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Lia Vitzilaiou, Lambadarios Law Offices
George Zohios, Alexiou-Kosmopoulos Law Firm

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Lia Vitzilaiou & George Zohios¹

On April 30, 2009, one day before the 5th anniversary of the entry into force of Regulation 1/2003 on the reform of EC competition law procedural rules,² the Commission of the European Communities published a Report on the functioning of the Regulation.³ In this Report, the Commission outlines its decision-making practices over the last five years and examines the impact of the new procedural arrangements on its productivity and duration of proceedings. Furthermore, the Commission describes its experience from its cooperation with National Competition Authorities (“NCAs”) and National Courts.

One of the most radical reforms that Council Regulation 1/2003 brought about was the abolishment of the prior notification system of agreements for individual exemption under Art. 81(3) and the introduction of the “self-assessment” system, which allowed the parties to decide whether their agreement qualified for an exemption and was therefore legal. The main purpose of such reform, which rendered Art. 81 (3) directly applicable, was to reduce the Commission workload associated with hundreds of notifications—many of which concerned agreements without any anticompetitive effects—and allow it to “concentrate its resources on curbing the most serious infringements, while also relieving undertakings from considerable costs.”⁴ According to the Commission Report, this aim has been largely fulfilled,⁵ unnecessary bureaucracy has been reduced, and the Commission has been able to focus its resources on important competition issues requiring extensive analysis.

¹ Lia Vitzilaiou may be contacted at: lvitzilaiou@lambalaw.gr and liavitzzi@gmail.com; and George Zohios at: g.zohios@aklawfirm.gr.

² Council Regulation (EC) No 1/2003, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L1/1, [2003] 4 CMLR 551.

³ Communication from the Commission to the European Parliament and the Council, Report on the functioning of Regulation 1/2003, Brussels, 29.4.2009, SEC(2009)574.

⁴ See n.2 above, Recital (3).

⁵ See Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council Report on the functioning of regulation 1/2003, Brussels, 29.4.2009, SEC (2009) 574 Final, Chapter 2.2.

The Report also points out that the majority of Member States have followed the model of Regulation 1/2003 and abolished the notification system of their national competition law; to date, national competition laws of more than 20 Member States operate without any notification obligation. A further success of Regulation 1/2003, pursuant to the Commission Report, was the creation of the European Network of Competition Authorities (“ECN”), which allowed NCAs and the Commission to effectively cooperate towards the uniform application of competition law within EEA—a very challenging goal of the Modernization Package which has created concerns as to its feasibility. Such concerns are acknowledged by the Commission, which notes in its Report that there are still areas which merit improvement, such as the negative impact of national divergences in the NCAs’ fining powers, procedural rules, and treatment of unilateral conduct.

The aforementioned Commission Report has major importance for Greece as it coincided with the presentation of a Bill aimed at reforming the existing national competition law, namely C.L. 703/1977. The Bill has two main goals, according to its preamble: a) to reinforce the role of the Hellenic Competition Commission (“HCC”) and b) to harmonize the Greek Competition Law to the *acquis communautaire*. The current legal regime indeed presents quite many discrepancies with the EC legislation; the main ones are stated below:

I. THE OBLIGATION OF PRIOR NOTIFICATION OF AGREEMENTS⁶, AND THE LOSS OF THE RIGHT TO AN EXEMPTION⁷ FOR FAILURE TO NOTIFY

It is evident that these provisions contain elements of the pre-Regulation 1/2003 notification system, namely the regime established by Regulation 17/62, and deprive Art. 1(3) C.L. 703/1977 of the direct effect attributed by the Commission to Art. 81(3). Moreover, such notification system also seems to violate Art. 1(2) in conjunction with Art. 3(2) of Regulation 1/2003, given that pursuant to Art. 1(2), “agreements which satisfy the conditions of Art. 81(3) shall not be prohibited without any prior decision being required to that effect,” while Member States are allowed to adopt stricter national laws only with regard to unilateral conduct, i.e. abusive behavior, as opposed to multilateral conduct, i.e. anticompetitive agreements.⁸ It is therefore evident that the obligation of prior notification provided in Art. 21 C.L. 703/77 and the relevant sanctions for failure to abide, deviates from EC Competition Law in three ways:

- a) An HCC decision is required for an exemption to be granted—in direct conflict with Art. 1(2) Council Regulation 1/2003;

⁶ Pursuant to Art. 21 C.L. 703/1977, which entails a significant fine and the loss of the right to exemption for failure to notify

⁷ Pursuant to Art. 1 (3) C.L. 703/1977

⁸ Art. 3(2) Regulation 1/2003.

- b) The obligation to notify is an administrative burden on the parties, which illicitly renders national law stricter than EC law, whereby neither notification nor Commission decision is required—in direct conflict with Art. 3(2) Regulation 1/2003; and
- c) The obligation to notify and the deprivation of the right to an exemption for failure to do so, arbitrarily adds an extra requirement to the essential conditions for exemption laid down by Art. 81(3) EC Treaty and Art.1 (3) C.L. 703/77. Such addition of a purely bureaucratic requirement clashes with the entire rationale of Art. 81 (3), which exempts agreements only because and only when the efficiencies produced outweigh their possible anticompetitive effects. In other words, for an exemption to be granted an agreement is solely appraised on the merits. Adding an “administrative” requirement to those criteria undermines the efficiency purpose of Art. 81 (3) and Art. 1 (3), given that a pro-competitive, welfare-enhancing agreement can be rendered illegal and thus prohibited, merely due to an administrative violation, resulting in the loss of all its efficiencies. At the same time, such “deprivation” sanction creates the paradox of having one agreement considered legal by EC Competition Law but illegal by Greek Competition Law.

II. THE OBLIGATION OF EX-POST NOTIFICATION OF MINOR MERGERS, I.E. MERGERS BETWEEN UNDERTAKINGS WITH MARKET SHARE OF AT LEAST 10% OR TOTAL TURNOVER OF AT LEAST EURO 15.000.000, BUT BELOW EURO 150.000.000⁹

This sui generis obligation of ex-post notification of minor mergers is a unique peculiarity of Greek Competition Law. The first thing to note about this provision is that it clashes with the very rationale of the EC Merger Control legislation, which is to prevent the creation and/or strengthening of a dominant position, and the resulting impediment of competition in the market. In cases of minor mergers, it is evident that there is no such concern, reaffirmed by the fact that such notification takes place post-merger and no Commission approval is required for its materialization. Consequently, such provision imposes a rather unnecessary administrative and financial burden on undertakings, while failure to notify involves severe penalties. It is evident that such provision may also act as a deterrent to business development, in a country that needs investments more than many other Member States, while also unnecessarily increasing the workload of the HCC.

III. THE PROHIBITION OF ABUSE OF ECONOMIC DEPENDENCE¹⁰

⁹ Art. 4(a) of C.L. 703/1977: Failure to notify entails a fine of at least EURO 3,000 up to 5 percent of the total turnovers of the undertakings concerned.

¹⁰ Art. 2a C.L. 703/1977.

This provision refers to the conduct of undertakings that do not hold a dominant position, but have significantly more bargaining power than their counter-parties. The proviso is intended to protect small companies (e.g. distributors) dependent on larger ones (e.g. manufacturers and/or suppliers), by placing a legal handicap on the latter. It is evident, though, that the purpose of such a provision is irrelevant to the safeguarding of free competition, which is the object of every antitrust legislation, but relates to the regulation of private relations, namely unfair competition. It is thus dubious whether the appropriate instrument to address this issue is a legislation of public character, closely related to the efficient development of national economy, which regulates unilateral conduct only when a certain threshold is exceeded, i.e. when an undertaking is found “dominant” and not just strong.¹¹ Moreover, if one takes into account that the HCC is already overburdened with unnecessary workload due to the above-mentioned notifications,¹² it seems rather unfeasible that it will be able to efficiently apply Art. 2a C.L. 703/1977 in practice.¹³

It is evident from the above that the discrepancies of the current legal regime with EC Competition Law are vital, creating both policy concerns and practical inefficiencies. Therefore, reform was much anticipated and primarily expected to modify these contradictory provisions, especially in view of the Commission Report which proudly states that “the entry into force of Regulation 1/2003 has generated an unprecedented degree of voluntary convergence of the procedural rules dedicated to the implementation of Articles 81 and 82 EC.”¹⁴ Unfortunately though, the Bill—despite its ambitious preamble—seems rather disappointing to the most part, as it leaves most of the divergent provisions practically unchanged. More in detail:

- a) According to its Preamble, Article 1 of the Bill abolishes the prior notification system and introduces the system of self-assessment and direct exemption. However, despite such triumphant declaration, the Bill maintains provisions of C.L. 703/1977 that both directly and indirectly maintain the notification obligation. In particular, the newly drafted Article 1(3) stipulates that no HCC decision is required for an exemption to be granted, provided that: a) the agreement is notified to HCC pursuant to Art. 21, and b) the efficiency criteria are met. Therefore, practically, the only significant change of the exemption system is that now the formerly implicit prerequisite of notification is explicitly rendered an “extra requirement,” having equal force with the efficiency requirements.

¹¹ See also Commission Staff Working Paper (note 5 above) ¶ 178: “...(I)t is not clear whether competition law is the appropriate instrument to address concerns arising from e.g. disparities in bargaining power.”

¹² Art. 4a and Art. 21 C.L. 703/1977.

¹³ See also HCC Karelias’ decision under Art. 2a C.L. 703/77, commented on below.

¹⁴ Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council Report on the functioning of Regulation 1/2003, COM(2009)206, Chapter 5.1.5, point 201.

Furthermore, and despite the fact that “no prior HCC decision is required” for an exemption to be granted, several articles of C.L. 703/1977 which remain unchanged indirectly maintain such decision prerequisite, e.g. Art. 8b (2): “The HCC has the following competencies: a) to decide whether agreements falling under Art. 1(1) are valid, pursuant to Art. 1(3)...” and Art. 10 (1): “The HCC is exclusively competent for the application of Art. 1 (3).” It is thus evident that, in essence, the proposed reform does not abolish the notification system, but merely attempts to simplify the notification procedure while preserving its structural elements. If the Bill remains unchanged, it will lead to a national law which lies somewhere between the notification system of Regulation 17/62 and the self-assessment system of Regulation 1/2003, which is bound to create legal uncertainty, while maintaining quasi all the identified discrepancies with EC Competition Law.

- b) Notwithstanding harsh criticism against the notification obligation for minor mergers, the proposed law reform maintains it. Pursuant to the Bill Preamble, with the proposed reform the required information about minor mergers is now reduced and clearly specified and this is thought to facilitate the notification procedure. Moreover, the aim of the notification is explicitly determined by the Bill preamble as the “mapping of the market.” It seems rather disappointing that although legislators realized the inefficiencies of Art. 4a C.L. 703/1977 and chose to intervene, they did not completely remove it.

Moreover, the determination of the provision aim as the mapping of the market made the provision even more problematic, given that this task cannot be imposed on private undertakings that have no duty whatsoever to map the market—all the more threatened by severe penalties if they fail to do so. On the contrary, such duty lays on the shoulders of the Government and the HCC as an independent administrative authority, both of which have wide powers to otherwise monitor the market, e.g. by conducting sector inquiries, sending questionnaires to undertakings, following-up on market conditions after the approval of major mergers, etc. If provision 4a C.L. 703/1977 remains, then undertakings will continue to incur unnecessary costs and be deterred from developing; the HCC will continue to be loaded with merger notifications without any anticompetitive effects, while being distracted from more important duties; and the mapping of the market is bound to move so slowly that most of the times it will be out-of-date.

And just to make things worse, the Bill introduces an imprisonment (!) penalty of at least 8 months for legal representatives of undertakings which violate said provision—which could well apply also when an undertaking files the relevant

notification one day after the 30-day deadline stipulated by the provision.

- c) As regards provision 2a C.L. 703/1977 prohibiting the abuse of economic dependence, unfortunately the Bill does not change it at all, let alone remove it. The only reform found is the introduction of the above-mentioned imprisonment penalty against representatives of the undertakings concerned, in case of violation of said provision.

Finally, another issue which questions the harmonization of Greek competition law with EC legislation relates to the limited role attributed to Greek courts in applying Articles 81 and 82 EC Treaty. The Commission Report indicates that national courts can play and have played a key role in the uniform enforcement of EC Competition Law, as the power attributed to them by Regulation 1/2003 to apply Art. 81 and 82 in full has functioned as a safeguard and a guarantee for the success of decentralization. However, Greek Competition Law seems to have sidelined the role of the courts and has granted to the HCC the exclusive competence to apply Articles 81 and 82¹⁵ whereas Art. 6 Council Regulation 1/2003 provides that “National courts shall have the power to apply Articles 81 and 82 of the Treaty.” The Bill only adds that national courts shall have “incidental” jurisdiction to apply Articles 81 and 82, giving no real solution to the problem of the essential exclusion of national courts from applying EC Competition legislation in full.

It is evident from the above that the much expected reform of the Greek Competition Law fails to resolve many and perhaps the most important deficiencies identified, including both its discrepancies with the EC legislation and the unnecessary workload imposed on HCC which hinders it from operating as effectively as it could. It is definitely an optimistic sign that the legislators acknowledged that the current legal regime must change towards the goal of harmonization and the strengthening of the HCC substructure, but the changes proposed so far seem too weak and disorientated to achieve these goals.

Meanwhile, the HCC, operating in a rather unfavorable legal environment, is striving to live up to the expectations associated with its role. It is true that the HCC seems more and more active over recent years and has increasingly improved its productivity. Nevertheless, several decisions from time to time reveal that the HCC still has margin for improvement and further harmonization with the EC case-law, methodology, and standards altogether.

A recent case that received rather negative publicity was the BP/Shell cartel case¹⁶ which resulted in a fine of EURO 30,066,585 for BP and EURO 19,664,888 for Shell. In the HCC’s view, BP and Shell had infringed Art. 1 (1) of C.L. 703/1977 and Art. 81 EC Treaty

¹⁵ Art. 8b (1) C.L. 703/1977.

¹⁶ See Decision 421/V/2008 of the Hellenic Competition Commission, available at: http://www.epant.gr/img/x2/apofaseis/apofaseis531_1_1230118929.pdf.

by applying a common rebate policy which resulted in similar wholesale prices. The criticism of the decision concentrated mainly on the peculiar economic analysis performed by the HCC to support its finding, which has no serious precedent either in case-law or in literature. The HCC divided the Greek market in three prefecture groups and subsequently compared the average discounts for each prefecture group over a reference period of 17 months (1/2003-5/2004). The resulting discount analogy varied—for the most part—from 0.9 to 1.3 and that, in the HCC view, was evidence of collusion between BP and Shell as to their discount and pricing policies.

It is clear, though, that the criterion used to show collusion, namely the “average” discount analogy over a long reference period and within a large territorial group underestimated local competition among petrol stations and the actual fluctuation of prices over time, which in this case appeared significant. Moreover, the HCC methodology disregarded the fact that in this particular market products are very close substitutes and price competition practically takes place within a fraction of Euro, e.g. EURO 0.95 as opposed to EURO 1.05 per oil liter. Besides, since there was no precedent of such economic methodology, the HCC failed to provide a proxy regarding which average discount analogy corresponded to normal competition conditions and which did not, making its finding of collusion even more unstable.

Finally, an indispensable element of an agreement within the meaning of Art. 81 EC Treaty and Art. 1 of Law 703/1977, is the ability of each party to monitor the other party’s compliance. In the present case, it seemed impossible for either party to control the alleged object of collusion; namely the perseverance of the average discount analogy over time. It should be noted and also acknowledged that most of the above criticism was expressed by five (out of ten) members of the HCC, forming a strong deviating opinion.

Another decision that suffered criticism was the decision against Hyundai Hellas¹⁷ pursuant to which recommended prices provided by suppliers to distributors equaled, in the HCC view, the imposition of fixed prices, mainly because the majority of the distributors in practice followed the prices recommended by the supplier.

To end with, the HCC Karelia decisions, which concerned abuse of economic dependence, also seem equally unsuccessful.¹⁸ The HCC had issued a decision¹⁹ which found cigarette supplier Karelias guilty of discriminating unfavorably against a distributor that economically depended on Karelias. Consequently, the HCC imposed a fine on Karelias, while also ordering it to cease its illegal behavior. Following this decision, Karelias continued the same behavior against the same distributor, who had to file a new complaint against Karelias two years later, on the same grounds. With the

¹⁷ See HCC Decision 370/V/ 2007, available at: http://www.epant.gr/img/x2/apofaseis/apofaseis508_1_1210245516.pdf.

¹⁸ Art. 2a C.L. 703/1977.

¹⁹ See HCC Decision 145/II/2000, available at: http://www.epant.gr/img/x2/apofaseis/apofaseis267_1_1194017647.pdf.

decision²⁰ 356/V/2007 the HCC ruled that its former decision made no provision for a penalty in case of failure to abide by its ruling, so it couldn't punish Karelias. Therefore the HCC merely acknowledged Karelias' failure to abide by its former decision—which hardly comforted the abused distributor.

It is obvious from the above that despite significant progress made by the HCC over the last years, the legal regime and maybe the lack of sufficient resources, e.g. specialized economists, have not allowed it to perform as efficiently as it could. The proposed law reform currently does not seem capable of promoting the vital issue of harmonization with EC legislation and essentially assisting the HCC in its difficult role, although this was supposed to be the goal of the Bill—a goal that appears even more imperative in light of Greece's participation in ECN and the notable progress made over the last 5 years by most Member States towards the ambitious purpose of the uniform application of EC Competition Law. Hopefully, the final reform will allow Greek Competition Law to effectively serve the purpose of “conscious parallelism” with the EC standards and to quit from a rather infertile “unconscious competition.”

²⁰ See HCC Decision 356/V/2007, available at:
http://www.epant.gr/img/x2/apofaseis/apofaseis470_1_1196930565.pdf.