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NEWSLETTER

COMPETITION

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The new Law on the "Protection of free competition

Law 3959/2011 radically reforms the legislation in relation to free competition and achieves in general terms the goals that had been set during the public consultation: enhancement of the institutional role of the Commission, improvement of the efficiency and speed of its action, safeguard of the deterrent power of the penalties and harmonization of the Greek legislation with the EU legislation. The abolishment on the one hand of the obligation to notify prohibited agreements, decisions and concerted practices and on the other hand of the post merger notification of concentrations undoubtedly heading towards the right direction of harmonization with the European standards and the improvement of the time required for the Commission to act. In a similar way, we consider the positive changes in the way of appointment, the establishment of a stricter context with regard to incompatibilities as well as disciplinary responsibility of the members of the Commission as they aim at the functional transparency and the safeguarding of legality. It is doubtful, however, whether on the one hand the imposition of a separate penalty to the representatives of undertakings and the imposition of stricter penal sanctions are consistent with the European conception on the implementation of competition law and on the other hand whether the Regulation for the Function and Management of the Commission in force provides the necessary guarantees for the protection of the defense rights which are guaranteed by the constitution.

On 20 April 2011 the new Law 3959/2011 on the "Protection of free competition" (Official Gazette A/93/20.04.2011) that had been passed by the Greek Parliament on 12 April 2011 was implemented (the "**new Law**"). The new Law which took its final shape at the end of 2010 upon public consultation on the initial bill of the Ministry of Regional Development and Competitiveness as well as comments by the European Commission, repeals Law 703/1977 "on the control of monopolies and oligopolies and the protection of free competition" and aims, according to the Explanatory Report, to the complete reform of the legislation for the protection of free competition (which it codifies) moving towards five keystones:

- *Harmonization between the national and the European law;*
- *safeguard of the deterrent power of the provided penalties;*
- *enhancement of the institutional role of the Commission;*
- *enhancement of the efficiency of action of the Commission and*

- *power of intervention of the Commission for the removal of regulatory obstacles of competition*

In particular, the most important changes that the new Law brings about to the pre-existing legal context of Law 703/1977 are the following:

1. Abolishment of the obligation to notify agreements, decisions and concerted practices

The obligations to notify agreements, decisions of associations of undertakings and concerted practices that obstruct, limit or distort competition, as in force according to article 21 of Law 703/1977, have been abolished. By virtue of the above abolishment, national law is being fully harmonized with the European legislation on competition (EU Regulation 1/2003) and the undertakings are relieved from the obligation to notify such agreements (e.g. distribution agreements, franchise agreements etc).

2. Abolishment of post-merger notification obligation

The new Law also abolishes the obligation to notify the so-called "small" concentrations that had to be notified upon their completion according to article 4a of Law 703/1977. This obligation which did not exist in any other Member State had been criticized in theory as an unjustified burden both for the liable undertakings and for the Commission. The abolishment of the obligation for post-merger notification of concentrations as well as of prohibited agreements, decisions of associations of undertakings and concerted practices are expected to lighten the workload of the Commission and improve its efficiency.

3. Merger control: pre-merger notification procedure

Important changes are also made in relation to the merger control procedure of mergers that are subject to prior notification (ex article 4b of Law 703/1977), whereas the possibility of approval by the Ministers of Regional Development and of Finance respectively of concentrations that had been prohibited by the Commission is now abolished.

(i) Deadline for the submission of the notification

The deadline for the prior notification of concentrations is extended from ten (10) working days to thirty (30) calendar days. According to the draftsmen of the new Law, the aim of the above extension is to give the undertakings obliged to make the notification enough time to prepare and submit a complete file

(ii) Deadline for the issuance of decisions

The new Law also extends the remaining procedural deadlines for the issuance of a decision by the Commission so as to facilitate the in-depth merger control, the complexity of which is, according to the draftsmen of the new Law, increased. In particular:

- the case is introduced to the Commission by way of issuance of the statement of objections within 45 days from the opening of an in-depth investigation (phase II investigation) (instead of 45 days from the submission of the notification);

- the Commission's decision with regard to the prohibition or the approval of the concentration is issued within ninety (90) days from the opening of an in depth investigation (phase II investigation) (instead of 90 days from the submission of the notification);

- the deadline of 90 days for the issuance of the decision is extended to 105 days, provided that commitments are submitted after the end of the provided deadline (15 days from the opening of an in-depth investigation (phase II investigation) and this is exceptionally accepted.

(iii) Application for derogation

The prerequisites for the granting of derogation from the obligation not to realize the concentration before the issuance of a relative decision by the Commission becomes stricter. In

particular, it is explicitly stated that the threat that the concentration under examination constitutes for the competition is, inter alia, taken into account.

(iv) Fines

The lower and the higher limit respectively of the fine imposed on any undertaking subject to notification for willful infringement of its notification obligation is increased and range from 30.000€ (instead of 15.000€) up to 10% of its annual worldwide turnover (instead of 7%). With regard to the fine imposed for willful infringement of the prohibition to realize the concentration until the issuance of a decision either approving or prohibiting it, it was decided that the maximum limit of the fine is limited from 15% to 10% of the aggregate turnover of the undertakings subject to notification obligation, whereas the lower limit of the fine was increased to 30.000€ (instead of 10.000€).

4. Other Fines and Limitation Period – Criminal Sanctions

The new Law enhances the powers of the Commission in cases of infringements, in order to increase its efficiency, providing, inter alia, for the first time for the imposition of a separate fine on natural persons who are responsible for the compliance of undertakings with the provisions, in relation to prohibited agreements, decisions or concerted practices, abuse of dominant position and mergers.

(i) Fines to undertakings

In case of breach of the provisions with regard to prohibited agreements, decisions or concerted practices and abuse of dominant position, the fine that is imposed or threatened to be imposed may amount up to 10% (instead of 15%) of the aggregate turnover of the undertaking, whereas in cases where it is possible to define the amount of the financial benefit of the undertaking from the particular breach of law, the amount of the fine cannot be lower than this, even if it exceeds the 10% limit.

In addition, it is defined that in the case of a group of companies, the aggregate turnover of the group is taken into consideration for the calculation of the fine. Finally, special provisions are introduced for the imposition of fines to associations of undertakings in order to ascertain the possibility of their collection. In particular, it is defined that in case the association of undertakings is not solvent, the association is obliged to ask the members for their contribution in order to pay the fine. If its members do not pay the above contribution, the Commission may demand the payment of the fine separately by each of the undertakings whose members were involved in the decision making bodies of the association.

(ii) Separate fines to representatives of undertakings

For the first time the Commission is authorized to impose separate fines on natural persons who are responsible for the compliance of undertakings with the provisions of law in relation to prohibited agreements, decisions or concerted practices, abuse of dominant position and mergers, in particular: entrepreneurs, administrators and all members of civil and commercial partnerships and joint ventures, the members of the board of directors and the persons responsible for the implementation of a decision in *sociétés* anonymes.

The fine ranges from 200.000€ to 2.000.000€ and is imposed, upon their prior oral hearing, on natural persons that have been proven to have participated in preparatory actions, the organization or the commitment of the illegal behavior of the undertaking. For the calculation of the fine their position in the undertaking and their level of participation in the illegal action are taken into consideration. According to the Explanatory Report of the new Law, the abovementioned provisions in conjunction with the expansion of the leniency program to natural persons, aims at motivating those persons to cooperate with the Commission.

(iii) Limitation period

Explicit provision is introduced stating that the breaches of the new Law that provide authority to the Commission to impose penalties are subject to a five year limitation period. The limitation period starts from the day of the commitment of the breach, whereas in cases of continuous breach or breach committed

repeatedly, the limitation period starts from the date of cessation of the breach. The breach is interrupted by any action taken by the Commission, the European Commission or any other competition authority of a Member State concerning the investigation or procedures against the specific breach. According to the interim provisions of the new Law, the limitation period includes actions that have taken place before its entry into force and have not been the object of a complaint or an investigation. This provision covers an important legislative gap following the standards of EU Regulation 1/2003 and the overwhelming majority of the rest of the EU Member States. It is expected to raise the security of law for the undertaking and provide the Commission with the opportunity to occupy itself with current infringements of competition.

(iv) More severe criminal sanctions

The new Law provides for a significant increase of the lowest level of sanctions in terms of imprisonment in cases of cartels (infringements of articles 1 of the Law or 101 TFEU from existing or potential competitors) from 6 months to 2 years. In addition, the amount of the imposed monetary penalty is increased: for cartels monetary penalty ranging from 100.000€ to 1.000.000€ can be imposed, whereas for abuse of dominant position, monetary penalty ranging from 30.000€ to 300.000€ can be imposed. This increase is justified, according to the draftsmen of the new Law, due to the criminal demerit of those actions and their impact on the proper functioning of the market, whereas it is expected to act in a deterrent way with regard to the development of such anti-competitive behaviors.

(v) Civil action appearance

Explicit provision is introduced with regard to the ability of any person who takes offence by breaches of the provisions relating to prohibited agreements, decisions or concerted practices, abuse of dominant position and mergers to stand in the relevant court trials as plaintiff.

5. Structure and organization of the Commission

With the aim of the institutional shielding and the enhancement of independence of the Commission the new Law provides for a change in the way of appointment of its members, prolongation of the duration of term of office of its members, expansion of the incompatibilities and establishment of accountability while on the other hand it provides for the limitation of the number of its full members to eight (8) in order to enhance its flexibility and the rapid issuance of decisions.

(i) Appointment and term of office of the Commission members

The President and Vice President of the Commission are chosen by the Parliament and are appointed by virtue of a decision by the Minister of Economy, Competitiveness and Shipping, while the rest of the members, full and alternates, including the Rapporteurs, are appointed by virtue of a decision by the Minister of Economy, Competitiveness and Shipping following an opinion by the Committee on Institutions and Transparency of the Greek Parliament. The term of office of the members of the Commission, full and alternates, is increased from three (3) to five (5) years and may be renewed for an additional period of five years. The will of the draftsmen of the new Law was to dissociate the term of office of the members of the Commission from the national elections periodic cycle.

(ii) Incompatibilities of the Commission members

During the taking over of their responsibilities the members of the Commission, full and alternates, are obliged to notify the Minister of Economy, Competitiveness and Shipping any privity in right (or order) for the provision of service, advice, work or project that they have undertaken during the last five years before the beginning of their term of office. In addition, the general prohibition for the provision of services to undertakings in cases handled by the members of the Commission or where those members participated in the taking of the decision relating to the above undertakings is determined for an indefinite period of time (instead of three years) and for the first time an explicit prohibition of appearance before the judicial authorities is adopted in appeals against decisions of the Commission for a period of three (3) years after the end of their term of office.

(iii) Disciplinary control

A disciplinary board and disciplinary control for the members of the Commission is established for the first time following the model of other independent administrative authorities.

The disciplinary board consists of one judge from the State Council, one judge from the Supreme Court and one Professor of Law specializing in competition law or finance. The disciplinary procedure is set out by the Ministerial Council upon proposal of the Minister of Economy, Competitiveness and Shipping.

6. Functioning of the Commission

(i) Introduction of a point system for the examination of cases

The new Law provides for the authority of the Commission to set the criteria of prioritization of the cases to be examined and the strategic targets upon public consultation in order to ensure transparency and objectivity in the choice of the cases to be examined by the Commission as well as in order to enhance its efficiency by aiming at the most sensitive for the public weal cases. Transparency is enhanced through the provision for the issuance of relevant decisions by the Commission which is uploaded on its website, where the criteria for the prioritization of the cases to be examined and its strategic targets will be quantified, according to the point system. Complaints that have low rankings will not be examined by the Commission, whereas negative decisions in terms of examination of complaints due to low rankings will be communicated to the complainant within thirty (30) days from the date of the decision.

(ii) Deprivation of the Rapporteur's voting right

The institution of the Raporteur which was introduced by Law 3784/2009 remains but its voting right is deprived. According to the Explanatory Report of the new Law, this modification was chosen in order to shield the prestige of the decisions of the Commission and ascertain the principle of the right trial, given the objections that had been expressed in theory against the Rapporteur's voting right

(iii) Deadlines for the examination of cases and taking of decisions

The deadlines for the examination of cases and the taking of decisions which had been introduced by virtue of Law 3784/2009 are amended, aiming at improving the efficiency of the Commission and striking the balance between the quality of the Commission's work and the rapid treatment of the infringements of law.

In that way, the deadline for the communication of the Statement of Objections to the parties is increased to 120 days (instead of 90 days) from the assignment of the case to the Rapporteur. The deadline for the issuance of decision by the Commission is increased to 12 months (instead of 6 months), and may be prolonged for 2 more months in exceptional cases. In addition, the deadline provided for the summons of the complainants is increased to 45 days (instead of 30 days). Finally, the deadline for the communication of the minutes of the hearings takes place within one (1) month from the completion of the discussion of the case instead of ten (10) days.

(iv) Enhancement of the advisory competences of the Commission

The advisory competences of the Commission are significantly enhanced. The Commission expresses an opinion with regard to the draft legislation and the remaining regulatory provisions that may create obstacles to the functioning of free competition upon request of the competent governmental body. In addition, in cases of regulatory intervention to sectors of the economy, it provides advice on the abolishment or modification of legislative provisions which are responsible for the lack of conditions of efficient competition.

7. Judicial Protection

(I) Suspension of decisions imposing

The execution of decisions by virtue of which fines are imposed may be suspended only in part, up to 80% of the fine, upon application of the appellant. In deviation from the Code of Administrative Procedure, the application for

suspension is only accepted in cases of an evident and well grounded appeal and irreparable injury, as well as when it is difficult to restore the injury. The Court takes any necessary measure to ensure the public's interest, in particular through the deposit of a letter of guarantee, prenotation of mortgage in writing or deposit of the amount in the Deposit and Loan Fund.

(II) Creation of special competition divisions in the Athens Administrative Court of Appeal

The new Law provides for the possibility of creation by virtue of Presidential Decree of special divisions *in the Athens Administrative Court of Appeal for the judgment of appeals, interventions, caveats and applications for revision.* The constitution of special divisions is justified due to the specific characteristics and the difficulty of competition cases, which require specialization, in depth knowledge of the subject matter and speed in the judgment of the cases.

(III) Application of articles 1 and 2 of the new Law and 101 and 102 TFEU from civil and penal courts

By fully harmonizing the national legislation with Regulation 1/2003 the new Law provides that the civil and the penal Courts apply (directly and not only incidentally as it was provided in Law 703/1977) articles 1 and 2 of the new Law and 101 and 102 TFEU

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