

Competition law training Webinar of 5 February 2020

# Participation in Public Hospital Procurement and compliance with Competition Law in Greece.



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# I. The legal framework for effective Competition in connexion with Public Procurement in Greece.

- ❑ In Greece, Free Competition is regulated by Law 3959/2011 on the protection of free competition, which incorporates the provisions of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

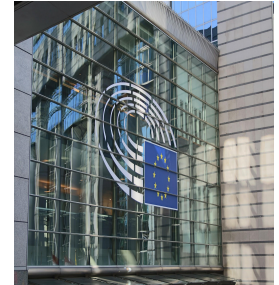
The rules of free competition are basically divided into three broad categories:

Rules prohibiting cartels that hinder / restrict / distort competition between competitors (horizontal cartels) or at different levels of distribution (vertical partnerships), e.g. agreements on prices and other terms of trade, the division of markets between competitors.

Rules on the prohibition of abuse of a dominant position, e.g. restrictions on undertakings holding a dominant position in the relevant market in which are active, in order to protect their customers and competitors. Behaviors that are permissible for small businesses are prohibited for a company with a particularly strong (dominant) market position.

Concentration control rules, according to which Competition Authorities are responsible for considering mergers / acquisitions / joint ventures joint ventures between companies that exceed certain turnover limits, in terms of their potential market effects. Competition Authorities can prohibit the transaction, or enforce the terms and conditions obligations as a condition for the approval of the transaction.

- ❑ Public procurement is regulated by Law 4412/2016 on Public Works Contracts, Supplies and Services, which adapts national legislation to the requirements of the Directive no 2014/24/EE of the European Parliament and of the Council on public procurement.



# A. European and Greek Competition law provisions

## ❑ **Articles 101 & 102 TFUE and articles 1 & 2 of Law 3959/2011**

As per article 101 of TFUE are prohibited “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have their object or effect the prevention, restriction or distortion of competition within the internal market.

As per article 102 of TFUE any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

(\*Articles 1 and 2 of law 3959/2011 follow the wording of articles 101 and 102 of TFUE verbatim.)

## ❑ **Directive 2014/24 EE of the Eur. Parliament and of the Council on public procurement**

Article 57 par. 4, point d of Directive 2014/24 stipulates that “if the Contracting Authority has sufficiently reasonable evidence to conclude that the economic operator entered into agreements with other economic operators with a view to distort competition , may refuse to participate in any of public procurement procedures. See respectively article 73 par.4 point c of law 4412/16.



## B. The prohibition of anticompetitive practices

### ❑ **Cartels between competitive businesses**

It is prohibited for competitive businesses to agree (in a formal or informal way) on a sharing of geographic zone or that a certain activity or a specific type of client will be reserved – entirely or partly – to one or another operator. Identifying and prosecuting cartels, and those who facilitate the creation of cartels, are top priorities of the Competition Authorities in Greece, Europe and worldwide.

### ❑ **Bid rigging and coordination of bids**

In public tenders competitors are forbidden to exchange information during the tender process and coordinating their bids in any way whatsoever. Some forms of undue coordination are “complementary bidding or covering bidding”, “bid rotation”, “bid suppression and subcontracting risk sharing agreement” and “market allocation”

### ❑ **Exchanging of commercially sensitive information between competitors**

Competitors are prohibited to exchange commercially sensitive information like prices, price lists, market shares, rebates or discounts, production or services (or sales) volumes and values, production of services (or sales) forecasts.

### ❑ **Collusion and good understanding**

Any partnership project between competitors requires a case-by-case assessment based on their market position, the goal of their agreement and their contractual clauses. This analysis should be done by the group’s legal department with the help of project managers.



## II. Risks and sanctions of Competition law infringement.

### A. Administrative fines

- ❑ Up to ten percent (10%) company's total turnover. In the case of a group of companies (involved in the infringement), the total turnover of the group is taken into account for the calculation of the fine.
- ❑ Liability of members of the board of directors and the persons responsible for the implementation of the relevant decisions a. are responsible with their personal property in full with the relevant legal entity, for the payment of the amount of the fine, and b. the Competition Commission may impose an independent fine from two hundred thousand (200,000) euros to two million (2,000,000) euros, if they have been proven to have participated in preparatory acts, in the organization or the commission of the illegal behavior of the company.

### B. Penal sanctions

- ❑ Fine of € 100,000-1,000,000 and imprisonment of at least two years for horizontal partnerships,
- ❑ Fine of 15,000-150,000 € for vertical partnerships,
- ❑ Sentence of at least six months imprisonment for obstructing or complicating the investigations of the Hellenic Competition Commission in any way,

## II. Risks and sanctions of Competition law infringement.

### C. Claims for damages

- Any third party, natural or legal, who has suffered damage as a result of an infringement of Free Competition Law may claim compensation before the competent court for the full restitution of the damage suffered. This includes positive loss, lost profits and interest.

### D. Disciplinary sanctions

- Disciplinary sanctions are applied as a matter of punishment by a superior for breaching the company's internal or general rule.

Examples:



# III. Promoting compliance with Competition law

## A. When participating to professional and business associations and other commercial associations

- ❑ Sof Medica may be represented in professional and business associations by members of management, executives or other members of its staff, to promote its interests, provided that they have taken the appropriate measures to prevent an issue from arising from any involvement in discussions that do not concern sectoral issues and can be considered as participation in anti-competitive practices (eg illegal exchange of sensitive business data / strategic information). In this regard some subjects of discussion should be avoided.

## B. In the performance of communications

- ❑ Company's members should pay attention to the language they use in all professional communications, either are **written or oral, during phone calls or meetings**. The careless use of the language could cause negative consequences, in case of an inspection by the competent competition authorities, or at the time of proceedings before national Courts.
- ❑ An unfortunate expression could be enough to give the impression even for an ultimately legitimate activity, that it is illegal.





## IV. The conduct of unannounced inspection “Dawn raid” by the Competition Commission at company’s premises .

### A. Extent and limits of inspection.

- ❑ The unannounced inspection is an on-site inspection carried out at company’s premises by executives of the General Directorate of the Competition Commission, without prior notice, to check compliance with the provisions of Competition Law, either ex officio or based on a complaint from a customer or competitor.
- ❑ Auditors have the right to request and receive a copy of each document provided that it is relevant to the object of the audit as described in the relevant command.
- ❑ The communication of SofMedica with external lawyers to obtain legal advice, and notes on legal advice are covered by "legal professional privilege ". Such communications may not be examined or seized by the public authorities or received in the investigation of the Directorate-General for Competition or in a lawsuit.



### B. Recommended practices at the time of inspection.

- ❑ It is advisable for everyone to prove calm throughout the process of inspection and to instantly notify the external lawyer. The behavior to Auditors should be polite. You should verify that each auditor is always accompanied by a staff member. In addition you should note what happens during the inspection and always keep copies of the documents seized by the Auditors.
- ❑ Do not hide or destroy related documents / emails because the Competition Commission applies advanced methods of retrieving (electronic) files and therefore even the deleted files can be traced, while the act of deleting the files may be considered as obstruction of the process. Do not react impulsively by making phone calls or discuss internal matters in the presence of Auditors

# We warmly thank you !



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