

# Kluwer Competition Law Blog

## Main Developments in Competition Law and Policy 2022 – Greece

Georgia Tzifa (WilmerHale) · Saturday, April 1st, 2023

2022 saw several important competition law developments in Greece, both in the legislative sphere and at the level of the national regulator. The Greek Competition Commission (“HCC”) remained very busy, continuing its work from the previous years and launching various interesting new initiatives.

### Modernisation of Greek competition law: Amended Greek Competition Act

In January 2022, the amended Greek Competition Act (Law 3959/2011) was finally published, concluding a two-year [legislative process](#). The amended Act transposes Directive (EU) 2019/1 (ECN+ Directive) into Greek law and substantially modernises the national competition law framework, taking into account, in particular, the development of the digital economy.

One of the most important provisions of the amended Act is the newly added Art. 1A. Inspired by, among others, Section 5 of the U.S. Federal Trade Commission Act, Art. 1A expressly prohibits two types of unilateral conduct, with significant negative effects on competition:

**a) invitations to collude:** proposing, coercing, providing incentives to or in any other way inviting another undertaking to participate in agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object to prevent, restrict or distort competition in the Greek market.

**b) price signalling:** disclosing information on prices, rebates, benefits or credits related to the products or services supplied or purchased by the undertaking in question, where such disclosure: **i)** restricts effective competition on the Greek market, and **ii)** does not constitute standard commercial practice. The disclosure of information exclusively addressed to end users is not considered as restricting effective competition.

Art. 1A does not apply where the conduct in question falls under Arts. 101 or 102 TFEU (or their equivalent provisions under Greek law), including in the case of an exchange of commercially sensitive information between competitors.

## HCC: Maintaining momentum

As [reported](#) previously, one of the main goals of the new leadership of the HCC was to clear a stockpile of pending cases, many of which had been initiated prior to 2011. In parallel, the HCC aimed to improve its efficiency by the speedy examination and conclusion of new cases. The significant progress made in [2020](#) and [2021](#) continued in 2022, with the HCC reducing the average age of pending cases by almost 80% over this three-year period. Indicatively, the average age of pending cases was reduced from approximately 8 years in September 2019 to 1.2 years in December 2021 and to 1 year and 8 months in December 2022.

In 2022, the HCC issued 42 decisions overall, which represents a 75% increase in comparison to the number of decisions issued in 2019. The breakdown is as follows:

- 30 decisions in various competition cases, 18 of which in mergers;
- 1 advisory opinion;
- 2 sector inquiries;
- 1 regulatory intervention (market investigation); and
- 8 other decisions.

In addition, 68 new cases to be opened came before the HCC in 2022. This is a significant increase, attributed mainly to the operation of the new whistleblowing system introduced in March 2021 (please see our [2021 overview](#) for more details on this system).

## Issuance of new Guidelines

Strengthening competition law compliance was an important area of focus for the HCC in 2022.

In that context, the HCC launched a [public consultation](#) on [draft guidelines](#) for the implementation of Art. 1A of the amended Greek Competition Act. These guidelines set out in more detail the main legal and economic principles based on which the HCC will assess invitations to collude and price signalling under that article. Among others, the guidelines discuss the types of information that are likely to restrict competition in a price signalling context, the concept of a “normal business practice”, as well as the potential justifications for both types of conduct. Having taken account of the feedback submitted by stakeholders and following informal consultations with the European Commission, the HCC published the [final guidelines](#) on its website, in February 2023 (available in Greek).

Furthermore, the HCC issued [updated guidelines](#) for the strengthening of the deterrent effect of competition law, focusing, among other points, on the bolstering of its fining powers. The HCC also published two guides:

- An updated “[Competition Guide for Associations of Undertakings](#)”, meant to serve as a “code of conduct” for the associations in question. This guide emphasises that associations of undertakings should adopt a cautious course of action for compliance with competition rules, given that they provide a platform for communication between undertakings. The guide was organised in an FAQ format, with indicative examples from the HCC’s decisional practice.
- An updated “[Guide for Contracting Authorities: Detecting and Preventing Collusive Practices in Public Procurement Procedures](#)”. The guide sets out the competition law framework relating to

public procurement procedures (including the penalty system currently provided for by law), focusing on the detection and prevention of collusive/manipulation practices. In order to assist contracting authorities in ensuring the legality and correct implementation of the procurement procedures they carry out, the guide includes annexes with checklists and relevant examples.

### **New whistleblowing system for contracting authorities**

Following up on the introduction of a digital whistleblowing system in March 2021, the HCC put in place a second such [platform](#), specifically designed for use by contracting authorities. Given their role as tender-launching and contract-awarding bodies, contracting authorities are in a position to receive information and/or complaints regarding anti-competitive behaviour in the context of public tenders. By using this new whistleblowing system, contracting authorities will be able to assist the HCC in uncovering illegal practices in public procurement procedures (e.g., collusive tendering and bid-rigging, cover bidding, bid suppression or rotation, and market allocation).

### **Continuation of sector inquiries**

The HCC was also busy on the sector inquiries front, making progress with the pending inquiries from last year (see our [blog post](#)).

#### *E-commerce sector inquiry: Publication of final report*

The sector inquiry into the e-commerce sector was concluded with the publication of the final report in November 2022 (available [here](#), in Greek). Although the inquiry mainly focused on competition issues, it also highlighted matters which do not fall *stricto sensu* within the HCC's competence, e.g., issues relating to consumer protection, the use of big data, and the implementation of Regulation (EU) 2019/1150 ("P2B Regulation").

In particular, the final report came to the following conclusions/proposals (see [here](#) for a summary in English):

#### *Consumer behaviour*

The main deterrents for e-purchasing relate, inter alia, to transport costs, the delivery time of goods, concerns about potential fraud, as well as the absence of payment-on-delivery options. Consumers tend to support Greek online stores rather than stores registered abroad but are more demanding as regards the features that Greek online stores are expected to meet. Nevertheless, 95% of consumers surveyed reported being satisfied with their overall experience as e-consumers, as cases of fraud are, in practice, very infrequent.

## ***P2B Regulation***

Although the implementation of the P2B Regulation is estimated to have a positive effect on the activity of e-commerce companies in Greece, in practice there have been no general changes in business relationships with online services providers. The HCC recommended the adoption of mechanisms to monitor the implementation of the Regulation and to strengthen the role of the competent supervisory authority, i.e. the Interagency for Market Control (“DIMEA”). In that regard, the HCC noted that it is important to develop channels for the submission of anonymous complaints, adopt fast-track dispute resolution mechanisms and introduce an appeal procedure against the decisions of DIMEA.

The HCC also highlighted the need to clarify certain provisions of the P2B Regulation, such as those relating to the dual status of undertakings as online platforms and business users at the same time.

## ***Digital Markets Act (“DMA”) and Digital Services Act (“DSA”)***

The HCC noted that there is a need for the alignment of these two Acts with national law and for the avoidance of the creation of additional formalities in the context of their implementation. Furthermore, the HCC stressed the need to allocate adequate resources for the provision of technical expertise in relation to these Acts, as well as for the establishment of a complaint mechanism to monitor compliance. The HCC also proposed to formally seek, through mandatory market surveys, the opinion of competitors and consumers regarding the compliance measures taken under these Acts.

## ***Entry barriers***

In the final report, the HCC discussed various barriers to entry into the e-commerce market. Among these are the high costs relating to the setting up, operation and promotion of an online store, an issue which mostly affects SMEs; difficulties to access funding for e-commerce activities, a lack of the necessary knowledge to organise/plan omnichannel strategies and difficulty in finding specialised staff for that purpose; as well as various bureaucratic obstacles.

The HCC also noted the difficulties or, at times, the complete inability of e-commerce companies to access data, which makes it difficult for them to adapt to the needs, habits and preferences of consumers, and therefore, to further develop in that sector. Another issue is the cost of using payment services, in particular the cost of supplying technical equipment (POS), as well as the high charges of banks for electronic transactions, especially for smaller enterprises.

The HCC proposed various solutions for these issues, such as the simplification of the relevant procedures for participation in co-funded programmes in order to raise capital, the issuance of guidelines and the creation of training programmes for (prospective) e-commerce entrepreneurs, as well as the simplification and modernisation of the legislative framework. As regards access to data, the HCC stressed that some issues could be resolved by increased use of the right to data portability, through the adoption of interoperable formats by e-commerce companies, together with the adoption of guidelines on the General Data Protection Regulation (“GDPR”) by the competent

authority.

### ***Barriers to cross-border business activity***

The HCC discussed various barriers to cross-border business activity, such as language and regulatory differences, high shipping costs, the limited liability of transport companies in the event of damage, additional insurance costs borne by e-commerce companies, as well as additional regulatory formalities/obligations imposed on domestic online platforms by comparison to foreign online platforms. The HCC highlighted that special care must be taken in the transposition of EU Directives into national law, so that they do not introduce additional formalities for domestic companies. Other barriers noted by the HCC were the diversity of tax rates – also taking into account the high (direct and indirect) taxation in Greece – as well as the absence of sufficient customs controls.

### ***Distortions at the retail level***

The HCC also examined various distortions at the retail level. Such distortions include the parallel imports of products from non-EU countries, which are not intended for sale within the EU; the operation of virtual stores, in connection with cases of tax evasion and consumer fraud; as well as the reliance of retailers on social media, which may facilitate consumer fraud and tax evasion, due to the lack of a proper regulatory framework and control.

A possible solution in this respect could be the certification of e-commerce companies. The HCC noted that there is a difference of opinion as regards the mandatory nature of such a certification. In any case, however, a certification procedure should not entail any administrative and financial burden for businesses. An additional suggestion is the development of a regulatory framework that would govern the participation of business users in social media operating as marketplaces.

### ***Distortions in specific product industries***

The HCC also noted the existence of distortions in specific product industries (e.g., food supplements, books), as well as distortions stemming from a poor operation of the competent control mechanisms due to, inter alia, their under-staffing. The HCC highlighted the need to strengthen the operation of the mechanisms in question, as well as to interconnect the competent authorities and bodies.

The publication of the final report marks the completion of the HCC's sector inquiry into e-commerce. On that basis, the HCC will subsequently be able to intervene either repressively or by taking initiatives to promote specific competition policies or regulations in the relevant sector.

### **Fintech sector inquiry: Publication of final report**

The HCC also concluded its sector inquiry into the fintech sector, with the publication of the final

report in December 2022 (available [here](#), in Greek; for a summary in English, please see [here](#)).

The sector inquiry showed that the market situation in the fintech sector is still immature and evolving. A broader sectoral issue, at the intersection of competition law and regulatory policy, is the possible strengthening of the market power of already established service providers in the banking, insurance, and big tech sectors, through the use of extensive, non-public, multi-level (including personal) big data. These companies acquire the data in question from their activities in different markets, possibly through self-preferencing or enveloping practices.

The HCC noted that this phenomenon entails possible exclusionary effects for those competitors who cannot collect and/or process such critical information, at least at the same cost. It is therefore possible to displace smaller competitors and/or start-ups (e.g., by denying them access to data) or exploit them (e.g., by overcharging for data access). These phenomena may, in some cases, be partially covered by sectoral legislation (e.g., the PSD 2), but the HCC must be ready to take action against practices that are not fully addressed through regulatory measures, especially if they occur in the framework of an ecosystem and not just on one relevant market.

As regards payment services in particular, the HCC noted that the national legislation has not made full use of the discretionary powers provided by PSD 2 to adopt proportional measures for a more case-by-case approach in relation to licensing requirements. This may result in increased entry barriers for fintech startups. Similar issues exist in relation to the national legislation on electronic money. These issues could be remedied by amending the legal framework so that any imposed restrictions are necessary and directly related to the operational and financial risks faced by fintech companies. The HCC observed that generally, the adaptation of legislation or the adoption of new rules at the national level would be a way forward for the strengthening of the regulatory framework when the issues in question are insufficiently covered by EU rules.

Regarding the regulatory framework relating to trust services, anti-money laundering and countering the finance of terrorism, as well as Know Your Customer requirements, the HCC stressed that compliance with the relevant obligations is a demanding task, with high costs for banking services providers, especially for incumbent ones, which are active through traditional channels. In view of this, it would be appropriate to explore, in future legislation, the possibility of introducing settings adapted to the new digital environment. These settings could proportionately mitigate fintech compliance costs and at the same time, provide greater clarity and legal certainty with more precise requirements, depending on the customer's risk level. The experience of the Regulatory Sandbox of the Bank of Greece will be valuable in this regard.

### **Mapping of the petroleum industry**

In March 2022, the HCC announced that it would carry out a mapping study on the competitive conditions in the petroleum industry. Mapping is a new tool that has been added to the amended Greek Competition Act. This tool allows the HCC to study the competitive conditions in any market or sector of the economy, where required for the effective exercise of its powers.

This mapping study was conducted by the Directorate General for Competition of the HCC, in collaboration with the Chief Technology Officer's team (mainly data scientists) and academic experts. The HCC is one of the first competition authorities in the EU to conduct such a study of the petroleum market: so far only the competition authorities of Austria and Germany have

undertaken similar initiatives.

The HCC's mapping study selectively **focuses** on 95 octane unleaded petrol, diesel and heating oil, i.e., three prime necessities with low price-inelastic demand. The study examines price pass-through in the oil production and distribution chain in the Greek market. Specifically, it analyses the phenomenon of asymmetric adjustment of fuel prices in relation to costs (also referred to as the "Rockets & Feathers- R&F" phenomenon, especially with regard to the existence of asymmetry in price adjustment between the different stages of the petroleum industry (refining, wholesale, retail)).

The econometric analysis focused on the direct effect of the change in product acquisition costs on prices. The conclusion of the analysis, which was geographically limited to the prefecture of Attica (a market where there is more competitive intensity), showed an asymmetry for all three products in all three stages of the production and distribution chain (refining, marketing, retailing). Further econometric analysis revealed that, regarding 95 octane unleaded petrol and heating oil, there is an asymmetric pass-through to the retail (gas station) prices after a change in the wholesale price.

The asymmetry in question appears simultaneously with the wholesale price change (direct effect) and still exists cumulatively after five days (aggregate pass-through), albeit decreasing. The HCC also examined the pricing mechanism for all three products as well as other factors that may be linked to the observed asymmetry. This asymmetry in the pass-through of fuel prices in Greece leads to a loss of part of the consumer surplus, as consumers pay more than the amount they would actually pay in the absence of this phenomenon.

On the basis of the results of the mapping study, the HCC then decided to initiate a regulatory intervention (market investigation) into the petroleum sector (see below).

### **Regulatory interventions (market investigations)**

The HCC concluded the regulatory intervention (market investigation) into the press distribution sector and made significant progress with the one into the construction sector (please see our [blog post](#) for more details). In parallel, the HCC also launched a new market investigation into the petroleum industry, on the basis of the amended Greek Competition Act.

*Decision for the press distribution sector: vertical common ownership and non-regulated "natural monopoly/essential facility"*

As regards the market investigation into the press distribution sector, the HCC issued its **decision** in November 2022, following the public consultations and the corresponding interim reports issued in 2020/2021. By that decision, the HCC confirmed that there are no conditions for effective competition in the market in question. In particular, the decision found that the printed press distribution market, at the press distribution agency level, has characteristics of a private, non-regulated "natural monopoly" or "essential facility"; this is a structural weakness which distorts competition. Subsequent to the change in the shareholder structure of the press distribution agency in May 2021, the vertical common ownership of certain publishing companies in that agency remained, whereas the vertical common ownership of a specific shareholder appears to have

ceased. However, according to the HCC, in case of a subsequent change of the shareholder structure in the future, the motive to vertically exclude competing publishing companies cannot be eliminated. This is only one possible anti-competitive effect of vertical common ownership in this case.

For that reason, the HCC decided to take measures based on Art. 11 of the Greek Competition Act, which aims to create conditions of effective competition in the market and not only to correct *ex post* the anti-competitive effects of specific practices. In particular, the HCC decided to:

- Establish a system for the prior notification to the HCC of changes in the shareholder structure of the press distribution agency;
- Oblige the press distribution agency to take measures for the creation of Chinese walls in order to prevent the leak of commercially sensitive information to the notifying party under point (a) above, as regards the commercial policy of the agency in relation to press distribution;
- Provide for the establishment of an advisory committee with the participation of representatives of the interested parties active in the entire press distribution value chain, with a consultative and advisory role on the proposed commercial policy of the press distribution agency;
- Appoint an Ombudsman for the supervision of the measures imposed by the HCC's decision.

In case of non-compliance, the HCC can impose a fine of 10.000 EUR per day on any of the companies in question.

### ***Construction sector: focus on horizontal common ownership***

As for the regulatory intervention (market investigation) into the construction sector, the [second interim report](#) was published in August 2022 (available [here](#), in Greek). According to this report, despite the significant reduction of the scale of horizontal common ownership in the two largest construction companies in Greece, the remaining common ownership and the structural conditions in the market for the construction of large public works (oligopoly with high barriers to entry) mean that the sector is prone to competitive distortions, in line with the theory of horizontal common ownership.

In particular, the HCC found that, for a significant period, there has been significant horizontal common ownership in both of the industry's biggest competitors. This is due to the existence of a fund with shareholdings in both companies. This fund's market behaviour was apparently to consider its overall interests in the companies in question (maximizing portfolio theory). The quantitative analysis carried out by the HCC identified a probable indirect result of "*passivity, i.e. failure of aggressive competition*" in a series of public tenders. The negative effect of the horizontal common ownership in the companies in question was found to have been limited, but not effectively neutralised by the partial disinvestment of the fund in one of these two companies.

The second interim report proposes the following remedies for the construction sector:

- The establishment of independent management/Chinese walls and the elaboration of a code of conduct in cases of horizontal common ownership of competing companies, concerning the members of the management and the shareholders of these companies, as well as the manner and type of information (sensitive or not) that will be transmitted by the common shareholders to competing businesses and vice versa;



- The provision of a notification obligation in case of an increase in the percentage of horizontal common ownership, when any legal entity acquires a percentage of more than 5% in the share capital of more than one competing company in the examined industry. Upon notification, the HCC would carry out an economic analysis of the effects of such an increase on the competition.
- The imposition of additional obligations to “*active common shareholders*” present in the examined sector and the specific sub-sector/markets involved.

As regards the more intensive and wider use of PPPs and concessions without prior systematic analysis of their possible effects on competition, the second interim report proposed to establish a procedure for the issuance of an opinion by the HCC regarding the effects of each infrastructure project on competition, both at the project design stage, as well as in the implementation and development stage.

The second interim report also proposed the provision of guidance by the HCC, in collaboration with the Hellenic Single Public Procurement Authority, regarding construction consortia (joint ventures). The [public consultation](#) on the second interim report ran until 30 September 2022; the issuance of the final decision of the HCC is pending.

### ***New regulatory intervention (market investigation) in the petroleum industry***

The HCC also decided to [launch](#) a new regulatory intervention (market investigation) into the petroleum industry, following up on the mapping study discussed above. The market investigation will assess the prevailing market conditions in terms of the effective competition at the three production and distribution stages (refining, wholesale, retail) of petroleum products (unleaded petrol, diesel and heating oil) in the Greek market. As noted above, these are prime basic necessities with low price-inelastic demand.

According to the HCC, the key factors triggering the regulatory competence of the HCC to launch a market investigation is the importance of the petroleum products sector for the Greek economy and its interconnection with all sectors of economic activity, as well as with final consumers.

The aim of the market investigation is to examine the conditions of competition in the relevant markets, in order to clarify whether the asymmetry discussed above and in general, the price increase of unleaded petrol, diesel and heating oil over the last two years, are due to the absence of conditions of effective competition. The HCC also plans to examine issues regarding the pricing policy mechanisms in this industry, the maintenance of security stocks and other potential barriers to entry and development of the market, as well as the maintenance of a high-profit margin by the industry firms.

### **Launch of the Sustainability Sandbox**

In the context of its Competition Law & Sustainability Initiative, on which we [reported](#) last year, the HCC launched its [Sustainability Sandbox](#) in October 2022. As a reminder, the Sustainability Sandbox entails the creation of a mechanism for the submission to the HCC of business proposals aimed at creating or enhancing conditions for sustainable development and which, in order to materialise, necessitate greater legal certainty in relation to competition law enforcement.

In particular, the Sustainability Sandbox creates a supervised space for experimentation to promote innovative business initiatives. The aim is to enhance legal certainty and reduce the regulatory risk for “green” investments, in furtherance of the wider public interest objective for sustainable development and in compliance with competition law.

Companies can submit business proposals through the sandbox, which will be fully evaluated *ex-ante* by the HCC. As reported last year, following this examination, the HCC may issue, in certain cases, a “no-enforcement action letter” to interested parties. On the basis of this letter, parties will be able to implement their proposal under the supervision of the HCC within a specific time frame.

The operation of the Sustainability Sandbox was also made possible by the amended Greek Competition Act. The newly added Art. 37A provides the possibility of adopting a “*no-enforcement action letter*”, in case an agreement between undertakings, the decision by associations of undertakings, concerted practice, or unilateral conduct is found, after an analysis of its effects on competition, to contribute significantly to sustainable development and the public interest. Such letters will be issued by the President of the HCC, following a report by the Directorate-General for Competition of the same authority. The Sustainability Sandbox can be accessed [here](#).

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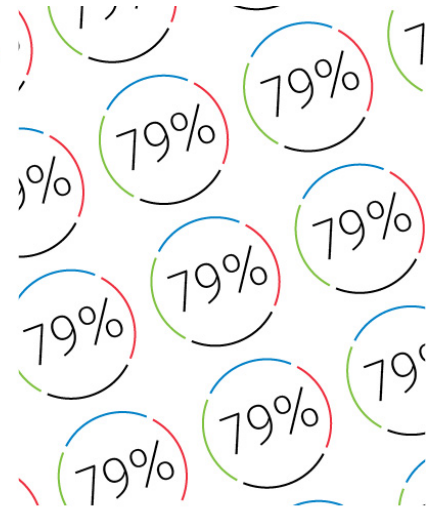
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