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Commentaries # 6

LAW 4886/2022 "ABOUT THE MODERNIZATION OF COMPETITION LAW FOR THE DIGITAL ERA" AMENDING NATIONAL COMPETITION LAW N. 3959/2011

The Greek national Competition Law n. 3959/2011 (the Law) has been extensively amended by Law n. 4886/2022 "Modernization of Competition Law for the Digital Era", issued on January 24th, 2022. The Law 4886/2022 (GG A' 12/24.01.2022) transposes into Greek national law the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (the Directive).

These amendments to the Law are the result of two years of thorough and systematic legislative work, initiated on January 15th, 2020, with the setting up of the Legislative Committee by Decision of the Ministry of Development and Investments, and completed with a public consultation lasting one month, from August 6th to September 3rd, 2021. Law n. 3959/2011 is amended both on substantive and procedural level, via the amendment of existing provisions and the introduction of a great number of essential novelties.

The new law aims to modernize the legislation on the protection of free competition, to further discourage anticompetitive practices, to strengthen the guarantees of independence and resources of the Hellenic Competition Commission (HCC), as well as the powers of application of the law and imposition of fines, so that the HCC may more effectively enforce EU and national competition law to further establish Greece as an area of enforcement of competition rules in Europe, by taking into account the developments in the digital economy.

The most notable amendments of Law n. 3959/2011 refer to the introduction of one completely new substantive prohibitive provision, and various insightfully ambitious procedural amendments and novelties on the merger control regime, the operation, powers vested and examination of cases before the HCC, the imposition and immunity from fines, the undertaking of commitments, the cooperation with other NCAs, the settlement procedure, the leniency program, the non-enforcement letter and the conduct of modern sectoral or agreement tailored investigations.

ANTITRUST

1.NEW ARTICLE 1A: INVITATION TO A PROHIBITED CARTEL AND ANNOUNCEMENT OF FUTURE INTENTIONS TO PRICE GOODS AND SERVICES BETWEEN COMPETITORS.

This new provision verbatim prohibits to an undertaking to propose, force, offer incentives or in any way invite another undertaking to get involved in any agreement between undertakings, making decisions by associations of undertakings or implementing concerted practices which have as their object the prevention, restriction or distortion of competition within the Greek territory, and in particular those which (a) directly or indirectly fix purchase or selling prices in a market, (b) limit or control production, supply, technical development, or investment, (c) share markets or sources of supply. The provision even focuses to specifically prohibit price signaling, provided it restricts effective competition within the Greek territory and it does not constitute a regular trade practice.

In order for the disclosure of sensitive commercial information to be assessed, this new provision even sets out a restrictive list of substantive factors to be taken into consideration by the HCC, such as the degree of specialization and the individuality of the exchanged information, the relation of the information exchanged to future activities, the degree to which the information exchanged is directly accessible to the public, the disclosure being part of a set of similar notifications by the undertaking, any previous collusion in the market or the sector where the undertakings exchanging information are involved, and the level of concentration or the oligopolistic character of the relevant market. The disclosure of information is not considered to restrict effective competition if it is addressed solely to the end users of the product or service. Moreover, the above practices are not prohibited, as long as they meet the conditions of paragraph 3 of article 1 of the Law.

In addition to the substantive criteria set out above, this new provision introduces a negative typical condition, as the prohibition is not applied in cases of undertakings with a total turnover of less than fifty million (EUR 50 000 000) and fewer than two hundred and fifty (250) employees.

Article 1A is without prejudice to the application of articles 1 and 2 of the Law, as well as articles 101 and 102 of the TFEU. Moreover, in case the conditions for the application of article 1A, as well as of articles 1 and 2 of the Law and articles 101 and 102 of the TFEU are fulfilled, the provisions of the latter articles shall prevail, leaving article 1A inapplicable.

MERGER CONTROL

2. AMENDMENT OF PARA. 7 OF ARTICLE 6: PRIOR NOTIFICATION OF CONCENTRATIONS OF UNDERTAKINGS

As far as merger control is concerned, a new provision for the process of the establishment and of the differentiation of thresholds and criteria required for the prior notification of a concentration are introduced. The thresholds and criteria provided for in para. 1 of article 6 of the Law will be determined by a joint ministerial decision of the Ministers of Finance and of Development and Investments, issued following public consultation, and not on a recommendation of the HCC in plenum, as the Law previously required. By the same decision, for the first time, the thresholds and criteria to be determined may be different and tailored to each sector of the economy, based on statistical data collected by the HCC by mapping the markets on a three year basis and concerning the implementation of the Law and the state of competition during the previous three years.

3. ADDITION OF PARA. 4A TO ARTICLE 8: PROCEDURE FOR THE PRUDENTIAL CONTROL OF CONCENTRATIONS AND DECISIONS OF THE HCC

Another novelty introduced is that undertakings having already submitted a prior notification for a merger can propose amendments to the merger as soon as the Phase I investigation, within fifteen days since the notification; in case the notified merger no longer raises concerns because of the proposed amendments, it receives approval by decision of the HCC, issued within one month since the notification of the merger. The decision may still contain further conditions and commitments to ensure compliance, or even threaten the participating undertakings with a fine for non-compliance. According to the Explanatory Report, this addition aims to incorporate **relevant OECD suggestions**.

OPERATION OF THE HCC

4. AMENDMENTS AND ADDITION OF PARA. 18 TO ARTICLE 12: ESTABLISHMENT AND OPERATION OF THE HCC

According to the new provisions, the members of the HCC shall not be dismissed on grounds relating to the performance of their duties or the exercise of their powers, without prejudice to the provisions regarding disciplinary control. The HCC is subject to administrative and financial monitoring by the Ministry of Development and Investments and to parliamentary control, pursuant to the Standing Orders of the Hellenic Parliament. Incorporating article 4 of the Directive, the HCC consists of ten members, instead of eight as previously in force, namely the President, the Vice-President, six Rapporteurs and two regular members, with their deputies. Further provisions of article 4 of the Directive have been implemented into the Law by amending provision regarding Disciplinary Control and Procedure.

5. AMENDMENTS TO AND ADDITION OF NEW PARA. 9A TO ARTICLE 15: EXAMINATION OF CASES BY THE HCC

Under the new provision, a proposal shall be submitted before the Plenum or to the corresponding Chamber of the HCC within an extended deadline of 150 days since its assignment, as opposed to the 120 days deadline previously in force. According to the new para. 9A, hearings before the HCC may take place by teleconference, by decision of the HCC, at its discretion.

POWERS OF THE HCC

6. AMENDMENT OF PARA. 1 AND 2 OF ARTICLE 14: POWERS OF THE HCC

Incorporating articles 4 and 10 of the Directive, the HCC cooperates and informs the European Commission accordingly about the completion of any procedure duly notified in accordance with para. 3 of article 11 of Regulation No 1/2003, as well as about the adoption of interim measures. Furthermore, one of the novelties introduced is the power to map the conditions of competition, in all markets or all sectors of the economy, where this is deemed necessary for the effective exercise of its competence.

7. AMENDMENT OF ARTICLE 25 OF THE LAW: POWERS OF THE HCC REGARDING INFRINGEMENTS

In full harmonization with articles 10, 11 of the Directive, the HCC may execute the powers vested to it in cases where infringements of articles 1, 2 and 11 of the Law or articles 101 and 102 of the TFEU are detected, solely following an investigation carried out either ex officio or following a complaint, as the possibility vested previously to the Minister of Development and Investment to submit a relevant request is abolished. Furthermore, the deadline for undertakings notified of a decision establishing an infringement or suspected infringement and ordering its cessation, to inform the President of the HCC of the actions they have taken or are about to take to bring the infringement to an end, is expanded to thirty days since the receipt of the notification, as opposed to the fifteen days deadline previously in force.

FINES

8. ADDITION OF NEW ARTICLE 25B: FINES

According to the new provision, incorporating articles 13 to 16 of the Directive, the fine imposed according to article 25 of the Law must be effective, proportionate and dissuasive. It may reach up to ten per cent (10%) of the **total worldwide turnover** of the undertaking in the financial year preceding the adoption of the decision, while the **total worldwide turnover of the group of undertakings** shall be taken into account for the calculation of the fine in relevant cases. Furthermore, in line with recital 46 of the Directive, the concept of undertaking covers the parent companies, within a single economic entity, the successors in the event of legal or organizational changes and the acquirers of the undertaking after the infringement has been committed, in cases where the infringer is unable to pay the fine or other periodic penalty payment imposed at the time of imposition. Additionally, under the new provision, any compensation paid to all or to a significant number of parties harmed by the anti-competitive practice under consideration, in the context of a consensual settlement, is taken into consideration as a mitigating circumstance by the HCC upon determining the amount of the fine. In case of a pending consensual settlement, the HCC may suspend the adoption of the decision imposing the fine for a period of up to three months.

COMMITMENTS

9. ADDITION OF NEW ARTICLE 25C: COMMITMENTS

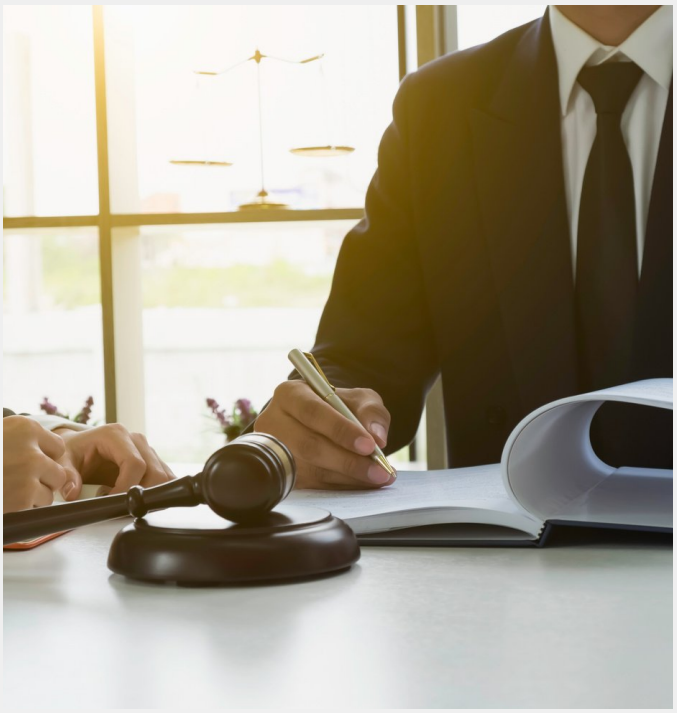
Under the new provision, transposing article 12 of the Directive, the power of the HCC to accept commitments on behalf of the undertakings suspected of anticompetitive conduct to put an end to the suspected infringement and to make such commitments binding on those undertakings, covers infringements of the new article 1A of the Law, along with infringements of articles 1 and 2 of the Law and 101 and 102 of the TFEU.

INTERIM MEASURES

10. ADDITION OF NEW ARTICLE 25D: INTERIM MEASURES

New article 25D of the Law, incorporating the relevant article 11 of the Directive, empowers the HCC to impose interim measures ex officio, where there is a suspected infringement of articles 1 and 2 of the Law or articles 101 and 102 of the TFEU in case of urgency due to risk of serious and irreparable damage to competition. This power was already previously vested to the HCC according to para. 5 of article 25 of the Law, however, under the new provision, the possibility vested previously to the Minister of Development and Investment to submit a relevant request is abolished and the explicit reference to the protection of public interest is omitted (although the protection of competition is considered as per se a goal of public interest). Self-evidently, the competence of civil courts to impose interim measures in order to ensure private interests shall be considered maintained.

In the context of this power, following a summons to a hearing of the natural or legal person who allegedly committed the suspected infringement, the HCC may issue an interim injunction, valid until the decision on the interim measures is issued. In case a temporary injunction is issued, the injunctions are introduced before the competent Department or the Plenum of the HCC within thirty (30) days, otherwise the temporary injunction shall automatically cease to exist.



COOPERATION AMONG NATIONAL COMPETITION AUTHORITIES

11. AMENDMENT OF ARTICLE 28: COOPERATION BETWEEN NATIONAL COMPETITION AUTHORITIES AND INTRODUCTION OF NEW ARTICLES 28A: COOPERATION BETWEEN COMPETITION AUTHORITIES IN THE CONDUCT OF INVESTIGATIVE MEASURES AND 28C: ENFORCEMENT OF DECISIONS OF COMPETITION AUTHORITIES OF MEMBER STATES

According to the new wording of article 28 of the Law, which incorporates article 24 of the Directive, the HCC is responsible, in accordance with Regulation 1/2003, for the cooperation with the European Commission and the NCAs of Member States of the European Union, as well as with the competent competition authorities of other countries on a bilateral basis within international and regional cooperation networks.
Respectively, under the new article 28A, implementing articles 24 and 27 para. 7 of the Directive, the officials and other accompanying persons authorised or appointed by the applicant NCA, under the supervision of the officials of the HCC, are present and assist under the supervision of the officials of the HCC, where the latter exercises an investigation on behalf and at the request of an NCA of a Member State. Accordingly, the HCC may instruct in writing to officials to appear and actively assist an NCA of a Member State carrying out in their territory, in the name and on behalf of the HCC, an inspection or a deposition, in accordance with Article 22 of Regulation (EC) 1/2003. To this end, the HCC submits an application to the national competition authority.
New article 28C, which incorporates articles 26 and 27 of the Directive, states that the HCC, at the request of an NCA of a Member State, shall take all necessary measures to enforce final decisions issued for the application of articles 101 or 102 of the TFEU, where the undertaking concerned has not either sufficient resources or an establishment in the Member State of the applicant authority. Mutually, the HCC may request that an NCA of a Member State enforce its final decisions, in order for the HCC to overcome the same impediments.

SETTLEMENT PROCEDURE

12. NEW ARTICLE 29A: SETTLEMENT PROCEDURE

New article 29A of the Law provides a dispute settlement procedure broadening the existing mechanism. Under the new provision, by decision of the HCC, it is possible to establish a procedure for the settlement of infringements for undertakings that admit having violated articles 1, 1A and 2 of the Law or of Articles 101 and 102 of the TFEU. This decision regulates, among others, the terms and conditions of inclusion in the settlement procedure, the stage of the procedure, at which a request may be made by the undertaking under investigation to be subject to a settlement procedure, the procedure to be followed in order to settle the dispute, etc. Where the dispute is settled, the HCC shall adopt a decision in accordance with a simplified procedure, attesting, inter alia, that the alleged infringement has been committed, that the dispute has been settled and that the appropriate penalties shall be imposed.

This introduction is pursuant to the relevant OECD Recommendation; the novelty lies to the extension of the procedure to any and all infringements of articles 1, 1A and 2 of the Law or articles 101 and 102 of the TFEU. Under the new regime, the procedure will no longer be limited to cases of participation in horizontal restrictive practices, but will also cover cases of abuse of dominance and invitation to collusion and announcement of future pricing intent provision of the new Article 1A of the Law.

LENIENCY PROGRAM

13. NEW ARTICLES 29B: LENIENCY PROGRAMS FOR SECRET CARTELS AND 29C: GENERAL CONDITIONS FOR LENIENCY

This new article 29B to the Law incorporates articles 17, 18 and 20 of the Directive, thus providing that the HCC will determine the terms and conditions for the exemption from fines or the reduction of fines referred to in articles 25 and 25B of the Law imposed against undertakings that participated independently in, and natural persons that contributed to the investigation of horizontal cartels of article 1 of the Law or article 101 of the TFEU.
In 2011, the leniency program details were, by virtue of article 25 para. 8 of the Law, determined by the HCC by its Decision No. 526/VI/2011, which retains its force until the adoption of a new Decision, under article 52 of Law 4886/2022.

According to the new article 29C, incorporating article 19 of the Directive, new general cumulative conditions are set to be met, in order to grant an immunity or reduction of a fine. The new regime requires, that the applicants cooperate fully, sincerely, without delay and on an ongoing basis with the HCC, from the submission of the application until the completion of the procedure, that they terminate their participation in the suspected infringement at the latest immediately after the submission of the application for inclusion in the Leniency Program – however, an exemption mechanism is foreseen – and that, during the period of examination of the possibility of submitting an application for inclusion in the Leniency Program, they do not destroy, misrepresent or conceal information or evidence of the suspected infringement and they do not disclose to any third party, with the exception of other competition authorities and the European Commission, the fact that it intends to apply for being sheltered by the Leniency Program or the content or part of its content.

14. NEW ARTICLES 29D: IMMUNITY FROM FINES, 29E: REDUCTION OF FINES, 29F: PLACE IN THE QUEUE AND 29G: SUBMISSION OF A SUMMARY APPLICATION.

New article 29D, implementing article 17 of the Directive, provides that the HCC shall grant to an undertaking immunity from fines, provided, firstly, that the applicant declares its participation in a horizontal cartel referred to in article 1 of the Law or article 101 of the TFEU, secondly, that in the context of that cartel, it has not attempted to force other undertakings to join or remain in it, and upon submission to the HCC of adequate evidence. However, the final decisive criterion is the fulfilment of the general conditions for immunity from fines laid down in new article 29C of the Law. However, in case of rejection of a request for immunity, the applicant may request that the HCC examine its application as a request for a reduction of the fine.

New article 29E of the Law, implementing article 18 of the Directive, provides that the HCC shall grant a reduction of the fines imposed, where the undertaking does not fulfil the terms and conditions for granting immunity from fines, and provided that it admits participation in a horizontal cartel and provides to the HCC with evidence of the suspected infringement; yet again, the undertaking is required to fulfil the general conditions for immunity from fines laid down in new article 29C.

New article 29F of the Law, implementing article 21 of the Directive, establishes the discretion of the HCC to grant the applicant for immunity from fines a place in the queue for leniency, for a period determined on a case-by-case basis. By submitting this request, the applicant shall provide the HCC with the information at its disposal for the horizontal cartel such as: (a) his name and address; (b) the names and addresses of the undertakings involved, or participated in, the suspected infringement; (c) the products and areas affected; (d) the duration and nature of the suspected infringement; and (e) information on any application for leniency previously submitted or likely to be submitted in the future to any other NCA of a Member State of the European Union, to the European Commission or to a competition authority of third countries in relation to the suspected infringement. With this scheme, the applicant shall maintain the priority received if, within the specified period of time, the information and evidence referred to in article 29C are provided. In that case, the information and evidence provided shall be deemed to have been submitted at the time of the request for a priority number.

New article 29G of the Law, incorporating article 22 of the Directive, enables undertakings or associations of undertakings, which have submitted an application for leniency to the European Commission, either by submitting a request for a place in the queue or by submitting a full application, to submit a summary application before the HCC for the same suspected infringement, provided that the application submitted to the European Commission covers more than three (3) Member States of the European Union as affected geographical areas. The summary requests shall include at least the elements referred to in para. 2 of Article 29F.
According to the Explanatory Report, in the same line with recital 62 of the Directive, the aim of the system of summary applications is to reduce the administrative burden on applicants submitting a leniency application before the Commission in relation to an alleged secret cartel that covers more than three Member States as affected territories.

NEW ARTICLE 37A: NON-ENFORCEMENT ACTION LETTER

Another particular novelty to the Law is the authority vested to the President of the HCC, upon recommendation of the Directorate-General for Competition, and at the request of the person concerned, to decide by letter not to take action against agreements between undertakings, decisions by associations of undertakings and concerted practices. The president of HCC may decide so either because the conditions of para. 1 of article 1 of the Law or article 101 of the TFEU are not met, or even in case those conditions are met, in so far as the conditions of paragraph 3 of article 1 of the Law [and correspondigly of paragraph 3 of article 101 TFEU] are met or the collusion at case whould be neceessary for serving a public interest goal such as the achievement of the goals of sustainable development. A similar decision may be made following the same procedure regarding article 2 of the Law or Article 102 of the TFEU.
Such a decision may be revoked, again upon the recommendation of the Directorate-General for Competition, should the Commission become aware of any new information which gravely affects the evaluation of the conduct, in case that the facts that supported the decision change, or if it was based on untrue or misleading information.

However, it is expressly provided that a non-action enforcement letter is not binding against the HCC or the courts, according to article 37A para. 4 of the Law.
The criteria and conditions under which the non-enforcement action letters are issued will be specified, along with any other issues related to the application of this provision, by decision of the HCC, following a public consultation.

OTHER AMENDMENTS

15. Amendment of para. 1 of article 39: Conduct of Investigations

Under this new provision, incorporating articles 6 to 16 of the Directive, the HCC is vested with the power, in case of reasonable suspicions of an infringement of articles 1 and 2 of the Law, to request the lifting of the confidentiality of communications in accordance with articles 4 and 5 of Law 2225/1994 (GG A' 121), provided that these communications may be essential for the detection of that infringement, and with respect to the principle of proportionality,

16. Amendment of para. 1 of article 40: Research in sectors of the economy or in types of agreements

Under this provision, the HCC may, within its competence, conduct investigations into a particular sector of the economy or into specific types of agreements or methods of formulating commercial conduct, even including algorithmic methods, in cases where price formation or other circumstances give rise to suspicions of possible restriction or distortion of competition within said sectors.

FINAL REMARKS

It is worth noting that the initially proposed[1] new article 2A on the "abuse of a position of power in an ecosystem of structural importance for competition", against which some hesitation was expressed during the public consultation period, was withdrawn from the draft law brought before the Parliament[2]. Later, this proposed article was removed from the draft, taking into consideration the said comments received, as well as targeted initiatives, in particular on a Union-wide level. Indeed, we refer to the package of the Digital Markets Act, which is expected to be adopted this year, aiming to establish a universal level playing field for such businesses across the Union.

Nevertheless, the new, amended and without any doubt enriched, Law n. 3959/2011 contains many interesting provisions promising to lead the protection of the free competition in Greece through the digital era. It remains to be seen what impact the new prohibitions and procedures will have towards the effort to keep competition effective and rigorous within the Greek market.

[1] Article 4 of the draft law open for public consultation from August 6th to September 3rd, 2021, available at http://www.opengov.gr/ypoian/?p=12356 (in greek) and http://www.opengov.gr/ypoian/wp-content/uploads/downloads/2021/08/%CE%95%CE%91_6.8.2021_final.pdf (in greek).
[2] Final draft law available at https://www.hellenicparliament.gr/UserFiles/c8827c35-4399-4fbb-8ea6-aebdc768f4f7/11835442.pdf.

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