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MONOPOLIES

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Which is the antimonopoly legislation in force?

Law 3959/2011 “for the protection of free competition” (the Antimonopoly Law) applies to the control of monopolies.

What article of the Antimonopoly Law deals with monopoly?

Article 2 of the Antimonopoly Law is designated to deal with monopoly and market power. It focuses on the unilateral behavior of undertakings which hold a “dominant position”. The Antimonopoly Law does not define the word “dominant”. Dominance is defined by Hellenic Competition Commission (HCC) as a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition and to behave independently of its competitors, customers and ultimately the consumers. Dominance is established by indicators of which sometimes the most important is the market structure. In view of this dominance may be assessed by market share, although specific thresholds are not provided in the Antimonopoly Law. Other significant factors taken into consideration by the competition authorities are the ability to restrict output or increase prices above the competitive level in order to earn monopoly profits. What matters is substantial market power which endures for a significant period of time. This is certainly the case for state owned or state created monopolies.

The Antimonopoly Law does not specifically prohibit the granting of a monopoly, but it prohibits actions, agreements and certain conduct, that permits to the monopoly to be organized in such a way as to infringe the competition rules. Power over price is often the starting point of the HCC in order to evaluate infringements of the competition rules and to assess the effect of monopolization of a specific market.

Article 2 of the Antimonopoly Law deals with the problem of abuse of a dominant position. Article 2 provides for a non-exhaustive list of types of abuse. In particular, an abuse may consist of:

- directly or indirectly imposing unreasonable purchase or selling prices or other unfair trading conditions;
- limiting production, consumption or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions, and in particular by unjustifiably refusing to sell, buy or enter into other transactions, thereby placing some enterprises at a competitive disadvantage;
- making the conclusion of agreements conditional upon the acceptance of additional obligations, or the conclusion of additional agreements that, by their

nature or according to commercial practice, are totally unrelated to the subject of such contracts.

Some of the above practices, such as price fixing, limiting production or sales, allocating markets or clientele, setting minimum resale prices or prohibit passive sales, have been considered by the HCC as per se illegal.

Furthermore and in view of the fact that some sectors are still monopolized by state owned or state created monopolies (as the electricity sector ruled by the state owned Public Power Corporation or the gaming sector ruled by the partially state owned monopoly OPAP) monitoring of breaches of the prohibitions included article 106 TFEU (former article 86 EC) is very important. It has been ruled by the Supreme Administrative Court that any person who takes offense by violation of the provisions of article 86 EC (now article 106 TFEU), may bring claims for breach before the Greek courts and dispute the validity of an agreement due to infringement of article 86 EC (Decision No 2176/1996 of the Council of State).

Article 46 of the Antimonopoly Law provides that the law applies to any restrictions on competition which produces effects or is capable of producing effects in the national market, even if such restrictions derive from agreements between undertakings, decisions by associations, concerted practices between undertakings or associations, concentrations of undertakings, which take place outside Greece or by undertakings or associations that are not resident in Greece.

Does merger control regulation cover attempts of undertakings to become monopolies?

Application of the merger control regulations included in the Antimonopoly Law aim to prevent the approval of a concentration, if such lead to creation of a monopoly, whether by monopolization of a market (creating or considerably enhancing dominant position by undertakings) or by a significant restriction of competition on the entire relevant market or a substantial part thereof. Barriers to entry or expansion are crucial when the HCC determines whether or not an undertaking is a monopolist or intends to become one through a concentration. Other aspects taken into consideration by the HCC are:

- the available assets and the strength of the financial position of the undertakings involved in a concentration,
- the existence of alternatives for the consumers,
- the market shares and the undertaking's superiority over its competitors in terms of technological development and commercial or industrial know-how, and
- access to raw materials.

Is there any other legislation for particular market sectors?

There is a specific law (Law 3592/2007) that applies to the markets of the media sector (television, radio, newspapers, magazines) having as objective to safeguard pluralism, transparency and healthy competition in the media sector. The law on media introduces thresholds for dominance, depending on which of the media sector markets the undertaking or person is active (ranging from 25% to 35%).

In the energy sector the main laws that liberalized the Greek electricity market (Law 2773/1999, as amendment and supplemented by ministerial decisions, Law 3426/2005,

Law 3468/2006 on Renewable Energy Sources, as amended by Law 3851/2010 and Law 4011/2011) and the Greek gas market (Law 3428/2005) provide antimonopoly rules and aim to the gradual liberalization of these markets, previously ruled exclusively by state monopolies. The energy laws and regulations provide competition rules and incentives to private investors. The above regulations enforce competition rules regarding access to grid and other infrastructures that resemble natural monopolies.

Which authorities are charged with the responsibility of enforcing Antimonopoly Law and related regulations? Details about bodies having responsibility over specific market sectors.

The authority which is mainly responsible for the enforcement of Antimonopoly Law to all market sectors is the Hellenic Competition Commission (the HCC). The HCC protects the proper functioning of the market and ensures the enforcement of the rules on competition, certifies any violation of the Antimonopoly Law and EU legislation, collects and examines every relevant document, imposes the fines in cases of violation and penalties for non-compliance. HCC acts as an independent authority and has administrative and financial autonomy.

For specific, recently liberated, industries (as telecommunications and energy) the relevant regulatory authorities are also assigned with the application of antimonopoly rules. The Hellenic Telecommunications and Postal Commission (EETT) is the national regulatory authority of the telecommunications sector, which supervises and regulates the relevant markets of telecommunications and postal services and ensures the implementation of the Antimonopoly Law in these markets. EETT has discretionary powers to seek the opinion of HCC in cases it deems this necessary.

In the energy market, the Regulatory Authority for Energy (RAE) RAE is entrusted with the monitoring and control of the electricity market and compliance with antimonopoly rules. RAE has mostly consultative and recommendatory powers and its role is to facilitate free and sound competition in this sector in order to provide best services to the end-user.

All other markets, fall under the jurisdiction of the HCC. Article 24 of the Antimonopoly Law specifies the terms of co-operation between the different authorities, given that in most cases co-ordination between the authorities is necessary.

Is the HCC able to prevent regulatory obstacles to competition?

HCC has an improved advisory role, under the new Antimonopoly Law (Article 23 (1)). The Antimonopoly Law enhances the power of intervention of the HCC for the removal of regulatory obstacles of competition. HCC may also express an opinion regarding the provisions of draft laws and regulations upon request made by the issuing authority. Furthermore the HCC has the right to intervene to certain sectors of the economy and propose the abolishment of legislative provisions that may be responsible for the restriction of efficient competition, as unnecessary legal barriers.

The Antimonopoly Law gives to HCC the necessary independence in order to be able to reduce the market power of state and other monopolies. The President and the Vice-President are appointed under the Antimonopoly Law by the Parliament. According to the previous framework the President was appointed by the Cabinet. This provision is criticized as creating a connection of dependency between government and HCC.

Recently, acting on the basis of article 23(1) the Hellenic Competition Commission issued an opinion (No 12/VI/2011) and proposed the abolition of a Ministerial Decision concerning the distribution of infant milk due to the fact that such regulations imposes entry barriers not justified by public policy considerations. According to the HCC's opinion, the said regulation imposes entry barriers to potential competitors (e.g. food retailers) and forecloses the retail market, while limiting the freedom of suppliers to use alternative distribution networks and results in the consumer being deprived of choice and potential benefits arising from combining distribution and price competition.

What are the main sectors in which state monopolies still exist?

Historically in Greece state monopolies have been operating as closed shops full of restrictive practices, claiming that such modus operandi was necessary in the public interest. This is now challenged. Nevertheless former monopolies, as Public Power Corporation (PPC), still dominate the relevant markets.

On 15th July 2011, RAE imposed a fine on the Public Power Corporation (PPC), for a series of breaches of its obligations as the operator of the national Electricity Distribution Network, thereby preventing the development of healthy competition in the Greek electricity market. RAE in its decision held that certain practices of PPC had significant adverse effects on growth and competition in the retail electricity market. According to the RAE's opinion the responsibility of PPC is increased, given that the company a) holds a dominant position in electricity supply; and b) it has been the only operator and provider of electricity in Greece for many years and, therefore, the distinction between distribution and supply has not been established in the minds of consumers (Operator - Owner of network).

A recent decision of RAE abolished some of the entry barriers in the gas market, as private companies, competitors and the Public Gas Corporation (DEPA), the earlier state monopoly, has been secured a right for access to the grid, following a complaint filed due to the refusal of the Hellenic Gas Transmission System Operator SA (DESFA) to provide access to a private supplier.

The recently voted Law 3986/2011 entitled 'Urgent measures for the application of the midterm framework for the fiscal and financial Strategy 2012-2015' establishes a fund responsible to privatize assets belonging to the Greek state, including public enterprises, infrastructures, state monopoly rights, and real property. The privatizations program includes a vast number of state activities -some of them reserved until now for the Greek State solely: as transport and infrastructures, ports, water supply and sewerage services and defense industry. However privatization can lead to private monopolies replacing public ones. It is the challenge of the competition authorities to ensure that privatizations will benefit consumers, especially in sectors that depend on the use of a network, which cannot be easily duplicated or where services are essential and need to be provided "universally" (supply of water, sewage and basic postal and telecommunication services).

What claims may be brought under the Antimonopoly Law?

Complaints to the HCC may be lodged in writing in a special form which is available on-line on HCC's website (www.epant.gr).

Besides filing complaints, the Antimonopoly Law provides that Greek courts may apply directly Articles 1 and 2 of the Antimonopoly Law and articles 101 and 102 of the TFEU. In view of this any person may bring claims for the violation of competition law before the Greek civil courts and dispute the validity of an agreement on competition law grounds or claims for damages due to infringement of EU and/or Greek competition rules. Under the Antimonopoly Law abuse of one's market dominating position is punishable criminal act, provided that the perpetrator acts with intent. Claims may be also brought before the Greek Courts for infringement of the prohibitions included in article 106 TFEU.

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