Organisation for Economic Co-operation and Development

DAF/COMP/WP2/WD(2021)5

Unclassified

English - Or. English

25 May 2021

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 2 on Competition and Regulation

Competition Enforcement and Regulatory Alternatives – Note by Greece

7 June 2021

This document reproduces a written contribution from Greece submitted for Item 1 of the 71st OECD Working Party 2 meeting on 7 June 2021.

More documents related to this discussion can be found at http://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives.htm

Please contact Ms Federica MAIORANO if you have any questions about this document [Email: Federica.MAIORANO@oecd.org].

JT03476974

Greece

1. Introduction

1. This Note by the Hellenic Competition Commission ("HCC") first provides a concise discussion of the interplay between regulation and competition[1]. Second, it discusses the quasi regulatory tools for the enforcement of competition law and policy under Law 3959/2011 on the Protection of Free Competition (as amended) ("Greek Competition Act") and presents examples of past enforcement practice. Third, it presents the proposed changes to the Greek Competition Act considering market digitalization and platform ecosystem competition.

2. Competition and Regulation: contextualising the debate

2. Competition law is one among various tools for state intervention in markets, and its contours must be defined with regard to other forms of state intervention, such as regulation[2]. Governments intervene widely in markets to achieve various policy goals. Sometimes these policy goals align with one another and sometimes they conflict and require various trade-offs in policy responses, such as to pursue efficiency, to correct market failures, or to ensure equity and distributive justice.

3. Broader competition policy (which includes not only competition law provisions but also other measures to address competition problems in the economy) interfaces with state activity across many different levels of how government organizes economic behaviour. Government organizes economic activity in part through the shape and nature of regulation and overall state involvement. When considering the question of institutional design, how countries design optimal competition policy involves three choices: what to leave to the jurisdiction of competition law (and competition agencies and judges), what to assign to non-competition authorities (such as sector regulators) exclusively as part of their jurisdiction, and how to establish concurrent jurisdiction among the competition authority and two or more regulatory authorities.

4. Competition policy goals can be aligned with broader regulatory goals. However, sometimes such goals are in conflict. Similarly the relationship between competition law and regulation can be shaped by various complementarities or can be one of substitution.

[1] Various issues on the competition/regulation interplay were addressed at the conference *The intersection between Competition and Regulation and the Prospects for Reform*, organised by HCC. See the relevant press release https://www.epant.gr/en/enimerosi/press-releases/item/1301-press-release-digital-international-conference-the-intersection-between-competition-and-regulation-prospects-for-reform.html. For the teleconference video overview see https://www.epant.gr/en/enimerosi/publications/media/item/1294-the-intersection-between-competition-and-regulation-prospects-for-reform.html

[2] There is a massive literature on this distinction between competition and regulation, perceived as separate spheres but still in constant interaction with each other. We note some recent contributions in Europe: N Dunne, *Competition law and Economic Regulation – Making and Managing Markets* (CUP, 2015); J Drexl & F DiPorto (eds.), *Competition Law as Regulation* (Edward Elgar, 2015); J Tapia & D Mantzari, 'The Regulation/Competition Interaction', in I Lianos and D Geradin (eds) *Handbook on European Competition Law-Substantive Aspects* (Edward-Elgar 2013), 588.

5. Conflicts between competition law and regulation may be *direct*, if regulation affects the core parameters of competitive markets by restricting competition on price, entry and quantity, as it is often the case for economic regulation, or *lateral*, in case these core dimensions of competition are not directly targeted, but regulation may nevertheless indirectly affect them, as it may be the case in situations of social or technical regulation. The situation is more complex with regard to social and technical regulation, which for instance sets and monitors standards to ensure compatibility between various products, to address privacy, or safety and environmental concerns. One may distinguish between situations of lateral conflict which may occur because competition law enforcement can jeopardise the aims followed by these various regulatory tools, from what we can call situations of "regulatory osmosis", that is, the absorption of regulatory aims in the enforcement of competition law[3]. This process may occur as a result of the pressure to interpret and enforce competition law principles in congruence to the aims and the structure of the entire legal system to which competition law is integrated.

6. Economic regulation denotes the government intervention in a sector to correct a market failure arising from e.g. a natural monopoly (telecom, energy), or asymmetric information. It acts *a priori*, requires continuous monitoring and is intrusive in management. In contrast, competition law consists in a set of rules for market operation that prevents and sanctions abuses of market power, across all sectors. It acts *a posteriori*, once behavior is observed and mostly relies on the dissuasive power of sanctions. From this perspective, it is a less intrusive tool for market management in comparison to regulation.

7. Economic regulation's role is complementary to competition law since regulation controls monopolies that would never function efficiently under competition, its main function being to adopt measures that can control monopoly pricing. By ensuring non-discriminatory access to necessary inputs, e.g. network infrastructure, economic regulation may also facilitate competition in markets, thus enabling a greater scope of intervention for competition law. The less the regulatory regime interferes with the workings of the market, the more room for competition law. Expanded confidence in competition and markets may lead some previously regulated sectors towards a specific competition law regime, taking into account the specificities of the economic sector, and even leading to the application of general competition law rules. This movement across the regulation/competition continuum may be observed in various sectors, such as airlines, maritime transports, telecoms and energy.

8. However, regulation may also be substitutable to competition law, as experience has shown that when markets or segments of network industries become competitive then sector-specific regulation is often substituted by competition law. Indeed, this may happen when the interaction of competition law and regulation could prove problematic, in particular if the regulatory regime aims to control prices, restrict entry, give incumbents a competitive advantage, or requires or permits some practice that competition law prohibits. Note that price or entry regulation by Member States may be subject to EU competition law, under a joint application of Articles 4(3) TEU and 101/102 TFEU[4]. Risks of

[3] See, I. Lianos, V. Korah, P. Siciliani, Competition Law: Analysis, Cases and Materials (OUP, 2019), paras 2.4.3.

[4] On price regulation and EU competition law in general, see AD Macculloch, 'State intervention in pricing: an intersection of EU free movement and competition law', (2017) 42(2) ELRev 190; A. Andreangelli, 'Making markets work in the public interest: Combating hazardous alcohol consumption through minimum *pricing rules* in Scotland', (2017) 36(1) Yearbook of European Law 522; N Dunne, 'Price Regulation in the Social Market Economy', LSE Law, Society and Economy

substantive conflict may be exacerbated if different institutions are in charge of competition law enforcement from those in charge of regulating the specific economic sector.[5]

9. In a nutshell, EU Competition law accepts the cumulative application of competition law and economic regulation. *Ex ante* regulation by a National Regulatory Authority ("NRA") does not prevent the *ex post* intervention on the basis of EU competition rules[6]. That said, it might be necessary to choose which of the instruments will be preferred for the specific circumstances of the case.

10. Several parameters may influence this choice. *First*, the timing of intervention, since regulatory authorities intervene *ex ante*, as opposed to 'traditional' competition enforcement being primarily an ex post instrument focusing on abusive and anti-competitive conduct. However, this distinction may be blurred, especially for competition authorities, given that they often possess a number of tools that allow for ex ante intervention, such as sector inquiries and the adoption of different types of "prophylactic" or structural remedies[7]. *Second*, regulation may pursue a wider array of policy goals than competition law enforcement[8]. *Third*, competition enforcement can be more adaptable to rapidly emerging new business models, such as multi-sided platforms and the emergence of platform ecosystems.

11. In conclusion, the balance between competition law enforcement and regulation will depend on the dominant perception of the moment with regard to the likelihood of market failure vis-à-vis governmental failure and on the policy space that is left by EU law (primary and secondary) to Member States for regulatory intervention. Periods favouring government intervention in markets and regulation may be followed by periods limiting government intervention and use instead the competition law tool.

12. Finally, as mentioned above, the distinction between competition and regulation becomes blurred in light of various competition authorities' quasi regulatory tools that allow for ex ante intervention. Section III below discusses such tools in the HCC arsenal.

Working Papers (03/2017). Department of Law, London School of Economics and Political Science.

[5] This may be the case in the EU, as the Commission and a network of National Competition Authorities (NCAs) are in charge of competition law enforcement but National Regulatory Authorities (NRAs) are in charge of regulation. In the UK, the risk of conflict is mitigated by the fact that sector-specific regulators have concurrent enforcement powers with regard to competition law enforcement in their respective economic sector of responsibility.

[6] See, Case C-280/08 *Deutsche Telekom AG v Commission [2010]* ECR I-9555; Case C-295/12, *Telefónica SA and Telefónica de España SAU v Commission*, ECLI:EU:C:2014:2062. For a more detailed analysis, see G. Monti, 'Managing the Intersection of Utilities Regulation and EC Competition Law' (2008) 4(2) *Competition Law Review* 123; J Tapia & D Mantzari, 'The Regulation/Competition Interaction', in I Lianos and D Geradin (eds) *Handbook on European Competition Law-Substantive Aspects* (Edward-Elgar 2013), 588. Concerning UK competition law, see G. Monti, 'Utilities regulators and the Competition Act 1998 in B. Rodger (ed) *Ten Years of UK Competition Law Reform* (Dundee University Press, 2010), 139.

[7] I. Lianos, Competition Law Remedies in Europe: Which Limits for Remedial Discretion?, in I. Lianos & D. Geradin, (Eds.), *Handbook on European competition law* (Edward Elgar, 2013), 362.

[8] Nevertheless, there is scope for adjusting competition enforcement tools to meet certain wider societal goals. See, I. Lianos, Polycentric Competition Law, (2018) 71(1) Current Legal Problems 161.

3. Quasi-regulatory instruments under Greek Competition Act

13. The HCC enforces competition law horizontally across sectors with the exception of telecommunications and postal services, where the authority lies with the competent NRA, i.e. the Hellenic Telecommunications and Post Commission ("EETT").

14. The Greek Competition Act incorporates a number of quasi regulatory tools namely: i) the acceptance of commitments (art. 25, par.6) in case of suspected infringements under Articles 1 and 2 (equivalent to Articles 101 and 102 TFEU)[9], ii) the imposition of structural and behavioral remedies under merger control (art.8 par.8)[10], iii) the competence to issue Opinions (art. 21)[11], iv) the market investigation tool in specific sectors of the economy where conditions of effective competition do not exist (art. 11) according to which remedial measures may be imposed upon market participants[12], and v) sectoral inquiries (art. 40).

15. In addition, the HCC cooperates with NRAs or other authorities monitoring particular sectors of the national economy, by assisting them, upon request, on matters of application of Articles 1 and 2 of the Greek Competition Act (equivalent to Articles 101 and 102 TFEU) in the relevant sectors or by requesting assistance of the above authorities in cases where the responsibility of implementing the above articles in those specific sectors lies with them (art. 24).

16. Below we discuss these quasi regulatory tools and the potential cooperation between the HCC and the NRAs in turn.

3.1. Adoption of commitment decisions – The case of the liberalized gas market

3.1.1. Commitment Decisions pursuant to Article 9 of Regulation No 1/2003

Legal Framework

17. Akin to art.9 of Regulation No.1/2003[13], art.25, par.6 of the Greek Competition Act foresees that the HCC may accept commitments, on the part of the undertakings or

[9] See HCC Decision 588/2014 codifying the commitment proceedings. See below HCC Decision 551/2012.

[10] See below HCC Decision 658/2018 .

[11] See below HCC Opinion 39/2019.

[12] See below HCC Decision 29/2012. See also https://www.epant.gr/en/enimerosi/investigation-press.html and also https://www.epant.gr/en/ enimerosi/investigation-construction.html.

[13] Art.9 of Regulation (EC) No 1/2003 has been used as a means of exerting pressure for the adoption of commitments and/or to force the opening of markets – i.e. the adoption of structural remedies, the standard of proof is thus significantly low and the parties may propose remedies to remove the Commission's concerns. Given the speed of the procedure, the Commission is also keen in relying on Article 9 decisions to obtain quick structural changes in the market. On commitment proceedings see J Temple Lang, 'Commitment Decisions under Regulation 1/2003' [2003] ECLR 347; R Whish, 'Commitment Decisions under Article 9 of the EC Modernisation Regulation: Some Unanswered Questions' in M Johansson, N Wahl and U Bernitz (eds), Liber Amicorum in Honour of Sven Norberg: A European for All Seasons (Bruxelles, Bruylant, 2006) 555; CJ Cook, 'Commitment Decisions: The Law and Practice under Article 9' (2006) 29 World Comp 209; W Wils, 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation 1/2003'(2006) 29 World Comp 345; GS Georgiev, 'Contagious Efficiency: The Growing Reliance on US-Style Antitrust Settlements in EU Law' [2007] Utah L Rev 971; H Schweitzer, 'Commitment Decisions under Art. 9 of Regulation 1/2003: The Developing EC Practice and Case Law' (2008) EUI Working

associations of undertakings concerned, to cease the possible infringement of Articles1 and 2 or Articles101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and may make such commitments binding for the undertakings or associations of undertakings concerned. The HCC may also reopen the proceedings where there has been a change in any of the facts on which the decision was based or the undertakings concerned act contrary to their commitments or the decision was based on incomplete, incorrect or misleading information provided by the undertakings concerned. The HCC with its Decision 588/2014 specified the terms, conditions and relevant procedure for the acceptance of commitments.

The case of the liberalized gas market

18. The case concerned two consolidated complaints by ALUMINIUM SA.[14], the first one submitted in 2009 against DEPA[15] and DESFA[16] (a wholly owned subsidiary of DEPA)[17] and the second one in 2010 against DEPA. Following the investigation of the Directorate General for Competition, evidence was found supporting the allegations of the complainant that DESFA, denied access to the gas transmission network and that DEPA denied access to the secondary gas transmission market excluding its customers from importing Liquid Natural Gas, concluded an exclusive purchasing agreement and imposed the tying of supply and transmission services of natural gas.

19. With Decision **551/2012**, the HCC accepted commitments offered by DEPA with a view to speeding up the liberalisation of the Greek gas supply market. The commitments evolve around four main axes: a) the unbundling of gas supply from gas transportation services[18], b) the higher degree of customers' mobility and increase of liquidity in the

Papers LAW 2008/22; W Wils, 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) 31 World Comp 335; Rab, Monnoyeur and Sukhtankar, 'Commitments in EU Competition Cases'(2010) 1 JECLAP 171; F Wagner-von Papp, 'Best and Ever Better Practices in Commitment Procedures after Alrosa: The Dangers of Abandoning the "Struggle for Competition Law" ' (2012) 49 CMLRev 929; N Dunne, 'Commitment Decisions in EU Competition Law' (2014) 10 JCL&Econ 399; M Ioannidou, 'The application of Article 102 TFEU in the EU energy sector: a critical evaluation of commitments' in F di Porto and R Podszun (eds), Abusive Practices in Competition Law (ASCOLA Competition Law series, Edward Elgar 2018) 129. See also J Tapia & D Mantzari, 'The Regulation/Competition Interaction', in I Lianos and D Geradin (eds) Handbook on European Competition Law-Substantive Aspects (Edward-Elgar 2013), 588.

[14] By the HCC Decision No. 75/2-12-2011 the two complaints were consolidated into one relevant investigation. The first of the aforementioned complaints was originally submitted to the Regulatory Authority for Energy (RAE) and was forwarded to the HCC pursuant to RAE Decision No 1175 in 2009. The second complaint was lodged against DEPA by ALUMINIUM SA directly to the HCC, in 2010.

[15] DEPA Commercial S.A. (DEPA)

[16] Hellenic Gas Transmission System Operator S.A. (DESFA), the operator of the gas transmission system in Greece.

[17] Greek law prescribes the full operational separation between the two entities.

[18]The **unbundling** of supply from transport is addressed with DEPA's obligation to untie contractually the two products/services by offering to its clients (from 30/11/2012) a gas supply contract not including transportation services. DEPA is also obliged to offer without undue delay and free of charge (if no cost incurred by it) any unused transportation capacity allocated to it at the gas network entry points, imposing a certain reduction percentage (55%) on DEPA's transportation rights per network entry point and a percentage (up to 20% or more, free of charge, if reserved capacity at the network exit points exists) on DEPA's total capacity per network entry point for a client after its declaration on the gas' purchase for a certain time period.

market of natural gas[19], c) the introduction of fair, transparent and non-discriminatory model contractual terms (including cost-oriented pricing of peak gas and other ancillary services)[20]as approved by the Regulatory Authority for Energy (RAE) and d) the gradual opening of reserved capacity in the natural gas transmission network[21].

20. Following the Decision 551/2012, the HCC issued a number of Decisions[22] amending the commitments initially adopted by taking into account changes in the regulatory framework or other facts , which effectively and efficiently address the competition concerns identified. In the light of all the case-file evidence and the positive opinion of the Regulatory Authority for Energy (RAE), with which the HCC had a close cooperation in this case, the HCC with its recent Decision 723/2020 unanimously decided that there has been a substantial change in the relevant market conditions on which HCC Decision No. 551/VII/2012, as amended and applicable, was based regarding the third Commitment undertaken by DEPA and accepted the request of DEPA for its exemption from the obligation to implement the program of distribution of natural gas quantities through electronic auctions, as set out in Decision No. 631/2016.

21. A Decision is still pending at the time of writing on whether the purpose of the remaining of the above Commitments[23] has now been fulfilled, taking into account the prevailing conditions in the domestic market for natural gas and the establishment of a substantial change in the facts on which the HCC Decision 551/2012, as amended and applicable, was based.

22. The HCC accepted the commitments proposed by DEPA since the problems resulted from the liberalization of the energy market have been promptly identified, addressed and effectively resolved within the period of commitments duration. Additionally, the commitment decision contributed to the speeding up and of the procedure of restoring the efficient competition in the market.

[19]A higher degree of **customers' mobility** is achieved, firstly, through the renegotiation of their annual contract gas quantities (ACQs). In particular, DEPA will inform all its clients by 30th November 2012 i) for the re-assessment of their annual quantities ii) for the contract duration (no longer than two years with customers that purchase more than 75% of their actual gas supply needs from DEPA). In addition, an auction system shall increase **liquidity** in the market of natural gas supply and therefore decrease customers' dependence from DEPA.

[20]With a view to enhancing **transparency** as regards contractual terms and to assuring that the respective services are supplied under **FRAND terms**, DEPA committed to adopt model contracts approved by the Regulatory Authority for Energy (RAE) and published at DEPA's website.

[21] The accepted commitments leading to the **opening of sufficient capacity** at the entry points of the transmission network for third importers and customers, in order to enable capacity acquisition at the primary market of gas transmission and thus the possibility to find alternative sources of supply. In this respect, DEPA committed, firstly to not acquire any future capacity at the network entry points, unless no third party has declared its intention to use such a capacity, and for a period of time not exceeding one year.

[22] Decisions 589/2014, 596/2014, 618/2015, 631/2016, 651/2017.

[23] See the relevant press release https://www.epant.gr/en/enimerosi/press-releases/item/1355-press-release-statement-of-objections-on-the-request-put-forth-by-depa-commercial-s-a.html. For commitment No.3 of Decision 551/VII/2012 see HCC Decision 723/2020.

3.2. Behavioural and Structural remedies under merger control – The case of sea-lines

3.2.1. Legal Framework

23. The Greek Competition Act, Art.8 par 8 foresees the issue of a decision approving a concentration, subject to terms and conditions stipulated by it, in order to ensure that the undertakings concerned abide by the commitments undertaken by them before the Hellenic Competition Commission in order to address potential competitive concerns and make the concentration compatible to Article 7(1) and, in the case of Article 5(5), compatible to Article 1(3) of the Law (equivalent to Art.101 par.3).

3.2.2. The case of sea-lines

24. The HCC with Decision 658/2018 cleared the concentration which concerns the acquisition of sole control over HELLENIC SEAWAYS S.A. by ATTICA GROUP, on the condition that the commitments taken on by ATTICA GROUP, which were imposed by the HCC pursuant to Article 8 par. 6 and 8 of the Greek Competition Act 3959/2011, are adhered to. ATTICA undertook commitments within the axes of i) the liberalisation of demand/space by facilitating new actors' (competitors) entry on areas connecting the port of origin with the port of destination (where ATTICA holds a monopoly/dominant position) and by decreasing ATTICA's dominance in the Greek territory combined with the sale of SUPERFAST XII and HIGHSPEED 7 and ii) maintaining the provided services' frequency and fees at the same levels.

25. In particular, ATTICA GROUP has taken on commitments (for a period of three (3) and five (5) years depending on the individual commitment and region/route) as follows:

- In the event that other third parties/competitors become active in the routes where ATTICA GROUP is competing i) with fast ferries and ii) with conventional ferries, ATTICA will cease its activity in these routes or reduce its routes or move the departure time or withdraw its high speed or conventional ferry.
- Will not increase nor decrease per relevant market (passengers, cars, lorries) the frequency of services from and to Attica for the commitments islands[24]
- Will not increase the fee for passengers, cars and lorries from the current fees per category and seat, with the exception of the current fee for the most expensive category of cabin in the routes from and to Attica for the "commitment" islands.
- Will increase by at least one approach per week its weekly approaches to three (3) remote islands for which there are currently no services provided by other shipping companies and will create links in Greek shipping to destinations for which ATTICA, HSW or any other company are not currently active.

26. In its decision, the HCC reserves the right to impose a fine of ten thousand (10,000) Euros per day in the event of non-compliance with the above commitments taken on by ATTICA.

27. The HCC has also appointed a Monitoring Trustee to oversee ATTICA's compliance with the commitments.

[24] in comparison to the frequency of the services during 2017/2018.

28. The HCC could also extend the commitments for a period up to 3 years. On April 19, 2021, the HCC (in plenary) assessed the conditions of competition and the effectiveness of the commitments undertaken by ATTICA (under Decision No. 658/2018) and decided to extend the vast majority of commitments for another 3 years[25].

3.3. Opinions - The case of the Press Distribution Market

3.3.1. Legal Framework

29. Based on article 23 of Greek Competition Act, the HCC may issue an opinion on matters within its competence either on its own initiative or upon request by the competent Minister. The HCC may also express an opinion on draft laws and other regulations that may create barriers to the functioning of competition upon request of the competent Government body.

3.3.2. HCC's Opinion 39/2019

30. In December 2019, the HCC issued an Opinion to the Government on the press distribution market and highlighted certain concerns with respect to the structure and organisation of this market and examined a range of relevant measures to address these concerns[26].

31. In particular, the Opinion examined the possible legislative adoption of structural measures pertaining to the legal form of the sole distribution agency operating in the market and examined: i) the possibility of the creation of a public-private partnership (PPP), ii) the functioning of distribution agencies in the form of a cooperative, guaranteeing competitive neutrality between publishers at the distribution stage, iii) a new special legal form of a hybrid non-profit (although capital based) press distribution organisation (which could also be adopted by publishing companies),the capital of which should be open to the public (publishers, employees/journalists, readers etc) through crowdfunding, based on specific governance rules enhancing the participation of all significant stakeholders by limiting voting rights for capital contributions up from a specific capital shares' threshold[27].

32. In addition, it examined potential State intervention measures such as: i) granting of a state aid/subsidy for the distribution of publications (for instance, remote or outermost areas in order to cover increased transport costs), ii) establishing an appropriate legal framework regarding the classification of press distribution services as Services of General Economic Interest (SGEIs), iii) establishing a Supervisory and Regulatory Authority for Press Distribution, responsible for the control, supervision and regulation of the market concerned as well as for ensuring transparency in press distribution or alternatively, the above powers to be included in the competences of the Hellenic Telecommunications and Post Commission (EETT).

33. Given that the market is characterised by quasi-natural monopoly elements, another option examined was to promote competition for the market by providing a printed-press distribution service to companies through auction processes, by form of exclusive rights acquired by the company, which will be bound at the lowest possible tariff to provide the

[25] See the relevant press release here https://www.epant.gr/en/enimerosi/press-releases/item/1385-press-release-decision-assessing-the-competitive-conditions-and-the-effectiveness-of-the-commitments-undertaken-by-attica-group.html.

[26] See https://www.epant.gr/en/decisions/item/1184-opinion-39-2019.html.

[27] See J Cage, Saving the media. Capitalism, Crowdfunding and Democracy (HUP 2016).

service to interested parties (thus ensuring, for instance, the viability of the publishing companies while protecting pluralism).

34. The possibility of enhancing the negotiating position of publishing companies dealing with the press agency's strong bargaining power because of its control over an essential facility in the press distribution value chain, was explored by the Opinion as well, while another potential remedy examined was the enactment of a Code of Conduct[28], focusing on practices promoting the principle of competitive neutrality.

3.4. Market Investigations

3.4.1. Legal Framework

35. The HCC may examine, pursuant to art.11 of Greek Competition Act, specific sectors of the Greek economy pertaining to its responsibility, at the request of the Minister of Economic Affairs, Competitiveness and Shipping or *ex officio*, and, if after its investigation and public consultation finds that conditions of effective competition do not exist in that sector and that the application of Articles 1, 2 and 5 to 10 (Articles 101/102 TFEU and merger control equivalent) cannot create conditions of effective competition, it may issue a reasoned decision requiring any necessary measures to be taken to create conditions of effective competition in the sector of the economy in question. The HCC may intervene by imposing specific measures which it deems to be strictly necessary, suitable and proportionate for the purpose of creating conditions of effective competition. If the HCC finds that conditions of effective competition do not exist, due, *inter alia*, to legislative acts, it shall issue an opinion, in accordance with the provisions of Article 23, recommending that they be repealed or amended. The article foresees also the re-assessment of the measures taken by the HCC to restore the conditions of effective competition, within no more than two (2) years of the date of its decision.

3.4.2. Market investigation in the fuel distribution sector – Regulatory Intervention - Formal Opinion (24 October 2012), Decision 29/2012

36. The HCC conducted two market investigations in the fuel distribution sector, based on Article 11 predecessor (former article 5 Greek Competition Act, as in force at that time) and published one opinion in 2012. This market was characterised by high concentration and a tight oligopolistic structure: there exist two companies in the refining sector, four large companies in the wholesale market (which have a market share of more than 50%), each of them with a nationwide network of fuel stations. The issue of the pricing of gasoline in the Greek market has become a major public issue, and has often been the focus of public debate. Refiners, wholesalers and retailers – essentially the whole oil industry – have been frequently accused of using crude oil price changes to unreasonably increase their margins, by increasing gasoline prices quickly when crude oil prices increase, and adjusting them downwards slowly when crude oil prices decrease, therefore showing that the price transmission mechanism does not operate to the benefit of the final consumer.

37. The measures proposed aimed to facilitate entry into the wholesale market (such as the reduction of the minimum capital and storage capacity required from the wholesale traders in order to obtain a trading license), as well as in the distribution of oil products, and the electronic tracking and monitoring of the fuel market.

38. In particular, Decision 334/V/2007 was issued upon request by the Minister of Development for the examination by the HCC of the competition conditions in the sector

[28]imposed by the Competition Commission and implemented by the Press Distribution Agency.

for the sale and trading of petroleum products. This decision described the main problems that distort competition in the three oil market segments (the refinery, the wholesale and the retail) and imposed behavioural remedies which it deemed necessary and in compliance with the principal of proportionality, in order to create conditions of effective competition in the said sector of the economy.

39. In the refinery segment, the major problem was connected to the existing strategic stockholding obligation system. In the wholesale segment, the existing legal framework considerably impeded the replacement of Private Use Tanks with new ones of modern specifications. In addition, the legislation in force fixed the minimum fares for transportation of liquid fuel by Public Use Tanks, a practice eventually compatible with social policy concerns, but incompatible with the rules of competition. In the retail segment competition was relatively strong. However, some problems could occur, which were the outcome of the existing legal framework. Although gasoline and oil prices had been set freely, the government reserved the right to set a price ceiling, if it considered that the market was not functioning adequately. Moreover, as a consequence of zoning restrictions imposed by the existing legislation, barriers to entry were raised against potential competitors (e.g. hypermarkets). Furthermore, the fact that the trading hours of liquid fuel service stations had not been liberalized restricted the choice spectrum of the end consumer and could lead to an ultimate price increase.

40. In this context the HCC imposed to the companies certain measures with regard to the reporting of prices before the placement of the order to refineries, other transparency criteria, the set up of nationwide objective criteria by all trading companies regarding the discounts granted on petroleum products, as well as the obligation to notify HCC of their pricing mechanism and any modification thereof applicable in the case of retailers and their buyers.

41. As mandated under Greek Competition Act (as in force at the time), within a year from the issuance of this Decision the HCC re-initiated an inquiry into the same sector, in order to assess the extent, to which the conditions of effective competition had been restored. Following a public consultation process, the HCC issued Decision No 418/V/2008, according to which, the major problem still remained in the refinery segment of the petroleum products sector and was connected to the existing strategic stockholding obligation system, as well as to some other restrictions (i.e lack of storage, bureaucracy, system of compulsory oil reserves in the Greek territory) which made it difficult for a marketer (oil company, large end-consumer etc) to easily import oil products. In the wholesale segment, the problems detected were the same and in the retail segment competition remained relatively strong. However, some problems could still occur, as a result of the existing legal framework (i.e. high fees for license contracts of fuel stations on national roads, fixed trading hours for liquid fuel service stations, prohibition of sale of fuel by hypermarkets etc).

42. By way of the decision in question the HCC imposed several behavioral measures/remedies which it deemed necessary and in compliance with the principal of proportionality, in order to ensure conditions of effective competition in the said sector of the economy, while these were modified by decision of the Minister of Development within the capacity granted by Greek Competition Act (as in force at the time) for reasons of social policy, national economy and/or public interest The main measures/remedies imposed were: (a) the obligation of the refinery companies to notify the Ministry of Development and the petroleum products trading companies of the cost of compulsory stock (CS) regarding the petroleum products traded in the domestic (gasoline, diesel, heating oil) and international markets (aviation and shipping fuel); (b) the obligation of the refinery companies, which supply fuel to non-branded petrol stations that meet the conditions for

direct access to the refineries, to price these in a manner, which does not render void of objective legal provisions on direct access of the stations and transparency measures with regard to discounts.

43. The HCC revisited the fuel sector in 2012, with a view to addressing regulatory barriers that may impede the functioning of effective competition in the fuel sector. By its 29/2012 Opinion, the HCC updated and supplemented its two earlier regulatory interventions (Decisions No 334/V/2007 and No 418/V/2008). The aim was to eliminate market distortions and promote competition to the benefit of market participants and the final consumers. Although a significant number of its 2007 and 2008 measures and proposals had already been adopted, by the State, the HCC considered appropriate to review anew the prevailing conditions in the fuel sector, by issuing detailed proposals concerning the different segments of the fuel chain.

44. In particular, the HCC proposed the adoption of several measures. The most important recommendation regarding the refining market were i) the imposition on refiners of the obligation to notify to the national Regulatory Authority for Energy (RAE) and the Ministry of the Environment, Energy and Climate Change (YPEKA) the cost of the "compulsory stock obligation" charged to fuel companies (wholesalers) and large final consumers, in both the domestic (petrol, heating and diesel fuel) and the international market (aviation and marine fuels), ii) the imposition on refiners of the obligation to make an analysis of the allocation of costs included in the premium which is charged to the oil companies and large final consumers, in both the domestic (petrol, heating and diesel fuel) and the international markets (aviation and marine fuels), and to notify this information to RAE and the competent Ministry (YPEKA) and iii) the need to create an "Independent Stockholding Operator for Security Stocks", in accordance with european standards, or to introduce a system of "regulated third-party access" to the storage facilities of refineries or fuel companies or even third parties for emergency stockholding (regulating access and use of the essential stockholding facilities under fair and non-discriminatory terms, as predetermined and approved by RAE).

45. The main recommendations regarding wholesale market were i)to abolish the minimum capital requirement with regard to fuel trading licensing [Art. 6(5)(b) Law 3054/2002], as this requirement could not be considered reasonably proportional for the achievement of any public interest objective pursued and ii) to abolish the mandatory storage of at least two categories of fuel products, i.e. Light, Medium and Heavy grades of oil [art. 6(6) Law 3054/2002] as a condition to wholesale licensing.

46. With regard to the retail segment, the main recommendations were a) to abolish the restriction that Supply Cooperatives and Consortia are not allowed to possess or use privately owned storage facilities, other than those specified in the operating licenses of the gas stations-members of the Supply Cooperative or Consortium [art. 7(10) Law 3054/2002], ii) to abolish the restriction that Supply Cooperatives and Consortia are not allowed to possess and/or operate tanker trucks, other than those specified in the operating licenses of the gas stations-members of the Supply Cooperative [Art. 7(10) Law 3054/2002], iii) to render the holders of Independent Gas Station retail licences solely liable for the quantity and quality of the transported fuel products (from the stage of delivery of the product to them to the stage of final delivery to the consumer) [art. 6(7) Law 3054/2002], iv) to install electronic panels along national motorways displaying liquid-fuel retail prices (for unleaded gasoline and diesel) of the three (3) gas stations following the electronic panel and their respective distances, in order to fully inform drivers, v) to oblige gas stations to state the price and quantity of liquid fuel on all receipts issued and vi) to impose the installation of inflow-outflow systems throughout the fuel supply chain (refining, wholesale trading and retail trading of any form).

47. The HCC also took the opportunity to stress the importance of some other parameters which, despite falling outside the ambit of its competences, entailed an indirect effect on competition levels (in particular, fuel smuggling and adulteration). Measures such as fuel tagging and GPS installation, liquid fuel tracing through the use of radioisotope or molecular technology tracers, implementation of inflow-outflow system in all tax warehouses and fuel transport vessels were recommended.

48. Most of the recommendations of the HCC were adopted by the State.

3.4.3. Market Investigation in the Construction Sector and in the Press Distribution Sector pursuant to Article 11 Law 3959/2011 – First Interim Report and Launch of Public Consultation

49. The HCC ex officio has recently decided to initiate a market investigation in the press distribution sector[29] and the construction sector[30].

50. The HCC has issued the first interim reports[31] with respect to the conditions of competition in the construction and press distribution sectors and has launched a public consultation inviting interested parties to comment. According to the interim reports, in the construction sector (and in particular in the market for public works) and in the press distribution sector (and in particular in the market for printed press distribution), there is a lack of effective competition, which cannot be remedied with the application of Articles 1,2 and 5-10 Greek Competition Act. In particular:

51. The interim report for the construction sector focused on structural market problems on the basis of horizontal common ownership. In particular, according to the report, the joint horizontal participation of a specific fund in the two largest construction undertakings in Greece may lead to unilateral and coordinated effects. Moreover there has been a significant concentration in the construction industry in the last decade with increasing barriers to entry in some of its sub markets. Also using quantitative estimates on the effective number of firms and a dataset of large public works tenders, the HCC examined the impact of common ownership, as measured by the number of discounts/offers, submitted in the context of each tender.

52. Other potential issues to competition were identified in the existing legal framework, taking into account the concerns expressed by companies in the industry and the preliminary investigation of HCC, such as: regulating abnormally low offers, allowing a construction joint venture after the selection of the bidder, changes in contract award criteria, the classification criteria of the Register of Contractors of Public Works (MH.EE.D.E), joint bidding and the more intensive and the wider use of Public Private Partnerships and concessions and prior analysis of their impact on competition.

53. The interim report in the press distribution sector focused on the monopolistic market structure and the existence of a single press distribution agency and applied the theory of vertical common ownership to the shareholder structure of the agency. In

[29]On December, 23rd 2020. See the relevant press release < https://www.epant.gr/en/enimerosi/press-releases/item/1273-press-release-decision-for-the-initiation-of-a-regulatory-intervention-procedure-market-investigation-in-the-press-distribution-sector-in-accordance-with-article-11-of-law-3959-2011.html>. On the progress of the market investigation see https://www.epant.gr/en/enimerosi/investigation-press.html.

[30]On January, 8th 2021. See the relevant press release < https://www.epant.gr/en/enimerosi/press-releases/item/1269-press-release-initiation-of-the-procedure-referred-to-in-article-11-of-law-3959-2011-regulatory-intervention-in-the-construction-sector.html>.

[31]On April, 7th 2021 for constructions sector and on March, 23rd 2020 for press distribution sector.

particular, according to the interim report, the structure of the single press distribution agency with the participation of publishers-shareholders in its share capital may create incentives for potential coordination and possible unilateral behaviour benefiting the publishers-shareholders over rival shareholders[32].

54. These market investigations are ongoing at the time of writing.

3.5. Sectoral inquiries

3.5.1. Legal Framework

55. Art. 40 of the Greek Competition Act provides the HCC with the competence to investigate a particular sector of the economy or certain types of agreements in various sectors where prices or other circumstances give cause to suspect that competition is being restricted or distorted. The HCC may publish a report on the results of its investigation of particular sectors of the economy or certain types of agreements in various sectors and ask the interested parties for their comments.

56. The HCC by exercising the respective powers conferred on it, pursuant to Article 40 of Law 3959/2011 has recently decided to initiate two sector inquires in the Fintech and E-commerce sector. [33] The HCC has initiated these in depth investigations on the competitive conditions prevailing in the market for financial technology services and in the digital environment, in order to enhance consumer welfare, but also to actively contribute to the country's digital transformation and the promotion of innovation. The launch of these sector inquiries takes place at a time when the Covid-19 pandemic has significantly strengthened the increasing use of electronic banking and electronic payment systems and has also increased the reliance of Greek consumers on online retailers' commercial activities. In that regard, it is part of the wider set of actions undertaken by the HCC to protect consumers at this difficult situation.

57. The HCC has also recently concluded its sector inquiry in the field of production, distribution and marketing of basic consumer goods and in particular food products, as well as cleaning and personal hygiene products[34].

3.5.2. Fintech

58. The HCC taking into account the increasing use of financial technology in the provision of financial services, as well as the ability of modern technology tools to facilitate restrictions of competition in the digital environment, has initiated by decision of 11.03.2020 a sector inquiry into financial technology services (Fintech) with the collaboration of the *Bank of Greece.*

59. The use of financial technologies benefits consumers and businesses in several ways, as it contributes to the development of innovative products and the provision of integrated and more affordable services, the improvement of the access to finance of companies (mainly SME's) and the strengthening of competition through the entry of new

[32]The HCC has also assessed the market for printed press distribution in its relevant Opinion 39/2019 (according to article 23 Law 3959/2011) as described above.

[33]On March, 11th 2020. For the ongoing sector inquiry in the e-commerce sector see https://www.epant.gr/en/enimerosi/sector-inquiry-into-e-commerce.html. For the ongoing sector inquiry in the fintech sector see https://www.epant.gr/en/enimerosi/sector-inquiry-into-fintech.html.

[34]HCC Decision in 2012 initiated in 2014, prioritized in 2019, updated in 2020 and concluded in 2021. See https://www.epant.gr/en/enimerosi/sector-inquiry-into-basic-consumer-goods.html

competitors in the market. However, the basic characteristics of these technologies, which are primarily the use of platforms, big data and algorithms, can facilitate the adoption of practices that are able to harm consumers and impede innovation and competitiveness in the specific sector.

3.5.3. E commerce

60. The HCC taking into account the increasing important role of e-commerce in Greek consumers' habits, as a reliable channel for the distribution of goods and services, as well as the ability of modern technology tools to facilitate restrictions of competition in the digital environment, has initiated by decision of 11.03.2020 a sector inquiry into e-commerce, pursuant to Article 40 of Law 3959/2011.

61. E-commerce is undoubtedly, after all, the key driver for promoting pricing competition due to certain parameters, such as, for example, the lower operating costs of online retailers and the ease of product search and price comparison. However, artificial intelligence, the use of algorithms and the ability to use big data can, in some cases, facilitate the adoption of practices that are able to harm consumers.

3.5.4. Basic consumer goods

62. Following the publication of an Interim Report, the public consultation, as well the analysis of the updated data collected during 2020, the HCC published[35] its Final (market study) Report in the field of production, distribution and marketing of basic consumer goods and in particular food products, as well as cleaning and personal hygiene products. The main conclusions and HCC's decision are that due to i) the significant changes in consumer habits in recent months (associated with the current difficult and extraordinary conditions of COVID-19 pandemic) ii)the expected entry of new business models in the market and iii) the limitation of the scope of this Sectoral Inquiry to certain product categories, it is not considered necessary at the moment to initiate a regulatory intervention in the sector or to consider the introduction of new institutions[36]. The above possibility will be considered after the completion of a follow-up supermarket sector inquiry, (which is planned in the medium term - in two years) which will expand, possibly, on different product categories; based on the systematic processing of data collected by the HCC Economic Intelligence Platform already (as of January 2020). It is considered necessary that the HCC continues to monitor the sector, both for the specific consumer products examined in the context of this sectoral inquiry, as well as for other products, food or other basic consumer products. Several of the competition problems of the market are related to the exercise of bargaining power and can possibly be solved by a carefully designed application of articles 1, 2 of Law 3959/2011 and of articles 101, 102 TFEU.

3.6. Cooperation with NRAs

3.6.1. Legal Framework

63. Art.24 of Greek Competition Act describes the framework of cooperation between HCC and regulatory or other authorities which monitor particular sectors of the national economy. The HCC shall assist such authorities, upon request, on matters of application of Articles 1 and 2 of this Law and Articles 101 and 102 of the TFEU and of Articles 5 to 10

[35] On March, 5th 2021.

[36]Such as that of an Ombudsman or Commissioner appointed by the HCC who would negotiate a Code of Conduct or a Best Practices Guide between the parties involved.

in relation to concentrations in the relevant sectors. The HCC may also request the assistance of the above authorities in cases where the responsibility of implementing the above articles in those specific sectors lies with it. Similar articles establishing the framework of cooperation between NRAs and the HCC are contained in art. 23 and 26 of law 4001/2011 governing the function of the Regulatory Authority for Energy, as well as in art. 112 of law 4389/2016 governing the functions of the Hellenic Regulatory Authority for Ports.

64. Currently, article 24 of Law 3959/2011 is under revision in order to establish a regulatory policy and competition network with the participation of four NRAs and the HCC, to enhance coordination and cooperation among these. More specifically, NRAs will cooperate with HCC i) by sharing information on cases in order to harmonize competition and regulation policies and avoid conflict and duplication of efforts, ii) by setting joint expert groups for the drafting of common guidelines for specific sectors and iii) for cooperating in sectoral inquiries and inspections.

3.6.2. MOUs

65. The HCC has proposed to all regulatory authorities as early as March 2020 the conclusion of Memoranda of Cooperation, on the model of the Memorandum of Cooperation with the Hellenic Single Public Procurement Authority (HSPPA) signed in October 2019. In this broader context for strengthening cooperation, a Memorandum of Understanding was signed between the Hellenic Competition Commission (HCC) and the Hellenic Regulatory Authority for Energy (RAE) on 25 September 2020 and another one between the Hellenic Competition Commission (HCC) and the Hellenic Regulatory Authority for Ports (RAL) on 2 April 2021, with the aim to consolidate and enhance the cooperation between HCC and the two Authorities by combining their common experiences, and strengthen their relationship. The enhanced cooperation between HCC and NRAs aims to increase regulatory efficiency to best interact as ex ante regulatory policy with ex post competition law enforcement in the energy and port industry markets. Particular emphasis is placed on the establishment of joint working groups for the development of guidelines, studies and research papers on issues of common interest, within the competences of the Authorities. The Authorities agreed, inter alia, to carry out actions to promote policies and strategies to inform economic operators/participants in the energy market and port industry market on matters relating to the responsibilities of the HCC and National Regulating Authorities, for the benefit of society, the economy and the general public.

4. Digital markets – Platform ecosystems: amendments to the Greek Competition Act

66. A proposal of the legislation drafting committee for the amendment of the Greek Competition Act (Law 3959/2011, as in force) is to include the abuse of central position by leading companies in ecosystems of paramount importance.

67. In the presence of complex interrelationships among multiple institutional actors guiding multi-product and multi-actor ecosystems, the need for effective integration and synchronization of regulatory and competition jurisdictions has to be in the core of legislative reform.[37] The proposal if adopted will work as a complement to the Digital

[37] Ecosystems and Competition Law in Theory and Practice (I. Lianos, Michael G. Jacobides UCL Centre for Law, Economics and Society , res Paper Series 1/2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3772366 .

Markets Act. The idea is to combine *ex ante* specification of what should or should not be allowed with a more traditional *ex post* framework for policing and remedying competitive issues arising in ecosystems. It requires the competition authority to explain the nature of the ecosystem failure, to establish there is an *abuse* of a central position in an ecosystem, and pinpoint the practices at fault, while also acknowledging that power may reside at the level of an ecosystem.