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The Standard and the Burden of Proof in Competition Law Cases – Note by Greece

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1. In this Note, we elaborate on the standard and burden of proof in competition law proceedings under Greek law. In this regard, we outline the relevant rules, provisions and legal basis and we refer to the national case law and the decisional practice of the Hellenic Competition Commission (HCC). We also discuss the assessment of evidence with an emphasis on the use of economic evidence as well as the role and extent of judicial review. Finally, we briefly describe the challenges faced by the HCC, especially as regards the integration of economic analysis in the assessment of competition cases, and we highlight the importance of striking a balance between effective competition law enforcement and the undertakings' rights of defence.

1. Standard of Proof

2. According to Regulation 1/2003¹, its provisions do not affect national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.

3. However, even though in principle Member States are able to decide whether to apply the mechanisms for satisfying the standard of proof developed by the EU Courts, in accordance with the principles of natural procedural autonomy, it has been argued that such mechanisms are an integral part of EU law and override national evidence rules, insofar as they are intrinsically linked to core elements of the antitrust provisions². The distinction between the substantive legal test and the standard of proof in view of the fact that the first one is uniform under EU law, whereas the second is governed by national law, can be crucial³.

4. The Greek national Law on the protection of Free Competition (L. 3959/2011) does not contain a specific provision regulating the standard of proof in competition cases. Accordingly, there are no general provisions in the national Code of Administrative Procedure (L. 2717/1999). In this context, case-law rules have been developed concerning the standard of proof in competition cases, which take into account, in addition to the provisions of the Code of Administrative Procedure on evidence, the principle of effectiveness of European law. According to the established case-law of the Greek Council of State (Symvoulío tis Epikratias - StE), which is also adopted by the HCC, the latter is, in principle, required to form a firm conviction that an infringement has been committed. However, in line with the principles that have been developed under the case-law of the StE on tax infringements, the HCC is not required to establish an infringement based on a

*The present note was drafted by Eftyhia Karkani and Nadia Skandali (Chief Legal Officer Directorate, HCC).

¹ Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, article 2 and Preamble, para 4.

² Kalintiri A., Evidence standards in EU competition enforcement, *The EU Approach*, 2019 (21) Hart Publishing, p. 217

³ Castillo de la Torre, F., & Gippini Fournier, E. (2024). Evidence, Proof and Judicial Review in EU Competition Law. 1.045 et seq.

“beyond reasonable doubt” standard. Therefore, an infringement may be established not only on the basis of direct evidence, but also on the basis of indirect evidence as well as “presumptions”. To accept otherwise would impose an excessive and often impossible burden on the HCC, that would be incompatible with the need to strike a fair balance between, on the one hand, the fundamental rights of the undertakings under investigation, such as the presumption of innocence, and, on the other hand, the overriding public interest in establishing infringements of competition, which are by their very nature usually difficult to detect.⁴

5. More specifically, in line with the above principles as well as with relevant EU Courts jurisprudence, it has been consistently held by the Greek Courts and the HCC that it is not necessary for every item of evidence produced to satisfy every aspect of the infringement in isolation. The existence of an anti-competitive practice or agreement may be inferred from a number of sufficiently serious, precise and concordant coincidences and indicia which, taken together, as a whole, may, in the absence of another plausible explanation and if not contradicted by contrary presumptions, constitute evidence of an infringement of the competition rules. Such evidence should be sufficient to support a judicial presumption of the existence of circumstances which (when taken together) establish (directly or indirectly, through the inference of further judicial presumption) the infringement⁵.

6. Moreover, although according to the above principles, the legal burden of proof is borne either by the HCC or by the undertaking or association concerned, the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged. In light of the above, even if the facts presented by the HCC are not sufficient, on their own, to draw a judicial presumption, the infringement may be considered proven if these facts are enough to establish the obligation of the involved undertaking to provide a convincing alternative explanation for its conduct and the latter fails to meet this obligation. The abovementioned methodology has been accepted as not constituting a shift in the burden of proof, but rather as a provision related to the evaluation of evidence, based on the facts of common experience. In short, even before the issue of allocation of the burden of proof arises, the parties are alternately required to fulfill their obligation to support their positions with appropriate evidence⁶.

7. In particular, when the HCC relies on evidence which is in principle sufficient to demonstrate the existence of the infringement, it is not sufficient for the undertaking concerned to raise the possibility that a circumstance arose which might affect the probative value of that evidence in order for the HCC to bear the burden of proving that that circumstance was not capable of affecting the probative value of the evidence. On the contrary, except in cases where such proof could not be provided by the undertaking concerned on account of the conduct of the HCC itself, it is for the undertaking concerned to prove to the requisite legal standard, first, the existence of the circumstance relied on by

⁴ See StE 884/2016, in conjunction with StE 1410/2022, which recognizes that the goal protected by the provisions on free competition is per se the competitive structure of the market, i.e., the individual right of equal access and participation in economic life, which is protected by the Greek constitution.

⁵ See indicatively, StE 3858/2014, 1934/2013 and 2780/2012.

⁶ Ibid.

it and, second, that that circumstance calls into question the probative value of the evidence relied on by the HCC⁷.

2. Assessment of evidence

8. Regarding the evaluation of evidence, it is noted that national procedural rules generally establish the principle of the unfettered evaluation of evidence, either independently or in combination with other evidence, unless otherwise provided for⁸. However, the fact that evidence is freely evaluated by the Courts does not mean that all individual pieces of evidence have the same substantive probative value nor that the Court is free to assess their weight as they wish.

9. The probative value of the evidence, meaning their reliability and the weight that should be attributed to them, is assessed based on the rules of common sense and, when appropriate, common or specialized and technical experience, and considering other evidence and circumstances. Such value also depends on the plausibility of the primary information provided, the circumstances in which that information was produced or obtained, its origin, and its recipient⁹.

10. Thus, an infringement may be established by records and data from commercial or tax books, internal documents, communications, correspondence, and even by unilateral statements or communications of an undertaking, exchanges of information and contacts with competitors, provided there is no public distancing.

11. Furthermore, it has been held, for instance, that incriminating information that derive from internal documents of an undertaking, which were drawn up in direct connection with the facts at issue, or more generally, at an unsuspecting time, without intention or thought that they may come to the knowledge of third parties, holds a particularly high probative value in relation to the matters they testify about, especially if it can reasonably be expected that the authors of the documents witnessed the facts described therein. Similarly, statements or testimonies contrary to the interests of the declarant have a high probative value. Such increased credibility allows them to serve, alone or in combination with other evidence, as a basis for inferring facts about other persons, undertakings, periods of time or relevant facts. Indicia of participation of an undertaking in a prohibited cartel may be inferred even from evidence that does not relate directly to that undertaking but to other members of the cartel¹⁰.

3. Burden of proof

12. According to Article 4 of Law 3959/2011, “each party shall bear the burden of proof of their claims during proceedings before the HCC for the purposes of Articles 1 and 2”, while according to Regulation 1/2003, it is for the authority alleging an infringement of Article 101(1) and Article 102 TFEU to prove the existence thereof to the required legal

⁷ HCC 787/2022.

⁸ Article 148 of Code of Administrative Procedure

⁹ StE 106/2022, 204/2021.

¹⁰ StE 106/2022, 204/2021, 1695/2017, 1677/2014, 1934/2013, 2780/2012, DEA 1628/2019.

standard¹¹. In this context, the HCC bears the burden of proof when finding an infringement.

13. Under Greek law, the level of evidence required before a judge can conclude that a party has met its burden of proof does not receive an *ex ante* abstract answer in terms of probability, as is the case in other civil law jurisdictions¹².

14. The burden of proof shifts to the undertakings under investigation in the following cases, by way of indication:

- It is for the undertaking or association of undertakings invoking the benefit of a defense against a finding of an infringement to demonstrate to the requisite legal standard that the conditions for applying such defense are satisfied¹³.
- The undertaking or association of undertakings claiming the benefit of Article 101(3) TFEU (and the corresponding national provision of Article 1 para 1 of Law no. 3959/2011) shall bear the burden of proving that the conditions of that paragraph are fulfilled¹⁴.
- It is for the dominant undertaking to prove in a justified and verifiable way, that, in view of special circumstances, either its conduct may not cause harm on competition, or it is objectively necessary or that efficiency gains counteract any likely effects¹⁵.
- It is incumbent upon the party requesting inability to pay an imposed fine to provide objective and sufficient evidence to support its request¹⁶.
- in the context of merger control, the party invoking the failing firm defense bears the burden of proof that its claim meets the relevant requirements¹⁷.

15. Moreover, in the case of complaints, it has been held that the complainant bears the burden of proving the practice complained of and it is for the complainant to put forward arguments and evidence both before the HCC and before the Courts in order to demonstrate the validity of their complaint and the unlawful nature of the HCC decision rejecting that complaint¹⁸.

¹¹ See Article 2 and Preamble para 4 of Regulation 1/2003. Also see Directive 2019/1, Preamble, para 35.

¹² Gippini, E. (2010), “The elusive standard of proof in EU Competition Cases”, World Competition https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1433744 .

¹³ Regulation 1/2003, para 4.

¹⁴ DEA 840/2019.

¹⁵ StE 985/2023

¹⁶ HCC 807/2023, 642/2017.

¹⁷ HCC 827/2023

¹⁸ DEA 2267/2019.

4. Presumptions

16. In line with EU case law, the HCC and national courts recognize a series of presumptions on which the HCC may rely to discharge its burden of proof, presented below by way of indication.

17. More specifically, it has been ruled that the overall and combined assessment of the circumstances and evidence of a particular case may substantiate a concerted practice if the parallel conduct identified constitutes the only plausible explanation for such conduct¹⁹. Similarly, it has been accepted in the case of vertical restraints that a presumption can also be inferred from the failure of an undertaking to oppose the seemingly individual conduct of its business partner²⁰.

18. In relation to Article 102 TFEU and the corresponding national provision - Article 2 of Law 3959/2011- it has been held that a dominant position is, in principle, presumed in any event when an undertaking has a market share of 50% or above, whereas a market share that merely exceeds or approaches 40% may be sufficient under some circumstances²¹. Furthermore, according to recent case law²², it is not necessary to prove the effects of exclusivity clauses, as well as loyalty rebates, since they are inherently capable of leading to foreclosure.

19. In the same vein, in the context of the application of Article 101 TFEU and the corresponding national provision - Article 1 of Law 3959/2011- violations by object are practices that can be regarded, by their very nature, harmful to the proper functioning of competition²³.

20. It is also noteworthy that it has been held by the StE that the distinction between by object and by effect infringements is primarily a matter of the applicable substantive legal test and not merely a procedural issue of evidence²⁴.

5. Economic Analysis

21. As mentioned above, it has been consistently held by national courts that in the case of “by object” violations, namely agreements, decisions by associations of undertakings and concerted practices constituting a form of coordination that must be regarded, by its very nature, as harmful to the proper functioning of normal competition, the HCC is in no way required to examine or prove the effects of that agreement and engage in thorough economic analysis²⁵.

22. However, following the adoption of the European Commission Guidance paper on the Commission's enforcement priorities in applying Article 82 of the EC Treaty as well as

¹⁹ StE 1036/2016, 3105/2015, 2365/2013.

²⁰ StE 1695/2017.

²¹ StE 1410/2022.

²² StE 1410/2022, 985/2023.

²³ StE 1677/2014.

²⁴ StE 166/2018.

²⁵ StE 3103/2015. 1324/2013. 2780/2012.

the CJEU Judgment in *Intel*²⁶, the HCC has faced a surge in claims that a full-blown economics analysis is a pre-requisite for the finding of an infringement under Article 102 TFEU and the corresponding national provision and, therefore, that it is necessary that the HCC should adopt an effects-based approach to assessing abuse of dominance cases. Such claims have been brought before the Greek courts, which have confirmed the legality of HCC's decisions on abuse of dominance to date²⁷.

23. More specifically, the StE has ruled that, when applying Article 102 TFEU - Article 2 of Law 3959/2011, the HCC is by no means obliged to perform econometric methods, such as the "as efficient competitor test"²⁸. Moreover, the StE confirmed that when an undertaking invokes defenses including economic studies (such as the AEC test) and hypothetical counterfactual analysis, they may not be taken into consideration unconditionally, even if deemed to lack technical flaws. Such analysis should be based on the worst possible case scenario and it should provide assurances of the lack of Type-2 errors (false negatives). If these preconditions are not met, the HCC may reject relevant defense arguments, without further analysis.

6. Judicial Review

24. HCC decisions may be challenged by means of an appeal before the Athens Administrative Court of Appeal (DEA), acting as a first instance court²⁹. The DEA may, in principle, exercise a full and unrestricted review of the facts and grounds of the case and may modify the challenged decision. However, such review may not extend to matters relating to the margin of discretion enjoyed by the HCC when exercising its competence to shape and enforce competition policy³⁰. Accordingly, the dismissal of defenses based on econometric models, such as the AEC test, as well as other complex technical and economic analysis, such as the counterfactual analysis, is subject to marginal review by the DEA³¹.

25. Successful substantive grounds based on the failure of the HCC to discharge its burden of proof are generally limited³². However, relatively recently the DEA annulled an HCC decision which based its finding of a concerted practice on the existence of parallel behavior (common rebates policy) and statistic and econometric analysis. According to the findings of DEA, parallelism could be attributed to another plausible economic explanation³³.

²⁶ C-413/14 P - *Intel v Commission*.

²⁷ See analysis under G.

²⁸ StE 1410/2022.

²⁹ DEA judgements may be challenged on points of law before the Council of State (StE). For more details on judicial review, see Kalintiri & Nteka, Greece Report in *Judicial Review of Competition Law Enforcement in the EU Member States and the UK*, Kluwer, 2024.

³⁰ StE 166/2018.

³¹ StE 1410/2022, 985/2023.

³² *Ibid.* Kalintiri, Nteka.

³³ DEA 2692/2021.

7. Challenges

26. The most important issues faced by the HCC in the assessment of competition cases concern the application of Articles 102 TFEU and the corresponding national provision (Article 2 L. 3959/2011), and, in particular, the obligation to conduct an AEC test and the proper rebuttal of AEC test-based arguments. We found challenging to navigate the evolving position of EU competition law with regard to exclusivity/loyalty rebates, in view of the Priority Guidance Document and the recent case law of the EU courts as well as the decisional practice of the European Commission with regard to the application of the *Intel* criteria, but also arguments submitted by the defendants attempting to expand this approach also to non-price restrictions, such as exclusive dealing arrangements. Similar difficulties have been raised regarding bundled rebates or mixed bundling practices, which may be addressed either by employing the tying standard or by having recourse to a price/cost test.

27. In the last two decades, the HCC has employed different types of economic quantitative methods in the context of its investigations in abuse/ monopolisation cases. Such examples include:

Decision 520/2011 concerning the salty snacks market in Greece.

28. The case concerned two complaints alleging that the company Tasty SA had implemented a targeted policy on a systematic basis, seeking to exclude its competitors from the market by means of exclusivity and discrimination.

29. In the course of the ensuing investigation, the HCC gathered an extensive set of data from the dawn raid which took place at Tasty's premises and from several information requests addressed to competitors and customers, with a view to establishing whether Tasty held a dominant position on the market and whether it had engaged in anti-competitive practices. Extensive economic analysis was also conducted for the purpose of defining the relevant product market, after the submission of economic reports and testimony by both Tasty and the complainant.

30. In particular, the quantitative tests performed and thoroughly discussed in the context of the market definition were a **SSNIP test**, **critical loss analysis**, **price correlation analysis** and **cointegration analysis**³⁴. The HCC assessed the economic analyses brought forward by the company and, without however performing additional quantitative tests, dismissed them and adopted a narrower market definition.

31. The DEA, which heard the case³⁵ upheld the HCC's analysis.

Decision 581/2013 concerning the retail market for baby diapers in Greece.

32. The HCC found that Procter & Gamble (P&G) Greece had infringed Articles 1 and 2 of the Greek Competition Act and Articles 101 and 102 TFEU, by engaging in anticompetitive commercial practices in the retail market for baby diapers in Greece and imposed a fine of EUR 5.3 million.

33. According to the HCC decision, the evidence gathered throughout the investigation (including contracts between P&G and the supermarkets concerned; interviews of the undertakings concerned; supermarkets' scorecards; shelf plan-o-grams, instructions to merchandisers and other internal documents and emails) proved that P&G adopted and

34 HCC Decision 520/2011, paras. 95-105.

35 DEA 869/2013.

implemented anticompetitive practices aimed at maintaining and/or strengthening its dominant position in the market for baby diapers, thereby excluding competitors and limiting their growth possibilities. The alleged abusive conduct included, in particular, individualised target rebates and rebates conditional upon the commitment of excessive shelf space for P&G baby diapers products, as agreed between the latter and major retail chains between 2003 and 2011.

34. In order to define the relevant market, the HCC considered the price elasticities of the company under investigation (own price elasticity of demand and cross price elasticity of demand) using a Log-Log model. The HCC also considered whether a SSNIP test would also be appropriate but eventually concluded that such a test would not be relevant in the circumstances of the case.

35. In addition, it is noted that the company under investigation argued that the HCC should have run an economic analysis in order to establish the anti-competitive effects of its behaviour. This approach was not accepted by the HCC, however, two HCC members expressed a dissenting opinion arguing that such analysis was necessary in the case at hand.

36. The DEA, which heard the case³⁶ upheld the HCC Decision as regards the above issues and, *inter alia*, dismissed the applicant's argument that the HCC was under the obligation to run an economic analysis in order to assess the effects of the company's behaviour on the market. The Court found that the HCC has broad discretion to this effect and it was sufficient that the HCC had considered that the analysis brought forward by the company under investigation during the administrative procedure was not relevant in the circumstances of the case. The StE confirmed the legality of the Decision³⁷.

Decision 590/2014 concerning the market for the production and distribution of beer:

37. The case concerned an investigation (*ex officio* and following a complaint by Mythos Brewery S.A.), into whether Athenian Brewery S.A., a subsidiary of Heineken N.V. active in the production and distribution of beer in Greece, abused its dominant position, thereby infringing Articles 2 of the Competition Act and 102 EU Treaty.

38. According to the HCC, the dominant company Athenian Brewery S.A. had adopted and implemented a single and targeted policy that sought to exclude its competitors from the on-trade consumption market (e.g. HORECA chains and other retail outlets) and to limit their growth possibilities, over a period of fifteen years. To achieve this objective, Athenian Brewery S.A. employed various commercial practices aimed at exclusivity, including significant payments conditional upon exclusivity and/or the foreclosure of competitive brands, loyalty and target rebates. Furthermore, Athenian Brewery S.A. was found to have engaged in restrictive practices at the wholesale level, by providing wholesalers with significant economic motives that promote exclusivity and by exercising pressure on them not to trade or introduce competing products. A fine totalling EUR 31.451.211 was imposed on Athenian Brewery S.A.

39. In that case, the company under investigation had brought forward a **SSNIP test** and carried out a **critical loss analysis** in the context of the market definition (see paras. 166-177 of the Decision). The HCC assessed the economic analyses brought forward by the company and dismissed them. Contrary to the company's submissions, the HC, adopted a broader market definition without however running an additional SSNIP test.

³⁶ DEA 2458/2017.

³⁷ StE 1410/2022.

40. In addition, the company under investigation submitted a detailed economic analysis (based on the **Almost Ideal Demand System -AIDS model**) in order to rebut the HCC's assumption that it held a dominant position in the relevant market (see paras. 274-291 of the Decision). The HCC assessed these arguments and dismissed them, finding that the company held a dominant position based on a number of factors that established that dominance and considered that the economic analysis brought forward by the company was not sufficient to overturn such conclusion.

41. The Administrative Court of Athens, which heard the case upheld the HCC's analysis³⁸. The StE confirmed the legality of the Decision³⁹.

Decision 610/2015 concerning the market for detergents and cosmetics:

42. The case concerned an *ex officio* investigation in the market for detergents and cosmetics which resulted in an infringement decision with fines totalling EUR 10,450,000 total imposed on Colgate Palmolive (C-P) and chains of super markets for anticompetitive clauses in the supply agreements that led to the prevention of importing C-P products from other Member States that constituted violation of Articles 1 and 2 of the Greek Competition Act and 101 and 102 TFEU.

43. The company under investigation had brought forward a theoretical econometric model to test whether the contractual clauses in question affect negatively the domestic prices and consumer welfare. The HCC assessed the company's proposed model and concluded that the econometric model was based on methodological assumptions that were reasonable to lead to different and misleading conclusions, noting, *inter alia*, that it did not take into account the important role price elasticity of demand plays out.

44. The DEA⁴⁰ upheld the HCC's analysis.

Decision 663/2018 concerning the market for the production and sale of margarine and butter:

45. The case concerned the *ex officio* investigation conducted by the Directorate-General for Competition regarding the potential violation of Articles 1 and 2 of the Greek Competition Act as well as Articles 101 and 102 TFEU by the company ELAIS-UNILEVER HELLAS in the market for the production and sale of margarine and butter. The HCC found that ELAIS-UNILEVER HELLAS SA had adopted and implemented abusive practices aimed at maintaining and/or strengthening its dominant position in the market for margarines, thereby excluding competitors and limiting their growth possibilities. The alleged abusive conduct included, *inter alia*, target rebates, as well as the imposition of unfair trading conditions by banning the promotion of competitive brands, in breach of Article 2 of the Greek Competition Act and 102 TFEU from 2002 to 2008. The HCC also found that ELAIS-UNILEVER HELLAS SA engaged in anticompetitive vertical practices, and it imposed a fine totalling EUR 27.561.704,69.

46. The DEA⁴¹ upheld the HCC Decision on the above issues and considered that the HCC's reasoning was not flawed in this respect, given that the AEC test was carried out by

38 DEA 4055/2017.

39 StE 985/2023.

40 DEA 1627/2019. The appeal before the StE is pending.

41 DEA 1611/2020. The appeal before the StE is pending.

the HCC only on a subsidiary basis and it had not altered the HCC's main conclusions as regards the effects of the company's behaviour on the market.

Decision no. 762/2021 concerning the market for sale of cola and non-cola beverages for on-premise consumption (cold market)

47. The HCC fined the company "COCA COLA HELLENIC BOTTLING COMPANY S.A." ("COCA COLA 3E") EUR 10,342,773 for abuse of dominant positions (infringement of Articles 2 L. 3959/2011 and 102 TFEU) in the Greek markets for sale of cola and non-cola beverages for on-premise consumption⁴², following the examination of a complaint by the company "VAP PANTELIS KOUGIOS S.A." and a relevant ex officio investigation. The HCC found that COCA-COLA 3E undertook a series of practices, during the period 2015-2019, by concluding exclusivity agreements and/or resorting to other practices with equivalent effect (in particular, with regard to products and/or refrigerators and/or logos of its competitors), which departed from competition on the merits and mainly aimed at single branding, leading to the exclusion of competitors, as well as by engaging in punitive behavior in case outlets decided to cooperate with competing suppliers. COCA-COLA 3E submitted two versions of an As Efficient Competitor test, in support of its argumentation, which were, however, both dismissed by the HCC, inter alia, due to technical flaws, which led the HCC to consider that COCA-COLA 3E's submissions were not sufficient to rebut the presumption that the practices under investigation were capable of restricting both actual and potential competition in the relevant market.

48. An appeal is pending before the DEA.

8. Conclusion

49. Competition law cases are inherently complex. Moreover, as companies become more aware of competition law, they tend to dispose of direct evidence. At the same time, as mentioned in the OECD's background note, the shift towards a more effects-based approach has led to the rise of economic evidence, which in turn has increased the evidentiary standard and the difficulty of meeting the standard of proof. Accordingly, the HCC has had to incur additional costs and dedicate significant of its limited resources to assess competition cases and develop itself technical expertise. In our view, this situation has undermined effective enforcement.

50. In light of the above, the ongoing policy debate on possible ways to ease the burden on competition authorities is of paramount importance. Admittedly, the discussion about possible adjustments to the legal standards is a delicate balancing exercise. Accordingly, ways to maintain and further develop rebuttable presumptions based on prior experience, common sense, proof proximity as well as effectiveness, particularly in cases of information asymmetry, should also be discussed. At the same time, having a clearly established standard of proof and applying it consistently and transparently can be important to promote legal certainty.

42 The HCC also imposed a specific behavioural remedy for a period of two years from the publication of the Decision.