

DECISION No. 789/2022

OF THE HELLENIC COMPETITION COMMISSION

ADOPTED AT ITS PLENARY SITTING

held at the meeting room on the 1st floor of its premises (Kotsika str. 1A & Patision av.), on Monday, 11 July 2022, at 11:30, with the following composition:

Chair: Ioannis Lianos (President)

Members: Kalliopi Benetatou (Vice-President),

Panagiotis Fotis,

Ioannis Stefatos,

Maria Ioannidou,

Sotirios Karkalakos and

Michael Polemis, as the full member, Ioannis Petroglou, had an obstacle for attendance

Secretary: Iliana Koutra

Subject: Decision, adopted in accordance with article 37(5) of L. 3959/2011, as in force, setting out the criteria and conditions for the issuance of a no-action letter under article 37A(1) of L. 3959/2011 and determining other relevant matters relating to the implementation of this provision, following a public consultation.

The Hellenic Competition Commission, taking into account the relevant provisions of Law 3959/2011, as in force, the fact that no expense is entailed, and following deliberations between its members, unanimously decides in accordance with Article 37 paragraph 5 of Law 3959/2011, as in force, on the setting of criteria and conditions for the issuance of a no-action letter under article 37A(1) of Law 3959/2011 and the other relevant matters concerning the application of this provision, following a public consultation, as reflected in the form attached hereto.

The Decision was adopted on the **11th of July 2022**.

This Decision shall be published in the Government Gazette, according to art. 47 of L. 3959/2011 (*FEK* 93/A'/20.4.2011).

The Secretary

Iliana Koutra

The President

Ioannis Lianos

Criteria and conditions for the issuance of a no-action letter under article 37A(1) of L. 3959/2011 and determination of other relevant matters relating to the application of this provision

The Hellenic Competition Commission (HCC), taking into account the provisions of Law 3959/2011 (*FEK* 93/A'/20.4.2011), as amended and currently in force, decided to launch a public consultation on the following text according to article 37A(5) of L. 3959/2011:

I. Preamble

1. The no-action letter is an instrument for assessing business plans of undertakings operating in the Greek territory on grounds of public interest, particularly focused on achieving the sustainable development goals.
2. The HCC notes that, apart from the financial uncertainty, which is inherent in long-term investments in sustainable development, firstly, most Greek enterprises are small in size and, therefore, have reasons to scale up their initiatives in order to more effectively draw the financial resources needed for the green transition, possibly by means of creating entrepreneurial ecosystems (private as well as through public-private partnerships). In addition, due to significant disparities in financial capacity for the green transition amongst EU Member States, despite the considerable efforts made to mobilise EU public funding and, in particular, due to the major economic and financial crisis in Greece over the last decade, which may exacerbate this funding gap, a significant effort should be made to limit any conditions of uncertainty, such as regulatory uncertainty due to the possible application of competition law, and to provide, by ensuring greater legal certainty, incentives for investors to make the necessary investments for the Green transition, thus strengthening in the long term the competitiveness of the national economy and the intensity of competition in the markets on the Greek territory.
3. Cooperation between undertakings can, in certain cases, contribute to the application of innovative technologies and to more effectively promoting sustainable development goals, such as environmental protection. In this context, undertakings may need guidance on their initiatives so that free competition rules do not hold back the achievement of sustainable development goals. To this end, no-action letters can be an instrument for enhancing and speeding up the implementation of such innovative initiatives that promote sustainable development without, however, substantially restricting competition. Unlawful agreements or unilateral behaviors that flagrantly violate free competition rules to the detriment of consumers on pretextual grounds related to ensuring the public interest, in particular linked to sustainable development (e.g., "green-washing" practices), do not contribute to implementing innovative technologies and promoting sustainable development.
4. According to the provisions of Article 37A of Law 3959/2011, one or more undertakings may submit a request for issuance of a no-action letter by the President of the HCC, stating that no action will be taken against a horizontal or vertical agreement for violation of Article 1 of Law 3959/2011 or article 101 TFEU or against a practice for violation of Article 2 of Law 3959/2011 and Article 102 TFEU. Undertakings can submit a relevant request on public interest grounds, especially with regard to implementation of the sustainable development goals.

5. The procedure laid down in Article 37A is a simplified procedure in the sense that the President of the HCC, by issuing a relevant letter, following a proposal by the Directorate-General for Competition (DGC), can determine that there are no grounds for further action. DGC will examine the relevant requests taking into account the arguments and evidence provided by the undertakings concerned. This letter creates legal certainty for undertakings as long as the factual circumstances on which the issuance of the no-action letter was based at the time of its issuance do not change.
6. The procedure of Article 37A does not affect the self-assessment system established by Regulation 1/2003 and Law 3959/2011. Applying for a no-action letter does not entitle the applicant to be granted such a letter. The HCC reserves the right to issue a no-action letter whenever it deems appropriate depending on the legal uncertainty arising from a novel or difficult matter falling within the scope of competition law, the conditions of competition in the specific relevant market, the envisaged benefit in terms of achieving sustainable development goals, the necessity of the specific action and the non-existence of sustainable alternatives with less impact on competition.
7. The no-action letter has no binding effect on the HCC, which has the possibility to subsequently reconsider a previous no-action letter. In this regard, national courts and national competition authorities may take a no-action letter into account, without actually being bound by it.
8. The President of Competition Commission, following a proposal by the DGC, withdraws a letter of no-action issued under par. 1 and 2, if new evidence become available to the Commission, which substantially affect the assessment of the conduct, if the factual circumstances have changed, or if its issuance was based on inaccurate or misleading information. The withdrawal shall be notified forthwith to the undertakings concerned.
9. Paragraph 5 of article 37A of Law 3959/2011, confers to the HCC the legislative power to specify, by decision, the criteria and conditions for issuance of a letter of par.1 following a public consultation and to determine any other matter concerning the application of this article.
10. In this context, the present Decision specifies the criteria and conditions for the adoption of a no-action letter according to paragraph 1 of article 37A of Law 3959/2011, regulates other relevant matters of application of this provision and sets out the details of the relevant procedure.

II. Grounds for initiating the procedure of article 37A

II.A. Necessary conditions for procedure initiation

11. In order to consider a submitted no-action letter request, the requesting undertakings must invoke and sufficiently substantiate:
 - (1) the overriding grounds of public interest in the particular case (see point III below)
 - (2) that genuine uncertainty arises due to a novel or difficult issue within the scope of competition law. A typical case is where an agreement or practice raises

issues that have not previously been dealt with by the Hellenic Competition Commission, the European Commission, national or EU Courts,

- (3) the agreement/practice is of major importance for the requesting undertakings, and the national economy, in general.

II.B. Request submission and content

- 12. In order for a submitted request to be considered, it shall include, as a minimum:
 - (i) the details of the requesting undertakings as well as of all the undertakings concerned
 - (ii) information on the activities of the undertakings concerned and the groups to which they belong
 - (iii) an address for service for all the requesting undertakings¹
 - (iv) a description of the content of the agreement, decision of an association of undertakings, concerted practice or unilateral practice which is the subject of the request
 - (v) economic and strategic reasons that led to the agreement, decision of an association of undertakings, concerted practice or unilateral practice, intended results and implementation timeframe
 - (vi) full and exhaustive information on all points relevant for a thorough evaluation of the questions raised as well as any other relevant information
 - (vii) full documentation of the above and relevant supporting evidence (for example, studies, financial analyses, presentations and other internal documents)
 - (viii) clear identification of the information covered by professional secrecy and a non-confidential summary of the subject matter of the request
 - (ix) a declaration of article 8 of Law 1599/1986 in which the requesting undertakings state that the information included in their request is true, correct and complete and that all opinions expressed are sincere
 - (x) all necessary legal documents.
- 13. The DGC is allowed, following its relevant proposal to and decision by the President of the HCC, not to consider requests that do not include the above minimum content. Upon a reasoned request from the undertaking, the DGC may set a reasonable time limit within which the undertaking concerned must produce it.
- 14. In any event, the period provided for in paragraph 23 below starts from the time when the DGC receives the full details of the request.

¹ The address for service may be common for more than one or all the requesting undertakings.

15. Any material changes in the information contained in the request, which has come or should have to the parties' knowledge after the submission of the request, must be communicated to the DGC voluntarily and without delay.
16. If the information submitted is inaccurate or misleading, the request shall be rejected.

III. Grounds relating to the public interest

17. The purpose of sustainable development is to meet the needs of present generations without compromising future generations' self-sufficiency. It thus constitutes a holistic approach as it includes aspects, repercussions and outcomes related to the environment, society and the economy which are interconnected and mutually reinforcing. Sustainable Development Goals (SDGs) are specified in texts of the United Nations (see, in particular, the "2030 Agenda for Sustainable Development"² and the Paris Agreement³) and the European Union (see in particular the European Green Deal⁴), which Greece is committed to implement.
18. The sustainable development goals that the HCC intends to consider include, inter alia:
 - (i) Environmental protection and limiting the negative effects of climate change, by reducing greenhouse gas emissions⁵.
 - (ii) Achieving technological innovation aimed at meeting sustainable development goals (e.g., smart cities).
 - (iii) Protecting and enhancing the green transition of Small and medium-sized enterprises (SMEs).
19. The reference to the attainment of sustainable development goals in Article 37A is indicative and does not preclude the adoption of no-action letters in cases where other reasons of public interest are present.
20. Reasons relating to the public interest means further mean the reasons recognised as such in the case-law of national and EU Courts, including the following reasons: public order; public security; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the health of animals; intellectual property; preservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives.
21. Indicatively, reasons of public interest for the purposes of article 37A, apart from those mentioned above, may be:

² See <https://sdgs.un.org/goals> and, in particular, the goals referred to in articles 7,9 and 13.

³ <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>.

⁴ See, in particular, COMMUNICATION FROM THE COMMISSION of 11.12.2019, The European Green Deal COM(2019) 640 final and relevant legislative tools. See also REGULATION (EU) 2021/1119 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

⁵ See Technical Report.

- (i) ensuring the supply and appropriate distribution of essential products and services and security of supply chains, especially in times of crisis;
- (ii) protection of public health;
- (iii) achieving or advocating the objectives of the Common Agricultural Policy, especially so far as sustainable development is concerned;
- (iv) strengthening regional sustainable development;
- (v) reaching/defending energy self-sufficiency within the framework of the National Energy and Climate Plan and the Long-term Strategy 2050;
- (vi) ensuring employment opportunities and decent working conditions for citizens and vulnerable groups of the population
- (vii) putting to effect or protecting social cohesion

IV. Procedure

IV.A. Letter from the DGC

- 22. Requests are submitted via e-mail or the HCC's digital services. Especially for requests concerning sustainable development, it is recommended to submit them through the digital platform, which provides a secure messaging space (sustainable development sandbox).
- 23. Each request is given a reference number and the DGC acknowledges receipt of the request to the applicant without delay.
- 24. Within twenty (20) working days from the receipt of the complete request, the DGC, pursuant to par. 13 above, addresses a letter to the requesting undertakings informing them either that it will not further examine their request or that it will proceed with its substantive evaluation.
- 25. The GDA will not further consider requests which:
 - (i) do not include the documentation referred to under II.A;
 - (ii) do not include the content referred to under II.B, without prejudice to the possibility of the DGC to ask the requesting companies to fill in their request as defined in paragraph 11 above;
 - (iii) undertakings involved in cases pending before national and EU courts, raising identical issues;
 - (iv) concerning identical issues as in cases brought before the HCC;
 - (v) are submitted on a purely hypothetical basis, as they should contain an indicative implementation timeframe;
 - (vi) are submitted on behalf of third parties;

- (vii) where the requesting undertakings do not respond in a timely manner to requests for information pursuant to Article 38 of Law 3959/2011.

- 26. In the event that the requesting undertaking withdraws its request, the DGC, following its relevant proposal to and decision by the President of the HCC, takes no action in respect of that request as no further consideration is needed. The information provided in the context of the request submission can be used for the purposes of any subsequent procedures (such as, an ex officio investigation by the HCC).

IV.B. Proposal by the DGC

- 27. The DGC assesses the request on the basis of the information contained therein, without being required to proceed with further investigation on its own initiative.
- 28. After proceeding with the substantive economic and legal assessment of the request, the DGC, within three months from the issuance of the letter of para. IV.A, submits a proposal to the President of the HCC regarding the (full or partial/conditional or non-conditional) acceptance or rejection of the request.
- 29. The GDA's proposal has no binding effect and does not prevent the DGC from assessing a relevant letter differently in future or from initiating a relevant investigation for possible violation of Law 3959/2011 and/or the Treaty on the Functioning of the European Union.
- 30. The DGC can withdraw its Proposal and issue a new one, suggesting to the President of the HCC not to issue a no-action letter, at any stage of the application/implementation of the request if new factual evidence comes to the knowledge of the HCC, which significantly affect the assessment of the conduct at issue, if new information, legal and factual, which materially affect the assessment of the conduct comes to its knowledge, if the facts change, or if the issuance of the no-action letter was based on inaccurate or misleading information.

V. No-action letter

V.A. Content

- 31. Within twenty (20) days of the submission of the DGC's Proposal, the President shall decide whether to issue a no-action letter. In the event that he decides that there are no grounds to issue a relevant letter, he informs the requesting undertaking accordingly, without proceeding with a substantive assessment of the request.
- 32. The no-action letter includes:
 - (i) a summary description of the facts
 - (ii) the legal reasoning which led to consider that:
 - i. the conditions of paragraph 1 of article 1 and/or 2 of Law 3959/2011 or of article 101 and/or 102 TFEU are not met
 - ii. the conditions of par. 3 of article 1 hereof or of article 101 TFEU are met

- (iii) the conclusion that, therefore, there are no grounds for further action
 - (iv) any requirements and conditions under which the HCC will not take further action as well as any clarifications that its issuance is based on the existence or absence of certain facts
 - (v) any effect/implementation expiry date
 - (vi) is without prejudice to its non-binding effect on the HCC or on national or EU courts and other competition authorities.
33. The no-action letter may be limited to part of the questions raised in the request. Furthermore, it can also cover other aspects beyond those raised in the request.

V.B. The nature of the no-action letter

34. A no-action letter does not constitute a decision by the HCC and is not binding on the HCC and the courts. National courts and national competition authorities may take a no-action letter into account, without being bound thereby.
35. A no-action letter is not equivalent to:
- (i) finding that there is no infringement,
 - (ii) finding an infringement of articles 1 and/or 2 of L. 3959/2011, or
 - (iii) negative clearance decisions.⁶
36. The no-action letter does not provide for a derogation from the prohibition of articles 101 or 102 TFEU.⁷
37. In this context, the requesting undertakings remain responsible for carrying out their own self-assessment regarding the applicability of 1 and/or 2 of Law 3959/2011 or Article 101 and/or 102 TFEU.
38. The letter can be revoked by the President following a Proposal by the DGC, at any stage of the application/implementation of the request if new information, legal and factual, comes to the knowledge of the HCC including developments in national and EU case-law and developments in the relevant markets which materially affect the assessment of the conduct, if the facts change, or if the issuance of the no-action letter was based on inaccurate or misleading information.
39. The issuing of a no-action letter does not preclude the initiation of an investigation by the DGC and does not prevent the HCC from subsequently assessing the same practice and the facts contained in the request, in particular following a complaint, and any changes in the underlying facts. The issuing of the no-action letter shall be without prejudice to the assessment of the respective subject-matter by the national and EU courts.

⁶ According to Article 5 of Council Regulation (EC) No 1/2003, the HCC is not empowered to establish the inapplicability of the provisions of articles 102 and 102 TFEU, as this capacity is reserved to the European Commission.

⁷ See article 10 of Council Regulation (EC) No 1/2003.

V.Г. Publication

40. The non-confidential versions of no-action letters shall be posted on the HCC's website and not published in the Official Gazette.

VI. Sandbox

41. The HCC operates a digital platform as a special supervised space for the assessment of requests related to sustainable development (sandbox).
42. It is recommended that requests related to sustainable development be submitted through the dedicated platform within the various sandbox "cycles" that will be promoted by the HCC.
43. The platform provides:
- (40) information on sustainable development issues;
 - (41) examples of practices and their analysis;
 - (42) information on the request evaluation process based on criteria/key performance indicators (KPIs);
 - (43) the steps to be taken for request submission and the different stages of the assessment procedure and application/implementation of the request's subject-matter.
44. At the request of interested parties, access is given to the supervised space (sandbox) for request processing at a later stage. In the course of the request processing stage, further information may be requested from the requesting undertakings.
45. The final decision as well as any conditions for the implementation of the request's subject-matter shall be communicated to the interested parties through the secure space.
46. All requests lodged through the digital platform receive a reference number (acknowledgement of receipt).