

e-Competitions

Antitrust Case Laws e-Bulletin

Preview

The Cypriot Administrative Court annuls a decision that imposed a fine of €20,775,630 on petroleum companies (*ExxonMobil / Hellenic Petroleum / Petrolina / Coral*)

ANTICOMPETITIVE PRACTICES, CYPRUS, ENERGY, SANCTIONS / FINES / PENALTIES, JUDICIAL REVIEW, DAWN RAIDS, ANNULMENT

Cypriot Administrative Court, *ExxonMobil / Hellenic Petroleum / Petrolina / Coral*, Cases no. 1646/2017, 1650/2017, 53/2018 and 125/2018, 29 April 2004 (Greek)

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The joined cases were brought before the Administrative Court of Cyprus (hereinafter the “**Court**”) by ExxonMobil Cyprus Ltd, Hellenic Petroleum Cyprus Ltd, Petrolina (Holdings) Public Ltd and Coral Energy Products Cyprus Ltd (hereinafter the “**petroleum companies**”) against the Commission for the Protection of Competition (hereinafter the “**CPC**”) for the annulment of the latter’s Decision *No. 51/2017*¹, dd. 30/10/2017 (hereinafter the “**Contested Decision**”). With the Contested Decision, the CPC imposed a total fine of €20,775,630 on the petroleum companies for violating Article 3(1)(a) of the Law on the Protection of Competition (Law 13(I)/2008). The Court annulled the Contested Decision, after concluding that it was unlawful in its entirety.

One of the main issues examined by the Court was the lawfulness of the CPC’s decision to authorize its Chairman to make a decision a) on whether to conduct an on-site inspection of the petroleum companies’ offices / premises and b) on the specific point in time at which such an inspection would take place. In that regard, the Court noted that the Protection of Competition Law of 1989 (hereinafter the “**Law 207/89**”), which was in force at the time in question, did not provide to the CPC the power to authorize its Chairman to decide on whether to conduct an unannounced on-site inspection. Under Article 25(2) of Law 207/89, on-site inspections “shall be conducted by competent officers of the Service *at the order of the CPC* when a notice is previously given, or, in exceptional and emergency cases that are specially reasoned in the order, without a previous notice given, to the undertaking concerned”. With this reasoning, the Court ruled that the decision of the CPC to delegate to its Chairman the decision on whether to conduct an unannounced on-site inspection and the timing of a potential on-site inspection was unlawful.

In addition, the Court ruled that the questionnaires sent after the conduct of the unannounced on-site inspection, both to the petroleum companies and to other persons, were also unlawful, as the CPC had relied on material collected during the unlawful on-site inspection for their preparation. Interestingly, the Court held that the

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questionnaires were unlawful for an additional reason. More specifically, the Court noted that the relevant decisions of the CPC to send the said questionnaires to the petroleum companies and third parties had been revoked by a subsequent composition of the CPC after the Supreme Court of the Republic of Cyprus had ruled that the previous composition of the CPC which had decided to send the said questionnaires was unlawful.

The Court went one step further clarifying that even if the questionnaires were to be regarded as elements of objective judgment, this was not sufficient to remedy the fact that they were sent in pursuant to a decision of the CPC whose composition was found to be unlawful by the Supreme Court of the Republic of Cyprus. Another issue examined by the Court was whether the decision of the Chairman of the CPC and the order given by the Chairman to competent officials of the Service of the CPC to conduct an unannounced on-site inspection accurately described the subject-matter and purpose of the inspection. Concerning this issue, the Court ruled that the wording of the said decision and order of the Chairman was vague and did not meet the requirements of Law 207/89. It is noted that as per Article 25(3) of Law 207/89 the “order of the CPC shall be in writing and accurately state the *subject-matter and purpose of the inquiry, fix the date of commencement of the inquiry and state the provision which this power of the CPC is based and the possible sanctions in case the undertaking refuses to comply with the order of the CPC*”.

According to the case-law of the Courts of the European Union, the decision to conduct an unannounced on-site inspection must be reasoned. To this end, the relevant decision should specify, as accurately as possible, the cases and conjectures whose validity the antitrust authority wishes to ascertain through an unannounced on-site inspection. In that regard, the antitrust authority should avoid carrying out unannounced on-site inspections to obtain evidence (fishing exhibitions) without already being in possession of any serious evidence and substantial indications that suggest that competition rules were violated. Furthermore, the antitrust authority has an obligation to describe in its decision the subject-matter and the purpose of the unannounced on-site inspection in order to enable the judicial review of the inspection decision (i.e., whether the indications towards a competition law violation were sufficient to justify the inspection and whether the decision was relevant and proportional).

Furthermore, according to the case-law of the Courts of the European Union, the articulation of the subject-matter and the purpose of the on-site inspection in the relevant decision of the antitrust authority is necessary for the undertakings under inspection to comprehend and/or assess the extent of their duties for cooperation with the inspecting officers of the antitrust authority. Importantly, the accurate description of the subject-matter and purpose of the on-site inspection ensures the rights of the undertakings under inspection, which could be seriously compromised if the antitrust authority could rely on evidence obtained during the on-site inspection which was not related to the subject-matter and purpose of that inspection. Having considered the above reasoning, the Court ruled that the Contested Decision was unlawful in its entirety.

The decision of the Administrative Court can be found *here* ² (in Greek).