

# Greece

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## Legal framework

In Greece, the competition scheme is regulated by Law 703/1977 On the Control of Monopolies and Oligopolies and the Protection of Competition (the Law), as amended, which establishes the basic principles and rules for the protection of efficient competition between undertakings within Greek territory. Specifically, the Law describes two types of trade practices, which under certain conditions may restrict competition: (i) restrictive agreements between undertakings and (ii) abuse of a dominant position. Furthermore, the Law adopts a system of ex ante control of the effect that certain concentrations between undertakings may have upon efficient competition. The most recent and important amendment of the Law took place in 2005 under Law 3373/2005, which was enacted in alignment with European Community Regulation 1/2003.

The authority which has the exclusive competence to apply the rules established by the Law for the protection of competition is the National Competition Commission (NCC), which was established in 1977 as an agency of the Ministry of Commerce. In 1995, through Law 2996/95 the NCC became an independent administrative authority with administrative autonomy and in 2000 the NCC also acquired economic independence through Law 2873/00. Finally, Law 3373/2005 introduced several modifications to the structure of NCC and enhanced its institutional role and independency.

## Restrictive agreements between undertakings

According to article 1 paragraph 1 of the Law, which in essence replicates the wording of article 81 of the European Community Treaty: "All agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition are prohibited and shall be automatically void."

In the same paragraph of the article, the Law refers indicatively and not restrictively to five examples of prohibited agreements, specifying in this way the above general prohibition. Therefore, clear cases of prohibited agreements are the following:

- to directly or indirectly fix purchase or selling prices or any other trading conditions;
- to limit or control production, markets, technical development or investment;
- to share markets or sources of supply;
- to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- to make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which by their nature or according to commercial usage, have no connection with the subject of such contracts.

But the above general prohibition of agreements that restricts competition is moderated by the provision of article 1 paragraph 3 of the Law which empowers the NCC with the authority to exempt an agreement from the prohibition of article 1 paragraph 1 as long as the agreement between undertakings contributes to improve the production or distribution of goods or to promote technical or eco-

nomical progress, while allowing consumers a fair share of the resulting benefits. Furthermore, the exempted agreement must neither impose on the undertakings concerned restrictions, which are not indispensable to the attainment of these objectives, nor afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

It is underlined, that although European Community Regulation 1/2003 abolished the notification and authorisation system in order to establish a decentralised system of application of European Community competition rules, Law 703/1977 allows for: (i) the option of the enterprises to apply before the NCC for a negative clearance according to article 11 of the Law and (ii) the obligation of the enterprises to notify their agreements that fall under article 1 paragraph 1 of the Law to the NCC within 30 days from their conclusion according to articles 21 and 22. In case the enterprises omit to notify such an agreement, the Law imposes a fine of €15,000 on each, and deprives them of the right to apply for a negative clearance according to article 11 and of the right to be granted with an individual exemption according to article 1 paragraph 3.

In contrast to the previous regime under which the application for an individual exemption had to be submitted simultaneously with the notification, after the enactment of law 3373/2005, enterprises may apply for an individual exemption at any time, provided that they have properly notified their agreement. Finally, according to article 23 of Law 703/1977, notified agreements will not necessarily be examined by the NCC and will not be considered as provisionally valid, as was the case before the recent amendment of the Law.

## Abuse of a dominant position

Although the Law does not prohibit the existence of monopolies or the holding of a dominant position as such, it does prohibit in article 2, in line with article 82 of the EC Treaty, the abuse of a dominant position by one or more undertakings within the market of the Greek territory or in a part of it.

In order to specify the above general prohibition, the Law in the same article sets out a number of examples of abuses, following the wording of article 82 of the EC Treaty. According to this indicative list of examples, the abuse of a dominant position may consist of:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- making contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

This indicative list is further specified by the NCC case law which has identified as clear abuse the following market practices:

- granting of loyalty (or fidelity) rebates or target discounts;

- application of predatory pricing;
- application of price discrimination;
- application of tying;
- refusal to supply existing customers; and
- imposition of cabinet exclusivity.

As far as the definition of dominance is concerned, Greek legal theory, in accordance with European case law, describes it as the position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.

Although neither the above definition nor the Law itself provides any criteria for assessing dominance, there is sufficient case law, according to which the existence of a dominant position may be based on the following factors:

- the market share of the enterprise, which usually exceeds 40 per cent, without precluding the possibility of ascertaining dominant position with a market share between 20 per cent and 40 per cent;
- the allocation of the market shares of competitors of the enterprise under examination;
- the level of the available financial means and capacities;
- having a leading position from a technological evolution and commercial or industrial experience point of view;
- the availability of raw materials with a systematic vertical integration of the enterprise; or
- the absence of potential competition (substitution of the products of the dominant enterprise by other products).

At this point it should be pointed out that in case dominant enterprises engage in a commercial practice that may consist of an abuse of their position and have doubts concerning its legitimacy, the Law grants them the right to notify it to the NCC and apply for a negative clearance according to article 11 paragraph 1 of the Law.

### **Abusive behaviour towards economically dependent undertakings**

In conformity with article 3 paragraph 3 of the European Community Regulation 1/2003, which stipulates that member states should not be precluded from applying on their territory stricter national competition laws which prohibit or impose penalties on unilateral conduct engaged in by an undertaking, the Greek legislator through Law 3373/2005 decided to reinstate article 2a of the Law. 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 'economical dependence' between two enterprises, which enables one to take advantage of the other. Before the recent amendment of the Law, small- and medium-sized enterprises were exposed to the abusive behaviour of powerful enterprises, through the imposition of unfair terms or the sudden termination of their commercial cooperation. Thus, 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.

Specifically, article 2a sets out the following conditions for its application:

- A relationship of economical dependence, which usually exists in vertical relations between undertakings and may relate to even a single kind of product or service. This kind of relationship is usually developed after a long-term cooperation between the enterprises and the dependent enterprise is either the customer or the supplier of the powerful one.

- Lack of an alternative solution for the dependent undertaking, either because no other solution is feasible or because an alternative solution is connected with serious problems for the dependent undertaking. This means that the dependent undertaking may not obtain the product or services from another source and even if it can it will be under more unfavourable terms, which will result in the deterioration of the enterprise's position as opposed to its competitor's.
- Abuse of the above-described economical dependence. The Law prohibits the abuse of the economical power caused by the inability of the dependant enterprises to find an alternative solution. This abuse takes place through the application of practices to the detriment of the dependent enterprise's competitiveness and is usually expressed through the imposition of unfair terms, the discriminative treatment and the sudden and unjustifiable termination of long commercial relationships.

When the above conditions occur, an infringement of article 2a of the Law takes place and the NCC may intervene by prohibiting the abusive behaviour of the powerful enterprise or by imposing the appropriate measures for the termination of the infringement.

### **Merger control**

According to articles 4 to 4f of Law 703/1977, the NCC is authorised to control the concentrations between undertakings and to prohibit the ones that are restrictive for competition in the national market or in a substantial part of it, through the creation or strengthening of a dominant position.

A concentration takes place when two or more previously independent undertakings merge or when one or more persons that already control at least one enterprise acquire directly or indirectly the control of another enterprise.

Such control derives from rights, agreements or other means which alone or in combination with other legal or real factors provide the exercise of decisive influence to the activity of the enterprise. In corporate practice, a decisive influence usually derives from the acquisition of ownership rights on the total or a substantive part of the assets of the company or of rights that provide the exercise of decisive influence on the composition and the decisions of the administrative body of the company.

Finally, under certain conditions, the creation of a full-function joint venture may be considered as a concentration.

After its recent amendment by Law 3373/2005, through which the ex post notification of a concentration (abolished in 2000) was reintroduced, the Law obliges enterprises to proceed with either an ex ante or an ex post notification of their concentration to the NCC, in case certain market share or turnover criteria are fulfilled.

#### **The ex ante notification of a concentration**

Article 4b of the Law regulates the system of ex ante control of concentrations and stipulates that every concentration between enterprises must be notified to the NCC within a strict deadline of 10 days from the conclusion of the agreement or the publication of the offer or the acquisition of the participation that secures the control of the enterprise, when:

- the total turnover of the enterprises that participate in the concentration reaches €150 million worldwide, and
- each of at least two of the enterprises have a total turnover above €15 million in the Greek market.

It should be underlined, that law 3373/2005 amended the ex ante notification system and simplified the relevant procedure through the abolition of the market share criterion and the establishment of the enterprises' turnover, (which is much easier to calculate) as the

sole criterion for the ex ante notification obligation. Furthermore, through the same law a simpler notification form was introduced, in order to facilitate enterprises with the task of submitting before the NCC a clear and complete description of their concentration agreement and the possible effects that it may have upon competition. Finally, under the recent amendments, strict deadlines are imposed on the NCC within which it is obliged to issue its decisions either permitting or prohibiting a notified concentration.

As soon as the relevant notification is submitted before the NCC, the authority has the following alternatives:

- it may estimate that the concentration does not fall under the application field of the law and issue a relevant act, within a month from the notification date;
- it may estimate that the concentration does not hinder effective competition and within a month from the notification date issue a relevant decision, through which it permits the concentration; and
- it may estimate that the concentration raises serious doubts as far as its restrictive effect on competition is concerned. In this case, the president of the NCC must issue a decision, within a month of notification, through which he sets forth the procedure of fully investigating the concentration. Following this, within a period of three months the NCC issues a decision by which it either prohibits the concentration, where it finds that it creates or strengthens a dominant position, or it permits it, sometimes by imposing certain terms and conditions.

The criteria set out in article 4c of the Law for the evaluation of a concentration are, among others, the existence of actual or potential competition by other enterprises, the existence of barriers to entry in the market, the position of the respective enterprises in the market, their financial and economical strength and their access to the supply sources or to the disposition markets of the products. Also, the contribution of the concentration to the technical and economical progress is taken into consideration, under the condition that this progress is for the benefit of consumers and does not restrict competition.

But the Law provides that some concentration cases that fall under the criteria of article 4c may be approved by a justified decision of the ministers of economy and development, provided that they generate general financial advantages that counterbalance the restriction of competition or are considered to be indispensable for the service of public and general interest through the attraction of investments, the creation of employment seats, the strengthening of competitiveness in the European and international market etc.

In each case, the ex ante notification leads to the suspension of the respective concentration, since according to article 4e of the Law, the realisation of the notified concentration is prohibited until the issuance of one of the decisions mentioned above.

#### The ex post notification of a concentration

As already mentioned, since 2005 enterprises that do not fall under the conditions of the ex ante notification are nevertheless obliged to proceed with an ex post notification of their concentration, if they exceed certain market share or alternative turnover thresholds. The justification of this provision is that by using it the NCC is able to efficiently monitor the market and be aware of some important structural modifications that take place.

It should be clarified that concentrations that are notified ex post to the NCC are not subject to its approval or any kind of substantive control. Where enterprises do not comply with this obligation, however, a fine is imposed on them, which amounts to at least €3,000 but must not exceed 5 per cent of their total turnover.

The ex post notification before the NCC must take place within

a month from the realisation of the concentration if the market share of the products or the services to which the concentration refers represents at least 10 per cent of the relevant market or the total turnover of the enterprises that participate in the concentration in the national market reaches at least €15 million.

#### The National Competition Commission

The National Competition Commission is the independent administrative authority with the exclusive competence to apply the provisions of law 703/1977 On the control of Monopolies and Oligopolies and the Protection of Competition.

#### Duties

The Commission's mandate comprises ascertaining the existence of prohibited agreements or concerted practices according to article 1 paragraph 1 of the Law; granting individual exemptions according to article 1 paragraph 3 of the Law; ascertaining the abuse of a dominant position according to article 2 of the Law; controlling ex ante certain concentrations; and certainly, imposing the relevant fines in case of the above infringements.

#### Injunctions

Furthermore, the NCC has the exclusive competence to take injunction measures in case one of the above infringements of the competition provisions is speculated.

#### Judicial review

The decisions of the NCC are challenged before the Athens Administrative Court of Appeal within a deadline of 20 days from their notification to the respective parties, while the decisions of the Administrative Court of Appeal are subject to appeal before the Council of State.

As far as civil proceedings are concerned, which include contractual and tort claims, the NCC has no authority to deal with them but they are brought before the competent national courts.

#### Recent amendments

In 2005, the structure of the NCC was modified and its institutional role was enhanced through several important modifications introduced by Law 3373/2005, the most important of which are the following:

- the increase in the number of members from nine to 11, in order to be able to function in two departments;
- the increase in personnel, which will be made up of scientists with high level of knowledge and experience;
- the stipulation 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;
- strict provisions, concerning the professional conflicts of interest of its members and enhanced participation obligations; and
- the explicit characterisation of the NCC as a separate legal entity with the ability to appear before the Civil Courts in every kind of legal proceedings that have as their object its acts or omissions.

Furthermore, through the recent modifications the NCC was equipped with new and broader authorities in order to apply more efficiently the national and community competition provisions. Thus, under the amended provisions of the Law, the NCC:

- has the exclusive authority to apply articles 81 and 82 of the EC Treaty, apart from the national competition provisions;
- has the authority 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 the competition provisions;
- is attributed with broad inspection powers for the safeguarding of national and European competition provisions, according to which it is authorised to conduct dawn raids and enter any premises, examine all kinds of books, records and documents in general and receive copies and extracts thereof;
  - may exercise additional advisory duties on competition issues upon request by a member of the Minister Cabinet or by a union of chambers or by industrial and commercial associations;
  - 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;
  - has the right to withdraw the benefit of a Block Exemption Regulation issued by the European Council, in compliance with Regulation 1/2003, if the specific conditions in a distinctive market require such a measure;
  - has the authority to intervene, either *ex officio* or following a relevant petition by the minister of development, 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
  - must closely monitor the execution of its decisions as well as the execution of the ministerial decrees and the decisions issued by the Athens Administrative Court of Appeal and the Council of State.

#### Leniency programme

According to article 9 paragraph 4 of Law 703/1977, which was introduced by Law 3373/2005, the NCC may reduce or even abolish the imposed fines on undertakings that, although they participate in

prohibited agreements or concerted practices, are cooperative and provide valuable information contributing to the detection of serious anti-competitive practices. In application of this provision, the NCC in its decision 299/V/2006 specifically determined the conditions under which the leniency programme applies, which however does not cover cases of abuse of a dominant position.

#### The relationship between the NCC, the national courts and the European Commission

Under the recent amendments and in accordance with Regulation 1/2003, the Law explicitly states 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. But the Law also stipulates that when the EC takes over a case in order to examine it and issue a decision, the NCC is deprived of its competence to apply articles 81 and 82.

As far as national courts are concerned, they are competent to incidentally decide on the validity of agreements, decisions and concerted practices according to either article 1 paragraph 1 of the Law or article 81 of the EC Treaty and on the abusive exploitation of a dominant position or of a relationship of economical dependence according to either article 2 and 2a of the Law or article 82 of the EC Treaty. In addition to this, where national courts apply the above provisions of community competition law (ie, article 81 and 82 of the EC Treaty), they have the opportunity to ask for information or for the legal opinion of the EC, without prejudice to their ability to address prejudicial queries to the European Court of Justice in application of article 234 of the Treaty. It must be underlined, however, that none of the above incidental judgments have any binding effect on the NCC, the Administrative Court of Appeal or the Council of State, when examining cases of infringement of the competition provisions.

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English, French, German, Japanese, Spanish

Lambadarios and Associates was founded in 1863 by Konstantinos E Lambadarios Sr in Athens and has been operating continuously since then with a well respected Greek and international clientele. The firm today numbers 20 lawyers and five partners, all located at its offices in the centre of Athens. Many of the firm's partners and associates are well respected individuals in their fields of expertise both nationally and internationally. Specifically, two of the partners are alumni of Cleary, Gottlieb, Steen & Hamilton, giving the firm a unique advantage in working with international clients.

The firm has grown under the leadership of Mr Epaminondas Lambadarios and Mr Dimitrios Lambadarios, who, after completing their studies at Harvard Law School and the University of London and joining the firm in 1970, have successfully and considerably diversified the categories of work that the firm offers to its clients. It is also worth noting that name partner Dimitri Lambadarios was appointed in 2006 as the president of the Greek Tourism Organisation.

#### Areas of Practice

The firm specialises in a wide variety of both domestic and international commercial work offering a high level of legal services to its clients worldwide. The firm's client base includes banks, financial institutions, insurance corporations, large industrial and commercial sector corporations and private individuals.

The main work done by the firm relates to corporate law, mergers and acquisitions, banking, structured finance, capital markets and securities. The competition law department is staffed by five lawyers all having extensive experience on competition law matters. The firm has recently been involved in defending large multinational corporations in the National Competition Commission in the areas of beverages, medical equipment and cosmetics against allegations of cartel formations and abuse of dominance. Moreover it has recently advised on a major cross border merger in the music industry, on the formation of the selective distribution network of a German car manufacturer in Greece and the formation of a Joint Venture between two leading banking institutions including all procedures related to applying to the NCC for negative clearance.

**Recent case law**

During recent years, the NCC has dealt with numerous cases, some of which concern the examination and clearance of notified concentrations between enterprises. But the NCC has clearly been more interested in cartel-like behaviour on the part of enterprises and has launched a series of investigations in several products and services markets such as banking, beverages, cosmetics, dairy products etc.

More specifically regarding restrictive agreements between undertakings, in 2005 the NCC dealt ex officio with a serious case of horizontal concerted practice between seven of the largest supermarkets in Greece. Specifically, the NCC after very intense and long research gathered strong evidence and reached the conclusion that these supermarkets, through their association and through several meetings which took place in a hotel, engaged in price fixing through the application of a predetermined list of discount percentages. Through its decision, 277/IV/2005, the NCC found the Supermarkets' Association and the seven companies liable for restricting competition and imposed fines of between €6,000 and €450,000 to the supermarkets, and a fine of €15 million to their Association. At present, the case is pending before the Athens Administrative Court of Appeal.

Another area of interest for the NCC has been the abuse of a dominant position by companies and only recently the NCC set a record fine in an abuse of dominant position case which was imposed on a company under the trade name Coca-Cola Greek Distilling Company SA following the filing of complaints by two of its competitors. In its decision, 207/III/2002, the NCC found Coca-Cola liable for a series of commercial practices which consisted in abuse of its dominant position, such as application of prohibited pricing policies (target discounts and fidelity rebates), application of discriminatory treatment among its wholesale and retail dealers, tying and freezer exclusivity, and ordered it to refrain from applying the above practices with a penalty of €5,869 for each day of infringement. Following this, by its recent decision, 309/V/2006, the NCC held Coca-Cola liable for not complying with its previous decision and for continuing infringing article 2 of the Law and imposed on it a fine of €8.7 million, ie, €5,869 multiplied by 1,476 days of infringement.