GLOBAL ANTITRUST COMPLIANCE HANDBOOK

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16

GREECE

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Introduction

According to article 1 of Law 3959/2011, all agreements between undertakings, all decisions by associations of undertakings, and concerted practices which have as their object or effect the prevention, restriction, or distortion of competition in the Greek territory are prohibited and, in particular, those which: **16.01**

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development, or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, in particular by refusing without valid justification, to sell, purchase, or conclude any other transaction; or

- make the conclusion of contracts subject to acceptance by other parties of additional obligations which, by their nature or according to commercial usage, have no connection with the object of such contracts.

16.02 The prohibition covers both horizontal and vertical agreements. The first category ("cartels") is generally regarded to encompass more "serious" violations. As far as the second category is concerned, the EU block exemption regulations (see also para. 16.05) also apply in Greece. Within the said category, the restriction of passive sales and resale price maintenance (RPM) are two types of practice which raise the most concerns.

16.03 Under article 1(3) of Law 3959/2011, the provisions of article 1(1) may not apply where the disputed agreement between undertakings, decision by associations of undertakings, or concerted practice, actually contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and does not:

- impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

16.04 Until the enactment of the new competition law (Law 3959/2011), the system of self-assessment was partially adopted in Greece, and a mandatory notification system was in place (as per art. 21 of Law 703/77). The new law has signified the end of this formality and the automatic exemption, so long as the above requirements are (cumulatively) met. The onus of (self-)assessment lies with the undertakings involved.

16.05 Lastly, paragraph 4 of Law 3959/2011 states that all EU regulations relevant to the application of article 101(3) TFEU (i.e. in relation to the block exemption) will accordingly apply to agreements and decisions which are not likely to affect inter-state trade. Essentially, this provision states that the relevant EU regulations also apply in Greece.

16.06 Article 2 prohibits any abuse by one or more undertakings of a dominant position, within the national market or in a part of it. Such abuse may, in particular, consist in:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

16.07 The particular type of abuse of dominance may vary. Every case needs to be evaluated on the basis of its own particular factual background and the competition "map" of the relevant market.

16.08 The Hellenic Competition Commission (HCC) has constructed a set of priorities for the enforcement of competition policy centered on the basic criterion of serving the public interest—this appears to have a particular significance in a period where the Greek market experiences a deep and long recession. Hence, competition policy in Greece has prioritized anticompetitive practices that especially affect end consumers. In achieving this, primary emphasis is given on cases that raise issues of hardcore restrictions of competition; which affect products and services of essential or major importance to Greek consumers; and which

affect prices and may have cumulative effects. As such, competition policy in Greece is applied under a certain unique set of criteria which derive from the abovementioned consumer-centric context.

I. Acting alone

16.09 Greek law does not provide for a definition of dominance. The HCC follows the path laid down by the EU case-law. Accordingly, the criteria of (i) market share (possibly > 40–50 percent) and (ii) the capacity of an undertaking to act independently of competitors and customers are crucial. Of course, several other factors will be taken into consideration, including barriers to entry, etc. The HCC will assess the instances of abuse on the basis of the established principles of EU case law. In terms of "acting alone," rebates and resale price maintenance are the main areas of enforcement by the HCC.

A. Predatory pricing

16.10 Predatory pricing covers cases when the dominant undertaking deliberately incurs losses ("sacrifice"), in order to foreclose or be likely to foreclose actual or potential competitors with a view to strengthening or maintaining its market power.[1]

16.11 The said conduct entails a sacrifice if, by charging a lower price for all or a particular part of its output over the relevant time period, the dominant undertaking is incurring losses that could have been avoided. Proper assessment of such a conduct presupposes a careful cost analysis. The average avoidable cost (AAC) (average variable cost according to *AKZO* case)[2] is the appropriate starting point for assessing whether the dominant undertaking is incurring avoidable losses. If a dominant undertaking charges a price below AAC for all or part of its output, it is not recovering the costs that could have been avoided by not producing that output: it is incurring a loss that could have been avoided. Other than that, each case needs to be examined on an *ad hoc* basis, in the framework of the exact competition conditions of each market.

16.12 The HCC has not yet ruled on a predatory pricing case, although it is to be noted that the pricing of various bundles of products/services (multi-product rebate schemes) offered by the dominant telecommunication operator are quite frequently under the review of the national regulator—the Hellenic Communications and Post Commission (EETT)—which has rejected various such offers as constituting an abusive practice. Usually, this abusive practice is related to predatory pricing and/or margin squeeze, for example, Decision no. 601/18 of the EETT of April 28, 2011 which prohibited a bundle of products/services (the offer was for the provision of broadband internet connectivity to the speed of 2 Mbps for the period of 6+6 months), since its pricing was considered as constituting predatory pricing and margin squeeze.

16.13 Sales below cost are also regulated by Greek Law 146/14, as amended "on unfair competition," which prohibits any unfair competitive act.

B. Exploitative offenses (excessive pricing, monopoly leveraging)

16.14 Article 2 of Law 3959/2011 prohibits a dominant company from abusing its position through imposing excessive prices. The European Community courts have in the past dealt with such cases and the HCC has in a number of occasions relied on these cases.

[1] TFEU, art. 102 and Law no. 3959/2011, art. 2.
[2] Case C-62/86 *AKZO v. Commission* [1991] ECR I-3359.

16.15 In a relatively recent decision the HCC rejected the complaint by a number of aeroclubs against EKO (a petroleum company) for allegedly abusing its dominant position through pricing excessively a specific type of fuel for airplanes.[3] The HCC applied the two-stage (cumulative conditions) test on excessive pricing deriving from the *United Brands* case,[4] and concluded that EKO's conduct did not satisfy the first limb of the test, namely that the price difference between EKO's costs and pricing of its customers was neither significant nor was there a significant profit margin available for EKO.

16.16 More recently, in its Decision 528/VI/2011,[5] the HCC—again applying the test in *United Brands* and in *Scandlines Sverige AB*[6]—similarly rejected the complaint made by the Hellenic Army General Staff in relation to the alleged excessive pricing by two maritime transportation companies. The HCC considered the pricing of the two companies in a number of cases and concluded that the higher costs charged by them were not at such a high level that could (compared to other cases on excessive pricing, e.g. *British Leyland*)[7] be considered as constituting an abuse and which could not possibly be objectively justified.

C. Monopsony

16.17 Article 2 of Law 3959/2011 also applies upon conduct by undertakings which are in a dominant position as a buyer, similar to relevant EU case law. It needs, however, to be noted that the creation of such a dominant buyer entity is not prohibited. Quite the opposite, very recently, the Greek state created such a body within the healthcare provision market—the National Organization for Health Care Provision (EOPYY)—in an attempt to enhance price and quality based competition in this sector of the economy. There have not been any monopsony cases yet.

D. Price discrimination

16.18 Article 2 of Law 3959/2011 mirrors article 102 TFEU, and hence it also expressly prohibits both price and non-price discrimination by dominant undertakings.

16.19 Finding that a dominant company has abused its position through discriminatory practices is, of course, not an easy task, especially given that various other factors may well justify the reason behind the difference in the treatment of customers (e.g. lower prices achieved through volume discounts). A relatively recent case on this issue that the HCC had to decide upon, following a complaint by a Greek political party against two companies operating in this sector, was related to the petroleum/fuel market. The complaint was related to the alleged cartel operated by two major petroleum companies (Hellenic Petroleum and Motor Oil) and/or the abuse of dominance; the absolute price alignment; the discriminatory treatment of smaller trading companies in relation to discount policies (i.e. that smaller companies receive far smaller discounts compared to those received by the bigger company—Shell); and on issues related to the lack of transparency in the cost data of the companies/refineries.[8]

16.20 In its Decision, the HCC considered that in relation to the alleged discriminatory conduct, the relevant EU case law on article 102 TFEU, does not prohibit volume discounts. The HCC considered that the discount policy concerned was not related to the Hellenic Petroleum company but to another company—Petrola. Hellenic Petroleum acquired Petrola

[3] HCC Decision no. 489/VI/2010 (May 7, 2010).
[4] Case 27/76 *United Brands Company and United Brands Continentaal BV v. Commission* [1978] ECR 207.
[5] HCC Decision no. 528/VI/2011 (September 29, 2011).
[6] *United Brands* (n 4); *Scandlines Sverige AB v. Port of Helsingborg*, COMP/A.36.568/D3 (July 23, 2004).
[7] Case 226/84 *British Leyland plc v. Commission* [1986] ECR 3263.
[8] HCC Decision no. 502/VI/2010 (July 21, 2010).

in 2003 (a company which was not in a dominant position) while these contested discounts were given. The latter's discount policy was a volume discount policy known in advance and applied uniformly to all its customers, based on the economies of scale logic of operation. According to the HCC, the relative variation in the increments between Shell and the other smaller companies were justified since Shell was the larger customer.

E. Dictating or influencing resale prices

(i) Resale price maintenance

16.21 Fixed or minimum RPM (i.e. a supplier imposing upon a distributor the products' resale price or setting the minimum price they are to be sold) is considered a serious infringement of article 1 of Law 3959/2011 similar to article 101 TFEU. A maximum or recommended price will not infringe the competition provisions, provided of course that they do not essentially operate as fixed or minimum prices.

16.22 The former forms of RPM are also caught by the Block Exemption Regulation 330/2010 (BER) as it is considered as a hard core restriction, no matter what the market share of the relevant company is (i.e. even if very low). It is essential to also note that RPM does not necessarily have to be direct; the relevant competition provisions will also be infringed by indirect methods of imposing the resale prices. Nonetheless, the new Guidelines of the BER provide—for the first time—certain examples where RPM could potentially be found to generate efficiencies as a defense.

16.23 In Greece, the HCC has previously ruled on RPM in several cases. In its Decision 370/V/2007 on spare parts for cars,[9] the HCC found an infringement of article 1 (of the then Law 703/1977) and of article 101 TFEU (then art. 81 EC) and fined a Greek car dealer. However, it is to be noted that the HCC's Decision has been appealed and is currently pending.

(ii) Minimum advertised price programs

16.24 See above, the discussion in subsection (i) on Resale Price Maintenance. The concept of minimum advertised price (MAP) (in any form, including Internet operated MAP (IMAP)) can be covered by rules on RPM which prohibit both direct and indirect methods of fixing the price or setting a minimum price.

F. Tying arrangements

16.25 Articles 101(1) (e) and 102(d) TFEU prohibit making a contract conditional on accepting supplementary obligations unrelated to the contract.

16.26 Pricing practices which have a tying effect could lead to an abuse of the dominant position. The HCC will normally take action where the undertaking is dominant in the tying market and where, in addition: (a) the tying and tied product are distinct products and (b) the tying practice is likely to lead to anticompetitive foreclosure. The anticompetitive foreclosure is assessed under the "as efficient competitor" test. If the "as efficient competitor" who offers only some of the components cannot compete against the discounted "bundle", the rebate scheme may be anticompetitive on the tied or tying market.

16.27 In the past, tying and bundling practices have been considered by the HCC, for example, in Decision 434/V/2009 which is discussed in Section I.J, and the relevant legislative framework and EU case law is always applied by the EETT as part of its review on offers of "bundles" of products/services in the telecoms sector.

[9] HCC Decision no. 370/V/2007 (November 29, 2007).

G. Exclusive dealing

16.28 According to recent case law, a dominant company's practice to provide cabinets on the basis of exclusivity aimed at capturing the available space at smaller retail shops (e.g. kiosks) and raising entry/expansion barriers, to the exclusion of competition and rebates conditional upon the commitment of all or the most substantial part of available shelf/store space for its products, has been held to be a prohibited abusive conduct.[10]

H. Refusal to deal

16.29 Refusal to deal is generally considered abusive, as it limits the customers' operations and prevents access of other competitors to the market of a certain product or service.

16.30 A refusal to supply may be justified by the right of the dominant undertaking "to take such reasonable steps as it deems appropriate to protect its [commercial] interests," although "such behavior cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it."[11] In other words, the refusal to supply may be legitimate as a commercial response to competitors' attacks, but it must be proportionate to the threat, taking into account the economic strength of the undertakings confronting each other.

16.31 Even if a refusal to supply/deal is deemed not to fall within the restrictions of article 2 of Law 3959/2011 because it is justified, it may still be considered abuse of right according to the general provisions of the Greek Civil Code.

I. Essential facilities

16.32 In its Decision no. 317/V/2006,[12] the HCC found that the company with the exclusive rights of management of the Canal of the Isthmus of Corinth (which is an essential infrastructure) had acted in a manner abusive of its dominant position. The company had the right to set and collect tolls for the passage of vessels from the Canal, while it also had the right to operate as a provider of "bateau mouche" cruises. The company gradually took advantage of this ability and became active "downstream" the market in the relevant geographic area of the Isthmus.

16.33 The abusive conduct came by way of both adjusting and setting the level of fees as well as setting a new categorization of vessels in such a way so as to make it particularly onerous for competing companies to operate in the relevant market for these cruises. The company raised the tolls by 852 percent, and although this was uniformly applied to all passenger vessels, the frequency of the cruises was a factor not taken into consideration. Hence, these arrangements particularly affected those smaller providers of similar Canal cruises which had to pass more frequently from the Isthmus than other passenger vessels, and which could not bear such huge costs resulting from the increased tolls, whilst the dominant company was not paying the tolls. The HCC considered that the dominant company could not use its power resulting from its exclusive right to manage the Canal and to set the tolls so as to further strengthen its position in another relevant market and to make it less favorable for competitors to operate in the same market. The HCC therefore ordered the company to cease its abusive practices and to re-adjust the relevant tolls.

J. Bundling (including loyalty and market share discounts)

16.34 Since tying is a form of bundling, the terms are often used interchangeably. Tying can be seen as a special type of bundling.

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[10] HCC Decision no. 520/VI/2011 (May 5, 2011); see also the HCC's Press Release on this Decision (in English) available at: <http://www.epant.gr/img/x2/news/news399_1_1328713831.pdf>.

[11] *United Brands* (n 4).

[12] HCC Decision no. 317/V/2006 (July 28, 2006).

Moreover, fidelity rebates (namely cases when, in order to obtain the rebate on past purchases, the customer is unable to switch for future purchases to other suppliers) and loyalty rebates (namely rebates conditional on the customer buying all or most of his requirements from the supplier) foreclose the market and discriminate between dealers. Both can come in various forms and combinations based on the ingenuity of the deviser of the scheme.[13] **16.35**

Target rebates are a particular case. A rebate is given if the customer reaches an individually specified sales target. Most schemes in the market include some element of target rebate/discount. As any rebate scheme it should reward a dealer for producing an economic benefit for the supplier, it must not discriminate between comparable dealers, it must not foreclose competition and it must be transparent. **16.36**

By applying the rulings of the European Courts, the HCC held in its Decision no. 434/V/2009 that the defendant company infringed Greek and EU competition law by abusing its dominant position in the instant coffee market. In particular, the HCC was concerned with: in the retail instant coffee market, regarding trading relations with supermarket chains, the granting of target and fidelity rebates, prohibiting/impeding parallel imports, as well as prohibiting any simultaneous marketing activities of its products and competitive products; and in the HO.RE.CA. instant coffee market, the imposition of exclusive supply and bundling contract arrangements, as well as the granting of fidelity rebates aiming at inducing customer loyalty. **16.37**

In its most recent Decision no. 520/VI/2011,[14] the HCC found that a company that is mainly active in the production and distribution of salty snacks in Greece, infringed Greek and EU competition Law. According to the Decision "the company has adopted and implemented a single, consistent and targeted policy in the market for salty snacks that sought to exclude its competitors from smaller retail outlets (notably kiosks, grocery stores and traditional food stores & mini-markets), and to limit their growth possibilities." To achieve this objective, the company employed various abusive practices including rebates conditional upon the commitment of all, or the most substantial part of, available shelf/store space for its products and target rebates at both wholesale and retail level. **16.38**

As mentioned in Section I.A, the bundling of products/services and their pricing appears in the telecoms sector and is an issue that is frequently reviewed (every offer to consumers during the year is being scrutinized) by the National Regulator for Telecommunications (EETT) in relation to the offers made by the dominant provider in Greece. **16.39**

K. Standard-setting groups (disclosure requirements, licensing arrangements, and licensing pools)

Standard-setting activities have been under the scrutiny of the Commission, with the publication of new guidance on this subject in 2011 which is also applicable in Greece. However, there does not appear to be any relevant extensive activity in Greece. **16.40**

L. Customer termination

Customer termination is a sub-category of "refusal to deal."[15] In case there are valid reasons which justify the termination of a relationship with a customer, it is unlikely that such refusal by a dominant undertaking to supply such customer would give rise to competition law implications, as it would in the opposite case. **16.41**

[13] See the discussion of the HCC's Decision no. 434/V/2009 (May 22, 2008) in para. 16.37.
[14] Cited at para. 16.28.
[15] See Section I.H.

16.42 Until recently, article 2a of the previous competition Law 703/77 provided for the prohibition of abuse of a relationship of economic dependence of an undertaking upon another undertaking which was its client or supplier, even if this relationship of dependence concerned only one type of product or service, so long as the "dependant" undertaking did not have an equivalent alternative. However, this provision was abolished and integrated in Law 146/1914 regarding unfair competition. Please note that the HCC has no jurisdiction over the application of the provisions of law 146/1914 on unfair competition, the application of which is in the competence of civil courts.

M. Termination of intermediaries (retailers, wholesalers, dealers, and value-added resellers, agents, and brokers)

16.43 Termination of intermediaries is a sub-category of "refusal to deal"[16] and would not amount to a violation of article 102 TFEU, unless the intermediaries are competing with the dominant undertaking. Moreover, it would not amount to a violation of article 101 TFEU, unless termination represents a tool to strengthen a separate anticompetitive practice, for example, cutting off supplies to distributors who do not comply with a fixed resale price imposed by the dominant undertaking or who disregard an export prohibition. In a recent case, the Athens Court of First Instance ruled that the company that provided certification services abused its dominant position by imposing on several examination centers exclusivity clauses and threatening to terminate the respective agreements in case they did not agree and/or follow such clauses (i.e. in case the examination centers proceeded in concluding agreements with rival companies that provided certification).[17] Moreover, in the famous *Lelos* case, the Athens Court of Appeals (1983/2010),[18] following a preliminary ruling by the Court of Justice of the European Union (CJEU),[19] ruled that the refusal by a pharmaceutical company to fulfill in total the orders of wholesalers engaging in parallel exports constitutes an infringement of article 102 TFEU.

N. Termination of relationships with competitors

16.44 Termination by a dominant undertaking of a relationship with a competitor would not amount to a competition violation, unless the circumstances of the termination point to abusive behavior. In such case, a violation of article 102 TFEU would be established.

O. Exemptions

16.45 As mentioned in para. 16.03, under article 1(3) of Law 3959/2011, the provisions of article 1(1) may be declared inapplicable in the case of any agreement between undertakings, any decision by associations of undertakings, any concerted practice, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

16.46 Greece applies the EU block exemption regulations.

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[16] See Section I.H.

[17] Case 4027/2007 of the Athens Court of First Instance (see rep. in "*Hellenic Justice*" 50(A) 2009, p. 619).

[18] Case 1983/2010 of the Administrative Court of Appeals of Athens (Judgment issued on August 24, 2010).

[19] Joined Cases C-486/06 to C-478/06 *Sot. Lelos kai Sia EE and others v. GlaxoSmithKline AEVE* [2008] ECR I-9139.

II. Dealing with competitors

16.47 Greek competition policy does not differ from that of the EU in terms of prioritization of targets. The main focus is to detect and punish all types of agreements that are of an anti-competitive nature and especially those which are considered as hard core infringements of competition (i.e. price fixing, market sharing, etc.). The interest comes with the enforcement aspect of the relevant competition provisions. The HCC has been quite active in the recent years in this area, having demonstrated an upgrade on its enforcement abilities, its investigative powers, and performance in tackling cartels.

A. Horizontal price fixing (including advanced announcements of price or product changes)

16.48 Horizontal price fixing is considered as a serious threat to competition and to the overall welfare of Greek consumers especially during the economic crisis experienced in Greece. It is worth mentioning that the fight against price-fixing cartels is considered as the first of certain "strategic targets" by the Hellenic Competition Commission in tackling anticompetitive conduct. Law 3959/2011 prohibits horizontal price fixing and the HCC has imposed considerable fines in a number of occasions.[20] Price fixing can take various formations and this may also included advanced announcements of price or product changes. The interpretation of article 1 of Law 3959/2011 will follow EU case law and its interpretation on these subjects.

B. Horizontal agreements to allocate customers or territories; agreements not to compete

16.49 All agreements which aim at allocating markets or customers as well as agreements to abstain from competing are, similar to price-fixing agreements, dealt with increased hostility by the HCC.

16.50 A recent *ex officio* investigation initiated by the HCC was triggered by announcements of an association of undertakings in its website asking its members to limit their activities (construction of new buildings/real estate) unless a certain percentage of their available real estate was previously sold.

C. Horizontal boycotts

16.51 Horizontal boycotts are prohibited by Law 3959/2011 and they are accordingly seen as a hardcore restriction of competition. Both articles 1 and 2 of Law 3959/2011 can apply upon such practice.

16.52 The HCC discussed the issue of boycotts in its Decision no. 277/IV/2005 (under the previous competition legislation, Law 703/1977) in relation to a supermarket's cartel formation.[21] It considered the possibility of applying article 1 as well as article 2 (arts. 101 and 102 TFEU) with the latter being of interest to the potential of having an abuse of collective dominant position. In that Decision the HCC proceeded in analyzing both bilateral boycotts and tripartite agreements to boycott. The latter category was analyzed from a cartel formation perspective, nevertheless there was absence of evidence that the parties acted in such a manner.

[20] See, most recently, HCC Decision no. 520/VI/2011 (February 14, 2011) for a EUR 4 million fine in relation only to art. 1 of Law 3959/2011 and art. 101 TFEU infringements by the dominant company (on appeal, the fine was reduced to EUR 2 million), see Case 869/2013 Administrative Court of Appeals of Athens, Judgment of March 13, 2013.

[21] HCC Decision no. 277/IV/2005 (April 1, 2005).

D. Joint ventures and other competitive collaborations

16.53 On the issue of joint ventures and other collaborations, the Greek competition law similarly follows that of EU law and case law precedent. In addition, and as it is noted in article 1(4) of Law 3959/2011, the EU exemption regulations will also apply, intact, in Greek law, hence this also will cover the specialization agreements and the R&D agreements.[22]

16.54 Joint ventures will be dealt with under the merger control provisions (i.e. non-full function joint ventures are subject to art. 1 of Law 3959/2011 and article 101 TFEU). These provisions are article 5(5) of Law 3959/2011 (art. 5 is titled Concentration of Undertakings), which defines what a joint venture is (i.e. autonomous economic entity), and article 7(3) of Law 3959/2011 (titled as Control of the Concentration of Undertakings) dealing with the appraisal of joint ventures, which mirrors articles 2(4) and 2(5) of Commission Regulation 139/2004.

E. Trade associations

16.55 The HCC has shown a particular interest in the rules of operation and decisions of trade associations in the Greek market in a number of sectors ranging from consumer goods to construction. Undoubtedly, the actual participation within such associations is not contrary to competition law, hence neither are discussions between members (competitors) or decisions applied upon the association's members provided of course that these do not have an anticompetitive target (i.e. fixing prices/commercial policies, etc.). Similarly to EU case law precedent, both decisions by the associations or discussions taking place therein by the members which have as their subject matter the imposition of uniform prices or components and parameters of formulating prices, trading terms and other commercial policies will infringe competition law.

16.56 As an example of its practice, the HCC has previously imposed a fine on the Technical Chamber of Greece for imposing upon its members a minimum price (cost) for the construction of projects thereby resulting in raising the prices charged by engineers/architects.[23] On another occasion, the HCC imposed small fines on a number of associations of estate agents for imposing on their members a direct and indirect minimum price percentage charged to clients (2 percent of the value of the property) as well as imposing restrictions on their members in relation to advertising of prices below that percentage.[24] More recently, the HCC imposed fines against a number of professional associations of foreign language school owners for price-fixing practices as well as other restrictions in the exercise of professional activities of their members.[25]

16.57 It is evident from the various *ex officio* investigations that the HCC monitors trade associations and attempts to gather evidence from various sources.

F. Interlocking directorates

16.58 Article 1 of Law 3959/2011 and article 101 TFEU can be used in cases where an interlocking system is used in order to coordinate prices and other commercial policies. Article 2 of Law 3959/2011 and article 102 TFEU as well as the Merger Control provisions could also apply.

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[22] See the relevant Commission Regulations Nos. 1218/2010 and 1217/2010.

[23] HCC Decision no. 512/VI/2010 (December 22, 2010).

[24] HCC Decision no. 518/VI/2011 (December 20, 2011).

[25] See the HCC's Press Release on this Decision (October 21, 2013), available at <http://www.epant.gr/img/x2/news/news563_1_1382420810.pdf> (in English).

Overall, this is an area that competition enforcement in Greece is not sufficiently explored in the wider market context. Nevertheless, it is to be emphasized that the HCC is also competent to enforce Law 3592/2007 on Concentration and Licensing of Media Companies and other Provisions, which focuses on the media sector and targets the concentration of control over the media market (art. 2) and also the control of more than one *electronic* media by the same legal or natural person (art. 5). The law encompasses the main competition provisions and it is also applied in conjunction with the existing competition legislation. **16.59**

G. Facilitating practices

There is nothing specific in the Greek legislation on the issue of facilitating practices. Following the Court of First Instance's Decision in *AC-Treuhand AG*,[26] the interpretation of article 1 of Law 3959/2011 can be wide enough so as to apply to undertakings that in any way facilitate cartel formation. Criminal sanctions could hence also apply to natural persons from such facilitating undertakings. **16.60**

H. Information exchange

Similar to EU competition case law precedent and the Commission's Horizontal Cooperation Agreements Guidelines. **16.61**

Recently, the Guidelines were also cited by the HCC (in relation to information exchange) in its Opinion no. 21/VII/2012 in relation to the repeal of article 9 of Market Decree 7/2009 on the obligation to submit wholesale price lists.[27] **16.62**

I. Joint purchasing agreements

Similar to EU competition case law precedent and the Commission's Horizontal Cooperation Agreements Guidelines. **16.63**

J. Joint lobbying/regulatory/legislative efforts

Joint lobbying is not prohibited, provided of course that these joint efforts are not also used as methods of coordinating commercial policies (e.g. in relation to prices).[28] **16.64**

III. General issues

A. Jurisdiction and applicable law (including sector-specific competition regulation)

Law 3959/2011 (for the Protection of Free Competition) is the main legislation. As mentioned earlier, articles 1 and 2 of Law 3959/2011 are equivalent to articles 101 and 102 TFEU. Similarly to the EU legislation, the relevant Law 3959/2011 is not restricted as to its application. This means that it could be applied in all markets (subject of course to the same EU law restrictions) and even to undertakings not situated in Greece but which implement the prohibited practices in Greece (as it follows from the relevant EU Court precedent). **16.65**

Additionally, Law 3592/2007 (on Concentration and Licensing of Media Companies and other Provisions) applies in relation to the media market sector. **16.66**

[26] T-99/04 *AC-Treuhand AG v. Commission* [2008] ECR II-1501.

[27] HCC Opinion 21/VII/2012 (March 22, 2012).

[28] See Section II.E in relation to discussions that may be regarded as anticompetitive in the context of trade associations and Section II.H in relation to information exchange.

B. Antitrust system

(i) Name of agency/agencies

16.67 The Hellenic Competition Commission (HCC)[29] and also the sector-specific Regulatory Authority of the Hellenic Telecommunications and Post Commission (EETT)[30] and the Regulatory Authority for Energy (RAE),[31] which both have regulatory/enforcement powers in their own sectors. According to article 24 of Law 3959/2011, the HCC cooperates with such Regulatory Authorities and may contribute towards the enforcement of both Greek and EU competition legislation.

(ii) Staff size and budget

16.68 The HCC's staff size is approximately 110 people in various positions (this number includes administrative staff). The majority of the personnel are divided into four main Divisions which correspond to four main categories of products and services, i.e.:

(1) Division A deals with markets such as chemicals, mines, quarries, construction, automobiles;
(2) Division B deals with markets such as agriculture, livestock farming, fishery, food, beverages, clothing, pharmaceuticals, electrical, and electronics;
(3) Division C deals with the banking sector, financial services, information technology, tourism, sports sector, culture, catering, and entertainment industry;
(4) Division D deals with the areas of energy, water supply, know-how, transportation, publishing, advertising, intellectual property.

16.69 Beyond these market categories, the HCC operates a Special Division for inspections in the Media market. These Divisions are supported by the Legal Substantiation Directorate and by the Economic Substantiation Directorate.

16.70 The HCC has a separate legal personality and it has administrative and financial autonomy, although it remains subject to auditing by the Court of Audit. Its budget is approved by the Minister of Finance and the Minister of Economy, Competitiveness and Shipping. Its budget for the year 2012 was around EUR 28 million and for 2013 around EUR 30 million.

16.71 Furthermore, according to article 17 of Law 3959/2011, a 1 per mil of the fee imposed on all limited companies which are either being set up in Greece or increase their capital (the fee is imposed on the founding capital or on the capital increase) is deposited to a special account manageable by the HCC.

16.72 Every two years, and following the deduction from any expenses, from the revenue generated—if any—by the HCC, an amount equal to 80 percent is given towards the state budget.

(iii) Recent enforcement actions and trends

Enforcement priorities/HCC's prioritization criteria

16.73 The *HCC* has set certain criteria which are applied for the prioritization of cases:[32]

(1) First, the HCC's basic concern is how to best serve the public interest; the most fundamental criterion assessed in light of the estimated impact upon effective competition and

[29] HCC website, <www.epant.gr>.
[30] EETT website <www.eett.gr>.
[31] RAE website <www.rae.gr>.
[32] HCC Decision no. 525/VI/2011 (July 7, 2011). See also HCC Press Release, "Criteria Setting for Enforcement Priorities and Strategic Objectives of the Competition Commission" (August 31, 2011) available at <http://www.epant.gr/img/x2/news/news365_1_1315828654.pdf> (in Greek).

consumers. This translates in giving priority to *ex officio* investigations and/or complaints which focus on and particularly raise the following issues:

- hard core restrictions of competition taking place across the Greek market (i.e. price fixing/market sharing/sale or production limitations—with horizontal agreements (cartels) being on top of the list of priorities) taking into consideration the market position of the undertakings; market structure; and volume of consumers affected;
- the essential nature and importance of the particular products/services for consumers;
- the impact on prices/quality following the anticompetitive practice;
- comparison of these effects felt in the Greek market with other EU member states; and
- potential cumulative effects resulting out of the anticompetitive conduct under investigation;

(2) Second, as to whether a complete leniency application has been made, provided of course that the leniency program criteria are met;

(3) Third, as to the actual necessity to adopt exceptional—and absolutely necessary, suitable, and proportionate—regulatory measures within particular sectors of the economy in order to create (possibly also enhance) the necessary conditions of effective competition; and

(4) Fourth, the HCC's advisory power/competence (e.g. advising in drafting legislation/amendments, etc.).

16.74 In addition to these four criteria, the HCC states that for this prioritization procedure it will additionally take into account a number of (internal to its operation) factors, such as the availability on human and financial resources; the necessity to clarify any potential novel legal issues; the HCC's best placement to deal with the case at hand; the result out of the intervention; the comprehensiveness of the submitted complaint. Recently, the HCC has adopted an informal and internal "point system" for the investigation of pending cases.[33] This system essentially covers the points (1)–(4) in the priority procedure aiming to enhance the effectiveness of the procedures and of the investigations of cases which are considered as having a significant impact on competition and/or are of a systemic effect.[34]

Recent trends, investigations/cases

16.75 Given the particular economic conditions experienced in Greece, there has been much debate as to whether competition policy is to be adapted and applied more leniently. Triggered by certain announcements as well as actions initiated by certain association of undertakings arguing for the validity of crisis cartels alleging the problematic financial market environment and how this affected their operation (e.g. through the rise of raw materials' prices, tax reforms, etc.), the HCC rejected this approach and sought to clear any misconceptions by noting that:

> [C]ompetition law... imposes on undertakings to face economic situations framing an autonomous trading policy independently of each other and with means which neither distort nor disrupt free competition. Therefore, any possible pursuit of increase or maintenance of undertakings or shifting financial burdens to consumers by way of cartels, decisions by associations of undertakings or unilateral abusive practices, puts the public interest at risk and harms the consumer, without any offset for society.[35]

16.76 Consequently, in preventing any similar considerations and practices by undertakings from arising in the future, the HCC stressed that it will use all potential sources of information to detect such anticompetitive conduct and subsequently to impose upon it severe sanctions.

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[33] HCC Decision no. 539/VII/2012 (May 24, 2012).

[34] HCC Press Release, "Point System for the investigation of cases by the Directorate-General for Competition" (June 28, 2012), available at <http://www.epant.gr/img/x2/news/news432_1_1340905460.pdf> (in English).

[35] HCC Announcement, "Enforcement of competition rules in special economic conditions" (March 14, 2011), available at <http://www.epant.gr/img/x2/news/news361_1_1311248129.pdf> (in English).

16.77 Following from this, and as a general observation, the HCC has been particularly active during the last two years. It has initiated a number of *ex officio* investigations and issued Opinions; concurrently, certain important decisions have been adopted both in relation to cartels and to abusive of dominance behavior. Most notably, during this period the HCC has amongst others:

- initiated an investigation into the construction sector following numerous press reports and evidence in the website of the Association of Building Manufacturers;
- initiated an investigation into the alleged infringement of article 1 of Law 703/77 and article 101 TFEU in the flour market in relation to the practices of two flour mills associations and in the context of its investigation to this market it imposed a fine for the obstruction of on-site inspections;
- imposed a fine on the Technical Chamber of Greece for the adoption of a "minimum cost for construction projects" thereby increasing fees for architects and engineers;
- adopted an infringement decision against two gas supply companies in relation to abusive of dominance behavior;
- initiated an investigation into alleged infringement of articles 101 and 102 TFEU and articles 1 and 2 of Law 703/77 in the gas market;
- adopted a decision concerning the infringements of both articles 1 and 2 of Law 703/77 and articles 101 and 102 TFEU, by the leading savory/salty snacks producer.

16.78 Moreover, the HCC issued numerous Statements of Objections, for example against the Association of Estate Agents for imposing restrictions and fixing minimum fees; in relation to an exclusivity agreement for satellite broadcasting (subsequently accepting commitments); against the professional associations of foreign language school owners in relation to price-fixing and professional restrictions; against a tank vehicles transport company in relation to an alleged article 1 and 2 of Law 703/77 violation; against various undertakings active in the production and distribution of poultry-meat in relation to an alleged cartel; more recently, against a leading producer of personal care products (for alleged violations of both articles 1 and 2 of Law 703/1977 and of Law 3959/2011, and articles 101 and 102 TFEU); and against a major telecommunications retailer (for violations of article 1 of Law 3959/2011 and of article 101 TFEU).

16.79 Furthermore, and amongst others, the HCC has reviewed and cleared two mergers in the ice-cream and dairy products markets imposing a Monitoring Trustee for the management of the divested branch of chocolate milk business; it has cleared a number of mergers in the banking sector; and also cleared concentrations in the supermarket sector.

16.80 In addition, the HCC issued Opinions in various market sectors, for example concerning the distribution of infant milk; in relation to the professions of actuaries, chartered appraisers, accountants, tax consultants, and many other public security licensed professions; in relation to the market for the production, testing, certification and marketing of cement; and issued an Opinion on numerous provisions of the Greek Market Control Code.

C. Private litigation

16.81 Persons who have suffered a loss due to acts or omissions by undertakings breaching the competition rules may refer the matter to the civil courts for an eventual award of damages. The number of such actions is small.

16.82 The law provides for two forms of compensation: pecuniary and non-pecuniary damages.

16.83 Pecuniary damages are awarded for damage to goods which have an economic value and can be paid through monetary compensation or, not commonly, in kind.

16.84 Non-pecuniary damages are awarded in cases of moral damage, i.e. damage to non-pecuniary goods, such as an undertaking's good will or market reputation.

The law provides for specific means of evidence in case of pecuniary damages, including: **16.85**

- confession,
- documents,
- expert opinion,
- witness testimony, etc.

The amount of damages is calculated based on the harm (usually monetary) incurred by the plaintiff. No economic models exist under Greek law for the calculation of damages. The amount of damages is determined by the court on the basis of three basic requirements: the existence of causation, the comparison between the economic situation of the aggrieved party before and after the occurrence of damage, and the actual evaluation of the harm incurred. **16.86**

The case law of the Greek courts confirms that violation of articles 1 and 2 of Law 3959/2011 (or previous competition legislation) may amount to tort under articles 914 ff. of the Greek Civil Code and allow private actions for damages.[36] **16.87**

The main reason for the limited number of damages actions against companies which have infringed competition rules is the difficulty of the claimant to obtain access to the relevant economic data and files of the defendant, since this usually requires separate legal action and, under Greek procedural law, the claimant must identify in detail the requested documents, which, in practice, may be an insurmountable obstacle. Additionally, Greek civil law rules on determining damages are stringent requiring causality between the infringement and the damage and concrete analysis of the damage. **16.88**

D. Follow-on litigation (includes role of agency determinations of liability for follow-on litigation)

By virtue of the law, decisions of the HCC, when final, are binding on national Civil Courts, while decisions of foreign Competition Authorities or foreign Courts are rarely assessed by domestic Courts. The burden, however, of putting forward such statements or decisions as supportive evidence during the proceedings lies with the parties. **16.89**

E. Arbitration and alternative dispute resolution

Competition issues may arise in the context of arbitration proceedings and are deemed proper subject matter for arbitration. Following the CJEU's ruling in *Eco Swiss* which pronounced the public policy nature of competition rules,[37] their mandatory nature in domestic private law (*ius cogens*) and in private international law (*lois d'application immediate*) cannot be disputed. Despite the narrow construction of the public order exception under the New York Convention,[38] Greek courts may find that public order is violated if awards violate or do not apply competition law rules. The Greek Supreme Court[39] confirmed that the basic provisions of EU and Greek competition law pertain to Greek public policy and any arbitral award that would run counter to the latter cannot be enforced in Greece. Notably, in this judgment, the Greek Supreme Court limited its review to whether the competition rules had been applied **16.90**

[36] See Decision 18743/1992 of the Athens Single Member Court of First Instance (see rep. in "*Commercial Law Review*" (44), 1993, p. 141); Decision 18/2002 of the Patras Administrative Court of Appeal (see rep. in "*Business and Company Law*" 9(5), 2003, p. 524); and Decision 6042/2002 of the Athens Court of Appeal (see rep. in "*Business and Company Law*" 9(3), 2003, p. 282).

[37] C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR I-3055.

[38] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958; entered into force June 7, 1959, 330 U.N.T.S. 38 (1959).

[39] Areios Pagos Judgment 1665/2009 (Civil, Division D) (published on June 30, 2009); the case is available at the Areios Pagos website: <http://www.areiospagos.gr/en/INDEX.htm> (in Greek).

by the arbitrator, and having found that they had been applied, was satisfied that there was no case of public policy violation despite that the arbitrator had rejected the arguments based on these provisions on their merits.

F. Remedies

(i) Civil liability

16.91 According to article 25 of Law 3959/11, the HCC has the power to impose fines against the violating undertakings which violate competition rules. The fine cannot exceed 10 percent of the gross turnover of the undertaking in the current or preceding financial year.

16.92 Law 3959/2011 provides for three new elements regarding administrative sanctions:

- in case of a group of companies, the aggregate group turnover is considered;
- in case where the economic benefit enjoyed by the undertaking can be measured, the fine cannot be less than that (even if it exceeds the threshold of 10 percent); and
- individuals involved in violations of Law 3595/2011 face a two-fold personal liability:
  - they are jointly liable together with the undertaking for the payment of the above fine; and
  - a separate fine ranging from EUR 200,000 to EUR 2 million may be imposed against them if it is proven that they have participated in the preparation, organization and commitment of the infringement by the undertaking.

16.93 The administrative fines for obstructing the Commission's investigation, for refusing to provide information or copies from required books and records are ranging from EUR 15,000 to 1 percent of the annual turnover.

16.94 Moreover, the HCC is vested with extensive powers in order to ensure compliance with its decisions. The Commission may impose fines or periodic penalty payments, or both, in cases of non-compliance.

16.95 The HCC may impose penalty payments not exceeding the amount of EUR 10,000 per day calculated from the date appointed by the decision for non-compliance with a decision requiring the undertakings concerned to bring an infringement to an end.

16.96 The HCC may impose a penalty payment not exceeding the amount of EUR 5,000 per day in order to compel the undertakings involved to comply with a decision ordering interim measures taken *ex officio* or upon request of the Minister of Development.

(ii) Criminal liability

16.97 The HCC may impose criminal sanctions in case of violation of Law 3959/2011. According to article 44 of Law 3959/2011, criminal sanctions may be imposed on partners/owners, executives or personnel such as imprisonment of at least two years and a criminal penalty from EUR 100,000 up to EUR 1,000,000 (for violations of art. 1 L.3959/2011 and 101 TFEU). A criminal penalty from EUR 30,000 to EUR 300,000 has been introduced against those who implement an abuse of dominant position. Nobody has been found guilty of criminal acts under the competition law yet.

G. Leniency and immunity

16.98 The HCC has recently revised its leniency program in an attempt to offer a more attractive and effective leniency framework which will strengthen its efforts against cartels.[40] According

[40] HCC Decision 526/VI/2011 (August 30, 2011); see further HCC Press Release, "The HCC adopts a revised Leniency Programme" (November 25, 2011), available at <http://www.epant.gr/img/x2/news/news378_1_1326791189.pdf> (in English).

to the HCC, the new leniency program builds upon European and international experience. The most important features of the new Leniency Program are:

(1) The leniency program is offered to both undertakings and natural persons involved that will cooperate with the HCC in relation to violations of article 1 of Law 3959/2011 and/or article 101 TFEU. Hence, it concerns horizontal agreements (cartels) that affect prices (or quantities or market shares etc.), market sharing, restrictions on imports/exports, bid rigging, collective boycott, etc.
(2) It can offer a total immunity or a reduction in the fines following a significant contribution towards the HCC that will assist it to detect cartel formations operating in the Greek market. In addition, for natural persons, a total immunity will absolve them from any potential criminal liability and a fine reduction will be seen as a mitigating circumstance.

16.99 A total immunity or reduction depends upon the time of the application; on the usability of the leniency application for the HCC to establish the infringement; as to whether the information/evidence submitted is complete and significant; the additional and probative value of the new evidence assisting the HCC to establish the critical facts of the investigated offense.

16.100 The HCC's Leniency Program comprises three types:

(1) *Type 1A* which offers full immunity from fines to the first to offer sufficient evidence that will allow the HCC to initiate its inspections. This evidence should not be in the HCC's possession prior to the submission.
(2) *Type 1B* which offers full immunity from fines to the first to offer evidence allowing the HCC to establish the cartel infringement—in case the HCC evidence was insufficient.
(3) *Type 2* which offers a reduction from fines following the provision of evidence for a cartel formation. The information must be of significant added value to the information gathered by the HCC.

16.101 Importantly, undertakings that have coerced others to participate in the cartel formation are excluded from the Leniency Program—although individuals acting for these undertakings are not.

16.102 Oral statements can be accepted. Access is possible after the statement of objections serving to the parties.

16.103 The Leniency Program also introduces a "marker" system. In addition, the HCC can offer advice prior to any official submission of evidence.

H. Document creation and retention

16.104 Greek competition law does not include any particular provision in relation to document creation or retention. However, it can be noted that Law 3959/2011 places particular emphasis on the full cooperation that companies and their officials must demonstrate while being under investigation by the HCC officials. Full cooperation in relation to this particular issue requires that documents are shown to the HCC investigators and copies of these documents are allowed to be taken.

16.105 As mentioned above, the relevant competition law provides heavy fines (from EUR 15,000 up to 1 percent of the annual turnover) in the case where the investigation is impeded and the necessary information/books/documents are not provided to the HCC investigators; while the people responsible are faced with an imprisonment for a period of at least 6 months.