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THE ABUSE OF DOMINANT POSITION OF PPC IN THE LIGNITE SUPPLY MARKET

In December 2016 the General Court of the European Union, following appeals of the Commission, dismissed the applications lodged by the Public Power Corporation of Greece (PPC) relating to the annulment of C (2008) 824 and C (2009) 6244 decisions of the Commission. In particular, the Commission held that the Hellenic Republic grants and keeps in force privileged rights to PPC for the exploitation of lignite resources in Greece and, in light of this, designated specific measures for discontinuing such anti-competitive effects.

The decisions of the Commission

After receiving the complaint that under Legislative Decree 4029/1959 and Statute 134/1975 that the Hellenic Republic has granted an exclusive free license to PPC to excavate and exploit lignite, the Commission adopted decision C (2008) 824. According to this decision, the Hellenic Republic, by granting and keeping in force privileged rights to PPC for the exploitation of lignite, has created inequality of opportunity between economic operators regarding access to primary fuels for the production of electricity and has enabled PPC to maintain and reinforce its dominant position in the Greek wholesale electricity market. Thus, the Commission required that within eight months from the notification of the decision the Hellenic Republic should adopt and implement specific measures intended to lift the anti-competitive effects.

The Commission delineated the measures to be taken in its decision C (2009) 6244. According to these, the Hellenic Republic should do the following: (a) grant exploitation rights on the deposits of the regions of Drama

(Eastern Macedonia), Ellassona, Vegora and Vevi (Western Macedonia) through tender procedures to entities other than PPC, unless no other reliable offer was made; (b) prohibit the owners of the deposits of Drama, Ellassona and Vegora to sell the extracted lignite to PPC, unless no other reliable offer was made, for as long as PPC would own exploitation rights of more than 60% of all lignite reserves licensed for exploitation in Greece; (c) carry out a new allocation procedure, if the ongoing procedure to award the rights for the exploitation of the Vevi deposit was cancelled; in such an event, a bid by PPC would not be admitted, unless no other reliable offer was made, and the owner of the deposit would be prohibited to sell the extracted lignite to PPC, unless no other reliable purchase offer was made, for as long as PPC would own exploitation rights of more than 60% of all lignite reserves licensed for exploitation in Greece; and (d) repeal any provision allowing special treatment to PPC for the allocation of exploitation rights on lignite reserves.

The appeal of decisions

PPC, supported by the Hellenic



Republic, brought actions to the General Court of the European Union for the annulment of the above Commission decisions. These actions were admitted by the General Court and the Commission's decisions were annulled. Then the Commission lodged appeals before the Court of Justice of the European Union, which rejected some of the pleas raised by PPC and referred the case back to the General Court.

The initial annulment of the Commission's decisions by the General Court of EU

In support of its action, PPC relied on four pleas, i.e.: (a) errors of law in applying the combined provisions of Articles 86(1) EC and 82 EC (Articles 106(1) TFEU and 102 TFEU) and a manifest error of assessment, (b) infringement of the duty to state reasons under Article 253 EC (Article 296 TFEU), (c) infringement of the principles of legal certainty, the protection of legitimate expectations and the protection of private property and misuse of powers, and (d) infringement of the principle of proportionality.

According to the General Court, the prohibitions laid down by Article 86(1) EC (Article 106(1) TFEU) are addressed to Member States, whereas Article 82 EC (Article 102 TFEU) is addressed to undertakings, prohibiting them from abusing a dominant position. In the case of the combined application of those two provisions, infringement of Article 86(1) EC (Article 106(1) TFEU) by a Member State cannot be established unless the State measure is contrary to Article 82 EC (Article 102 TFEU). The General Court, therefore, raised the question relating to the extent of an abuse, even if only potential, of the dominant position by an undertaking. Such an abuse must be identified, when it has a link with the State measure. According to the General Court, by finding only that PPC, a former monopolistic undertaking, continues to maintain a dominant position in the wholesale electricity market by virtue of the advantage conferred upon it by privileged access to lignite and that that situation creates an inequality of opportunities in that market between the applicant (PPC) and other undertakings, the Commission had neither identified nor established to a

sufficient legal standard to what abuse, within the meaning of Article 82 EC (Article 102 TFEU), the State measure in question has led or could lead the undertaking concerned. Accordingly, the General Court held that the mere fact that the PPC finds itself in an advantageous situation in comparison with its competitors, by reason of a State measure, does not in itself constitute an abuse of a dominant position. On this ground, the argument raised by PPC, in the context of the first plea, was, according to the General Court, well founded and annulled the contested decision, without having to examine the other complaints, parts and pleas that were submitted.

The appeal of the Commission before the Court of Justice of the European Union (CJEU)

In support of its appeal, the Commission relied on two grounds: On the one hand, it claimed that the General Court erred in law with regard to the interpretation and application of Article 86(1) EC in conjunction with Article 82 EC, in finding that the Commission was required to identify and establish the conduct



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constituting abuse of a dominant position to which the State measure in question led, or could have led. On the other hand, the Commission, in its second ground of appeal, contended that paragraphs 85 to 93 of the General Court judgment were based on incorrect, defective and insufficient reasoning, on distortion of the evidence and on a misinterpretation of the basis of the contested decision.

The General Court rejected the plea relating to PPC's argument that the Commission did not take into account the recent developments in the Greek electricity market

Contrary to the General Court's reasoning, CJEU found that a potential or actual anti-competitive consequence is liable to result from the State measure at issue and that it is not necessary to identify any further abuse, other than the abuse resulting from the situation brought about by the measure itself. Consequently, CJEU ruled that the General Court erred in law in holding that the Commission had neither identified

nor established to a sufficient legal standard the abuse and found that PPC continued to maintain a dominant position in the wholesale electricity market by virtue of its privileged access to lignite and that the situation created inequality of opportunity in that market. Therefore, the court decided that the first ground of appeal must be upheld and the judgment under appeal must be set aside, without having to examine the second ground of appeal.

According to the judgment, PPC was wrong to assert that, in order to apply the principle that the public undertaking extended its dominant position from one market to another neighbouring and separate market, the Commission should have shown that the State measure at issue grants or enhances special or exclusive rights. On the contrary, pursuant to case-law, it was sufficient that the measure at issue creates a situation in which a public undertaking or an undertaking on which the State has conferred special or exclusive rights is led to abuse its dominant position. Furthermore, the Court ruled that it is not necessary for the Commission to show in every case that the undertaking concerned enjoys a monopoly or that a State measure awards it exclusive or special rights over a neighbouring and separate market, or that it has any regulatory powers. The Court also rejected PPC's arguments that the Commission should prove the impact of the infringement of the combined provisions of Articles 86(1) EC and 82 EC on the interests of consumers,

and that the Commission should define lignite as an essential facility given that the Commission only referred to PPC's situation in the electricity wholesale market as a "quasi-monopoly".

The final decision of the General Court

Following the ruling of the CJEU, the case was referred back to the General Court for re-examination. The pleas examined by the General Court related to the Commission's alleged error in law when applying Article 86 (1) EC in conjunction with Article 82 EC, and to its manifest error of assessment regarding (a) the definition of the relevant markets, (b) the fact that Greek legislation, on the basis of which PPC acquired rights in respect of the exploitation of lignite, does not treat the situation as one leading to unequal opportunity to the detriment of competitors, and (c) the recent developments in the Greek electricity market.

The General Court first examined the market definition adopted by the Commission. The Commission had concluded that the State measures in question concerned two markets: the upstream market of supply of lignite (excluding other combustibles) and the downstream market, i.e. the wholesale markets for the production and supply of electricity (excluding the markets of transmission and distribution of electricity). As for the geographical markets at issue, the market for the supply of lignite was of national dimension and the wholesale electricity



market extended to the territory of the Greek interconnected network of mainland Greece. Furthermore, according to the Commission, the Hellenic Republic, by granting lignite exploitation rights to PPC and by excluding or hindering competitors from entry to that market, allowed PPC to maintain or strengthen its dominant position in the downstream market, namely the wholesale electricity market.

On the other hand, in relation to the upstream market, PPC argued that the supply of lignite is not a separate market but falls within a market that covers all fuels and, therefore, the upstream market should include all fuels from which electricity is produced. It therefore challenged the definition of the upstream market as adopted by the Commission. Regarding the downstream market, it claimed that the Commission took no account of the high level of market liberalisation following the establishment of a mandatory day-ahead market.

The General Court sided with the Commission's arguments and concluded that the upstream market

has been correctly defined and that there is no deficient, incorrect and insufficient reasoning in the Commission's arguments. Regarding the unequal opportunity to the detriment of competitors, the General Court rejected the arguments of PPC and confirmed that competitors have had no free access to the market of lignite supply. In particular, it indicated that the repeal of Statute 134/1975 regarding the privileged access of PPC to the exploitation rights of lignite and the possibility on paper that lignite reserves may be allocated to third parties were not by themselves sufficient to mitigate the inequality between PPC and its competitors and PPC's dominant position in lignite deposits.

The General Court also rejected the plea relating to PPC's argument that the Commission did not take into account the recent developments in the Greek electricity market and found that there were shortcomings in the examination of evidence. Indeed, it found that the recent (at the time) legislative developments through Law 3175/2003 (on the granting of licenses to entities other than PPC

for the construction of new power plants) were not sufficient to mitigate the dominant position of PPC.

One-way street

The above rulings resulted in that the Hellenic Republic had indeed granted PPC a privileged access to the cheapest available fuel for electricity production in Greece. This reinforced PPC's dominant position in the wholesale electricity market at a level close to a monopoly by excluding or hindering newcomers from market entry. Effectively, this enabled PPC to protect its quasi-monopolistic market position despite the regulatory liberalisation of the wholesale electricity market. Taking into account these rulings, the Hellenic Republic and PPC must comply with the Commission's decisions, i.e. to implement the designated specific measures for the liberalisation of the upstream lignite supply market.

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