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Cartels 2023

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Greece: Trends & Developments

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Trends and Developments

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Kyriakides Georgopoulos Law Firm (KG) is a multi-tier business law firm dating back to the 1930s and one of the most prestigious in Greece. The firm has over 100 highly skilled lawyers working in expert multi-disciplinary teams. It regularly provides legal services to high-profile Greek and international clients in complex, cross-border deals and is consistently highly ranked by prestigious international directories. Delivering legal services at sophisticated international standards, the firm is the preferred choice for US and European international law firms doing business in Greece, and is a founding member of South East Europe Legal Group (SEE Legal). KG has a leading practice

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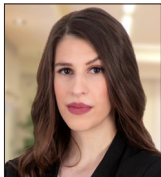


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Introduction

The Hellenic Competition Commission (HCC) continues to place emphasis on pursuing cartel cases. This report examines key trends in cartel enforcement and unannounced inspections, basic sectors under investigation, the HCC's operation of its "Sandbox for Sustainable Development and Competition", HCC guidelines on the newly introduced Article 1A, as well as notable cartel cases.

Transition to the Green Economy: Operation of the HCC's Sandbox

With a view to facilitating the "green transition" of the Greek economy and the promotion of public interest, as well as taking a proactive role in the ex-ante evaluation of the compliance of "green investments" with competition law rules, in June 2022, the HCC launched its "Sandbox for Sustainable Development and Competition" (the "Sandbox"). This is a supervised space for experimentation where businesses, and in particular, small and medium enterprises (SMEs), can adopt sustainable initiatives for a specific period of time – under the guidance and in direct collaboration with the HCC – in order to ensure that said initiatives do not significantly impede competition. In this context, companies wishing to promote their sustainable initiatives and reduce the regulatory risk from a competition law perspective can benefit from the HCC's Sandbox. Any business active in the technology, environment and energy, recycling/waste management, and healthcare sector, but also in other sectors that will primarily aim to promote the environmental goals of sustainable development, may be eligible for the Sandbox. The legal basis of the said initiative is the "no-enforcement action letter" referred to in Article 37A of the Greek Competition Act (CA) which provides that the HCC chairman may issue a "no-enforcement action letter" against a hori-

zontal or vertical agreement for infringement of Article 1 CA and/or Article 101 TFEU or against a practice for infringement of Article 2 CA and/or Article 102 TFEU. The operation of the "no-enforcement action letter" presents analogies with the mechanism used by the European Commission in accepting co-operation for reasons of public health due to the pandemic.

HCC Guidelines on the Implementation of Article 1A

Article 1A "Invitation to collude and disclosure of future pricing intentions for products and services between competitors" was introduced into Law 3959/2011 on the "Protection of Free Competition" (Greek Competition Act/CA) by Law 4886/2022 "on the modernisation of competition law for the digital era" (GG A' 12/24.01.2022) with the aim of combating two different forms of unilateral practices:

- invitation(s) to collude with the object of preventing, restricting or distorting competition in the Greek territory; or
- announcement(s) relating to communicating mainly future pricing intentions for products or services between undertakings that are competitors ("price signalling") if the disclosure restricts competition in the Greek territory and is not an ordinary business practice.

Such unilateral practices fall outside the scope of collusive behaviour prohibited under Article 101 TFEU and Article 1 Law 3959/2011.

Specifically, Article 1A:

- does not apply to invitations or disclosures that occur in the context of a vertical relationship or in the context of a relationship between an undertaking and a final consumer; and

- is only applicable to undertakings with a total turnover exceeding EUR50 million and more than 250 employees.

In order to shed some light on the implementation of the provision of Article 1A and to provide legal certainty for businesses, on 1 February 2023, the HCC launched its highly anticipated guidelines on the implementation of Article 1A (the “Guidelines”).

The [Guidelines are available in Greek](#) on the HCC website. The only English version available is for the [draft Guidelines](#) that were under public consultation.

Article 1A paragraph 1 – invitations to collude between competitors

The purpose of paragraph 1 of Article 1A is to combat the attempt to establish certain forms of horizontal restrictions of competition by unilaterally inviting another undertaking to participate in a cartel aimed at restricting competition. More specifically, the Guidelines clarify that the provision of paragraph 1 of Article 1A applies where:

- the invitation to collude was unsuccessful because it was rejected by the recipient in a way that prevents the application of Article 101 TFEU and Article 1 of Law 3959/2011; or
- the invitation to collude was accepted but it is not possible to provide the requisite standard of proof that it was accepted.

The invitation to collude concerns either private or public communications with a competitor. Thus, purely internal discussions within one and the same undertaking do not, as such, fall within the scope of paragraph 1.

Article 1A paragraph 2 – disclosures relating to future pricing intentions

Paragraph 2 of Article 1A aims to tackle unilateral conduct that leads to “price signalling” through the direct or indirect communication of the future pricing intentions of an undertaking to its competitors. According to the Guidelines, only the following three categories of announcements may restrict effective competition, because they may facilitate tacit collusion between undertakings or lead to a market situation that may harm consumers:

- announcements that forecast an undertaking’s future conduct and the industry’s future performance;
- announcements that prescribe how a rival or the industry should behave in the future; and
- announcements that describe how an undertaking’s future conduct is contingent on a rival’s conduct.

For the assessment of whether a disclosure restricts effective competition, the HCC will consider factors including whether the information disclosed is specific and individualised, whether it relates to future activities, whether it is genuinely public information, whether there is a pattern of similar disclosures in that market, and whether the market to which the disclosure relates is concentrated and oligopolistic in nature.

It remains to be seen how Article 1A and its Guidelines will be implemented by the HCC in practice.

Sectors Under Investigation

The HCC continues its investigations and unannounced inspections in multiple sectors of the Greek economy, responding to geopolitical and other challenges, such as the energy crisis and

the phenomenon of price increases, especially after the Russia-Ukraine war. A significant number of dawn raids were initiated, and, in particular, during 2022 and up to May 2023, the HCC carried out 16 dawn raids in 68 undertakings active in the following sectors: pasta products, cosmetics and personal care, eyewear, transport, children's toys, electricity, breast pumps, white goods, and in the manufacturing, import and distribution of aluminium, PVC and iron-processing machines sectors. In 2023, the HCC conducted unannounced inspections in the beer and other alcoholic beverages sector and in the currant market.

Regulatory Interventions

The HCC continues its focus on regulatory interventions (Article 11 of the CA) as a tool to create conditions of competition in a sector under investigation. This is in the absence of effective competition, where the HCC considers that the application of Article 1 (prohibiting anti-competitive agreements between undertakings), Article 2 (prohibiting abuse of dominant market position), and Articles 5 and 10 of the CA (merger review) are not sufficient.

Regulatory intervention in the petroleum sector

In this vein, in November 2022, the HCC launched a (currently ongoing) regulatory intervention in the petroleum sector, due to the importance of this sector in the Greek economy and its interconnection with all sectors of economic activity. This sector seems to be under the continuous scrutiny of the HCC, which has systematically intervened in the sector with a series of Opinions and Regulatory Decisions over the last 15 years. In the context of the initiated procedure, the conditions of competition in the relevant markets will be examined in depth, in order to clarify whether the observed asymmetry, and in general the

price increase of these products over the last two years, are due to the absence of conditions of effective competition. Issues regarding the pricing policy mechanism, the maintenance of security stocks and other potential barriers to entry and development of the market, and maintenance of a high profit margin by the industry firms will all be examined. It is also noteworthy that said initiative is based on the findings of the HCC's mapping study on the conditions of competition in the petroleum industry (ie, the HCC's new tool). The HCC's mapping examined the phenomenon of asymmetric adjustment of fuel prices in relation to costs (also referred to as the "Rockets & Feathers" phenomenon), especially regarding the existence of asymmetry in price adjustment between the different stages of the petroleum industry (refining, wholesale and retail) and was concluded by the HCC's decision to initiate said regulatory intervention.

Regulatory intervention in the construction sector

In August 2022, the HCC launched its second Interim Report/second phase of the regulatory intervention investigation. The HCC found again that in the construction sector and in particular in the market for public works, there is a lack of effective competition, which cannot be remedied with the application of antitrust and merger control provisions. In particular, risks/theories of harm related to possible, unco-ordinated anti-competitive effects, as well as co-ordinated anti-competitive effects, have been identified. Regarding remedies, the HCC proposed inter alia "Independent Management – Chinese Walls – Code of Conduct" in cases of horizontal common ownership of competing companies, concerning the members of the management and the shareholders of these companies, as well as the manner and type of information (sensitive and not) that will be transmitted by the com-

mon shareholders to competing businesses and vice versa. It also requires the imposition of a notification obligation to the HCC, to carry out a relevant economic analysis of competitive effects, in cases of an increase in the percentage of horizontal common ownership, when any legal entity acquires more than 5% of the share capital of more than one competing company in the examined industry, and additional obligations to “active common shareholders” present in the examined sector, and the specific sub-sector/markets involved.

Regulatory intervention in the press distribution sector

Following the publication of its second Interim Report, as well as a second public consultation, on 4 November 2022, the HCC issued its Final Report. According to its findings, the HCC concluded that there is a lack of effective competition in the press distribution sector and it imposed inter alia the following remedies to restore competition in the sector: prior notification of changes in the shareholding of the sole press distribution agency and changes in the corporate governance of the sole press distribution agency; Chinese Walls; and the introduction of a code of conduct and the appointment of a trustee (HCC Decision 768/2022).

Notable Cases

Below is a summary of recent HCC Decisions illustrating the HCC’s continued interest in cartels, with a particular focus on bid rigging and market allocation/price fixing.

Settlement Decision 767/2022 – catering services to migrants/refugees

This Decision refers to the ex officio investigation on competitive conditions in the markets for the provision of catering services to migrants/refugees, through tendering procedures, on the

islands of the North and East Aegean Sea. Following an ex officio investigation carried out by the HCC’s Directorate-General for Competition (DGC) on the conditions of competition in this market, the HCC concluded that four companies active in said market had entered into a horizontal agreement with the object of restricting the provision of catering services on the specific islands of Lesbos and Chios, which constitutes a serious restriction of competition caught by Article 1(1) of the CA prohibiting anti-competitive agreements. In particular, the obligation of exclusive co-operation contained in the agreements concluded between the companies for a future number of tenders resulted in the exclusion of independent participation for each of the participating companies or in association with the other companies, and the exclusion of competitors. The HCC’s Decision was adopted according to the simplified settlement procedure following the settlement submissions by the companies under investigation and the consequent clear and unequivocal acknowledgement of their participation in the infringements found. Following the settlement procedure, the HCC imposed a total fine on the four companies amounting to EUR304,427.89.

Settlement Decision 796/2022 – harbour tug services

HCC Decision 796/2022 refers to a relevant complaint and an ex officio investigation into the market for the provision of harbour tug services. By unanimous decision, adopted under the simplified settlement procedure, the plenary session of the HCC imposed fines totalling EUR4,360,818.28 on the companies concerned. According to the HCC’s findings, said companies entered into an anti-competitive horizontal agreement in the form of market allocation and setting of prices (discounts) in the provision of tug services for commercial ships (i) in the

port of Thessaloniki (both cargo ships and oil tankers); (ii) in the ports of Attica (oil tankers); and (iii) in the ports of Kavala (both cargo ships and oil tankers), thus violating Article 1 of Law 3959/2011.

Settlement Decision 793/2022 – ferry services

The Decision at issue, adopted in the context of the HCC's simplified settlement procedure, concerns the ex officio investigation into the ferry connection Igoumenitsa – Lefkimmi, which followed another HCC ex officio investigation concerning the Igoumenitsa ferry connection with the Port of Corfu. According to the HCC's unanimous decision, the companies concerned participated in a concerted practice/horizontal agreement in the form of price fixing and market sharing respectively, defining the framework of their joint action in relation to their commercial policy (ie, their discount policy and the scheduled services/routes that they would run on the Igoumenitsa – Lefkimmi ferry connection). The total amount of the fine imposed was EUR135,236 for violation of Article 1 of Law 3959/2011.

Final Remarks

This report shows that cartels and horizontal anti-competitive practices remain a key priority for the HCC and are tackled using a multitude of enforcement tools. The Greek Competition Authority systematically monitors various economic sectors, with a specific focus on sectors where price hikes are increasingly common. Regarding upcoming cartel decisions, notable decisions are anticipated as a result of the above-mentioned dawn raids conducted by the HCC.

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