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The Greek Supreme Administrative Court overturns the Athens Administrative Court of Appeal's rulings on the calculation of fines in bid rigging cases in the construction sector (*Ergasis / Michaniki / Karkanias...*)

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References: [Greek Supreme Administrative Court, *Karkanias*, Case No. A1301/2024, Decision, 23 September 2024 \(Greek\)](#) | [Greek Supreme Administrative Court, *Michaniki*, Case No. A1302/2024, Decision, 23 September 2024 \(Greek\)](#) | [Greek Supreme Administrative Court, *Axion*, Case No. A1303/2024, Decision, 23 September 2024 \(Greek\)](#) | [Greek Supreme Administrative Court, *Ergasis*, Case No. A1304/2024, Decision, 23 September 2024 \(Greek\)](#)

I. Introduction

The subject-matter of the judgments 1301-1304/2024 is the calculation of fines in cases of competition law violations. More specifically, the Supreme Administrative Court of Greece (hereinafter referred to as Council of State) ruled on the duration of the infringement as a parameter of calculating the fine imposed in cases of bid-rigging as well as on the fine ceiling of 10% of the total turnover.

II. Background

In order to illustrate the legal aspects of the judgment it is necessary to clarify both the procedural and the factual background of the case. From a procedural perspective, the Council of State ruled as a last degree court, that is as a court whose judgment is not subject to any further judicial remedy under national law. In particular, the Hellenic Competition Commission (HCC) filed before the Council of State an appeal against a series of judgments of the Athens Administrative Court of Appeals, which had (partially) overturned HCC Decision no. 644/2017 as to the amount of the fine imposed.

Moving to the factual background, that is the infringement itself, HCC Decision No. 644/2017 concerned bid-rigging in the tender for “Environmental Rehabilitation - Regeneration X.AD.A. of Prefecture of Pella” between nine undertakings active in the construction sector. HCC defined the relevant market as that of the tenders for public works at national level and found an infringement since “*the nine companies held a multilateral meeting before the tender in a Hotel [...] during which they prepared a plan for the prior: a) determination of contractor of the project, b) the offered discounts that would ensure its promotion with the lowest possible discount (pricing) and c) the submission of coverage offers*” ([link](#)). On that note, one additional fact, clearly stated in the Council of State judgment, is critical; the nine contractors had

also agreed to a system of subcontracting agreements in order to share the profits of the project of an estimated budget of 4,470,000.00 €.

III. Duration of infringement in cases of bid-rigging

One of the grounds on which the Administrative Court of Appeals based the amendment of the imposed fine was the wrongful determination of the infringement duration. Three moments are critical; *firstly*, the meeting between the competitors (29.11.2010), *secondly*, the day of entering into the public contract (30.12.2010) and *thirdly*, the signing of subcontract agreements (18.04.2011).

HCC found that the infringement lasted six months (29.11.2010 to 18.04.2011) for the first four undertakings (Ergasis, Michaniki, Karkanias, Axion) and one month for the rest of the undertakings. On the contrary the Administrative Court of Appeals found that the duration of the infringement for the first four undertakings only lasted two months (29.11.2010 to 30.12.2010). The Council of State upheld the Administrative Court of Appeals judgments clarifying that the implementation of the compensation mechanism (established through the subcontracting agreements) was not part of the infringement but rather an element of its gravity.

The Council of State referred to the CJEU ruling in case C-450/19, *Kilpailu- ja kuluttajavirasto*, according to which “*in [bid-rigging cases], the restrictive effects of the cartel on competition disappear, in principle, at the latest at the time when the essential characteristics of the contract, and in particular the overall price to be paid for the goods, works or services which are the subject of the contract, have been definitively determined, where appropriate, by the conclusion of a contract between the successful tenderer and the contracting*

authority, as it is at that moment that the latter is definitively deprived of the opportunity to obtain the goods, works or services in question under normal market conditions” (para. 35). Therefore, it is not the completion of the project but rather the signing of the public contract that constitutes the end of the infringement.

The Council of State’s ruling successfully supplements the CJEU case law stating that it is neither the implementation of the compensation mechanism that marks the end of a bid-rigging. All the more, Council of State went on to explain that “the question on whether the existence of a compensation mechanism reflects **the gravity of the infringement** [...] is a different one”. Thus, the reprehensibility of the compensation mechanism may be taken into account by competition authorities (as a matter of *gravity*) without unlawfully extending the notion of “duration” as established under EU competition law.

IV. Legal maximum

HCC Guidelines on imposing fines are similar to the Guidelines adopted by the European Commission. Fine calculation consists of three stages: *firstly*, the calculation of the basic amount of the fine with reference to the value of sales in the relevant market; *secondly*, the adjustment of the basic amount to reflect any aggravating or mitigating circumstances; and *thirdly*, the fine decrease if it exceeds 10% of the total turnover.

HCC applied a proportion of 15% to the value of sales for determining the basic amount; Athens Administrative Court of Appeals found that this proportion exceeded the legal maximum of 10% provided for in HCC Guidelines. The Council of State ruled that the Administrative Court of Appeals misinterpreted the Guidelines; the 10% legal maximum of the total turnover is the last part of the fine calculation while the proportion to the value of sales merely concerns the determination of the basic amount of the fine. Therefore, the judgments of the Athens Administrative Court which determined the basic amount on the basis of the total turnover were overturned.

This part of the judgment shall be correlated with the Judgment in Case T-211/08 where the General Court ruled that “[...] the application of the 10% ceiling

[...] is now the rule rather than the exception for any undertaking which operates mainly on a single market and has participated in a cartel for over a year. In that case, **any distinction on the basis of gravity or mitigating circumstances will as a matter of course no longer be capable of impacting on a fine which has been capped in order to be brought below the 10% ceiling**. The failure to draw a distinction with regard to the final fine that results presents a difficulty in terms of the **principle that penalties must be specific to the offender and to the offence** [...]”. If one revisits the fines imposed on the first three undertakings they will notice the following amendments:

Undertaking concerned	Fine according to HCC	Fine amended by the Athens Administrative Court of Appeals
Ergasis Techniki S.A.	380,721€	10,940.24€
Michaniki Perivallontos S.A.	194,531€	16,837.28€
Karkanias-Technologia Perivallontos S.A.	133,176€	20,051.09€

In other words, while all the four fines were amended on the same grounds (duration and 10% ceiling), *Karkanias* – having only the third highest fine imposed by HCC – had the highest fine imposed by the Administrative Court (*Ergasis*’ case is exactly the adverse example). Therefore, the overturned judgments failed to take into account the different role and profits gained by each cartel participant. In that vein, the Council of State judgment constitutes a practical example of the different roles envisaged by each stage of the fine calculation – the initial proportion is to mirror each undertaking’s participation and the last stage to avoid any excessive fines.

V. Conclusions

To sum up, the commented judgments clarify some key aspects of the fine calculation methodology in a manner that is consistent with CJEU case-law. Therefore, they may be applied *mutatis mutandis* in national legal systems of other EU member states when it comes to determining the duration of an

infringement and the different stages of calculating

competition law fines.

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