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The Greek construction sector is again under the HCC's microscope!

The HCC has published its provisional report on a regulatory intervention in the construction sector launched in January 2021. The report's initial findings are open to a public consultation until 07.05.2021.

Four (4) years after the Hellenic Competition Commission ("HCC") completed its large-scale ex officio investigation on tenders for contracts in public infrastructure projects, , which led to the discovery and sanctioning of a long standing bid-rigging cartel involving several major players and smaller companies in the construction sector¹, the HCC has decided to launch a new -horizontal-review of the sector, in particular activities related to the development of public construction projects and infrastructure works (including concessions, which were excluded from the scope of the prohibited practices²), apparently triggered by the fact that the relevant Greek market has become increasingly concentrated over the past 10 years due to the financial crisis, combined with the recent acquisition of significant stakes in rival construction groups by the same investment fund³.

This time the HCC has opted for another tool in order to detect potential competition distortions in the construction sector, which eventually go beyond collusion or abuse of dominance (in violation of articles 1 and 2 of the Greek Competition Act⁴): by a plenary decision dated January 8th, 2021 the HCC decided to initiate the procedure of "*regulatory intervention in a sector of the national economy*" according to article 11 of the Competition Act⁵, which empowers the HCC -ex officio or at the request of the competent Minister - to examine specific sectors of the Greek economy and issue a reasoned opinion, as to whether or not conditions of effective competition exist in the sector under review.

¹ See HCC Decisions 642/2017 (settlement procedure) & 647/2017 (litigation procedure). See also HCC decisions on bid rigging cartels (on a national or local level) by Greek construction companies: 715/2020, 674/2018, 644/2017.

² Decision 642/2017 para 236-238.

³ In the meantime, the fund in question has entirely divested the stock held in one of the rival groups.

⁴ L. 3959/2011, as currently in force.

⁵ See full description of the entire procedure in L. 3959/2011, Article 11-Regulation of sectors of the economy.

Pursuant to a Press Release dated 7.4.2021 the HCC has published its provisional Opinion⁶, which pinpoints the lack of efficient competition in the construction sector and focuses on the following issues:

- Regulation of “unusually low offers” in public tenders,
- Reinstatement of the institution of “construction consortium” after the award of a public contract,
- Modifications regarding the criteria for public contract awards,
- Organisation of the Register of Contracting Undertakings for Public Works (MH.EE.Δ.E), in particular the ranking criteria for registered members,
- Increasing use of concessions and public-private partnerships (PPP) by tendering authorities without a prior systematic analysis/evaluation of their potential impact on competition.

The above opinion’s findings are open to a public consultation, which will last one (1) month (8.4.2021-7.5.2021). Once the public consultation is completed, the HCC shall announce “*specific measures deemed necessary, suitable and proportionate*” for the purpose of creating conditions of effective competition in the construction sector, which shall also be open to a public consultation for at least thirty (30) days. Following completion of the second public consultation, the HCC shall issue an enforceable decision imposing the appropriate specific measures. Such measures may include recommendations to amend or revoke legislative acts.

The majority of the issues highlighted as potentially problematic by the HCC’s provisional report have been included in a recent legislative initiative, the amendment of Law 4412/2016 on public procurement⁷.

In particular, the issue of “unusually low offers”, which was also dealt with in the HCC’s ex officio investigation as a potential collusion-facilitating factor, is regulated in article 32 para 5a) of the new law, which specifically provides that offers differing more than 10% from the average of all competing offers are presumed “unusually low”, unless the bidder submits sufficient clarifications to the contracting authority justifying the low offer.

The new law (art. 23⁸) also radically modifies the procedure regarding the exclusion of economic operators who fail to demonstrate their reliability⁹ from participation in future public tenders.

⁶ The full text of the Opinion is available on the HCC’s official website.

⁷ L. 4782/2021 (Gov. Gazette 36A/9.3.2021) on the “*modernization, simplification and remodeling of the legal framework of public contracts*” modifying L. 4412/2016 on “*public procurement for works, supplies and services-adoption of EU Directives 2014/24 and 2014/25*” (Gov. Gazette 147A/8.8.2016).

⁸ Amends art. 74 of L. 4412/2016, which transposes art. 57 of EU Directive 2014/24.

⁹ In a relevant judgment dated 24.10.2018 (case C-124/17), the EU Court ruled that “*the contracting authority may require that economic operator to provide elements of a factual nature making it possible to show that the measures on which it relies are indeed appropriate to avoid a repetition of the conduct complained of, having regard to the specific circumstances in which those infringements were committed. The fact that the evidence to be provided, in that regard, by the economic operator has already been requested by the competition authority in the course of its investigation does not, by itself, justify that*”

According to this, a system of horizontal exclusion from procurement procedures and concessions shall be established by Presidential Decree and a special register of excluded operators shall be kept by the competent Hellenic Single Public Procurement Authority (ΕΕΑΔΗΣΥ).

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economic operator being exempted from providing that evidence to the contracting authority, unless the facts or circumstances in respect of which evidence is thereby requested follow sufficiently clearly from other documents provided by the economic operator, in particular from the decision establishing the infringement of the competition rules."