Interaction between Competition Law and State Activities, in D. Sokol, T. Cheng & I. Lianos (ed.), *Competition and the State* (Stanford Univ. Press, 2014), 32-55.

[4] See Case C-289/04P, *Showa Denko KK v. Commission* [2006] ECR I-5859, para. 55 ; Joined Cases T259–264 and 271/02, Raiffeisen Zentralbank Österreich AG and Others v. Commission [2006]

immunity for sector-specific regulation, if the undertakings in question preserve decision-making authority[5], as is usually the case in the context of incentive regulation[6]. Similarly, the EU Courts have accepted that EU competition law may also apply to the so called "regulatory offences"[7]

8. Taking account of the aforementioned, it would be interesting to elaborate on possible strategies of interaction between the principle of competition and government action. In this regard, the tendency to subject state action to the discipline of competition may be systematized by a prophylactic ex ante competition screening of all proposed laws and regulations[8]. Such an approach challenges the view that competition and government action are antithetical to each other and marks the evolution towards a complete integration and *diffusion* of the principles of competition across government bureaucracies. Moreover, the traditional analytical framework of competition law may need to be adjusted in the case of provision of services of general interest, to reflect the proper balance between the different aims pursued in this respect by government action.

ECR II5169, para. 255 44; Case C-198/01, *Consorzio Industrie Fiammiferi* [2003] ECR I-8055, paras. 54–55.

[5] See for instance Case C-280/08 P, *Deutsche Telekom AG v European Commission* [2010] ECR I9555; Casd c-295/12 P, *Telefónica SA and Telefónica de España SAU v European Commission*, ECLI:EU:C:2014:2062; Case c-165/19, *Slovak Telekom, a.s. v European Commission*, ECLI:EU:C:2021:239, paras 576-58.

[6] According to the case-law of the Court of Justice, it is only if anticompetitive conduct is *required* of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, that Articles 101 and 102 TFEU do not apply, whereas those articles may apply if it is found that the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings (see, to that effect, Case C-280/08 P, *Deutsche Telekom* v *Commission*, EU:C:2010:603, para. 80).

[7] Case C- 457/ 10, *AstraZeneca v Commission*, ECLI:EU:C:2012:770, paras 105– 12. In in *Allianz Hungária*, the CJEU also held that frustrating the objectives pursued by another set of national rules may be taken into account in the consideration of the economic and legal context when assessing a restriction of competition: Case C- 32/ 11, *Allianz Hungária Biztosító Zrt and Others v Gazdasági Versenyhivatal*, ECLI:EU:C:2013:160, paras 46– 7. Note should also be taken of the fact that the German Bundeskartellamt opened in March 2016 proceedings and adopted a decision against Facebook for having abused its market power by infringing data protection rules. By decision in June 2021, the German Federal Court of Justice provisionally confirmed the Bundeskartellamt decision. Following this judgment the Oberlandesgericht Düsseldorf sent a preliminary reference to the CJEU. On this AG Rantos concluded that "Articles 51 to 66 of the GDPR must be interpreted as meaning that a competition authority, within the framework of its powers under the competition rules, may examine, as an incidental question, the compliance of the practices under investigation with the GDPR rules, while taking account of any decision or investigation of the competent supervisory authority on the basis of the GDPR, informing and, where appropriate, consulting the national supervisory authority": Case C-252/21, Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social) , ECLI:EU:C:2022:704, para 33 (& 18).

[8] See for instance the OECD Competition Toolkit. For a discussion of various strategies for competition authorities to intergrate competition principles in regulatory action, see F. Jenny, *Competition Authorities: Independence and Advocacy, in I. Lianos & D. Sokol (ed.), The Global Limits of Competition Law (Stanford U Press, 2012), 158-176.*

2. Competition and regulation as complements: The Digital Economy Toolkit Approach

9. It has already been illustrated that, although competition law and regulation are often viewed as antagonistic fields, they could also, however, operate in a complementary manner.

10. The regulatory framework put in place by the EU for the digital economy (GDPR, DMA, DSA etc) forms a characteristic example of the complementarity between regulation and competition law. The (recently adopted) DMA, in particular, establishes a specific *ex ante* regulatory regime for certain large digital platforms, that can be identified as "gatekeepers". This behavioral-focused regulation is very much competition law-like, the main difference being that the implementation of the DMA does not require individualised assessment of market positions and behaviour, including its likely effects and the precise scope of the prohibited behaviour, and does not provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question. It offers an effective in terms of market monitoring bright-line rules competition regulation approach, with the aim to accelerate the pace of public intervention in these markets, in comparison to the slow and heavy tool of competition law enforcement, which will also need however a change of course.

11. At the same time, enforcing competition law in a complex economy[9] requires the development of a deeper understanding of the social structure of competition and of the various spaces on which competition tournaments take place. Competition law may focus on "ecosystems"[10], either through expansive interpretation of the traditional concepts of dominance and abuse, or in the creation of new provisions that aim to tackle then directly[11]. Different methodologies should also be developed to account for this complex reality to better map the multi-functional strategies of actors in the various competition ecosystems and allow for computation, mixing both regulatory and competition law enforcement approaches. **This connects the activity of competition authorities with other regulatory fields, the relation between competition and regulation not being necessarily seen as antagonistic but also as complementary.**

12. Despite the benefits associated with the complementary application of regulation and competition law enforcement, complementarity also sets challenges as to the appropriate institutional design, especially in view of the recent case law of the EU courts regarding the *ne bis in idem* principle, where a behavior is caught both by sector-specific regulation and by competition law. In this regard, we may refer to C-117/20, *bpost*[12], where the ECJ found that it is in principle legitimate for a Member State to punish infringements, on the one hand, of sectoral rules concerning the liberalisation of the relevant market and, on the other, of the rules applicable to competition law, since such sets of rules pursue **distinct legitimate objectives**. The Court also held that the finding of an infringement of EU competition law on the part of a legal person is not precluded where, on the same facts, that person has already been the subject of a final decision following proceedings relating to an infringement of sectoral rules, however, such duplication is subject to a set of conditions. More specifically, application of both sectoral regulation and competition law to the same factual circumstances is not precluded provided that there are **clear and precise rules** making it possible to **predict** which **acts or omissions** are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be **coordination**

[9] I. Lianos, Competition Law for a Complex Economy, (2019) 50 *IIC - International Review of Intellectual Property and Competition Law*, 643–648.

[10] M. Jacobides & I. Lianos, Ecosystems and competition law in theory and practice, (2021) 30(5) *Industrial and Corporate Change*, 1199-1229.

[11] An example is Art. 19a GWB, or the proposition for Article 2A in the Greek Competition Law Bill 2020..

[12] Case C-117/20, *bpost SA v Autorité belge de la concurrence*, ECLI:EU:C:2022:202.

between the two competent authorities; that the two sets of proceedings have been conducted in a **sufficiently coordinated manner** within a **proximate timeframe**; and that the overall **penalties** imposed correspond to the **seriousness of the offences** committed.

3. Ex ante regulation and quasi-regulatory competition law enforcement: Article 11 of Law 3959/2011 (the Greek Competition Act)

13. On a related note, an interesting paradigm of the possibility to complementarily apply ex post competition law enforcement and ex ante regulation may be found in the provisions of the Greek Competition Act. In addition to its powers to apply competition law through the ex ante merger control and the ex post prohibition of anti-competitive behaviors, the HCC is also entrusted by law with the power to enact regulatory measures.

14. More specifically, pursuant to Article 11 of the Greek Competition Act ('*Regulatory intervention in sectors of the economy*'), if the HCC finds that there are no conditions of effective competition in a sector of the economy, it may take any appropriate measures so as to restore such conditions, so long and to the extent that the rules governing ex post competition enforcement and/or ex ante merger control do not suffice to this effect. In this context, the HCC must publish two interim reports, both subject to public consultation so that the opinion of market players may be considered, before reaching its final decision, by virtue of which lack of effective competition in the sector may be established and specific regulatory measures may be imposed, following a proportionality test. The legality of the HCC decision is subject to judicial control by the Supreme Administrative Court (Council of State). The impact of such measures on the conditions of competition in the sector in question is assessed within two years as from the issuance of the HCC's decision.

15. It should be noted that exercise of the HCC's regulatory power as per the above provision does not preclude ex post competition law enforcement in the same sector where the HCC decides to intervene by virtue of Article 11; it is, however, triggered only if ex post enforcement (or ex ante merger control) is found by the HCC not to be sufficient to restore effective competition for the specific issues, addressed by the regulatory intervention of Article 11. In this sense, the HCC's regulatory power is designed to compensate for the insufficiency in certain instances of competition law enforcement, for instance in situations in which merger control or Articles 101 and/or 102 TFEU may not apply; the anticompetitive effects of common ownership that may not fall under the previous provisions form a characteristic example. Interestingly, Article 11 also provides that, where the HCC finds that lack of effective competition is due to state regulation, it may opine that the latter should be abolished or amended. In this regard, the Greek Competition Act empowers the HCC on the one hand to regulate so as to restore effective competition and on the other hand to provide guidance as to state regulation undermining this objective.

16. The HCC has already made use of its powers under Article 11. In 2008, the HCC imposed regulatory measures in the petroleum products sector, whereas in 2020 and 2021 respectively, it opened market investigations as per Article 11 in the press distribution and the construction sectors. In the present note, we will focus on the two latter HCC investigations.

17. In the press distribution sector, the HCC recently issued its Decision, imposing a set of measures to alleviate the effects of vertical common ownership between newspaper and magazine publishing companies and the sole undertaking acting as a distribution hub in the printed-press distribution market, which was considered to have the characteristics of a (non-regulated) quasi-natural monopoly. Participation of publishers in the monopolist's share capital was found to be liable to create incentives for potential coordination and possible unilateral behavior to the benefit of publishers holding stakes in the monopolist. At the same time, it was concluded that the systematic application of competition law against behaviors that may lead to the exclusion of

certain publishing companies is not a solution to the structural problems of the press distribution market. The measures imposed consist in the establishment of a system of prior notification to the HCC of changes in the monopolist's shareholding structure, the erection of Chinese walls within the monopolist to avoid the flow of commercially sensitive information to publishing companies acquiring stakes in its share capital, the formation of a committee comprised of representatives across the press distribution value chain (publishers, wholesalers, retailers) and entrusted with the task to provide non-binding consultation as to the monopolist's business plan as well as the appointment of a Mediator to supervise compliance and to draw up a neutrality framework for the monopolist's conduct of business.

18. It is interesting to note that, prior to initiating its market investigation pursuant to Article 11 of the Greek Competition Act, the HCC had issued a non-binding opinion elaborating, inter alia, on the issue of vertical common ownership in the press distribution market and recommending, inter alia, that a Supervisory and Regulatory Authority for Press Distribution could be established by law. It was suggested that its responsibilities could include the control, supervision and regulation of the market concerned as well as ensuring transparency in press distribution, while publishing companies could have recourse to it in case they consider that press distribution is not properly functioning and/or it is likely to harm their interests. However, the above recommendation has not been adopted by the government. Therefore, and due to the fact that the market has characteristics of a quasi-natural monopoly, the HCC considered it was necessary to intervene, following a lapse of two years from its previous intervention, as already explained, by exercising its regulatory power.

19. Furthermore, in the context of its investigation in the construction sector, the HCC has published two interim reports. In its first report, it found that the joint horizontal participation of a fund in the share capital of the two largest construction undertakings in Greece may lead to unilateral and coordinated effects, whereas such participation was not caught by ex ante merger control nor were the pre-conditions for the application of Articles 101/102 TFEU and the respective provisions of national law fulfilled. The HCC also identified potential issues to competition in the applicable legal framework, such as the fact that legislation allows the formation of joint ventures for the execution of a contract, following the award thereof, thus, providing incentives for lesser competition among participants in the bidding stage of the tender. In its second report, the HCC put forward a set of suggested measures which could address the competition issues identified, consisting, by way of indication, in the obligation of legal persons acquiring more than 5% of the share capital of competing undertakings in the construction sector to notify the acquisition to the HCC so that the latter may conduct a competition impact assessment to alleviate risks to competition, stemming from common ownership. The HCC's Decision on the investigation is still pending.

4. Interaction between the competition authority and sector-specific regulators in Greece - allocation of competences

20. The interplay between competition law and regulation has consequences on the institutional design and the allocation of powers between competition authorities and sector regulators.

21. In Greece, the competence to apply competition law lies primarily with the HCC. On the other hand, several sector regulators are entrusted -mainly, but not exclusively- with the ex ante application thereof, in special sectors, such as telecoms, energy, transport etc. Such sector regulators comprise, inter alia, the Hellenic Telecommunications & Post Commission (EETT), the Regulatory Authority for Energy (RAE), the Regulatory Authority for Ports (RAL) and the Regulatory Authority for Railways (RAS), the **National Council for Radio and Television and the Civil Aviation Authority (APA)**.

22. The issue of the allocation of powers between the HCC and sector specific regulators has been clarified to a significant extent following the amendments recently introduced into Law 3959/2011

(the Greek Competition Act)[13], expressly vesting the HCC with the power to enforce competition in all sectors and markets nationwide with the sole, yet notable, exception of telecommunication and postal services. In the latter sector, both ex ante and ex post application of competition law falls within the competences of the sector regulator (EETT).

23. Other sector regulators are empowered by law to supervise compliance with the legislative and regulatory framework and to monitor the markets falling within their competences, having also regard to the conditions of competition therein.

24. It is obvious that, despite the exception of the telecoms and postal sectors, which is admittedly unparalleled, at least in the EU, Greek lawmakers consider that the HCC has the safeguards and the expertise to enforce ex post competition law horizontally, thus avoiding, inter alia, the risk of regulatory capture.

25. However, due to various parameters, such as for instance, lack of a clear, uniform criterion for the allocation of powers among the HCC and sector regulators (e.g. ex ante – ex post application) and the fact that some sector regulators are entrusted with the exercise, in the sector of their competence, of the investigative powers and/or the power to impose sanctions provided for in the Greek Competition Act, ambiguity or tension respectively as to the delineation of competencies have not entirely been avoided.

26. A characteristic example in this regard is that of the Regulatory Authority for Railways (RAS). RAS is competent to supervise undertakings active in the railway sector as well as infrastructure operators and to monitor markets for railway services, including compliance with competition law (Article 28 of Law 3891/2010). As per Article 32 of Law 3891/2010, in the event of breach of competition law in the market for railway services, RAS may impose the sanctions provided for in the Greek Competition Act. However, pursuant to Article 58 of Law 4408/2016, transposing into the Greek legal order Directive 2012/34/EU for the establishment of a single European railway, RAS is competent to monitor the conditions of competition in the markets for railway services "… *without prejudice to the competences of the Hellenic Competition Commission*…" under the Greek Competition Act. Despite the unequivocal wording of the latter provision, RAS has issued one decision, following the entry into force thereof, on the basis of Articles 2 of the Greek Competition Act and 102 TFEU, evoking its powers as provided for in Article 32 of Law 3891/2010, by virtue of which it found a prima facie abuse of dominance by TRAINOSE, the main provider for railways services in Greece, and it accepted commitments in relation thereto.

27. In all cases, it is expected that the recent amendment of the Greek Competition Act already mentioned leaves no doubts as to the exclusive competence of the HCC to horizontally enforce ex post competition law (and ex ante merger control) to all sectors, but for telecoms and postal services.

5. The Interaction between the competition authority and sector-specific regulators in Greece – co-operation

28. In view of the aforementioned, it becomes apparent that co-operation between competition authorities and sector regulators is of utmost importance. It enhances effectiveness in the exercise of the authorities' powers and minimizes costs related to possible conflicts of competencies.

[13] Article 14 para 1 of Law 3959/2011, as in force following the amendments introduced by Law 4886/2022.

29. In Greece, there is no umbrella legislative framework providing for the details of such co-operation, nevertheless, provisions on certain aspects thereof are included in the Greek Competition Act and in sector-specific legislation.

30. More specifically, Article 24 of the Greek Competition Act ('*Relations with regulatory authorities'*) allows the HCC both to assist regulatory authorities and to request their assistance. Moreover, according to Article 26 of Law 4011/2011 regulating the cooperation between HCC and the Regulatory Authority for Energy (RAE), each authority may participate in investigations conducted by the other and both authorities shall mutually forward information useful for the exercise of their competences, while maintaining the same standard of protection of confidential information. Relevant provisions, regulating the exchange of information between the HCC and sector regulators (eg EETT) and the possibility of some (e.g. RAL, APA) to request the HCC's opinion on matters of its competence and/or to suggest that the HCC should initiate an investigation on possible breaches of competition law in a sector, can be found in other pieces of sector-specific legislation.

31. With an aim to intensifying co-operation, the HCC has entered into -non binding- MOUs with regulatory authorities, elaborating on further practical aspects of cooperation, such as the exchange of know-how and the set-up of joint working groups.

32. More specifically, in 2020 and 2021 the HCC entered into MOUs with the Regulatory Authority for Energy and the Regulatory Authority for Ports respectively, by means of which it has been agreed that the Authorities shall strengthen existing cooperation and they shall exchange specialized knowledge aiming at the healthy development of energy and ports, as well as that they shall undertake campaigns for the promotion of policies and strategies in order to inform economic operators / participants in the energy and port industries for matters related to their competencies. Particular emphasis was placed on the establishment of joint working groups for the development of guidelines and the undertaking of studies and research on issues of common interest, within the competences of the two Authorities.

33. The HCC has also organized an International Conference on "*The intersection between Competition and Regulation: Prospects for Reform*", where, inter alia, the creation of a national competition and regulatory authorities network was discussed[14]. Moreover, it has commissioned a study to the Centre for European Constitutional Law (CECL) based in Athens intended to shed light on the optimal delineation of competences and the elaboration of a coherent framework for effective co-operation and co-ordination between the HCC and sector regulators.

[14] See, https://www.epant.gr/enimerosi/dimosieyseis/media/item/1295-i-diastayrosi-anamesa-ston-antagonismo-kai-sti-rythmistiki-politiki-prooptikes-metarrythmisis.html .