

Unclassified

DAF/COMP/WD(2016)28

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

01-Jun-2016

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**COMMITMENT DECISIONS IN ANTITRUST CASES**

-- Note by Greece --

**15-17 June 2016**

*This document reproduces a written contribution from Greece submitted for Item 9 of the 125th meeting of the OECD Competition Committee on 15-17 June 2016.*

*More documents related to this discussion can be found at  
[www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm](http://www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm)*

**JT03397099**

Complete document available on OLIS in its original format

*This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*

DAF/COMP/WD(2016)28  
Unclassified

English - Or. English

## **1. Introduction – legal basis**

1. Article 5 of Council Regulation (EC) No 1/2003 of 16 December 2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty enables national competition authorities (NCAs) to adopt decisions accepting commitments when applying Articles 101 and 102 TFEU.

2. The possibility to adopt commitment decisions is also provided for in the Greek Competition Act (L. 3959/2011- Art.25). The HCC has recently issued guidelines concerning commitment proceedings and commitment decisions, in order to give undertakings guidance about the benefits they may gain from the procedure, the practical requirements for their submissions, the procedural steps involved and the possible outcomes (depending primarily on whether the case at hand is eligible for commitments). Since the adoption of the guidelines, the HCC has issued an increased number of commitment decisions, thereby considerably diversifying the mix of cases pursued by the Authority.

## **2. HCC Guidelines on Commitments (Notice on Commitments)**

3. In April 2014, the HCC adopted Decision No. 588/2014 concerning Guidelines on the Commitment Procedure (hereinafter “Notice on Commitments”). The Notice 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 Competition Act or 101 and 102 TFEU.

4. In particular, the new Notice on Commitments:

- Optimizes the HCC’s administrative practice, notably by focusing on accelerating the procedure and making it more efficient. The biggest novelty is that interested undertakings are now encouraged to signal their interest in discussing commitments at an earlier stage of the investigation, thereby promoting the earlier, more efficient and expedient resolution of eligible cases, while at the same time it enables the HCC to allocate more resources in the investigation of more serious competition law infringements in the interest of increased deterrence.
- Ensures that the most appropriate sanction is chosen in terms of public interest and competition policy. To this effect, the Notice clarifies the cases where commitments may be appropriate, based on the nature of the infringement, the characteristics of the market and the anticipated benefit. It also sets out the criteria for the commencement of the procedure.
- Introduces a set framework for the discussion of proposed commitments between the parties and the Authority, the aim being to address any competition concerns in full and in the most effective way. This procedure may take various forms, such as telephone interviews with representatives of undertakings or their associations, ad hoc meetings or public consultation.
- Enhances transparency and predictability as regards the procedure to be followed and the time schedule to be applied.

5. The Notice on Commitments takes stock of EU practice and precedents, as well the HCC’s experience on accepting commitments in critical and/or rapidly evolving sectors of the national economy (e.g. energy, satellite pay-TV). In brief, according to the Notice:

6. The HCC enjoys a wide margin of discretion to decide on the initiation of the procedure for evaluating and accepting, or not accepting, commitments proposed by the interested undertakings. The interested undertakings may propose commitments in any case involving possible infringements of articles 1 and/or 2 of the Competition Act (and of articles 101 and 102 TFEU).

7. The HCC considers commitments to be appropriate in cases where the competition concerns:
- are readily identifiable
  - are fully addressed by the commitments offered and no other new concerns emerge
  - may be efficiently resolved and within a short period of time
8. In addition, the HCC will **not** accept commitments:
- in cases involving serious restrictions of competition (notably cartels and hardcore restrictions)
  - in cases involving serious abusive conduct
  - in horizontal agreements falling within the leniency program.
9. The HCC considers that commitments are appropriate where they contribute to a better allocation of resources and improve the efficiency of the procedure and, thus, encourages undertakings to indicate their interest in discussing commitments as early as possible. Interested undertakings may propose commitments at any time during the course of an investigation. However, the HCC does not generally consider commitments to be appropriate when the undertakings concerned have already received a statement of objections (i.e. where the investigation has essentially been concluded).
10. The procedure for evaluating commitments is initiated if:
- The undertaking concerned demonstrates a genuine willingness to propose commitments, which are expected to fully and effectively address the competition concerns at issue.
  - The case at hand is appropriate / eligible for commitments (i.e. no cartel or serious infringement is involved).
  - The nature, modalities and specific characteristics of the commitments can adequately be monitored and applied in practice.
11. Regarding the procedure to be followed in commitment cases the stages are set out in an Annex to the Notice. The main procedural steps are as follows:

<b>Commitments Procedure – Key Steps</b>
<ul style="list-style-type: none"> <li>• Preliminary meetings with the Directorate General and/or the HCC Rapporteur at any time during the course of the investigation</li> <li>• Evaluation of the criteria for the initiation of the procedure and invitation to the undertakings concerned to submit their final proposal.</li> <li>• Market consultation on commitments (tentative).</li> <li>• Notification of a Report on the acceptance of the final proposal of commitments.</li> <li>• Hearing of undertakings concerned, complainants and third parties showing a legitimate interest before the HCC.</li> <li>• HCC decision rendering the commitments binding on the undertakings concerned and providing for fines in case of non-compliance</li> </ul>

12. The digitalization of the HCC systems and services is expected to facilitate further the process outlined above. In particular, in the context of the HCC's ongoing project "Digital Competition Commission Services", financed by EU funds, that aims mostly at providing citizens, professionals and undertakings with better quality online services in all their dealings with the HCC, a secure platform will soon be introduced accessible to all undertakings wishing to interact with the Authority. Regarding commitments procedure, the new technologies infrastructure will encourage electronic submission, thereby reducing administrative costs and freeing resources.

### **3. Type of commitments – Market test – Compliance**

13. The HCC has the power to accept structural and/or behavioral commitments. Structural commitments in the sense of divestiture of ownership have not yet been adopted. Commitments thus far accepted are behavioral in nature and concern contractual issues mostly referring to the duration of contracts, the removal of allegedly anti-competitive clauses, pricing and other market policies.

14. The Notice introduced a flexible market test for commitments, which may be applied at any point of the procedure and with any suitable manner e.g. questionnaires, interviews, publication of a summary of preliminary findings on the HCC webpage etc. Third parties may also be summoned to the hearing at the discretion of the HCC. This enables the Authority to consider third parties' views on the proposed commitments. Regarding third parties, the HCC also examines whether the implementation of the commitments is dependent on the will of a third party. In such cases, the burden of proof lies upon the party offering the commitments to establish the third party's consent.

15. The Greek Competition Act expressly empowers the HCC to impose fines in case of non-compliance with a commitment decision. Usually, HCC's commitment decisions already include a provision on the power of the HCC to impose fines in case of non-compliance. Compliance with commitment decisions is monitored and a statement of objections for violation of the undertaking's obligation is issued in case of non-compliance (without being necessary for the HCC to establish any likelihood of a substantive infringement).

### **4. Judicial review**

16. The Notice clarifies, based on national and EU jurisprudence, that the HCC enjoys wide discretionary power to decide whether or not to accept commitments. Further, the HCC is not expressly obliged to verify that commitments do not manifestly go beyond what is necessary to address competition concerns, nor that the parties have not offered less onerous commitments that address the competition concerns adequately. Both matters may be subject to judicial review, only in cases of alleged infringement of the authority's exercise of discretionary power.

17. Decisions accepting commitments and rendering them binding on the undertakings concerned have not yet been subject to appeal before administrative courts.

18. It should be noted that the HCC issues a decision only in case of acceptance of commitments, whereas in case commitments are rejected the relevant decision is integrated in the final decision of the HCC finding an infringement. In this regard, administrative courts have confirmed that the rejection of commitments is to be considered only as a preparatory / interim act in nature, which can only be appealed with the final infringement decision.

19. Upon appeal of the final infringement decision, parties often challenge, *inter alia*, the HCC's (interim) rejection decision. In this regard, administrative courts have invariably sided with the HCC, thereby confirming its wide margin of discretion in rejecting commitments proposed by the parties.

20. The HCC is not aware of any follow on damages actions based on commitment decisions.

## 5. HCC's recent decisional practice

### 5.1 *The Forthnet case – Broadcasting Sector*

21. On 26 March 2012, the HCC decided to accept the commitments proposed by FORTHNET S.A (Forthnet) and its subsidiary, MULTICHOICE HELLAS S.A (Multichoice) regarding the exclusive broadcast by its digital satellite pay-TV of all major private free-to-air Greek nationwide TV channels, as a way to immediately ensure more effective access of competitors to the relevant market.

22. The HCC initiated the investigation following a complaint filed by the Hellenic Telecommunications Organization S.A (OTE) alleging that the contracts concluded between Forthnet/Multichoice and all major private free-to-air Greek nationwide-broadcasting TV channels, in order for the latter to broadcast their content exclusively via its pay-TV platform «NOVA», constituted an infringement of Article 1 and/or Article 2 of the Competition Act and of Articles 101 and/or 102 TFEU. According to OTE, they resulted in the creation of barriers for competing undertakings wishing to enter the satellite pay-TV market (where currently NOVA dominates). In this regard, a potential subscriber was more likely to choose the NOVA pay-TV platform which, *ceteris paribus*, offered access to private free-to-air Greek TV channels on an exclusive basis.

23. In its reply to the SO, and prior to the oral hearing before the Grand Chamber of the HCC, Forthnet offered commitments to meet the concerns raised in the SO, i.e. that the exclusivity clause for satellite retransmission of the private free-to-air TV stations via its NOVA platform secured in practice an advantage for Forthnet over its potential and actual competitors in the market for the provision of satellite pay TV platform, thus artificially raising barriers to entry.

24. The HCC decided to accept the revised version of the proposed commitments, whereby Forthnet and its subsidiary Multichoice agreed to:

- Waive the aforementioned exclusivity clause and amend the respective agreements accordingly, with immediate effect (as of 27 March 2012)
- Maintain the rest of the terms of the agreements in question, as currently in force, and
- Commit to refrain from seeking the aforementioned exclusivity for an indefinite period.

25. The commitments were made binding on the companies Forthnet and Multichoice. In the event of non-compliance, the HCC reserved its right to impose on these companies a fine up to 10% of their aggregate turnover of the financial year preceding the decision in question.

### 5.2 *The flour mills commitments in the context of an interim measures procedure*

26. The novelty of the case is that – unusually – the decision was taken in the context of the interim measures procedure, a fact that underlines the flexibility of the commitments procedure. More specifically, in 2010, in a case regarding the adoption of interim measures against two associations of undertakings, namely the “Greek Flour Millers’ Association” and the “Association of Flour Mills of Greece”, the HCC decided to accept the commitments offered by the parties, thereby closing its investigation.

27. According to a preliminary report, there was a *prima facie* case which entailed a risk of serious and irreparable damage to competition arising from both associations' recommendations to their members for an immediate readjustment of prices for flour in mid-August 2010. During the oral hearing on interim measures, the two associations offered commitments, which were accepted by the HCC. According to the commitments, the two associations undertook to withdraw the press releases and announcements of mid-August 2010, to publicise this withdrawal to their members and in the press, and to refrain from any similar announcement or any other action recommending or tending to recommend. In case of the associations' non-compliance, the HCC could impose fines up to 10% of their members' annual turnover..

### **5.3 Foreign Language Schools case**

28. In 2012, the HCC also accepted the commitments proposed by the Panhellenic Federation of Language School Owners, referred to as the "Palso Federation", with respect to the non-compete clause included in the statute of association of the trade association.

29. In particular, the commitment referred to the amendment of one Article contained in the Articles of Association of the Palso Federation, which obliged its members to only apply for the foreign language examinations awarding certificates recognized by the Palso Federation. The aforementioned clause which prohibited foreign language schools members to the association from enlisting their students at competitive foreign language examinations violated both Article 1 of the Greek Competition Act and Article 101 TFEU. In particular, it was assessed that the above clause aimed at eliminating competition from rival institutions organizing foreign language examinations and resulted by effect to hindering the effective entry of such institutions to the market, taking into consideration the market share of the Palso Federation, the market shares of its members in each prefecture of Greece and the scope of the practice. Moreover it affected competition between the members of the Palso Federation and vis-a-vis third parties by coordinating their market behaviour. The Palso Federation offered to amend the above statutory clause so that its members may participate at foreign language examinations for all skill levels, organised by the State or recognised by the competent Greek or non-Greek accreditation bodies.

### **5.4 Fuel Trading Companies case – The first case dealt with under the new Notice**

30. The HCC, following an ex officio investigation, by a unanimous decision (No 602/2015) accepted commitments proposed by 9 wholesale fuel companies, namely "HELLENIC FUELS S.A" (former BP Hellas), "EKO S.A.", "AVIN OIL S.A." "CORAL S.A." (former Shell Hellas), "CYCLON HELLAS S.A.", "ELINOIL HELLENIC PETROLEUM COMPANY S.A.", "AEGEAN OIL", "MAMIDOIL-JETOIL S.A" and "REVOIL S.A.", so as to meet the competition concerns expressed to them by the HCC.

31. In its decision, the HCC examined whether the transfer of proprietary rights over land and gas station premises and the concurrent entry into long-term exclusive cooperation agreements between the owner/operator of the gas station and the trading company, gave rise to competition concerns within the meaning of Articles 101 TFEU and 1 of the Greek Competition Act. The undertakings under investigation entered into commercial lease agreements with gas station operators and subsequently subleased the stations back to their lessors or to third parties connected to them, while at the same time they signed exclusive commercial cooperation agreements with same sub-lessees for a duration exceeding 5 years or for an indefinite duration upon tacit renewal. As a result, the 5-year limit for non-compete clauses was circumvented, with certain terms reaching up to 22 years. Some commercial and sub-lease agreements also contained reciprocal termination clauses.

32. According to the HCC's preliminary assessment, the above agreements might give rise to competition concerns within the meaning of Articles 101 TFEU and 1 of the Greek Competition Act, because they amount to a non-compete obligation of more than 5 years, thus excessively restricting the petrol-station operator's contractual freedom and hindering entry and/or expansion in the retail fuel markets. In order to address the preliminary concerns expressed to them by the HCC, the 9 wholesale fuel trading companies concerned offered commitments.

33. In summary, according to the commitments, the fuel trading companies agreed to:

- Refrain from entering into any such future arrangements exceeding 5 years,
- Gradually terminate all such existing arrangements, based on a specific timeframe relative to the time of their conclusion, thereby ensuring both the independence of the contracting petrol-station operators in their business decision-making and any outstanding financial requirements of the trading companies, and
- Inform the petrol-station operators concerned about the time and procedure for terminating the said contracts.

34. The HCC made the above commitments binding on the undertakings concerned, thereby finding that there are no longer grounds for further action, without such decision concluding whether or not there has been or still is an infringement. In case of non-compliance by the fuel trading companies concerned, the HCC may impose fines in accordance with the Greek Competition Act.

#### **5.4 *The Tobacco Manufacturers case***

35. In this case, (Decision No 612/2015), the HCC accepted commitments proposed by four (4) leading producers and importers of tobacco products in Greece (Papastratos SA, the Philip Morris Int'L affiliate, British American Tobacco SA, Karelia Cigarette Manufacturing Co and Imperial Tobacco Hellas SA.) and the local distributor of Japan Tobacco (Athanassiou SA.).

36. The tobacco companies agreed to amend certain clauses in their distribution agreements with local distributors in Athens, Thessaloniki and Patra and subsequently with distributors in the rest of Greece. The amendments addressed the HCC's concerns of unnecessary restrictions of intra-brand competition amongst distributors and of tentative access of competing manufacturers and importers to each other's sensitive business information, thereby possibly infringing articles 1 of the Greek Competition Act and 101 TFEU.

37. The HCC's investigation was initiated pursuant to a complaint filed by former terminated distributors and their trade associations, alleging that the tobacco producers coordinated to alter their distribution networks simultaneously and refused illegally to supply them with tobacco products. The complainants also alleged that the new distribution systems operated by the said tobacco producers caused anti-competitive cumulative effects. With the same decision, the HCC rejected allegations of the complainants pertaining to concerted practices, abuse of sole and collective dominance, cumulative effects, resale price maintenance and a request by the complainants for the adoption of structural measures whereby they would continue being supplied by the companies under the same terms<sup>1</sup>.

---

<sup>1</sup> In particular, the HCC held that the evidence it examined was not sufficient to substantiate an anticompetitive horizontal agreement between the tobacco companies; instead it indicated that the restructuring of their networks at wholesale level –ranging from exclusive distribution to non-exclusive arrangements- was sufficiently justified and consistent to normal commercial behavior. It also rejected

### 5.5 *Supply of electricity from PPC S.A. to Aluminium of Greece S.A.- A case in the context of an interim measures procedure*

38. In this case, the HCC accepted commitments proposed by the Public Power Corporation S.A. (PPC S.A.), the incumbent producer and supplier of electricity in Greece, so as to meet the preliminary competition concerns expressed by the HCC. The HCC's investigation in the markets for the production and trade of electricity was initiated following a complaint by Aluminium of Greece S.A. (Aluminium) and its parent group Mytilineos Holdings (group of companies also active in the energy sector) for alleged abuse of dominance by PPC (article 102 TFEU and art. 2 of the Greek Competition Act). Aluminium is the biggest high voltage electricity consumer (manufacturer of aluminium). The complainants alleged that PPC refused to supply Aluminium and imposed on the latter unfair and discriminatory trading conditions, thereby also foreclosing a competitor in the upstream electricity production market. It should be noted that the case, similarly to the flour mills case mentioned above, was initiated within the framework of an interim measures procedure. Following a proposal by PPC, the investigation closed with the issuance of a commitments decision.

39. On the basis of the commitments proposed by PPC, in summary, PPC agreed to:

- Immediately withdraw its request to the power transmission operator (“ADMIE”) to no longer represent Aluminium's electricity meters, revoke the declaration of discontinuation of power supply to Aluminium and the termination of the commercial relationship for power supply with the latter and, subsequently, publicize the said retraction.
- Continue to supply Aluminium on the current terms and conditions.
- Conduct negotiations with Aluminium concerning the fees for the supply of electricity to Aluminium on the basis of the pertinent legislation and regulatory framework, to be completed within 3 months with the conclusion of a supply agreement between the parties.
- Abstain from similar actions until the conclusion of the negotiations / the resolution of the dispute, provided that Aluminium continues to pay the fees it currently pays.

40. The HCC made the above commitments binding on the undertaking concerned without concluding whether or not there has been or still is an infringement. In case of non-compliance by PPC S.A., the HCC may impose fines in accordance with the Greek Competition Act.

### 5.6 *Steel Sector case*

41. In the context of an *ex officio* investigation in the steel sector, the HCC decided, upon majority vote, to accept and make binding – pursuant to Art. 25 para. 6 of the Greek Competition Act – the commitments proposed by the three largest steel producers in Greece, namely SIDENOR SA, HELLENIC HALYVOURGIA SA and HALYVOURGIKI SA, and by their trade association, ENHE, to address competition concerns in the market for the production of steel products.

---

allegations of resale price maintenance and setting of profit margins, based on the fact that tobacco companies are obliged by law to place maximum resale retail prices on tobacco products, whereas retailers are prohibited from selling tobacco products at prices below those indicated on-pack, therefore any increase in inter- and intra-brand competition would not directly impact price at retail level. The request for the adoption of structural measures was rejected on account of the fact that their adoption would presuppose a violation but also because it would go against the principle of proportionality and the prevailing freedom of the undertakings to plan their distribution networks. The HCC also recognized the existence of strong and established players in the market, a sufficient level of intra-brand competition which counterbalanced any exclusivity arrangements and insignificant market shares tied up with multiple exclusive dealership arrangements.

42. In particular, the three steel producers agreed to change the terms and conditions of their ongoing cooperation within their trade association, so as to ensure that any information exchanged in that context does not increase the prospects of them coordinating their business policy. In case of non-compliance with the said commitments, the HCC may impose considerable fines on the undertakings and the association of undertakings concerned.

### **5.7 *The DEPA case in the gas supply market – a series of commitments decisions & modifications thereof***

43. In its decision of 12 November 2012, the HCC accepted commitments offered by DEPA, the Greek incumbent gas supplier, with a view to speeding up the liberalisation of the Greek gas supply market. DEPA is dominant in the market of natural gas supply and the secondary market of natural gas transmission.

44. The commitments evolve around four main axes: a) the unbundling of gas supply from gas transportation services, b) providing for a higher degree of customer mobility and increase of liquidity in the market of natural gas, c) the introduction of fair, transparent and non discriminatory contractual terms and d) the gradual opening of reserved capacity in the natural gas transmission network. In particular, the commitments provide for:

- The unbundling of supply from transport is addressed through DEPA's obligation to untie contractually the two products/services by offering to its clients a gas supply contract, not including transportation services. The price of supply of natural gas will be the same in both types of contracts.
- A higher degree of customers' mobility is achieved, firstly, through the renegotiation of annual contractual gas quantities (ACQs). In particular, DEPA had to inform all its clients by 30 November 2012 that they may re-assess (without any limit as to quantities declared) their ACQ for 2013. Furthermore, regarding new contracts or in case of renewal of existing contracts DEPA: a) will inform its clients that they may opt for a one-year duration contract and b) will not enter into contracts of a duration longer than two years with customers that purchase more than 75% of their actual gas supply needs from DEPA.

45. In addition, an auction system shall increase liquidity in the market of natural gas supply. DEPA committed to auction each year 10% of its yearly gas supply to customers. The first auction has taken place on 11 December 2012 and thereafter auctions take place every three months, and following an amendment of the commitments on 2014, in addition to these auctions an annual auction is held.

- With a view to enhancing contractual transparency and to ensuring the use of FRAND terms, DEPA committed a) to adopt model contracts to be approved by the Regulatory Authority for Energy (RAE) and published on DEPA's website for: i) the sale and storage of Liquefied Natural Gas (LNG) and ii) the transfer of transmission capacity at the network exit points and b) to model a pricing system for peak gas based on the consumption profiles of each customer and the cost actually incurred by DEPA.
- Finally, the HCC accepted commitments leading to the opening of sufficient capacity at the entry points of the transmission network for third importers and customers, in order to enable capacity acquisition at the primary market of gas transmission and thus the possibility to find alternative sources of supply.

46. The above commitments were offered by DEPA following a statement of objections issued by the HCC in July 2012 against both DEPA and DESFA, the dominant Greek operator of the gas transmission system. According to the Statement of Objections, DEPA abused its dominant position by foreclosing its clients and competitors from accessing the gas network and imposing de facto exclusivity contracts, thus preventing clients from purchasing gas from other suppliers.

## **5.8 Decisions revising the DEPA commitments**

47. Following extensive consultation with customers of DEPA, and in collaboration with the Regulatory Authority for Energy (RAE), the HCC decided to revise and update its former commitments decision of 2012 (551/VII/2012). The revised commitments decision focused on the specific terms and conditions for the supply of natural gas through electronic auctions, the purpose being to promote a more efficient functioning of electronic auctions (based on the experience accumulated thus far), to increase participation in the said auctions, as well as to optimize sources of natural gas supply for customers and wholesale suppliers.

48. In particular, the HCC accepted a proposal from DEPA to partly revise the commitments adopted with earlier HCC's decisions (551/VII/2012, 589/2014 and 596/2014), and in particular to amend the specific terms of the system for the supply of natural gas through electronic auctions (gas release programme), also in view of the forthcoming annual auction. This partial revision aims at promoting a more efficient functioning of electronic auctions at a transitional phase, until assessment of the effects that may result from the application of the recently enacted Law 4336/2015.

49. Given the recent broadening of the Selecting Natural Gas Customer group and the resulting possibility thereof to be directly supplied with natural gas through auctions conducted by DEPA, as well as the change brought to the scheme of the existing three Gas Suppliers Companies (amendments that were recently adopted by Laws 4336/2015 and 4337/2015), the HCC shall revisit the matter of the natural gas disposable quantities through auctions, in collaboration with the Regulatory Authority for Energy (RAE), also taking into account the evolution of demand at the forthcoming annual auction.

## **6. Concluding remarks**

### **6.1 The Greek paradigm**

50. Commitments may immediately, fully and efficiently deal with competition concerns whilst allowing for a better allocation of administrative resources. The possibility of offering commitments at an early stage of the procedure, coupled with the sufficiency of *prima facie* (and not conclusive) evidence of an infringement, may promote flexibility and shorten the time frame for the resolution of pending cases, in the interest of increased administrative efficiency.

51. However, in the Greek paradigm, those perceived benefits have yet to materialize to the fullest. Albeit the significant progress made in the course of the last years, the benefits in terms of procedural efficiency are still relatively limited, primarily because commitments are usually being proposed by the implicated parties only after the issuance of a statement of objections (and not earlier in the process).

52. This is the main reason that prompted the HCC to issue a new Notice (see point 2 above), with a view to encouraging companies to engage with the Authority and propose commitments prior to the notification of a statement of objections. Under the new Notice, the Directorate-General may actually play an active role in this direction, by informing on its own initiative companies about the possibility of undertaking commitments in a specific case, as early as possible in the process. This is expected to yield significant benefits in the terms of procedural efficiency in the future.

53. As an aside, and although structural or behavioral measures can also be imposed in an infringement decision, the measures accepted in the context of a commitment decision, allow the HCC, the undertakings involved and third parties to engage in an open dialogue so as design the most appropriate remedies in a cooperative way. In turn, the cooperative manner of commitments allows for a more detailed identification of the appropriate measures, which is also more tailored to the specificities of certain markets (e.g. energy or technology markets) and to the business needs of the parties involved. Therefore,

commitments may go further in remedying complex competition concerns, as compared to corrective measures imposed in a decision finding an infringement. The DEPA case (see point 5 h above) eloquently manifests this advantage: the HCC worked closely with the energy regulator (RAE) and DEPA and eventually accepted a commitment to organize electronic auctions and thereby auction 10% of its annual quantity. This could not have been imposed in an infringement decision and proved to be of utmost importance for customers of DEPA (as it was the only gas release program in Greece, pending legislative and other legislative reforms). The HCC, responding to requests by DEPA and other players in the gas market, has repeatedly revisited the decision and amended the rules applicable to electronic auctions, thereby allowing for a more targeted and sustained intervention in the gas supply market (notwithstanding the challenges involved in monitoring the implementation of the commitments).

## **6.2 *Balancing of risks***

54. The extensive use of commitment decisions entails a risk that the parties involved may possibly delay or manipulate the process, so as to avoid an infringement decision, to the detriment of the deterrent effect of a fine and the legal clarity of an infringement decision. There is also an increased concern that commitment decisions may have a chilling effect on follow-on damages actions.

55. The Notice and the decisional practice of the HCC aim at minimizing both these risks, by applying rigorously and in a coherent manner the criteria of appropriateness and eligibility of cases to be resolved by commitments (i.e. notably by consistently rejecting commitments for serious infringements of competition law – see point 2 above).