

Concurrences

e-COMPETITIONS | ANTITRUST CASE LAWS e-BULLETIN

The Hellenic Competition Commission finds that a COVID-19 rapid-tests wholesaler has not participated in bid-rigging on the basis of a series of indicators of pure parallel conduct (*Prognosis*)

July 2024 | e-Competitions News Issue

Christodoulou Vasileios

cvasilis18@gmail.com

Student

National and Kapodistrian University of Athens (Athens)

The Hellenic Competition Commission finds that *Prognosis* has not participated in bid-rigging for providing rapid tests on the basis of a series of indicators of pure parallel conduct*

Introduction

Hellenic Competition Commission (HCC)’s Decision No. 850/2024 is a rare example of cases where the national watchdog found that a violation of competition law has *not* taken place. The case concerns *Prognosis*, a COVID-19 rapid-tests wholesaler, which participated in a public tender and offered exactly the same offer as three cartelists which admitted their fault. HCC, co-estimating a series of factors, found the price coincidence to be random and, thus, compatible with article 101 TFEU.

Legal Background

The basic legal question posed before the HCC was under which circumstances does parallel behaviour equal to a concerted practice prohibited by articles 101 TFEU and 1 of law 3959/2011. According to ECJ Judgment in Case 48/69, *ICI v. Commission (Dyestuffs)* “parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it

leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market (para 66)”. In other words, in cases where the parallel behaviour substitutes cooperation against the normal risks of competition in the market, it may constitute an indicator of anti-competitive practice (Amira Abdel Ghaffar, *Concerted practices*, Global Dictionary of Competition Law, Concurrences, Art. N° 12332).

A closely related question concerns the burden of proof in cases of parallel behaviour. Mentioning the presumption of the judgment in Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *Ahlström*, where the ECJ ruled that “parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only *plausible* explanation for such conduct” only leads half the way, since it needs to be framed by two important clarifications. *Firstly*, following the case-law of Greek administrative courts (Athens Administrative Court of Appeals Judgment no. 2094/2007) the competition authority may apply the aforementioned presumption even when it is *probable* (instead of certain) that concertation constitutes the only plausible explanation. *Secondly*, that presumption is rebuttable, since the undertaking concerned can prove that there are alternative explanations (Roundtable on Safe Harbours and Legal Presumptions in Competition Law – Note by the European Union to the OECD, 2017, p. 3; Italian Council of State, 2012, no. 3026, *Prezzo del GPL*).

Factual Background

On November, 30, 2021, the National Centralized Health Procurement Authority published a call for tenders for the urgent procurement of 9,516,600 SARS-CoV-2 rapid tests, with the most economically advantageous tender (based solely on the price) being the award criterion and a total estimated value of 28,549,800.00 euros. The tender provided that the national authority would choose as many offers as necessary in order to reach the total of 9,516,600

rapid tests; that is, the tenderers were not obliged to make a bid for the total quantity of rapid tests. Moreover, in case more tenderers made the exactly same offer cumulatively exceeding the required number of rapid tests, the contract would be awarded by draw.

Interestingly, four bidders offered exactly the same price (€ 0.8890); INEX made an offer for 3,800,000 rapid tests, LAINIOTIS made an offer for 3,216,600 tests and

VIOLAK made an offer for 2,500,000 rapid tests, while PROGNOSIS submitted an offer for the total amount of 9,516,600 rapid tests. HCC, with decision 828/2023, imposed a total fine of €373,943.38 on the first three undertakings for bid-rigging through the submission of tied bids. Decision 850/2024 concerned the liability of the fourth bidder and found that, contrary to the concerted practice of the first three bidders, PROGNOSIS' bid constituted lawful parallel behaviour, based on a series of indicators analysed below.

The critical indicators

HCC found that PROGNOSIS' bid was a case of legal parallel behaviour taking into account a series of indicators, which may be summarised in three major categories.

Firstly, HCC took into consideration indicators concerning the relationship between PROGNOSIS and INEX, LAINIOTIS and VIOLAK (hereinafter referred to as “three cartelists” or “three undertakings”). The relevant indicators may be further divided to elements arisen in the course of the specific tender and elements arisen in the course of other similar tenders. As to the specific tender, HCC noted that there was no evidence that PROGNOSIS participated in any meeting or had any communication at all with the three cartelists before submitting its bid; besides the three cartelists admitted that they coordinated their bids, stating however that they had no communication with PROGNOSIS about the bids. All the more, HCC noted as to the execution of this tender that PROGNOSIS became neither a subcontractor nor a supplier of the three undertakings. As to any subsequent tenders, it is noted that PROGNOSIS did

not collaborate with these undertakings, e.g. as members of the same joint venture

Another element concerning the relationship between the four undertakings was the legal dispute following the award of the contract. More precisely, PROGNOSIS' bid was excluded on the grounds of not submitting an adequate (as to the required amount) letter of guarantee. PROGNOSIS disputed that decision of the contracting authority before the Hellenic Single Public Procurement Authority; nevertheless, its quasi-judicial appeal was dismissed due to the lack of electronic signature (HSPPA Decision No. 564/2022). Despite the appeal being inadmissible, HCC considered that the legal dispute constituted an indicator of lack of coordination; nevertheless, in my opinion, such inadmissible legal actions shall not be taken into account or only be taken into account in a limited manner.

Secondly, the price offered by PROGNOSIS can be explained from an economic perspective on the basis of two factors. On the one hand, in contrast to the three cartelists PROGNOSIS was able to produce its own rapid tests instead of importing them. On the other hand, this tender provided for a contract from the provision of a very large number of rapid tests which would lead to a substantial *total* profit for the contractor. Thus, PROGNOSIS had the opportunity to offer a better price *per item* in comparison with previous similar tenders which provided for a smaller amount of rapid tests to be supplied.

Thirdly, HCC highlighted the structure of the tender. Had PROGNOSIS' bid been admissible, the contractor would have been chosen by draw, therefore it would be either PROGNOSIS alone or the three cartelists altogether that could be awarded the contract. In other words, the structure of the tender eliminated the possibility that all the four undertakings had a common interest in submitting the same price for the quantities of rapid tests that they offered.

It is noted from the outset that HCC globally examined the abovementioned indicators. Although from a methodological point of view one could argue that the economic explanation of the bid should be examined well before the other factors, since in case there was another economic explanation the examination of the other factors would be without due cause, the global examination of the indicators also constitutes a justified methodological choice.

Conclusions

The commented decision offers a characteristic example of lawful parallel behaviour. Despite any methodological concerns, the decision constitutes a useful guide as to the indicators which distinguish

between any illegal coordinated practices and the lawful parallel behaviour of more undertakings. The categorisation followed by this comment illustrates the *systemic* role and importance of each indicator for distinguishing between lawful and unlawful parallel conduct.

> Concurrences + ... *Quote upon request*

Unlimited access to the entire database

- 12 issues of the Concurrences Review with 15,000 archives
- 45 issues of the e-Competitions Bulletin with 30,000 archives
- 75+ eBooks and printed versions of books published during your subscription
- 650+ conference materials: summaries, transcripts, audio files, PPT presentations

Premium services

- Access to the ConcurrencesAi tool to facilitate your legal research
- Option to download PDF versions of all articles and documents
- Named user access and access via IP addresses

> Concurrences Select *Quote upon request*

- 12 issues of the Concurrences Review with 15,000 archives
- 45 issues of the e-Competitions Bulletin with 30,000 archives
- 650+ conference materials: summaries, transcripts, audio files, PPT presentations
- Named user access and access via IP addresses

> Concurrences Basic *Quote upon request*

- 12 issues of the Concurrences Review with 15,000 archives
- 45 issues of the e-Competitions Bulletin with 30,000 archives
- Named user access

For any additional information or to request a customized quote, please contact us at **subscriptions@concurrences.com**. A member of our sales team will be delighted to respond within 24 hours.

You can also reach us directly by phone at **+33 6 95 25 93 33**.

To enjoy a free trial,
please **[click on this link](#)**.