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GREEK LAW DIGEST

The Official Guide to Greek Law

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KLC Law Firm

THE PROCEDURE BEFORE THE HELLENIC
COMPETITION COMMISSION – HCC

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2nd EDITION


HELLENIC REPUBLIC
MINISTRY OF ECONOMY,
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■ COMPETITION



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THE PROCEDURE BEFORE THE HELLENIC COMPETITION COMMISSION – HCC

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What is the HCC?

The Hellenic Competition Commission (the “HCC”) is the Greek independent authority empowered with the administrative enforcement of Law 3959/2011 (Gov’t Gazette Issue A’ 93/20.04.2011), namely the Law on the Protection of Free Competition) – (the “LPFC”) and articles 101 and 102 of the Treaty on the Functioning of the European Union (the “TFEU”), when appropriate. The HCC is the Greek National Competition Authority (the “NCA”) within the meaning of Regulation (EC) 1/2003, participating on behalf of Greece in the European Competition Network (the “ECN”).

The HCC consists of eight (8) full members, including a President, a Vice-President and four Rapporteurs, and two alternate members who must have the same qualifications as the full members. The members of the HCC enjoy specific guarantees of independence while exercising their duties. The HCC sits in plenary or in chambers, according to the significance of the various cases to be heard.

The Directorate General for Competition examines the cases pending. The President, upon recommendation by the Directorate-General for Competition, brings before the HCC, those cases that meet the criteria for priority consideration, pursuant to Article 14, para 2, letters (n) and (i) of the LPFC, from the cases pending before the Directorate-General under Articles 1, 2 and 11 of the LPFC. After the implementation of the point-based system, the Directorate-General investigates the cases according to their ranking order, pursuant to Article 14 para 2, letter (o) of the LPFC. Each case is assigned by lot by the HCC plenum, to one of the Commissioner-Rapporteurs, as soon as a decision concerning the priority of the case is issued, as well as any case of concentration under Articles 5 to 10 of the LPFC. The Commissioner - Rapporteur designated for a specific case participates in the meetings and deliberations of the HCC in Plenary and of its chambers, without voting rights.

What powers does the HCC have?

The HCC has extensive investigative powers, as regards undertakings. First, it has the power to issue Requests for Information in writing. The persons to whom the letter is addressed must provide the information requested, accurately, in full and immediately, unless such person is exempt from examination in criminal trials. In the event of refusal, obstruction or delay in providing the information requested, or in the event that inaccurate or incomplete information is provided, the HCC, without prejudice to the criminal sanctions provided by article 44 of the LPFC, may impose a fine of EUR fifteen thousand (15,000), capped at 1% of

turnover calculated in accordance with Article 10 of the LPFC, on each person, for each infringement, in the case of undertakings or associations of undertakings and their directors and employees, or private individuals or private-law legal entities.

In order to establish a substantial infringement of Articles 1, 2 and 5 to 10 and apply Article 11 of the LPFC, and in order to establish an infringement of Articles 101 and 102 of the Treaty on the Functioning of the European Union, the HCC has the power to conduct *Unexpected Inspections (Dawn Raids)*. More specifically, the authorized employees of the Directorate-General of Competition exercise the powers of tax auditor and are authorized in particular: a) to inspect any document of the undertaking and to take copies or extracts of them; b) to seize such documents; c) to inspect and collect information and data from mobile terminals and portable devices and their servers, located on or off the premises of the undertaking or association of undertakings being inspected, in collaboration with the competent authorities; d) to carry out inspections in the offices and other premises and means of transport of the undertaking or association of undertakings; e) to seal any professional premises, books or documents for the period of and to the extent necessary for the inspection; f) to carry out inspections in the residencies of the businessmen, directors, chief executive officers and persons entrusted with the management or administration in general and of the staff of the undertaking or association of undertakings, where there is reasonable cause to suspect that they are storing books or other documents pertaining to the undertaking and the purpose of the inspection and g) to take, at their discretion, sworn or unsworn witness statements, subject to the provisions of Article 212 of the Code of Criminal Procedure. Without prejudice to the criminal sanctions provided for in Article 44, a fine of at least EUR fifteen thousand (15,000) capped at 1% of their previous year's turnover, calculated according to Article 10 of the LPFC for each of the persons involved and for each infringement, may be imposed by a decision of the HCC on undertakings, associations of undertakings or persons who obstruct or hamper, in any manner, inspections and investigations, as well as on undertakings, associations of undertakings or persons who refuse to comply with relevant inspections, produce books, records and other documents requested and provide copies or extracts of them.

In terms of decision powers, the HCC has the powers described in article 5 of Regulation 1/2003 concerning anti-trust enforcement. In particular, according to article 25 of the LPFC, if the HCC, following a relevant investigation carried out either *ex officio* or following a complaint or a request by the Minister of Economy and Competitiveness, finds that Articles 1, 2 and 11 of the LPFC or Articles 101 and 102 of the TFEU have been infringed, it may decide, either alternatively or cumulatively, to:

(a) issue recommendations in the event of infringement of Articles 1 and 2 of the LPFC or Articles 101 and 102 of the Treaty on the Functioning of the European Union; (b) require the undertakings or associations of undertakings concerned to cease the infringement and refrain from it in the future, (c) impose behavioral or structural remedies; (d) impose a fine on undertakings or associations of undertakings that commit an infringement or fail to fulfil a commitment made by them, and that has been rendered binding by a decision of the HCC; (e) threaten a fine, where the infringement is continued or repeated; (f) impose the threatened fine where it is confirmed by a decision of the HCC, that the infringement is continued

or repeated or that the concerned undertakings or associations of undertakings fail to fulfil a commitment made by them, and which has been made binding by a decision of the HCC.

The fine threatened or imposed may amount to up to ten percent (10%) of the total turnover of the undertaking for the financial year in which the infringement ceased or, if it continues until the issuance of the decision, the year preceding the issuance of the decision. In the case of a group of companies, the calculation of the fine shall take into account the total turnover of the group. In determining the level of the fine, consideration must be taken of the gravity, duration and geographical scope of the infringement, the duration and nature of participation in the infringement by the undertaking concerned, and also its economic benefit derived therefrom. Where it is possible to calculate the level of economic benefit to the undertaking from the infringement, the fine shall be no less than that, even if it exceeds the aforementioned percentage (10%). More detailed rules concerning the determination of the exact amount of the fines and the methodology of their calculation are contained in the soft law Notice of the HCC entitled "Guidelines for the calculation of fines" of **12.5.2006** and the Notice of **17.7.2009**.

Moreover, as specifically laid down in Articles 7 and 8 of the LPFC, the HCC has the power to authorize or prohibit the implementation of a concentration between undertakings, notified to it under Article 6 of the LPFC.

How is the procedure initiated?

The procedure before the HCC is initiated either following a relevant investigation carried out ex officio or following a complaint or a request by the Minister of Economy and Competitiveness. Complaints provided in article 36 of the LPFC are filed with the HCC according to the specific procedure laid down in the Communication of HCC of **11.9.2012** and the relevant form provided by the decision of HCC No. **546/VII/2012**. Article 37 of the LPFC provides for a procedure of summary rejection of complaints which do not fall within the remit of the HCC or are manifestly unfounded. The relevant acts of the President of the HCC are subject to Appeal by the Complainant before the Administrative Court of Appeal of Athens.

How can parties access the file?

Parties in cases before the HCC can seek and obtain access to file. However, it must be stressed that parties' access to the file can be restricted for the protection of business and other professional secrets or other information considered confidential (such as internal documents of the HCC or correspondence with the European Commission and other National Competition Authorities – NCAs), as also provided for by article 27 paragraph 2 of Regulation 1/2003, article 41 paragraph 3 of the LPFC and article 15 of the Rules of Management and Procedure (Government Gazette B' 54/16.1.2013). The HCC follows a consistent policy for the protection of confidentiality. Previously, it applied by analogy the European Commission's Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty; now it directly applies its own Guidelines of **13.01.2015**, which, of course, are inspired by the European Commission's confidentiality policy. A specific form for claiming confidentiality of information submitted is provided in the Guide-

lines (submission of non-confidential versions etc.). Officials and public servants of HCC are bound by an obligation of professional secrecy concerning the information collected in course of the exercise of their duties (article 41 paragraphs 1 and 2 of the LPFC).

Which are the common rules of procedure?

The Rules of Management and Procedure lay down the basic applicable rules for hearings before the HCC. The HCC sits in plenum or in chambers. The plenary sits at least once per month. The plenary and the chambers sit following adequate convocation by the President. The Rules of Management and Procedure provide for the specific reasons and procedure for the members of the HCC to be challenged or refrain themselves, mainly where there exists a ground of conflict of interests (articles 6-9 of the Rules of Management and Procedure). These provisions apply by analogy also for the persons participating in the composition of the plenary or the chambers of the HCC on the basis of specific provisions, and for the secretaries (article 10 of the Rules of Management and Procedure).

The President introduces before the HCC the prioritized cases according to article 15 paragraph 1 of the LPFC, and the cases concerning concentrations and interim measures. The plenary appoints the Commissioner-Rapporteur in charge of the case by lot. If the case is introduced before a chamber, the plenary appoints the members of HCC that will compose the chamber by lot, in which the Commissioner-Rapporteur does not participate. The chamber can at any moment defer the case to the plenary, if it poses an issue of great importance. The President designates the time and the venue of the hearing before the plenary or the chamber and the secretary convokes the parties accordingly, and proceeds with the relevant entry on the HCC's website. The convocation must be in writing and served to the parties 45 days before the hearing, and 15 days in cases of articles 8 and 9 of the LPFC. The Report (Statement of Objections) is served to the parties together with the convocation. Basically, the Report must be submitted to the Plenary or the corresponding chamber, as appropriate, within one hundred and twenty (120) days from the assignment of the case, without prejudice to the time-limits determined in Articles 5 to 10 of the LPFC. This time-limit may be extended by the President of the HCC, on request of the Commissioner-Rapporteur, for a period not exceeding sixty (60) days.

The parties have the right to file with the HCC a memorandum within 20 days prior to the hearing under a penalty of inadmissibility (article 14 of the Rules of Management and Procedure). In this memorandum the parties must declare if they wish to make use of their right to oral hearing, declare the name of their legal representative, the number of witnesses they wish to examine and the subject thereof [the maximum permitted being three (3) witnesses per party], as well as the reasons for which their examination before the HCC is considered indispensable. In the same memorandum the parties should include all evidence and procedural documents they wish to invoke. The memorandum, its non-confidential versions and the annexes to it must be submitted in hard and soft copies. The HCC reserves the right to limit the number of witnesses and to not accept the oral hearing. The parties have the right to file with the HCC supplemental pleadings 10 days prior to the hearing, at the latest. The parties, by themselves or through their attorneys, by means of a special power of attorney, have the right to request in writing a prolongation of the above-

mentioned deadlines, for serious reasons. The President of the HCC decides upon the granting of the prolongation, and this decision is not subject to appeal.

The President or the Presiding Member direct the hearing (article 22 of the Rules of Management and Procedure). They give the floor to the Commissioner-Rapporteur and the members of the Directorate-General who assist them, address questions to the witnesses or authorize the members of the plenary or the chamber to do so, give the floor to legal representatives of the parties or their attorneys who have the right to plead or address questions to the witnesses, etc. In any stage of the hearing, the plenary or the chamber can ask the parties to submit new evidence or statements under oath. The President, the Presiding Member, the plenary or the chamber can at any moment of the hearing convoke any third party (individual or legal entity), if it appears that such party's testimony can contribute to the illumination of the case. Any third party can submit a memorandum before the plenary or the chamber for any case being heard (article 23 of the Rules of Management and Procedure).

After the end of the hearing (which can take place in several sessions), the parties may request and be authorized by the President or the Presiding Member to submit a supplementary memorandum. The supplementary memorandum, its non-confidential versions (in as many copies as the number of the parties) and its annexes are submitted to the secretary in hard and soft copies three days after the day that the parties received the minutes of the hearing, unless the President or the Presiding Member grants a more extensive time-limit (article 25 of the Rules of Management and Procedure). All decisions of the HCC shall be taken within twelve (12) months of the relevant case being assigned to the Commissioner - Rapporteur, except in the instances provided for in Articles 5 to 10 of the LPFC. In exceptional circumstances, or when the case requires further investigation, the HCC may extend this time-limit by a maximum of two (2) months.

According to article 25 paragraph 6 of the LPFC, if the HCC considers during the relevant investigation carried out either on its own initiative or following a request by the Minister of Economy, Competitiveness and Shipping or a complaint, that there is a likelihood of infringement of Articles 1 and 2 of the LPFC or Articles 101 and 102 of the TFEU, it may decide to accept commitments on the part of the undertakings or associations of undertakings concerned to cease the infringement considered likely, and may make such commitments binding on the undertakings or associations of undertakings. Decision No. **588/2014** of the HCC further specifies the conditions and the procedure for accepting commitments on behalf of accused undertakings. Basically, commitments are not accepted for serious infringements such as cartels and some serious forms of abuse of dominance.

What about the Leniency program?

Individuals or undertakings involved in cartels may submit to the HCC a leniency petition either for immunity from or for reduction of fines. The basic prerequisite to be covered by leniency is that the submitted evidence must have additional value of proof in comparison to the evidence already in the possession of the Directorate General. Decision No. **526/VI/2011** sets forth the conditions and the procedure for the applicable leniency program.

What about the possibility of a settlement?

Article 105 of Law 4389/2016 (Gov't Gazette Issue A' 94/27.05.2016) introduced article 25a in the LPFC providing for the possibility of settlement exclusively in the case of cartels (horizontal agreements). Such settlement can be inclusive of all the participants in the infringement and the HCC or partial (between some of the participants and HCC). Although the necessary substantive and procedural conditions for such settlements should be defined by a normative decision of the plenary of the HCC (not yet issued), some minimal prerequisites are defined by the LPFC itself, as amended. More specifically, the settlement request should be submitted together with the first memorandum, at the latest (i.e. 20 days before the oral hearing), while the explicit acceptance of participation in the cartel on behalf of any party seeking the settlement is a necessary prerequisite of eligibility and the reduction of the fine cannot exceed 15% of the fine that would be otherwise imposed (without settlement). In case a settlement is not reached between the accused party or parties and the HCC, the acceptance of the participation on behalf of the claimant(s) is considered as never occurred and cannot be taken into consideration by the HCC or the courts. Article 106 of Law 4389/2016 further adapts the framework of the criminal sanctions provided by the LPFC to Leniency and Settlement provisions.

Concentrations: which are the particular rules of procedure?

All concentrations of undertakings must be notified to the HCC within thirty (30) days of the conclusion of the agreement or the announcement of the bid or the acquisition of a controlling interest, where the turnover by all undertakings in a concentration, within the meaning of Article 10 of the LPFC, totals at least EUR one hundred and fifty million (150,000,000) on the global market, and each of at least two of the undertakings involved generate turnover totaling over EUR fifteen million (15,000,000) in the Greek market. The period of thirty (30) days commences on the date of the first of the abovementioned acts. The HCC has the right to impose on each person who is at fault for failing to notify in accordance with paragraph 3 of article 6, a fine of at least EUR thirty thousand (30,000), capped at ten percent (10%) of aggregate turnover, as defined in Article 10 of the LPFC. In determining the amount of the fine, the economic power of the undertakings participating in the concentration, the number of the affected markets and the level of competition in those, as well as the estimated impact of the concentration on competition shall be taken into consideration.

The HCC examines notified concentrations as soon as the notification is received. Where it concludes that the concentration notified does not fall within the scope of Article 6(1) of the LPFC, the President of the HCC issues a deed within one (1) month from the notification, which shall be notified to the persons or undertakings which filed the notification. This shall not restrict the application of the provisions of Articles 1 and 2 of the LPFC (agreements, decisions concerning associations of undertakings, concerted practices and abuse of dominance). Where it finds that the concentration notified, although falling within the scope of Article 6(1) of the LPFC, does not raise serious doubts as to its compatibility with the requirements of the functioning of competition in the individual markets it concerns, the HCC issues a decision approving the concentration within one (1) month from notification. Where it finds that the notified concentration falls within the scope of the LPFC and raises serious

doubts as to its compatibility with the requirements of the functioning of competition in the individual markets it concerns, the President of the HCC issues a decision within one (1) month from notification, initiating the procedure of in-depth investigation of the concentration notified and shall immediately inform the undertakings concerned of his decision. Once the undertakings concerned have been informed that the procedure for a full investigation has been initiated, the undertakings concerned may jointly proceed to modifications to the concentration or propose to undertake commitments, so that there are no serious doubts as to its compatibility with the requirements of competition in the individual markets it concerns, and notify them to the HCC. The case shall be introduced before the HCC within forty-five (45) days from the date on which the full investigation procedure was initiated. The concentration shall be prohibited, if it restricts competition, by a decision of the HCC. If the period of ninety (90) days expires and a decision prohibiting the concentration has not been issued, this shall be construed as approval of the concentration by the HCC, which must issue the relevant declaratory act. Decisions for the approval of concentrations shall also cover restrictions directly related and necessary to the implementation of the concentration (ancillary restrictions). The HCC may issue a decision approving a concentration, subject to terms and conditions stipulated by it, in order to ensure that the undertakings concerned abide by the commitments undertaken by them before the HCC in order to make the concentration compatible. The commitments proposed by the undertakings concerned must be submitted within no more than twenty (20) days of the date on which the case is introduced before the HCC, with the submission of the relevant Report. The HCC may, in exceptional cases, accept commitments once the above deadline for their submission has expired. In such case, the deadline of ninety (90) days may be extended to one hundred and five (105) days, by a decision of the Commission, which is notified to the undertakings concerned. The HCC may, in the same decision, threaten the undertakings concerned with a fine if they fail to comply with the above terms or conditions applicable to commitments. The fine referred to in the previous sentence may amount to up to ten per cent (10%) of the aggregate turnover of the undertakings. In determining the amount of the fine, regard must mainly be given to the impact of the non-compliance on competition. The HCC may, by its decision, regard the fine as forfeit, if non-compliance of the undertakings in the concentration with the terms or conditions imposed is established. The HCC can revoke any decision permitting a concentration if it was issued on the basis of inaccurate and misleading information or if the undertakings concerned commit a breach of any term or obligation arising from the decision. If a decision is revoked in the above cases, a new decision may be issued without the need to comply with the time limits provided for in article 8 paragraph 14 of the LPFC.

What about precautionary or interim measures and derogations?

The HCC is empowered to order precautionary or interim measures for the cases pending before it, whether they are anti-trust cases or concentrations.

In anti-trust cases the HCC has the power to order precautionary measures either on its own initiative or following a request by the Minister of Economy and Competitiveness, where an infringement of Articles 1, 2 and 11 of the LPFC or of Articles 101 and 102 of the TFEU is suspected and there is an urgent need to prevent an imminent risk of irreparable harm to

the public interest. These powers of the HCC do not prejudice the powers with which the ordinary civil courts are vested, for taking interim measures in cases pending before them.

In concentrations, the HCC may take interim measures to restore or maintain effective competition, when a concentration: a) has been implemented in breach of Article 1 of the LPFC and a decision has not yet been taken in accordance with Article 7(1) of the LPFC; b) has been implemented in breach of a term or condition imposed on the undertaking concerned by a decision, under Article 8 of the LPFC and c) has been implemented in breach of provisions prohibiting its implementation.

It is also worth noting that the HCC, by virtue of article 9 of the LPFC may, on request, grant a derogation from the obligation to suspend a concentration, in order to prevent serious losses to one or more undertakings affected by the concentration or to a third party. In deciding on the request, the HCC shall take into account, inter alia, the threat to competition posed by the concentration. The decision granting the derogation may set conditions and obligations in order to ensure conditions of effective competition and prevent situations which might hamper the execution of any final decision. A derogation may be applied for and granted at any time, be it before notification or after the transaction. The HCC may revoke the decision granting the derogation if any of the grounds listed in Article 8(14) apply.

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