Greek competition law follows EC's lead

Greece has drafted legislation to implement the latest EC competition directive. Constantine Lambadarios and Melina Katsimi of Lambadarios and Associates outline the changes

The competition rules set by the EC within the Treaty of Rome, which came into force in 1958, aimed to create a common culture of competition, through the unified interpretation and application of the substantive competition provisions (that is, Articles 81 and 82 (ex articles 85 and 86) of the Treaty), and ensuring the integration of national markets in Europe.

Regulation 17/1962, which regulated the enforcement of competition rules in the EC, established a centralized enforcement system with the following characteristics:

- The EC had the *exclusive competency* to grant individual exemptions to restrictive practices that, although they restricted effective competition, fulfilled the four criteria set out in Article 81(3) and so could be granted an individual exemption and avoid annulment.
- A *prior notification and authorization system* was established, under which an agreement that appeared to infringe Article 81(1) and that did not fall within a block exemption regulation had to be notified to the EC to qualify for an exemption or a negative clearance.

White paper on modernization

After many years of broad application of Articles 81 and 82 of the Treaty by the EC and the European Court of Justice (ECJ), and in view of the impressive expansion of the EU, there was a need for greater enforcement at a national level - the EC no longer had the resources or the time to deal with all the competition cases. Furthermore, the notification system prevented the EC from concentrating on the most serious cases and imposed excessive costs and bureaucratic burden on the undertakings. Lastly, the evolution of community competition law and the rich case law both of the EC and of the ECJ permits undertakings, and national authorities, to judge themselves the compatibility of an agreement with Article 81 and 82 of the Treaty and, especially, the possibility of an exemption under Article 81(3). All these factors led to the need to change and move towards a decentralized system so that the EC could focus on the most serious infringements of European competition law.

Reform of Regulation 17/1962 was considered imperative and, in 1999, the White Paper on Modernization of the rules implementing Articles 81 and 82 was issued, which proposed the following:

- **Abandoning the EC's monopoly** over the grant of exemptions under Article 81(3): national courts and national authorities would decide *ex post* if an arrangement fulfils the criteria of Article 81(3) and therefore can be exempted from the prohibition of Article 81(1).
- Abolishing the notification and authorization system: Article 81(3) would **directly apply** and prior notification would no longer be an option for undertakings, which instead would learn to judge themselves the compatibility of their agreement with the competition rules. Thus, individual exemptions would no longer exist.
- Article 81 would be applied in its entirety by the national courts and the national competition authorities, which would have an **enhanced role.**

The White Paper triggered many reactions in the legal, commercial and financial circles of the EU, which expressed their concerns that this radical reform of the enforcement system of community competition law would lead to the loss of legal certainty, because the undertakings could no longer be assured that their agreement or concerted practice complied with the community competition rules, and that Articles 81 and 82 of the EC Treaty would be inconsistently enforced.

There was a need to change and move towards a decentralized system so that the EC could focus on the most serious infringements of European competition law

Regulation 1/2003

Despite these objections, and after four years of discussion and negotiation between the member states, Regulation 17/1962 was finally replaced by the new Regulation 1/2003, which adopts all the proposals set out the White Paper of 1999 without any major modifications. The new Regulation, by stipulating that no prior decision is required for the application of Article 81(3), abolishes the prior notification and authorization system and the exclusive competency of the EC to grant individual exemptions. Instead it empowers national courts and authorities with the *ex post* direct application of Article 81(3), which has an *ab initio* effect, each time the relevant criteria are satisfied. Therefore, undertakings can invoke application of Article 81(3) before the national authorities and courts at any time and they no longer need to notify their agreement to the EC and apply for a negative clearance or an individual exemption according to the four criteria of Article 81(3). This means that they or their legal advisers must make such an assessment when entering to the specific agreement. Lastly, under the new Regulation the national authorities and courts are no longer confined to the application of national provisions but have the power and obligation to apply Article 81 (including the assessment under Article 81.3) and Article 82 each time the specific case has a community dimension, that is, could affect trade between member states.

In view of these basic reforms towards decentralization, and considering the enhancement of the role of the national courts and authorities, which are empowered to simultaneously apply national and community competition provisions, the

Constantine E Lambadarios
Lambadarios & Associates Law Office

Associate Constantine Lambadarios specializes in competition law, international business transactions, international commercial arbitration, and franchising.

Constantine Lambadarios recently advised Sony Music Entertainment on the Greek aspects of its global joint venture with BMG Music creating, through a merger, SonyBmg Music Entertainment Greece; advised Aspis Real Estate in the creation of one of the most successful franchises in Greece for real estate transactions; and has advised Mercedes Benz, Procter and Gamble and Heineken – Amstel on issues relating to competition law.

Lambadarios is a graduate of Tufts University, Medford Mass (BA International Relations and History, 1997); Northeastern University, Boston Mass (Juris Doctor, 2001); and University of London, King's College (LLM, Master in International Business, Merit, 2002).

Lambadarios is a member of the School of International Arbitration and the International Bar Association.

Melina Katsimi
Lambadarios & Associates Law Office

Associate Melina Katsimi specializes in civil law, commercial and corporate law, and EC competition law.

Katsimi is a graduate of the University of Athens Law School (LLB) and the University College of London (LLM in commercial and corporate law), and is a member of the Athens Bar Association.

new Regulation establishes the basic principles governing the new close relationship and cooperation between the EC and the national authorities:

- The principle of supremacy of Community law is not surpassed and the EC maintains its leading role.
  - If the EC has initiated proceedings to adopt a decision on a case, national courts and authorities of a member state will be relieved of their competence to apply Articles 81 and 82. Furthermore, the EC always has the right to set forward the proceedings for issuing a decision on a case at any stage, depriving the national authorities of their competence to apply Article 81 and 82 on the same case.
  - National courts and authorities cannot take decisions running counter to a decision already adopted by the EC on the same case. However, the EC can take a decision that is contrary to a decision taken by a national authority. Furthermore, the EC is not bound and has the right to reverse a definite national court decision even if it is final.
  - National courts and authorities may not prohibit agreements that could affect trade between member states but that do not restrict competition under the community competition provisions. On the same direction, the supremacy of community law prohibits the legalization under national law of anti-competitive practices that are prohibited under community law.
- Member states retain their procedural autonomy.
- Block exemptions are still binding for the member states, but each member state may withdraw the benefit of this Regulation in certain circumstances.
- Member states are not precluded from adopting and applying stricter laws that prohibit or sanction unilateral conducts engaged in by undertakings, even if they do not fall within Article 82.
- The EC continues to play a central guiding role by having the exclusive competency to legislate through the issuance of notices, regulations, block exemptions and guidelines and to take negative but also positive decisions (declaring that Articles 81 and 82 are not breached) in individual important cases to clarify the law and contribute to the consistent and uniform application of the competition rules (especially of Article 81(3), which requires a complicated legal and economic analysis). Lastly, the EC is authorized with extensive inspection powers and may take two new kinds of enforcement measures instead of the imposition of fines: it may impose on undertakings either certain behavioural or structural remedies or seek commitment that they will cease the respective infringement.
- When acting under Articles 81 and 82, and 30 days before issuing a decision at the latest, national authorities have the obligation to immediately inform the EC.
- National courts need to closely cooperate with the EC when dealing with competition cases that require the application of community law, by requesting information and written remarks, without prejudice to the procedure of Article 234 of the Treaty.

Draft law in Greece on Regulation 1/2003

Despite the radical change of the European competition scheme through the new Regulation 1/2003 on the application of Articles 81 and 82 of the EU Treaty, the creation of unified competition conditions within the whole territory of the internal market cannot be achieved without harmonizing the respective competition legislation in each member state. In the past few months Greece has adapted the provisions and the spirit of the Regulation by issuing a new law for the radical reform of the competition legal framework. This new law, which has taken its final form and will shortly be approved by the Greek parliament, modifies, replaces and completes the Law on the control of Monopolies and Oligopolies and the protection of Competition 703/1977 and is expected to contribute greatly to the modernization of competition law in Greece, both from a substantial and a procedural point of view. The changes that are introduced refer to some modifications of the substantial provisions of Law 703/1977, upgrading the National Competition Commission (NCC) and creating a framework for the permanent and substantial cooperation between the NCC, the EC and the national competition authorities and courts of the rest member states for the application of community legislation.

Basic modifications

Specifically, the draft law establishes modifications in the following sectors:

Enforcement of the NCC through its reorganization and through the expansion of its authorities

The structure of the NCC is modified and its institutional role and independency are enhanced through:

- Increasing the number of its members from nine to 11, to be able to function in two departments.

- Increase the organic posts of its personnel, which will be occupied by scientists with a high level of knowledge and experience.
- Stipulating that the president of the NCC is elected and appointed by the Minister Cabinet, and not solely by the minister of development, upon approval of the parliament committee and proposal of the minister of development.
- Stricter provisions, concerning the professional incompatibilities of its members and enhanced participation obligations.
- The explicit characterization of the NCC as a separate legal entity with the ability to appear before the Civil Courts.

The draft law grants the NCC new authorities, to apply more efficiently the national and community competition provisions.

First of all, it explicitly provides the NCC with the exclusive authority to apply Articles 81 and 82 of the EC Treaty, apart from the national competition provisions, and to impose behavioural and structural remedies on the enterprises or the commitment that they will cease their anti-competitive behaviour, in case of breach of these provisions. The NCC is equipped with broad inspection powers, to safeguard national and European competition legal provisions, which authorize it to enter any premises and examine books and records related to the business. The NCC may also exercise additional advisory duties upon request by a member of the Minister Cabinet or any other regulatory authority. Furthermore, it has the right to express its opinion in writing before the competent national courts on issues of application of European competition law, contributing in this way to the unified and correct interpretation of these issues. Another novelty is the NCC's right to withdraw the benefit of a block exemption regulation issued by the EC, in compliance with Regulation 1/2003, if the specific conditions in a distinctive market require such a measure. Lastly, the draft law introduces two new provisions, according to which the NCC: a) has the authority to intervene *ex officio* in a specific sector of the economy in which the prevailing conditions do not permit effective competition and to take the necessary regulatory measures; and b) may reduce or even abolish the imposed fines on undertakings that are cooperative and provide valuable information contributing to the detection of serious infringements of the competition provisions.

Notification procedure

In contrast to the abolition of the notification and authorization system by Council Regulation 1/2003, the draft law preserves the obligation of enterprises to notify their agreement to the NCC to be granted a negative clearance or an individual exemption according to Article 1(1) and (3) of Law 703/1977. However, enterprises may apply for an individual exemption at any time, in contrast to the previous regime under which the application for an individual exemption had to be submitted simultaneously with the notification. Lastly, agreements that will be notified will not necessarily be examined by the NCC and will not be considered as provisionally valid, as is the case under Law 703/1977.

These provisions refer only to the application of national provisions. As far as the application of Articles 81 and 82 is concerned, any kind of notification or individual exemption procedure has been

abolished by the new Regulation 1/2003, as it is analyzed above.

Provisions that regulate the relationship between the NCC and the EC

In strict compliance with Regulation 1/2003, the draft law stipulates that, when the EC takes over a case to issue a decision, the NCC is deprived from its competence to apply Articles 81 and 82. Apart from that, it is explicitly stated that the NCC has the obligation to closely cooperate with the EC and the competition authorities of the other member states for the application of community competition law. Lastly, a new provision is established according to which national courts have the obligation to send to the EC copies of their decisions in which they invoke the application of Articles 81 and 82 of the EC Treaty, to enable the EC to monitor the way Articles 81 and 82 are applied within the Greek territory.

The draft law grants the NCC new authorities, to apply more efficiently the national and community competition provisions

Article 2a of Law 703/1977

In conformity with Article 3(3) of Regulation 1/2003, which stipulates that member states should not be precluded from applying on their territory stricter national competition laws that prohibit or impose sanctions on unilateral conduct engaged in by an undertaking, the Greek legislator decided to reinstate Article 2a of Law 703/1977. This clause, which was abolished in 2000, prohibits abusive behaviour towards economically dependent undertakings, irrespectively of the existence of a dominant position. The critical point is the relation of *economic dependence* between two enterprises that enables one to take advantage of the other. Under the current regime, small and medium-sized enterprises were exposed to the abusive behaviour of powerful enterprises, through the imposition of unfair terms. So it was considered imperative to reinstate Article 2a of Law 703/1977, which enables weak enterprises to appeal against such abusive practices of powerful but not dominant firms.

Courts

National Courts are competent under the draft law to incidentally decide on the validity of the agreements, decisions and concerted practices according to Articles 81 and 82 of the Treaty, in addition to the relevant national competition provisions. Furthermore, they have the facility to ask for information or for the legal opinion of the EC on issues that refer to community competition law, without prejudice to their ability to address prejudicial queries to the ECJ in application of Article 234 of the Treaty.

Concentrations

The draft law establishes a simple procedure concerning the *ex ante* notification of a concentration to the NCC within 10 days of the conclusion of the relevant agreement, through the abolition of the market share criterion: from now on the only criterion that the enterprises have to take into consideration to estimate whether they are obliged to notify of their concentration or not, will be their *turnover*. On the other hand, it reintroduces the *ex post* notification (which had been abolished in 2000) of a concentration within 30 days of its realization under certain conditions of market share percentages or, alternatively, turnover amounts, for the NCC to be able to efficiently monitor the relevant market. Lastly, the draft law imposes strict deadlines on the NCC for the assessment of the notified concentrations and introduces a much simpler notification form.

Change is imperative

The reform of Law 703/1977 was imperative for the NCC and the Greek courts to have the authority to apply Articles 81 and 81 of the Treaty, in line with Council Regulation 1/2003. At a theoretical level it is estimated that the draft law will have positive effects on competition practice in Greece, with the upgrading of the NCC, through its structural reform and its equipment with wider regulatory and investigatory powers. In addition, the NCC becomes more flexible through its authority to impose structural or behavioural remedies on enterprises and its ability to leniently treat undertakings in cases where they are cooperative and contribute to the detection of serious competition infringement cases. Furthermore, the imposition of strict deadlines on NCC for the issuance of its decisions and its ability to appear before Greek courts as an autonomous legal entity are considered positive steps. As far as the reinstatement of the prohibition of abuse of economic dependence by Article 2a is concerned, it provides an additional protection to the economically weaker enterprises towards their suppliers. Lastly, on concentrations, the abolition of the market share criterion for their *ex ante* notification has been positively evaluated on an almost unanimous basis.

However, some reservations that have been expressed on several specific provisions of the draft law cannot be disregarded. For example, it has been argued that the reinstatement of Article 2a will compel the NCC to deal with numerous cases that are not directly related to competition issues and could be dealt with through civil law provisions. Furthermore, the *ex post* notification obligation of the concentrations will create an additional bureaucratic burden both on the NCC and on the undertakings. Apart from that, serious issues are raised concerning the regulatory intervention of the NCC in particular sectors of the economy, which is described in a rather vague and general way and could therefore lead to legal uncertainty.

All these issues will be evaluated in practice after a reasonable time and through case law created both by the NCC and by the courts, during the application of the draft law, which will be shortly enacted by the Greek parliament. What is of equal importance, though, and is still pending, is the creation of a special community legal framework for the mutual recognition and enforcement of the decisions on competition cases issued by the national competition authorities and courts of the member states within the whole of the EU.