

The *Greek Lignite* case

Article 106 TFEU rebooted against firms with special or exclusive rights

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On 17 July 2014, the European Court of Justice (the ECJ) affirmed the conventional wisdom that the European Commission (the Commission) has sweeping powers under article 106 of the treaty on the functioning of the EU (TFEU) in dealing with ex-state monopolies or firms upon which the state has conferred “special or exclusive rights”.

While the treaty is in principle agnostic on the issue of whether member states can maintain state-owned undertakings, or indeed grant special or exclusive rights, it has in the past used the hybrid provision of article 106 as the basis upon which to attack a firm indirectly by effectively challenging the legitimacy of the member state measures which have conferred the problematic benefit upon it. In doing so, it has relied on the logic of article 102 TFEU, which prohibits the abuse of a dominant position.

The scope of the European Commission’s powers had been considered to have been significantly restricted when the General Court overturned the Commission’s original Greek Lignite decision.

The 2008 Commission decision

In its decision, the Commission concluded that DEI, a former state-owned monopolist in the Greek energy market, had acted contrary to the terms of article 106(1) TFEU, having continued to maintain a dominant position on the wholesale electricity market by taking advantage of a state measure conferring upon it privileged access to lignite resources (the primary fuel for the generation of electricity). Despite competitor interest in access to lignite reserves, no exploitation rights had been granted by the Greek state to third parties in relation to the remaining unexploited lignite reserves in Greece.

The Commission found that this privileged access to lignite created a situation of inequality of opportunity between economic operators, thereby allowing DEI to maintain or reinforce its dominant position in the Greek wholesale electricity market (still at 85% market share in a theoretically liberalised market, while also enjoying 97% market share on the downstream lignite supply market).

General Court appeal of 2012

According to the General Court, however, the Commission’s conclusions could not be sustained because it had failed to identify any actual abusive behaviour on the part of DEI, and had also failed to establish any particular abuse to which DEI had been induced or to which it could have been induced by the grant of the privileged access to lignite deposits in Greece.

Material to the General Court’s judgment was the observation that large reserves of lignite had remained unexploited in Greece. Accordingly, this failure to exploit could not be imputed to DEI, since it was the Greek state that

was responsible for the granting of the relevant lignite extraction licenses.

Moreover, the General Court was of the view that “the mere fact that the undertaking in question 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. The Commission had not established to the General Court’s satisfaction that privileged access to lignite was capable of creating a situation in which, by virtue of the mere exercise of its exploitation rights, DEI was able to commit abuses of a dominant position on the wholesale electricity market or was led to commit such abuses on that market. In the light of these considerations, the General Court annulled the Commission’s decision.

In so holding, the General Court seemed to be severely limiting the application of article 106(1), by appearing to equate the standard of proof for the establishment of an infringement under article 106(1) TFEU with the standard of proof which the Commission is expected to discharge in an action under article 102 TFEU for a firm’s alleged abuse of a dominant position (insofar as it seemed to be expected by the General Court that proof of likely anticompetitive effects was required to flow from the grant of exclusivity).

The appeal before the ECJ

In overturning the General Court’s judgment on appeal, the ECJ held that the legal standard established by the General Court was incorrect, as the Commission was not required to identify or establish that an actual abuse had occurred or a particular abuse could have occurred as a result of the state measure at issue.

The ECJ repeated its well established case law, according to which a member state may be found to have infringed article 106(1) TFEU if its measures create a situation in which a public undertaking or an undertaking on which it has conferred special or exclusive rights, merely by exercising the preferential rights conferred upon it, is led to abuse its dominant position, or when those rights are liable to create a situation in which that undertaking is led to commit such abuses. In that respect, the ECJ reiterated that it is not necessary that any abuse should be found to have actually occurred, but merely that a clear inducement to so act was available.

In addition, the ECJ noted that the existence of an equality of opportunity between the economic operators is a fundamental element of the principle of undistorted competition. Thus, if a state measure creates such inequality, it will be regarded as giving rise to an infringement of article 106(1) TFEU, read together with article 102 TFEU.

Thus, consistent with the opinion expressed by Advocate General Wathelet (5 December 2013), the ECJ concluded that

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the relevant treaty rules may be infringed irrespective of whether or not any abuse is shown to have actually occurred. Rather, such an infringement may be established where the state measure at issue affects the structure of the market by creating unequal conditions of competition between competitors, thereby allowing the public undertaking or the undertaking that was granted special or exclusive rights to maintain, strengthen or extend its dominant position over another market.

Implications of ECJ judgment

Legal rationale

From a legal perspective, the ECJ's judgment has left no doubt that, in pursuing an action under article 106 TFEU, the Commission is entitled to presume that anticompetitive effects are likely to flow from the mere creation of unequal conditions of competition (in this particular case, the grant of privileged access to lignite deposits). As long as the potential anticompetitive effects can be identified from the existence of such privileged access, it is not necessary for the Commission to establish the existence of actual anticompetitive harm. The General Court had, by requiring the Commission to demonstrate an abuse of dominant position in order to establish an infringement of article 106 TFEU, sought to change the scope of the traditional breadth of powers enjoyed by the Commission under that provision.

The whole structure of article 106, read in conjunction with article 102, does not suggest that any effects-based test is appropriate for its application, as had been suggested by the General Court. To have insisted on such a link would have been, in effect, to assimilate the practice under article 106 with that of article 102. This would render article 106 largely superfluous if one needs to prove in each case that an actual instance of abusive behaviour will occur. By contrast, article 106 TFEU is tantamount to the censure of a “by object” infringement, whose logic flows directly from the fact that the conferred exclusive right (or the comity of interests between the state and the beneficiary) is of importance vis-à-vis other markets in which the beneficiary operates.

Those markets might be upstream, downstream, neighbouring or ancillary to the principal market in which the right is granted, but they are all potentially prone to the beneficiary firm leveraging its undisputed market power into those other related market areas. It will be the mere creation of unequal conditions of competition by a state measure (in this case, the grant of exclusivity) which is sufficient to establish a presumption that the firm in question is in breach of article 106(1) TFEU if it is in some way incentivised to engage in anticompetitive behaviour. Where markets are economically related, it will be a logical analytical step to conclude that the “unequal conditions of competition” that have been effected by the state measures are capable of triggering the presumption under article 106(1) TFEU.

Thus, the only real causal link that needs to be drawn is that between the market in which the right is conferred and a commercially related market. It will indeed be rare in sectors characterised by monopoly rights or state affiliations that those causal links will not be as obvious as they are material. The

presumption of such a causal link lies at the heart of the logic found in the classic *RTT*, *ERT*, *Porto di Genoa* and *Höfner* judgments of the European Courts over the years. In this sense, the ECJ in *Greek Lignite* is returning us back to familiar territory.

Enforcement implications

After years of inactivity in the enforcement of article 106 since the 1990s, it is now clear that the Commission has a major weapon back in its arsenal. That weaponry might be used across a range of fully or partially liberalised sectors, where some firms cling on to exclusive rights as the basis upon which they can “overhang” into other areas of economic activity that would otherwise be competitive. Thus, seen more broadly, the judgment confirms that, while there is nothing in the treaty that prevents member states from having ownership stakes in firms in strategic economic sectors (especially utility sectors), firms enjoying the fruits of historical state-sanctioned monopoly will be subject to an even higher level of scrutiny than their private sector counterparts, given that their privileged position will always mean that they can adversely affect the structure of relevant markets.

Given the clarity with which the Court has expressed its views, the onset of a new Commission president and competition commissioner is unlikely to change that aspect of competition law enforcement in the foreseeable future, regardless of the “industrial policy” rhetoric that is swirling around Brussels decision-making at this moment in time. In any event, even the industrial policy rhetoric is clear on its face that the creation of European champions, while a laudable goal, is not coterminous with the creation of individual national champions across the length and breadth of the European Union.

Local flavour

The delivery of the European Court of Justice judgment could not have been more timely, given that Greece is in the advanced stages of its privatisation of DEI, while, at the same time, seeking to opening up the electricity market to competition by long overdue legislative reforms designed to implement EU obligations.

From an economic perspective, the judgment will hopefully provide some impetus for the shifting of the virtual tectonic plates between energy liberalisation on the one hand and the entrenched position of DEI on the other. There is an urgent need for a real opening of the Greek energy market to occur for the benefit of consumers and businesses alike. The other side of that economic coin, however, may be less appealing to a Greek state that is still so desperate to generate revenues, as the judgment will have an inevitable impact on DEI's perceived value in the marketplace in the light of its imminent privatisation.

Beyond the energy sector, the logic of *Greek Lignite* should play an important role in Greece's plans in the selling off of its metaphorical family silver across a range of industrial sectors. The temptation to make the purchasing price that little more attractive by granting prospective buyers “special or exclusive rights” – either directly or indirectly through the grant of other advantageous terms – should be avoided. If the price for paying off Greece's debts is that its core industries will develop distorted competitive structures, it is a price that is surely not worth paying.