



HELLENIC  
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## **Competition Law Procedures at the Hellenic Competition Commission: A Primer**

# INFORMATION GUIDE

# Competition Law Procedures at the Hellenic Competition Commission (HCC): A primer<sup>1</sup>

## I. Introduction

The Hellenic Competition Commission (hereinafter “HCC” or “Competition Commission”, website: [www.epant.gr](http://www.epant.gr)) is the primary competition body in Greece, exclusively responsible for the enforcement of national and EU competition rules, designated according to Article 35 of Regulation 1/2003 as the Authority responsible for the application of Articles 101 and 102 TFEU in Greece<sup>2</sup>. According to Law 3959/2011 on the “Protection of Free Competition” (hereinafter “Law 3959/2011” or “The Law” or the “Greek Competition Act”)<sup>3</sup> the HCC is an Independent Administrative Authority and enjoys administrative and financial autonomy. It also has distinct legal personality and may be a party to any kind of trials/legal proceedings on its own right. Its main statutory responsibilities are to:

- Investigate anti-competitive agreements and abuses of a dominant position. The Law kept intact, with only minor grammatical and technical changes<sup>4</sup>, the core substantive law provisions of Law 703/1977, namely Art. 1 on restrictive agreements, and Art. 2 on the abuse of a dominant position closely drafted to Art. 101 and 102 TFEU respectively. The most important change in this respect is that the Law introduced a “dynamic reference”<sup>5</sup>, prescribing the application by analogy of the EU Block Exemption Regulations also on agreements, decisions and concerted practices, which affect Greece, but are not likely to affect EU trade. The reference ensures that such agreements will not be treated more strictly than those falling within the scope of Article 101 TFEU, and is attuned with Art. 3 § 2 Reg. 1/2003, even if not directly associated with it.
- Appraise concentrations. The amendments introduced by the Law regarding concentrations compared to the previously applicable regime are also mostly technical in nature<sup>6</sup>. The relevant provisions largely follow the provisions of the relevant EU Regulation 139/2004. The substantive provisions on merger control (notably pertaining to the substantial-lessening-of-competition test for assessing notified mergers introduced in Greece already by Law 703/1977) were not affected;
- Conduct market studies and sector inquiries, introduced for the first time by the Law;

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<sup>1</sup> A modified version of this text was submitted by the Hellenic Competition Commission, Greece, to the International Competition Network (ICN) pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

<sup>2</sup> The HCC is part of the EU competition regime, and in particular a member of the European Competition Network (ECN). The Treaty on the Functioning of the European Union sets common rules on competition that apply across the EU.

<sup>3</sup> Gov’t Gazette Issue A’ 93/20.04.2011.

<sup>4</sup> The legislator has however, included, notably inspired by Art. 2 Reg. 1/2003, a provision stating that in Art. 1 and 2 proceedings before the HCC, each party has the burden to prove its allegations (see Art. 4 Law 3959/2011).

<sup>5</sup> Art. 1, para 4 Law 3959/2011.

<sup>6</sup> E.g. extension from 10 to 30 days of the notification deadline (Art. 6 para 1 Law 3959/2011) and a detailed procedure for commitments (Art. 8 para 8 Law 3959/2011, as already amended by Art. 19 para 1 Law 4013/2011).

- Issue opinions on regulatory measures restricting competition; and
- Cooperate with sectoral/ industry – specific regulators, namely The Hellenic Telecommunications and Post Commission (EETT) and the Regulatory Authority for Energy (RAE).

The Minister of Economy and Development oversees certain of the HCC’s administrative functions in accordance with specific provisions of the Law. As the relevant provisions have been interpreted so far, this supervision is exercised as prescribed by the Law and comprises mainly of (a) approving the HCC’s budget, to be annexed to the budget of the Ministry of Economy and Development and (b) addressing means of parliamentary control regarding the activities of the HCC.

The Authority maintains a dualist structure, essentially comprising two bodies: the Directorate General for Competition (hereinafter “DGC” or “Directorate-General”), which is conducting all necessary investigative actions (ie requests for information-“RFIs”, dawn-raids, taking depositions) and the Board, which is the decision-making body. The HCC Board comprises of the following Members: 1 President, 1 Vice-President, 4 Full-time Commissioner-Rapporteurs, 2 Part-time Members (and their alternates). The Commissioner-Rapporteurs are not just members of the decision-making body, but further supervise the drafting of the Report – Proposal for each case that is introduced to the HCC for resolution (be it a Statement of Objections, a rejection of a complaint or a recommendation that no further action is needed). In the context of drafting each Report – Proposal, the Commissioner-Rapporteur is assisted by members of the Directorate-General assigned to each specific case.

## ***II. Laws, Regulations, and Policies relevant for the implementation of the HCC Procedures***

### ***a) Non-Discrimination***

Under the Greek Competition Act, the nationality, residence, or origin of a Person being investigated is irrelevant to the application of the laws, procedural rules and policies. The laws, procedural rules and policies afford Persons of other jurisdictions treatment no less favourable in like circumstances. All persons and companies concerned are treated in the same way.

Greece is a contracting party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

### ***b) Transparency and Predictability***

The HCC makes available on its website a comprehensive collection of guidance documents, guidelines and notices, information leaflets and legislation, mainly in Greek (with translation of some of the documents in English). In particular, the website contains legislative documents such as the Greek Competition Act as amended and in force, the Rules of Internal Procedure and Management of the HCC (hereinafter also referred to as the “Rules of Internal Procedure”)<sup>7</sup>, and the Presidential

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<sup>7</sup> GG 54/B’/16.01.2013. The Regulation adapted the operational framework of the HCC to the requirements and amendments of the Law, and aims to strengthen HCC’s independence and to streamline/optimize the administrative procedures before the HCC for the undertakings. The Regulation, also, describes the internal operation system and

Decree 76/2012 regarding the “Organization of the Directorate General for Competition of the HCC”. The Greek Competition Act contains information clarifying and explaining its investigations proceedings<sup>8</sup>. The HCC also makes available on its website a series of HCC notices which clarify the procedural Rules that apply to Investigations and Enforcement Proceedings, such as, inter alia:

- Notice on Enforcement Priorities defining the criteria for enforcement priorities and strategic objectives. The prioritization of cases is firmly based on the criterion of public interest which is assessed in the light of the estimated impact of a practice on the functioning of competition;
- Leniency program. With a view to serving public interest, the HCC adopted a modern incentive framework to reward companies or individuals who are willing to put an end to their participation in the cartel and cooperate with the HCC.
- Settlement Notice. The Notice establishes the terms and conditions of the settlement procedure in cartel cases, according to the provisions of Articles 25a and 14 par 2 of the Greek Competition Act. In the context of its advocacy initiatives, and with a view to raising awareness of businesses and consumers in competition matters, the HCC has also issued a MEMO in the form of Questions and Answers (Q&As) accompanying its decision on the Settlement Procedure.
- Merger Notification Form and the Form for the Submission of Commitments in Merger Cases. The updated Merger Notification Form takes into account the amendments to the merger proceedings introduced by Law 3915/2011. Also, it incorporates in its questionnaire the information necessary for the assessment of merger notifications within the context of the specific provisions of Law 3592/2007 on “Media Concentrations”.
- Guidelines regarding Merger Notification Forms. The HCC issued new guidelines for Mergers Notifications forms (short form, form reasoned submission and form relating to the information concerning commitments), specifying more explicitly the criteria under which the short form of notification should be completed, based upon the experience HCC has gained from previous merger cases.
- The Form for the Submission of Complaints and the accompanying explanatory Notice (HCC decision No 546/2012). The decision elaborates the procedure for the submission of complaints and prescribes the procedural rights of the complainants.
- An internal management tool in the form of a “Point System” for the investigation of cases by the Directorate-General.
- Notice on the terms, conditions and the procedure for the acceptance of commitments offered by undertakings to cease possible infringements of articles 1 and 2 of Law 3959/2011 or 101 and 102 TFEU, in 2014. The decision aims to optimize the current administrative practice,

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the financial management of the HCC, based on the rules of transparency and the sustainable management of its financial resources.

<sup>8</sup> Article 39 Law 3959/2011

ensures the appropriateness of the sanction and/or consequence chosen in terms of public interest and competition policy, introduces a procedure of consultation on the proposed commitments and provides guidelines to undertakings.

- Notice on the meaning and treatment of confidential information of cases falling within the ambit of Law 3959/2011, including merger cases, as well as on the way in which a non-confidential version must be submitted. The Notice aims to improve efficiency as to the treatment of confidential information and consequently to save administrative resources, as well as to strengthen legal certainty and transparency of the procedure, to the benefit of undertakings.

Further, the HCC's website contains a case database, which offers the possibility to search for published decisions and case summaries relating to cases on cartel prohibition, control of abusive practices, merger control decisions, etc.

Finally, the HCC's Annual Report provides a concise overview of facts and figures as well as the most important cases of the year.

### *c) Investigative Process*

The HCC performs all the enforcement actions of a designated National Competition Authority to apply national and EU competition rules. Pursuant to the provisions of the Greek Competition Act, the HCC has broad enforcement powers in the area of collusive practices/cartels, abuses of dominance and merger control.

Procedural due process is safeguarded under Law 3959/2011 and the Regulation for the Internal Operation and Management of the HCC (hereinafter "Procedural Regulation")<sup>9</sup> which provide for the sequence, stages and timetable of the proceedings, as well as for the defense rights of the persons that are subject to the HCC proceedings<sup>10</sup>. In brief, the procedural stages before the HCC can be summarised as follows<sup>11</sup>:

- a) Investigation Phase I:** The Directorate-General launches an investigation following a complaint or on its own initiative.
- b) Investigation Phase II:** According to Article 15 of the Greek Competition Act the President shall, upon recommendation by the Directorate-General for Competition, bring before the Competition Commission, from among the cases pending before the Directorate-General under Articles 1, 2 and 11, those cases that meet the criteria for priority consideration, set pursuant to Article 14(2)(n)(i) of the Greek Competition Act, taking into account the available human resources and the number and progress of cases pending from earlier case allocation. Based on the implementation of the points-based system, the Directorate-General

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<sup>9</sup> Joint Ministerial Decision 117/16.1.2013.

<sup>10</sup> The Code of Administrative Proceedings which establishes general procedural rules for administrative bodies is also applicable to the HCC proceedings, but in a supplementary way.

<sup>11</sup> The procedure is followed also with regard to the authority's competence to impose interim measures, when there is imminent risk of serious and irreparable damage to competition.

shall investigate the cases according to their ranking order pursuant to Article 14(2)(o). Each case shall be assigned by lot, by the Competition Commission plenum, to one of the Commissioner-Rapporteurs, as soon as a decision concerning the priority consideration of the case is issued by the President. The Commissioner - Rapporteur to whom the case is assigned shall be assisted by a team of case handlers of the Directorate-General for Competition. The number of staff of the Directorate-General appointed in the particular instance shall depend on the gravity and complexity of the case. The investigation is concluded with the notification of the Statement of Objections (or of the proposal to reject the complaint) to the parties, i.e. to the complainants and to the accused undertakings. The Report shall be submitted to the Plenary or the corresponding chamber, as appropriate, within one hundred and twenty (120) days from the assignment of the case, without prejudice to the time-limits prescribed in Articles 5 to 10 (merger control). This time-limit may be extended by the President of the HCC, on request of the Commissioner - Rapporteur, for a period not exceeding sixty (60) days. The summons before the HCC's Board is served with the notification of the Statement of Objections at least 45 days prior to the scheduled hearing<sup>12</sup>. After the summons, the parties are permitted access to a *non-confidential copy* of the case file (see point f below).

**c) Oral hearing:** There is no Hearing Officer within the HCC. However, the President of the HCC acts as an independent arbiter, when a dispute concerning the effective exercise of procedural rights arises between parties and the Directorate-General (e.g disclosure of confidential information).

Additionally, the Board of HCC decides on applications to be heard by third parties in the proceedings. In this phase, the parties have the right to be heard, represented by qualified legal counsel of their choosing. They are free to raise views regarding substantive and procedural issues via counsel in accordance with applicable law and to provide direct evidence.

**d) Issuance of HCC's decision:** At the conclusion of the oral hearing, the HCC issues a decision on whether an infringement of competition law provisions has been committed, in which case it may impose a fine, issue a cease-and-desist order, impose necessary behavioural or structural measures, accept commitments, propose remedies, or make recommendations. Final decisions have to be issued in principle within twelve months from the assignment of the case to a Commissioner - Rapporteur. The decisions are published in the Official Journal of the Government<sup>13</sup>.

During the investigative phase, the DGC has broad powers of investigation, it conducts a full and thorough investigation and examination of the facts and evidence submitted by the parties, and it may initiate the proceedings *ex officio*. For this purpose, investigative measures such as requests for information-“RFIs”<sup>14</sup>, dawn-raids<sup>15</sup> and taking depositions<sup>16</sup> are employed. The HCC does not limit

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<sup>12</sup> In merger control proceedings, different deadlines apply (see answer to point e below).

<sup>13</sup> Articles 15 and 27 Law 3959/2011

<sup>14</sup> According to article 38 of the Greek Competition Act, the HCC may address compulsory requests for information to undertakings, associations of undertakings, other natural or legal entities, public or other authorities, in order to determine whether an infringement of competition law has taken place.

itself to allegations of the parties, but collects information from any source; it is not obliged to accept the allegations of the parties, but submits them to thorough control, and it freely decides on the appropriate means of evidence. In doing so, the DGC focuses on information that it deems relevant to the competition issues under review. The Greek Competition Act maintains that the recipients of the RFIs may answer within no less than 5 days (in a merger case) or 10 days (in all other cases). Typically, when the RFI contains numerous questions or questions that require complex economic analysis, the DGC will set a longer deadline that ensures that the recipient will have the time to answer in a well-rounded and comprehensive manner. Further, the DGC very rarely declines deadline extension requests by the recipients. The addressees of the request have a duty of cooperation with the Authority, and procedural fines for non compliance and submission of data can be imposed<sup>17</sup>.

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<sup>15</sup> According to article 39 of the Greek Competition Act, the HCC has the power to conduct inspections at the premises of an undertaking/association of undertakings or in some circumstances at private premises, provided there are reasonable grounds to suspect that books or other documents relating to the undertaking and to the object of the investigation are kept there. Article 39 of Competition Act provides that the HCC employees may inspect all documents of the undertaking *“regardless of how and where they are stored”*, may *“carry out inspections in the offices and other premises and means of transport of the undertaking”* and may *“seal any professional premises, books or documents for the period of and to the extent necessary for the inspection”*. The mandate is issued in writing by the HCC President and it specifies the subject matter of the investigation and the consequences of the obstruction or hindrance thereof or of the refusal to present the requested books, records and other documents or to provide copies or excerpts thereof. This is in accordance with the criteria set by the relevant EU case law. The persons concerned actively participate in the procedure of storage and processing of electronic files and correspondence, collected for the purposes of enforcing the competition rules. A report on the inspection conducted is drafted by the inspectors and a copy is sent to the undertakings concerned. Under the Greek Competition Act only Greek officials may participate to the dawn-raid with the exception of Commission officials (Art. 28 of Competition Act). For the purposes of conducting an inspection, the HCC officials are vested with the powers of a fiscal auditor and must observe the national constitutional provisions on the sanctuary of domicile (Article 9 of the Greek Constitution). In the latter context an inspection in private premises can only be carried out in the presence of a judge. According to Article 9 of the Greek Constitution a judge or prosecutor should be present during the conduction of inspections to non- business premises at all cases. Article 39(1) last indent refers expressly to article 9 of the Greek Constitution *“The employees of the Directorate-General of Competition shall comply with the provisions of Article 9 of the Constitution on the asylum of residence during the exercise of their powers in accordance with subparagraphs (a) to (g) above”*.

<sup>16</sup> According to Article 39 of the Competition Act, the officials of the Directorate General for Competition of the HCC have the power to take sworn or unsworn testimonies, as appropriate, by any representative or member of staff of any undertaking or association of undertakings. In practice the above mentioned power is exercised in two ways: a) a written invitation is sent to the undertaking or the representative of the undertaking. The invitation specifies the subject - matter of the investigation conducted by the HCC. The statement is taken in the offices of the HCC by at least two officials of the DGC. The interviewee if he/ she so wishes may be accompanied by a legal counsel. The record of the testimony is signed by the officials of the DGC and by the interviewee. According to general principles of national and EC law the interviewee has the obligation to state the truth. The principle of non self – incrimination is also applicable. b) a statement is taken during the conduction of an inspection in the premises of an undertaking. The statement is taken usually by the leader of the team of the DGC. The interviewee if he/ she so wishes may be accompanied by a legal counsel. The record of the testimony, typed in a portable PC or kept in writing, is signed by the official of the DGC and by the interviewee. Refusal to submit to questioning during the conduction of an inspection or of a written invitation may be considered as a refusal to cooperate and therefore procedural fines may be imposed.

<sup>17</sup> Regarding public or other authorities, in the event of refusal, obstruction or delay in providing the information requested, the HCC may file an official report, so that disciplinary action can be taken against civil servants or employees of public-law legal entities for the above infringements, which are a disciplinary offence.

Under the HCC Procedural Regulation, during the investigation phases I and II and prior to the notification of the Statement of Objections, the persons that are subject to the investigation enjoy [limited, in comparison with the access to file rights provided post-SO] access to file rights and have the opportunity to and may at any point submit exculpatory evidence and data. In particular, in the early phases (prior to the notification of the SO), the undertakings under investigation are informed about the alleged infringements of competition law either from the content of the inspection mandate and/or from the HCC's letters requesting information. In addition, according to Art. 15 par. 7 and 8 of the Procedural Regulation, prior to the notification of the Statement of Objections, access to a non-confidential copy<sup>18</sup> of the complaint may be granted to the undertaking involved in the infringement, following a request and provided that such access does not jeopardize the investigation of the case. Under the Procedural Regulation, parties may obtain non-confidential copies of the complaint filed against them prior to the notification of the Statement of Objections in order to have the opportunity to rebut the complaint prior to the notification of the SO.

#### *d) Timing of Investigations and Enforcement Proceedings*

##### *a) ANTITRUST CASES*

The Greek Competition Act provides for deadlines after the case has been assigned to a Commissioner-Rapporteur (see answer to point d above). The time period of the whole proceedings concerning an *ex officio* investigation or complaint (not replies to emails or letters, mergers, compliance to commitments etc) can be found in the flow chart below.

For a better understanding of the chart, note that according to article 36 of the Greek Competition Act, the HCC, by virtue of its decision No 546/2012, has set the format, type and means of submission for the complaints filed before the Authority. For this purpose, it adopted a specific Form for complaints, which essentially mirrors Form C, annex to Regulation 773/2004. The HCC also issued a Notice explaining the requirements applicable to complaints pursuant to Art. 36 of the Competition Act. The Notice clarifies the formalities for launching complaints before the HCC, explains the handling of submissions that do not comply with the requirements for complaints and further sets out the procedural consequences of different types of submissions (i.e. complaints, other submissions). The legal framework does not provide for informal complaints. Documents that do not fulfil the requirements of the HCC decision on formal complaints are considered information regarding the market. The formal complaints filed before the HCC a) that do not fall within its competences or, b) are manifestly unfounded, are rejected by an act/decision issued by the President of the HCC, which may be appealed before the Athens Administrative Court of Appeals (Art. 37 Greek Competition Act). Additionally, complaints which receive a low score under the prioritization point system, provided for by Art. 14 of the Greek Competition Act, are also rejected by an act/decision issued by the President of the HCC, which may be appealed before the Athens Administrative Court of Appeals. Finally, by an act/ decision issued by the President complaints

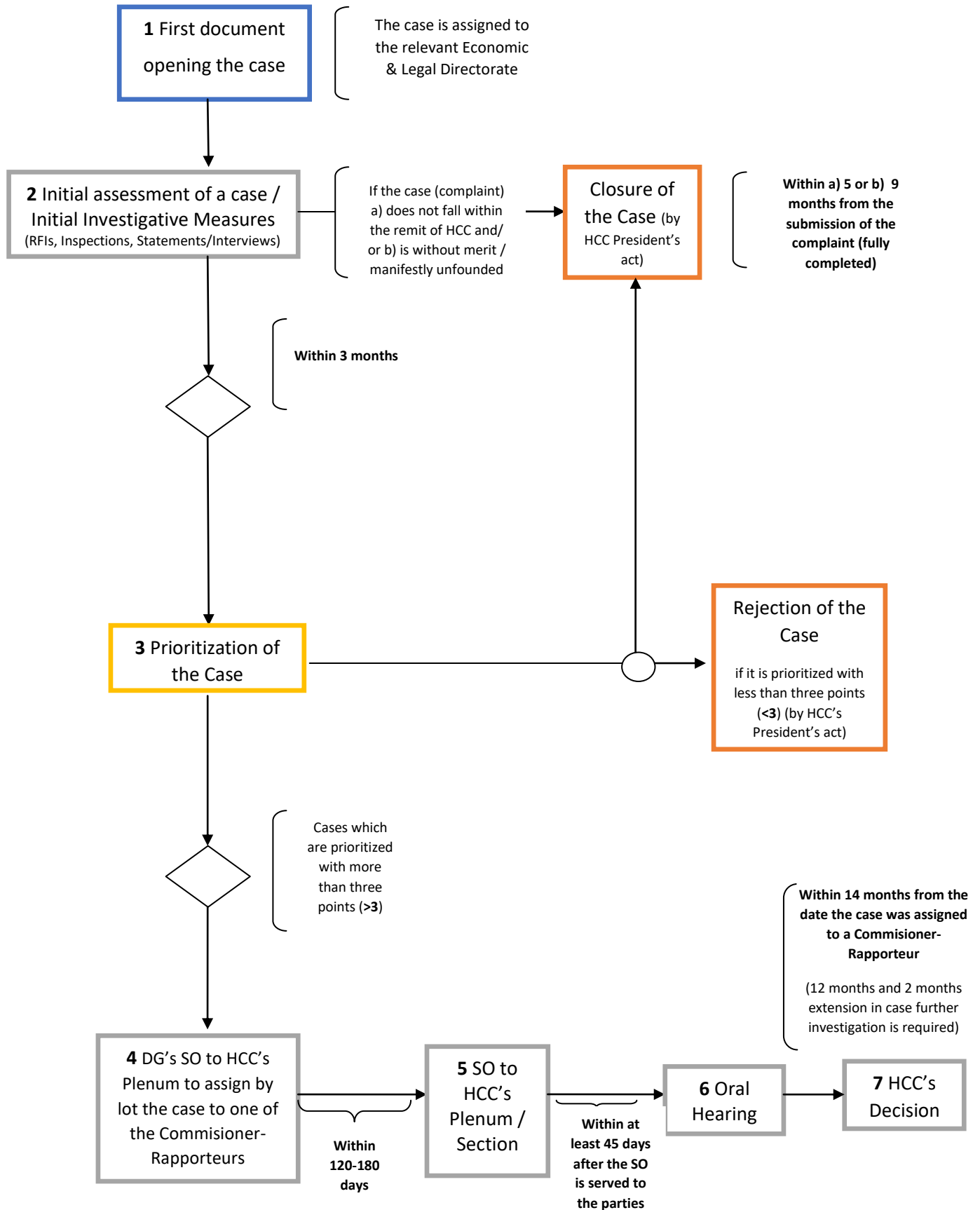
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<sup>18</sup> Under Article 19 of the Procedural Regulation the complainant may by reasoned request apply for confidential treatment of parts of his complaint, in which case he is responsible for submitting a non-confidential thereof.



withdrawn by the complainant are closed. All other formal complaints are closed by a decision of the HCC, as described above.

## HCC'S CASE FLOW CHART - TIMELINE



## ***b) MERGER CASES***

The Competition Act provides for strict deadlines from the notification date until the issuance of the decision, which **the HCC has followed in all cases to date**.

In particular, under Article 6 of the Greek Competition Act, a **concentration must be notified** to HCC **within 30 days** of: (a) the signing of the agreement; (b) an offer being made public; and (c) the acquisition of a share percentage that gives the control to a participating party, if the annual aggregate turnover of all undertakings participating in the concentration exceeds €150 million in the world-wide market **and** each of at least two undertakings concerned have an annual aggregate turnover of €15 million in the national market.

Currently, according to article 8 of the Greek Competition Act, the Competition Commission shall examine a notified concentration as soon as it is received and proceed as following depending on the outcome of the review:

- **Out of scope:** Where it concludes that the concentration notified does not fall within the scope of Article 6(1) [i.e. does not reach the thresholds for notification], the President of the HCC shall issue a deed within one (1) month from the notification, which shall be notified to the persons or undertakings which filed the notification.
- **Simplified procedure:** Where it finds that the concentration notified, although falling within the scope of Article 6(1), does not raise serious doubts as to its compatibility with the requirements of the functioning of competition in the individual markets it concerns, the Competition Commission shall issue a decision approving the concentration within one (1) month from notification.
- **Full investigation procedure:** Where it finds that the notified concentration falls within the scope of the present law and raises serious doubts as to its compatibility with the requirements of the functioning of competition in the individual markets it concerns, the President of the HCC shall issue a decision within one (1) month from notification, initiating the procedure of in depth investigation of the concentration notified and shall immediately advise the undertakings concerned of his decision. The case shall be introduced before the Competition Commission within forty-five (45) days from the date on which the full investigation procedure was initiated. The concentration shall be prohibited by decision of the Competition Commission, issued within ninety (90) days from the date on which the full investigation procedure was initiated, in case of serious competition concerns raised. The Competition Commission shall permit the concentration in all other cases. However, if the period of ninety (90) days expires and a decision prohibiting the concentration has not been issued, it shall be construed as approval of the concentration by the Competition Commission, which must issue the relevant declaratory act.

Upon notification of the concentration, the HCC shall identify any missing or incorrect data and respond within seven (7) working days by asking the notifying parties to proceed with the respective modifications. The HCC shall set a deadline of at least five (5) days for each request for information.

In case the undertakings fail to respond to the HCC request adequately, the Competition Commission shall ask within two (2) working days the parties to provide all missing data within at least five (5) working days. The aforementioned steps are repeated until the HCC regards that the notification has been adequately documented. Until the notification is deemed adequately documented, the deadlines provided for the simplified and full investigation procedure are suspended. In the meantime, the HCC may also request either from the undertakings concerned or third parties (e.g. customers, suppliers, competitors) for any quantitative or qualitative data necessary for a thorough and efficient evaluation of the concentration's effect.

According to article 8 (par. 4 and 8) of the Greek Competition Act once the undertakings concerned have been advised that the procedure for a full investigation has been initiated, the undertakings concerned may jointly proceed to modifications to the concentration or propose the undertaking of commitments, so that there are no serious doubts as to its compatibility with the requirements of competition in the individual markets it concerns, and notify them to the HCC. The Competition Commission may issue a decision approving a concentration, subject to terms and conditions stipulated by it ("remedies" or "commitments"), in order to ensure that the undertakings concerned abide by the commitments undertaken by them before the HCC in order to make the concentration compatible to the provisions of the Competition Act. The commitments proposed by the undertakings concerned must be submitted within no more than twenty (20) days of the date on which the case is introduced before the Competition Commission with the submission of the relevant report. The HCC may, in exceptional cases, accept commitments once the above deadline for their submission has expired. In that case, the deadline of ninety (90) days for HCC to issue its decision may be extended to one hundred and five (105) days, by decision of the Commission which is notified to the undertakings concerned. The HCC may, in the same decision, threaten the undertakings concerned with a fine, if they fail to comply with the above terms or conditions applicable to commitments. If commitments are to be undertaken, the notifying parties must submit the respective Commitment Form completed in compliance with the HCC Decision 524/VI/2011 available in HCC's site.

#### **e) Confidentiality**

On 5.3.2015, the HCC issued a Notice "on the treatment of confidential information and on the submission of the non-confidential versions of documents", which clarifies the application of the Greek Competition Act and article 15 of the Rules of Internal Procedure of the HCC in this respect, taking into consideration recent national and EU law and jurisprudence and codifying HCC's best practices for the future. In particular, this explanatory notice (the "Notice") clarifies: (a) the meaning of confidentiality and the treatment of confidential information and (b) the submission of the non-confidential version of documents, pursuant to the Rules of Internal Procedure, in cases falling within the ambit of Law 3959/2011 (including merger cases). The Notice exemplifies the application of Law 3959/2011 and Article 15 of the Rules of Internal Procedure in this regard, taking into consideration recent national and EU legislation and jurisprudence<sup>19</sup> and codifying for the future the HCC's best practices. The objectives of the Notice are the enhancement of efficiency in the administration of

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<sup>19</sup> Without prejudice to the principle of procedural autonomy.

confidential information and consequently the saving of administrative resources, as well as the strengthening of legal certainty and transparency of the procedure.

As a matter of general principle of law, assessment of the confidential nature of information requires balancing the requirements for due exercise of the right of defence against the need to safeguard the confidentiality of certain information, as well as any legal interests prohibiting their disclosure. Efficient and consistent application of national and European rules on competition requires that the disclosure of evidence does not unjustifiably restrict the efficient enforcement of competition law by competition authorities. Moreover, the qualification of information as confidential does not prevent the Competition Commission from disclosing and using information necessary to prove an infringement of Articles 1 and 2 of Law 3959/2011 or Articles 101 and 102 TFEU. Where business secrets and confidential information are necessary to prove an infringement or for the purpose of applying competition rules in general, the Commission must assess for each individual document whether the need to disclose is greater than the harm which might result from disclosure.

According to Art. 15 par. 11 of the Procedural Regulation, the internal documents of the HCC, the European Commission and other National Competition Authorities are confidential. According to the Notice the preparatory documents and the documents destined for internal use, such as notes, drafts, working papers or communication, of the HCC, the European Commission or other national Competition Authorities as well as documents and information exchanged within the framework of Art. 11 and Art. 14 of Regulation 1/2003 are not at all accessible to the parties to the proceedings or to third parties.

According to the Notice, as a general rule, correspondence between the HCC and other public authorities or services or Competition Authorities or the European Commission or between the above is not accessible to the parties to the proceedings or to third parties.

In exceptional cases, the HCC may grant access to the parties to the proceedings by deleting the business secrets or other confidential information therein. Prior to granting access, the HCC requests the Authority which provided the relevant document to determine the business secrets and the other confidential information. Such documents are accessible if they include claims against the parties which should be examined by the HCC or if they constitute part of the evidence of the investigation. Documents and information exchanged within the framework of Art. 11 and Art. 14 of Regulation 1/2003 are not accessible to the parties to the proceedings or to third parties.

According to the Notice, as a general rule business secrets are not accessible to the parties to the proceedings. Furthermore, according to Article 15 par. 6 of the Procedural Regulation, inculpatory or exculpatory documents are included in the SO and are not treated from this point onwards as confidential. Finally, according to Art. 15 par. 7 of the Procedural Regulation, in case access to documents containing confidential information is absolutely necessary for the exercise of the rights of defence of a party, the President of the HCC, following a request, issues a justified decision and grants access in whole or in part to these documents and only to the person for whom the access has been considered as absolutely necessary.

According to the Notice, the following are considered as confidential:

- (a) Preparatory documents and internal documents of the HCC, the European Commission or National Competition Authorities of Member States.
- (b) Correspondence between the HCC and other public authorities or services or National Competition Authorities or the European Commission or between these authorities.
- (c) Business and professional secrets.
- (d) Other confidential information, i.e. information that does not constitute a business secret, however its disclosure would significantly harm a person (e.g. information that would enable the parties to identify complainants or other third parties where those have a justified wish to remain anonymous).

Thus, all other information which does not qualify as confidential information is accessible to the parties, unless there is a justified reason for the opposite. Such information includes information related to the requested undertaking or the group of undertakings which is already known outside the undertaking or the group (information may lose its confidential nature if it is available to specialist circles or is capable of being inferred from publicly available information) contractual terms and conditions signed with a broad number of parties on the basis of template agreements, documents that are publishable by law, information that has lost its commercial value etc.

The Notice also contains detailed guidelines on the submission of the non-confidential versions. The parties should provide a separate non confidential version of the documents in which all confidential information is redacted and replaced by (a) the indication [CONFIDENTIAL] and (b) a short non confidential description of the erased information. Erased market shares are to be replaced by set by the Notice ranges. In case of non compliance with the procedure described in the Notice, the information, the documents and the parts of documents for which a justified request for confidential treatment has not been provided or those which have not been submitted in a separate non-confidential version, will be considered as non-confidential and it will be assumed that the undertaking has no objection to their disclosure.

According to Art. 15 par. 2 of the Procedural Regulation, the persons or undertakings which provide information or from which information is collected should submit, within a deadline set by the HCC, a request for the confidential treatment of the information submitted and to provide the HCC with a non confidential version of such information.

It is noted though that in case the HCC Directorate-General or the Commissioner-Rapporteur does not agree with the request for confidential treatment, it notifies to the applicant its intention to disclose the information, explains the reasons for such disclosure and determines a deadline in which the applicant can submit its views. If, following such an exchange of views, there is still disagreement between the Directorate-General or the Commissioner-Rapporteur and the requested party, the President of the HCC decides on the qualification of the document or of the information as confidential or not.

According to article 15 par. 7 of the Procedural Regulation, the parties may request access to confidential information absolutely necessary for the exercise of their rights of defence.

The issue of civil courts requesting access to leniency documents is not dealt with by the Competition Act or the HCC Procedural Regulation. Thus the provisions of the Code of Civil Proceedings apply (Art. 450 et seq.) which provide that the court may order the disclosure of any document in the possession of a public authority, with the exception of state secrets, national security, international relations or unless there is an overriding reason that justifies the non-disclosure of the evidence. So far no civil court has requested the disclosure of leniency documents, so the interpretation of the above provisions is to be clarified. The position of the HCC is that it could support the non-disclosure of leniency statements for overriding reasons (effectiveness of leniency programs, protection of the investigation etc). The provisions of the Directive on Damages would help in this direction.

Access may be given to (a) pre-existing documents unless it is deemed that the investigation may be endangered or if not covered by confidentiality – although as mentioned above it is not clear based on the provisions of the Code of Civil Proceedings whether a confidentiality claim would be accepted by the court as a justification of non-disclosure (b) the complaint, especially if access has been granted to it to the undertaking involved prior to the SO.

Furthermore, regarding each Participant's obligation to protect from unlawful disclosure all confidential information obtained or used by the Participant during investigations and enforcement proceedings, it is noted that, according to the Greek Competition Act, the information collected pursuant to the provisions of Law 3959/2011 may only be used for the purpose of the request for information, the inspection or the hearing<sup>20</sup>. Employees of the Directorate-General who, during the performance of their duties, obtain knowledge of confidential information on undertakings, associations of undertakings or other natural or legal persons which has no bearing on the application of Law 3959/2011 shall keep such information in confidence. Confidential information bearing on the application of Law 3959/2011 shall form part of the administrative file. Employees must keep the abovementioned information in confidence. The confidential information of the administrative file shall form part of the file submitted to the Athens Administrative Court of Appeal and the Council of State, and shall remain confidential. The above information shall therefore be forwarded in a separate section of the administrative file marked 'confidential information'. The court registrar shall ensure that the parties cannot access the parts of the file that are confidential for them, unless access is deemed necessary in order to defend their overriding interest and the adjudicating court grants them respective permission, to the necessary extent, at their request. Anyone who fails to honour the abovementioned obligations shall a) be punished in accordance with Article 252 of the Penal Code and with a fine of between EUR one thousand (1,000) and ten thousand (10,000) and b) be subject to disciplinary proceedings for infringement of duty of confidentiality, which is a disciplinary offence<sup>21</sup>.

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<sup>20</sup> Art. 41 para 1 Law 3959/2011.

<sup>21</sup> Art. 41 para 2-4 Law 3959/2011.

Furthermore, if the President, Vice-President or members of the Competition Commission infringe their duties stipulated above, they shall be punished in accordance with Section 252 of the Penal Code and with a fine of between EUR one thousand five hundred (1,500) and a maximum of EUR fifteen thousand (15,000) and shall be dismissed, in the same ruling, from the Competition Commission<sup>22</sup>. The Competition Act also states that the Chairman, Vice-Chairman and members of the Board of the HCC shall be bound to observe confidentiality of information obtained during the performance of their duties for a period of four (4) years after the termination of their term of service or withdrawal from it, in respect of all information obtained in the performance of carrying out their tasks<sup>23</sup>.

Moreover, persons instructed by the Competition Commission to draft a study on its behalf or involved in a working party set up by the Competition Commission and lawyers working in the Legal Office of the Competition Commission, whose contract contains a confidentiality clause, shall also be subject to penalties. The previous sentence shall also apply to the employees of the person to whom the study has been assigned who have been notified of the confidentiality clause.

#### **f) Conflicts of Interest**

The Greek Competition Act maintains the rule that HCC Board members shall be individuals of recognised standing, as well as of scientific formation and professional ability in law and in economics, particularly as regards competition-related matters. The Greek Competition Act also states that the members of the HCC shall enjoy personal and operational independence and shall be bound in the exercise of their duties only by the law and their conscience and must observe objectivity and impartiality principles. It also states that its members, in the performance of their duties, shall not take or seek instructions from the Government or from any public or private entity<sup>24</sup>. It also emphasises the independence of HCC Board, as the President and the Vice-President are selected by the Greek Parliament's Chamber of Presidents, thus ensuring broader parliamentary consensus. All other Members, including the 4 Commissioner-Rapporteurs, are selected by the Minister of Development & Competitiveness, following a hearing before the Parliamentary Committee of Institutions and Transparency. Moreover, the term in office of all new of the HCC's Board has been extended to 5 years, in order to decouple it from election cycles and strengthen continuity of operations.

According to the Competition Act, Competition Commission members, both full and alternate, shall, on taking up their duties, notify the Minister of Economy, Competitiveness and Shipping and the President of the Competition Commission, of any service, consultancy, work or project they have carried out, under instruction or any form of legal relationship whatsoever, in the last five (5) years prior to the start of their term of office<sup>25</sup>. Those Commission members not employed on a full-time and exclusive basis during their term of office shall also have a corresponding obligation to inform the President of the Competition Commission in writing of any project, work, service, consultancy or

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<sup>22</sup> Art. 41 para 5 Law 3959/2011.

<sup>23</sup> Art. 12 para 9 Law 3959/2011.

<sup>24</sup> Art. 12 para 1 Law 3959/2011.

<sup>25</sup> Art. 12 para 4 Law 3959/2011. See accordingly Art. 11 of the Procedural Regulation of the HCC.



instruction carried out. Where the above notifications show members to have a previous or existing relationship with an undertaking directly or indirectly involved in a case under consideration, it is construed that they are disqualified from participating in the Competition Commission hearings to discuss and deliberations to take decisions regarding that undertaking<sup>26</sup>.

During their term of office, full members of the Competition Commission who are not employed on a full-time and exclusive basis, as well as alternate members, shall not be permitted to hold any salaried or unsalaried public office or carry out any other professional activity, commercial or other, that is not compatible with the status and duties of a Competition Commission member. It shall not be incompatible for Competition Commission members, both full and alternate, to perform duties as academic staff of Higher Education Institutions, on a full-time or part-time basis<sup>27</sup>.

For the purpose of ensuring the functional independence of the Competition Commission and its protection against external interference or political pressure liable to jeopardize in any way the independent assessment of matters coming before the HCC, the Greek Competition Act states that the capacity of the Chairman, Vice-Chairman and member (full or alternate) of the Board shall be incompatible with any form of position or delegation of tasks or secondment or employment at the office of the Prime Minister or at the office of the Secretariat-General of the Prime Minister or at the office of a member of the Government or at the political office of a member of the Government or at the Secretariat-General of the Government or at the office of a General or Special Secretary of a Ministry for a period of five (5) years following the expiry of the abovementioned position or delegation of tasks or secondment or employment<sup>28</sup>. Moreover, the capacity of the Chairman, Vice-Chairman and member (full or alternate) of the Board shall be incompatible with any family relationship (up to 2<sup>nd</sup> degree) or marital relationship with any person being a member of the Government. The above incompatibility applies at the time of the appointment and throughout their term of office. The finding of such an incompatibility shall result in the automatic removal from the office of Chairman, Vice-Chairman or member of the Board, respectively, upon the issuing of the respective declaratory act by the body responsible for their appointment<sup>29</sup> <sup>30</sup>. Any benefit, direct or indirect, to the Chairman, Vice-Chairman and members of the Board of the HCC by undertakings or third parties directly affected by their activity shall be prohibited<sup>31</sup>.

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<sup>26</sup> See accordingly Art. 4 of the Code of Conduct (Gov't Gazette Issue 739/13.06.2001).

<sup>27</sup> Art. 12 para 5 Law 3959/2011.

<sup>28</sup> Art. 12 para 7 Law 3959/2011, as amended by Law 4623/2019 (Gov't Gazette Issue A' 134/09.08.2019).

<sup>29</sup> Moreover, according to the Greek Competition Act (Art. 12 para 11 Law 3959/2011) the President, Vice-President and members of the Competition Commission, both full and alternate, shall not be permitted, after their term of office expires, in whatever way, to provide a service, under salaried instruction or any form of legal relationship whatsoever, to a company or undertaking regarding those cases that they handled themselves or that they decided on during their mandate. The President, Vice-President and members of the Competition Commission, both full and alternate, shall not be permitted, for three (3) years after their term of office expires, to support in general cases before the Competition Commission or in appeals before the courts against Competition Commission decisions. A fine shall be imposed on persons infringing the provisions of the preceding subparagraph, by decision of the Minister for Economy, Competitiveness and Shipping, equal to ten times the total salary and remunerations received by the Competition Commission member during his or her term of office.

<sup>30</sup> Art. 12 para 7 Law 3959/2011.

<sup>31</sup> Art. 12 para 8 Law 3959/2011.

Moreover, the Procedural Regulation of the HCC lays down the applicable internal procedures in cases of exclusion, declarations of abstention and requests for exemption in situations of conflicts<sup>32</sup>.

Noted, the HCC's Plenary will convene by the end of the year to amend its Rules of Internal Procedure with a view to increasing its effectiveness and strengthening its independence, while further promoting harmonisation with EU competition law. In that context, the new Rules of Internal Procedure will transpose the provisions of EU Directive 2019/1 that concern, inter alia, conflict of interest issues.

#### **g) Representation by Counsel and Privilege**

Each person has the right to be represented by qualified legal counsel of its choosing during all interactions with the HCC. However, when conducting dawn raids, the investigators do not have to await the arrival of the defence counsel.

Furthermore, each person is provided a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Refer to point d) above.

It is the practice of the HCC to afford persons under investigation multiple opportunities to meet with staff and senior leadership to explain their views, present evidence and engage on substantive and procedural issues. In almost all such instances, persons are represented by counsel, and counsel typically lead the presentation. Indeed, the HCC welcomes presentations by counsel as this practice often helps to better focus the discussions of relevant competition law issues, including both substantive issues and procedural matters.

Although there is no specific relevant provision in the Greek Competition Act, the HCC recognizes the legal professional privilege. According to Art. 39 para 1 (g) Law 3959/2011, the authorised servants of the Directorate-General shall be authorised to take, at their discretion, sworn or unsworn witness statements, subject to the provisions of Art. 212 of the Code of Criminal Procedure, and to ask any representative or member of staff of the undertaking or association of undertakings for explanations of facts or documents relating to the subject matter and purpose of the inspection and to record their answers. Article 212 of the Code of Criminal Procedure recognizes specifically the attorney's right to refuse testimony on professional grounds concerning the information that was entrusted to the attorney or became known to the attorney in this capacity<sup>33</sup>. Although the Competition Commission has broad investigation powers and extensive rights of access to documents of the business, documents protected by legal professional privilege, even if collected, are not used as evidence in any phase of the proceedings<sup>34</sup>. According to Art. 15 par. 13 of the Procedural Regulation, in case of a dispute, following a request, the President of the HCC decides whether a document falls under the said protection.

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<sup>32</sup> Art. 6-10.

<sup>33</sup> See accordingly Art. 371 of the Penal Code regarding the breach of professional confidentiality.

<sup>34</sup> In accordance with the European case law, the correspondence between the business and its in-house lawyers is not covered by the legal privilege protection, therefore only correspondence with external lawyers is excluded from inspection by the HCC.

## h) Decisions in Writing

According to Art. 27 of the Competition Act, decisions of the HCC, being of individual nature and provided for under the present Law, must be specifically reasoned, published in the Government Gazette and posted on its website. The decision contains, inter alia, information on the facts established in the fining decision, information on the type of the infringement and the period during which the infringement occurred, information on the undertakings which were involved in the infringement and information on the goods and services affected. In addition, the HCC, will issue a detailed press release:

- In the case of a fine imposition, after the decision has been made available to the parties. The press release will typically contain a summary of the HCC's findings and any remedies or sanctions it imposed.
- In the case of commitments offered by the parties, upon reaching a decision. The press release will typically provide a summary explanation of the commitments and the reasons for them<sup>35</sup>.

## i) Independent Review

The Greek Competition Act provides that specialised competition chambers can be established at the Athens Administrative Court of Appeals, the aim being to further enhance the effectiveness of judicial review. Under the current regime, the Athens Administrative Court of Appeals conducts a full-scale review of the HCC decisions, while judgments rendered by the said court may be brought on appeal for further judicial review (control of legality) before the Council of State (Supreme Administrative Court – Conseil d'Etat)<sup>36</sup>.

In practice, decisions issued by the HCC are subject to **appeal** before the Administrative Court of Appeal of Athens within a period of sixty days from notification. In these cases, the Administrative Court of Appeal acts as a first instance court by examining the case on the merits. It exercises its powers by either upholding or annulling the decision, or even reducing the fines imposed by the HCC. The decisions of the Administrative Court of Appeal of Athens are subject to a second instance appeal before the Council of State by the parties to the trial before the Administrative Court of Appeal of Athens. In this case, the Council of State acts as a second (and last) instance court. There is not third instance for decisions issued by the HCC.

The filing of appeals does not suspend execution of the HCC's decisions. However, the Administrative Court of Appeal of Athens may, if there is sufficient cause, **suspend the decision** at appeal in whole or in part or conditionally, following a petition by the interested party. In particular, the Administrative Court of Appeal of Athens may, by a reasoned judgment, following an appellant's petition, order the suspension of a part of the fine, which cannot exceed 80%. The petition for suspension shall be acceptable up to the above percentage of the fine, subject to the requirements of

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<sup>35</sup> In April 2014, the HCC adopted Decision No. 588/2014 concerning Guidelines on the Commitment Procedure, which defines the terms, conditions and the procedure for the acceptance of commitments offered by undertakings to cease possible infringements of articles 1 and 2 of the Greek Competition Act or 101 and 102 TFEU.

<sup>36</sup> Articles 30-32 Law 3959/2011.

the principle of proportionality in the case at issue, where it is found that immediate execution of the contested action would cause the applicant irreparable damage or a damage which would be difficult to repair if the appeal is successful.

According to the Greek Competition Act<sup>37</sup> a third party may bring an appeal against an HCC's commitment decision provided that such party has shown a legitimate interest to this effect.

The HCC appears in Court represented by external lawyers, which are appointed by the HCC on a case by case basis, since the competition act forbids the lawyers employed in the DG units to practice law and appear before Court, as long as they work for the competition authority. However, the case handlers – both lawyers and economists – are actively involved in the preparation of the case for the Court and cooperate closely with the appointed lawyers. The President of the HCC overviews the Authority's written submissions to Courts.

According to Articles 30 par. 7 and 32 par. 7 of Greek Competition Act, the HCC shall upload on its website a non-confidential version of the relevant decisions issued by the Athens Administrative Court of Appeal and the Council of State, with a view to safeguard the protection of personal data and professional secrecy of the parties.

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<sup>37</sup> Art. 30 Law 3959/2011.