The Extraction and Exploitation of Lignite by Public Power Corporation of Greece S.A. as a Quasi-Monopoly: The End of an Era

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Abstract

This paper focuses on a significant European Union competition law issue: the granting of exclusive rights to public companies by a State measure. Such a situation is regulated by Article 106(1) of the Treaty on the Functioning of the European Union (TFEU) which makes reference to Article 102 TFEU. The above issue is approached through an examination of the case of Public Power Corporation of Greece S.A., hereafter "Dimosia Epicheirisi Ilektrismou S.A. European Commission". The starting point of this case was a European Commission's decision in 2008, followed by a decision of the General Court of the European Union in 2012, and then by a decision of the Court of Justice of the European Union in 2014, which decided upon the main issue, and then referred it back to the General Court to decide on the remaining pleas; in 2016, the General Court issued its final decision. The paper seeks to clarify the preconditions that should occur in order for the Member State to breach Article 106(1) TFEU in conjunction with Article 102 TFEU.

Keywords. Exclusive rights, competition law, monopoly.

1. Introduction

Article 102 of the Treaty on the Functioning of the European Union (TFEU) plays a central role in the European Union Competition Law establishing an obligation on undertakings not to abuse their dominant position. Article 106(1) TFEU sets up an obligation to the Member States not to enact or maintain any measure which is contrary, amongst others, to the rule provided in Article 102 TFEU. The interrelation between these two Articles is complicated, and the preconditions needed for a violation of Article 106(1) in conjunction to Article 102 are not very clear. However, the jurisprudence of the Court of Justice of the European Union and the General Court of the European Union has enlightened the interrelation between these two articles.

The present article delves into this interrelation, focusing on the particular case of Dimosia Epicheirisi Ilektrismou AE (DEI) (Public Power Corporation S.A) v. European Commission (Judgment of the General Court of 15 December 2016, Dimosia Epicheirisi Ilektrismou AE (DEI) v. European Commission, T-169/08, EU:T:2016:733 (henceforth, Judgment of the General Court of 15 December 2016, T-169/08, DEI-lignite)) upon which the Court of Justice of the European Union gave its

ruling (Judgment of the Court of Justice of the European Union of 17 July 2014, European Commission v. Dimosia Epicheirisi Ilektrismou AE (DEI), C-553/12, EU:C:2014:2083 (henceforth, Judgment of the CJEU of 17 July 2014, C-553/12, DEI-lignite), drew the line that links the above Articles when applied together, held that there was a violation of Article 106(1) in conjunction with Article 102 in that the State measure under question created and maintained inequality of opportunities between the competitors in the electricity wholesale market thus distorting competition in favour of a particular undertaking, DEI, and referred the case back to the General Court of the European Union to decide upon the rest of the issues of the case. An insight into the above case is provided hereby, seeking to highlight the preconditions necessary for the said violation.

2. When Article 106 (1) is applied in conjunction with Article 102 TFEU

Article 106(1) of the Treaty on the Functioning of the European Union provides: "In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109". Article 102 of the Treaty on the Functioning of the European Union provides: "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.

Such abuse may, in particular, consist in:

a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
b) limiting production, markets or technical development to the prejudice of consumers;
c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".

Seeking to understand the interrelation between the above Articles, it is clear that Article 106(1) TFEU establishes an obligation towards the Member States of the European Union not to enforce any measure contrary to Article 102 TFEU. As far as Article 102 TFEU is concerned, "the dominant position referred to in this Article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers" (Judgment of 14 February 1978, United Brands v. Commission, C-27/76, EU:C:1978:22, para. 65). According to the case law of the Court of Justice of the European Union (CJEU). Thus, the dominant position is

regarded to be "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers" (Judgment of 13 February 1979, Hoffman-La Roche & Co AG v. Commission, C-85/76, EU:C:1979:36, paras. 38-39).

It is noteworthy that "if an undertaking has a statutory monopoly over a relevant market, that is the end of the matter. It is in a dominant position. In the absence of statutory monopoly it has been settled case law since Hoffman-La Roche that the starting point for the assessment of dominance is market share" (Jones and Surfin (2016), p. 321).

The European Commission issued a Guidance Paper, in 2009, providing assistance with the assessment of whether an undertaking is in a dominant position, the degree of market power it holds and the relevant factors that combined together result in a dominant position (Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, OJ C 45, 2009, (henceforth the Guidance Paper) paras. 9-11). This Paper states that "it is not in itself illegal for an undertaking to be in a dominant position and such a dominant undertaking is entitled to compete on the merits" (The Guidance Paper, par. 1), adding that "the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market. Article 82 (now 102 TFEU) is the legal basis for a crucial component of competition policy and its effective enforcement helps markets to work better for the benefit of businesses and consumers. This is particularly important in the context of the wider objective of achieving an integrated internal market" (The Guidance Paper, par. 1).

Therefore, abusing the dominant position is illegal, and the two most important types of abuse are exploitative abuses, i.e. "conduct whereby the dominant undertaking takes advantage of its market power to exploit its trading partners (customers or suppliers)" (Jones and Surfin (2016), p. 351), and exclusionary abuses, i.e. "conduct whereby the dominant undertaking prevents or hinders competition on the market" (Jones and Surfin (2016), p. 351). There is also the type of discrimination abuses, "where the dominant undertaking applies discriminatory prices or conditions to its customers or suppliers, thereby placing some of them at a 'competitive disadvantage'" (Jones and Surfin (2016), p. 351).

Regarding Article 106(1) TFEU, it has been submitted in literature that it does not create supplementary obligations for Member States apart from establishing "a specific application of the general obligation of Member States to refrain from adopting or maintaining in force measures which are likely to defeat the effet utile of Articles 85 and 86 [101 and 102]" (Bacon, (1997) 287-288). More analytically, Article 106 TFEU balances the tension between the principle of free competition and the system of property ownership of the member states on undertakings which entails

the creation and maintenance of legal monopolies (Edward and Hoskins (1995) 158). The principle of free competition was depicted as one of the fundamental objectives (Edward and Hoskins (1995) 158) of the European Union in Article 3(g) of the Treaty on European Union signed at Maastricht, and it was further elaborated in Article 3a of that Treaty in a careful phrasing: "the activities of the Member States and the Community shall include […] the adoption of an economic policy which is [...] conducted in accordance with the principle of an open market economy with free competition".

Currently, after the Treaty of Lisbon, Article 119 TFEU restates the same wording as the previous Article 3(a) of the Treaty on European Union signed at Maastricht, while Article 120 TFEU provides that the Member States and the Union "shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources […]".Meanwhile, the system of property ownership regulated by the member states was and still is protected by Article 222 of the Treaty establishing the European Community (Maastricht consolidated version) (Edward and Hoskins (1995) 158), Article 295 of the Treaty establishing the European Community (Amsterdam consolidated version) (http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:11997E295&from=EN (last visited 15/02/2018)), and now by Article 345 TFEU.

To sum up, Article 106 sets a "delicate balance […] between opposing models of economic organisation – the free market versus state planning" (Gardner (1995) 78); "the liberalisation of Europe's regulated sectors has been most dramatically achieved by means of the combined application of Articles 90 [106] and 86 [102]" (Gardner (1995) 79).

In order for a State measure to infringe Article 106(1) in combination with Article 102, three preconditions shall coincide: a. the dominant position of a public or privileged undertaking on a market relevant from an economic point of view, b. the state measure leads the undertaking to behave in such a way as to abuse its dominant position, or has the potentiality to lead it to behave as such, or produces effects similar to those of an abusive behaviour, and c. the effects of the abuse or the State measure are capable of affecting the intra-Union trade (Sierra (2014) para. 6.54).

2.1. The nature of the undertaking as public and its dominant position

At the time the Commission's decision was issued, DEI was a public undertaking (COM (2008), 154) - ex state-owned company (Law No. 1468/1950). Since 2001 (Law No. 2414/1996, Law No. 2773/1999 (article 43) and Presidential Degree 333/2000), DEI has been a public - in the sense of having wide spread ownership - company limited by shares (Society Anonymous) and listed. Currently, the Greek state holds 34,12% of the shares, 17% of the shares was transferred in 2011 by it to the Hellenic Republic Asset Development Fund (which is a private company limited by shares whose unique shareholder is the Hellenic Corporation of Assets and Participations whose only shareholder is the Greek State (Articles 184, 187, 188 of

Law No. 4389/2016; also http://www.hradf.com/en/fund, last visited 15/02/2018), and the rest of the shares belongs: a. 3,81% to Greek social security agencies, b. 45,07% to the general public and institutional investors (https://www.dei.gr/el/i-dei/enimerwsi-ependutwn/xrimatistiriaka-stoixeia/metoxiki-sunthesi, last visited 15/2/2018).

In 2008, the percentage of 17% of the shares also belonged to the Greek state, and so from the point of view of Article 106 (1) (Sierra (2014), para. 6.29), DEI was a public company given that the majority of shares belonged to the state which exercises dominant influence (Commission Directive 2006/111/EC (article 2(b)) upon it. According to the Updated Asset Development Plan, 26.4.2016, (https://ec.europa.eu/info/sites/info/files/ecfin_adp_2016_en.pdf), the 17% of the shares has been planned to be sold in terms of a privatisation method. The sale of this 17% quota of DEI by the State was, also, mentioned in the Second Economic Adjustment Programme for Greece – Third Review – July 2013 (Occasional Papers 159, par. 87) as part of the privitasation processes related to the energy sector expected to have been completed by early 2016 (http://ec.europa.eu/economy_finance/publications /occasional_paper/2013/pdf/ocp159_en.pdf).

Moreover, Dimosia Epicheirisi Ilektrismou A.E. (DEI) is a listed company limited by shares which, at the time the Commission's decision was issued, was enjoying a quasi-statutory monopoly on the market of lignite supply legislated by the Greek State via the granting of the rights of extracting and exploiting lignite (almost, see below s. 2.2) exclusively to DEI. It was decided by the Commission and held by the CJEU that this practice of the Greek State was contrary to Article 106(1) TFEU in conjunction to Article 102 TFEU, because in this way the State enabled the specific undertaking to maintain or reinforce its dominance on the wholesale electricity market by creating inequality of opportunities between the competitors on the upstream market of lignite supply. Therefore, DEI possessed a dominant position on the upstream market of lignite supply. It also possessed a dominant position on the downstream market – the wholesale electricity market because of its market share which at the time of the Commission's decision reached a share over 85% (see below s. 2.3).

2.2. State measures granting exclusive rights

The exclusive extraction and exploitation rights granted by the State (by virtue of the Legislative Decree No 4029/1959 (ar. 22), the Legislative Decree No 210/1973(ar. 58, 59 et seq), Law No. 134/1975; also COM (2008) 824, paras. 18 – 36, 37, 38) to DEI, in total, covered 94% of the quantity of deposits for which exploitation rights had been granted to the undertaking (COM (2008) 824, para. 49). It was estimated in 2013 that the same percentage of the rights to exploit lignite had been assigned to DEI (Report 2013, Greek Minister of Industry, p. 13, http://www.ypeka.gr/LinkClick.aspx?fileticket=feLVial96ik%3D&tabid=295&language=el-GR, last visited at 15.02.2018). Therefore, DEI operated like a quasi-monopoly in the relevant market of supply of lignite at the time of the Commission's decision. The

granting of the exclusive rights of extracting and exploiting lignite to DEI was based on a discretionary decision by the public authority (Sierra (2014), para. 6.35), which was formed via legislation. "Those State measures, which were prior to the liberalisation of the electricity market, have been maintained and continue to affect the market for the supply of lignite" (Judgment of the General Court of 20 September 2012, Dimosia Epicheirisi Ilektrismou AE (DEI) v. European Commission, Case T-169/08, EU:T:2012:448, para. 87).

2.3. The infringement

It should be noted as an introductory remark that the creation of dominant position by granting exclusive rights within the meaning of Article 106(1) is not in itself incompatible with Article 102 (Judgment of the Court of 12 February 1998, Silvano Raso and Others, Case C-163/96, EU:C:1998:54, para. 27). The infringement identified by the Commission and the CJEU was not the quasi-monopoly or else the dominance of DEI (COM (2008) 824, par. 176) on the lignite supply (upstream) market following the exclusive rights, but that, by virtue of these exclusive rights, DEI's dominance on the downstream market of wholesale electricity market was extended (COM (2008) 824, paras. 225 and 238). The Commission defined the wholesale electricity market as the affected market - one of the relevant markets (the other being the lignite supply) - that the state measure concerned (COM (2008) 824, para. 160-162). In this market, DEI also held a dominant position with a market share above 85%, at the time of the Commission's decision (COM (2008) 824, paras. 177-178). It is highlighted that in 2017, DEI's market share on the wholesale market was in excess of 50 % in production and almost 80 % in capacity, and on the retail market its market share was of some 84 % (European Commission, Compliance Report ESM Stability Support Programme for Greece – Third Review – January 201820/01/2018, para. 5.3, p. 24 (https://ec.europa.eu/info/sites/info/files/economy-finance/compliance_report_-_3rd_review.pdf, last visited 15/02/2018).

On the Greek wholesale market, since 2005 (by virtue of Law No 3175/2003) a mandatory day-ahead market based on bids (pool) for all sellers and buyers of electricity has been in operation within the system which supplies power to mainland Greece (COM (2008) 824, paras. 60-65, 105, for a description of this pool see Graham (2013). This system was not disputed in the DEI-lignite case (Judgment of the General Court of 15 December 2016, Case T-169/08, para. 91).

The Commission considered that the granting of these exclusive rights was reinforcing DEI's dominance (COM (2008) 824, para. 190) in the market of lignite supply, thus creating inequality of opportunities between the competitors in the electricity wholesale market and distorting competition in favour of DEI. This anti-competitive effect (actual or potential) of the state measure in the downstream (COM (2008) 824, paras. 199) market of wholesale electricity constituted the violation of Article 106(1) in combination to 102.

It is to be noted that, according to the current Supplemental Memorandum of Understanding for Greece (The Supplemental Memorandum of Understanding – Greece, 18 January 2018, s. 4.3.i, https://ec.europa.eu/info/sites/info/files/economy-finance/draft_smou_3rd_review.pdf; also Compliance Report – The Third Economic Adjustment – Programme for Greece – Second Review, s. 5.3, https://ec.europa.eu/info/sites/info/files/compliance_report-to_ewg_2017_06_21.pdf), around 40% of the lignite-fired capacity of DEI should be divested in compliance with the above judgments in relation to the above Commission's decision and its decision (COM (2009) 6244 and the subsequent judgments of the General Court and the CJEU (T-421/09, C-554/12P, T-421/09 RENV) that addressed that the Hellenic Republic shall take the necessary measures to correct the anti-competitive effects of the state measures identified by the Commission in the former decision. The Hellenic Governmental Council of Economic Policy promulgated in May 2017 (Issue 1, No. 72/19.05.2017 of the Official Government Gazette, http://www.dikaiologitika.gr/eidhseis/business-news/157553/se-fek-i-apofasi-tou-kysoip-gia-polisi-tou-40-ton-monadon-tis-dei) its relevant decision. And in January 2018, the "Compliance Report ESM Stability Support Programme for Greece – Third Review" stated: "To open up the monopoly on lignite, as part of the second review and following a ruling by the European Court of Justice in December 2016, a process has been launched under EU competition rules to bring around 40 % of PPC's [DEI's] lignite-fired generation capacity under the control of other market participants. As part of the third review, after submission of a proposal by the authorities and a market test through the Directorate General for Competition of the European Commission (DG COMP), a final commitment offer has been officially submitted. This contains the Meliti 1 plant and option for a new Meliti 2 plant, as well as units 3 and 4 of the Megalopoli plant with all related assets and resources. Implementation steps have also been agreed and will need to follow swiftly" (European Commission, Compliance Report ESM Stability Support Programme for Greece – Third Review – January 2018, 20/01/2018, para. 5.3, p. 24, https://ec.europa.eu/info/sites/info/files/economy-finance/compliance_report_-_3rd_review.pdf).

3. The case of DEI-lignite

3.1. The Commission's approach

Under the Commission's view, the actual abuse of DEI's dominant position was not required (see Judgment of the European Court of Justice of 17 July 2014, Case C-553/12 European Commission v. Dimosia Epicheirisi Ilektrismou AE (DEI), paras. 46-47). The Commission's decision and the courts' judgments (excluding the General Court's first judgment) were based on the inequality of opportunities between competitors created by the State-measure that enabled DEI to extend its dominance to a neigbouring market. The Commission (COM (2008) 824, paras. 180-182) founded its decision on three points:

That although merely creating a dominant position by granting exclusive rights is not in itself incompatible with Article 102 TFEU, however a Member State is in breach of Article 106(1) together with Article 102 if the undertaking in question, merely by exercising the exclusive rights granted to it, is led to abuse its dominant position, or when such rights are liable to create a situation in which that undertaking is led to commit such abuses.

The system of undistorted competition laid down by the Treaty can only be guaranteed if equality of opportunity is secured between the various economic operators; if a State measure creates inequality of opportunities and therefore distortion of competition, then it infringes Article 106 (1) in conjunction with 102 (Judgment of the Court of 22 May 2003, Connect Austria, C-462/99, EU:C:2003:297, para. 83). The Commission underlined that the competitors of DEI filed in 2007 applications to build power stations that run on lignite and extract and exploit lignite in a specific area of Greece, which confirms that they need access to lignite in order to be able to compete in the wholesale electricity market (COM (2008) 824, para 224). The Hellenic Republic, by not assigning to competitors access to lignite, protected the position of DEI, extended its dominant position in the level of production/generation of electricity (COM (2008) 824, para. 225) and created inequality of opportunities between the undertakings in the downstream market of electricity wholesale (COM (2008) 824, para. 237-238).

When an undertaking with a dominant position in one market tends to extend that position to a neighbouring (or else the affected (COM (2008) 824, paras. 158-166, 179), or the downstream market (COM (2008) 824, para. 188) and separate market by distorting competition, then there is an abuse under Article 102; in the wording of the Commission (COM (2008) 824, para. 182),"the Court has applied this principle to find a violation of Article 86(1) [106(1)] in conjunction with Article 82 [102] when the State measure allowed the dominant firm to distort competition on a neighbouring market which absent the measure it would not have been able to achieve without infringing Article 82 [102]".

Moreover, before concluding that the Greek State enabled DEI "to protect its quasi-monopolistic market position despite liberalisation of the wholesale electricity market, thereby maintaining and reinforcing its dominant position in that market", the Commission stated that "by granting and maintaining in force quasi-monopolistic rights giving the public undertaking PPC [DEI] privileged access to lignite exploitation, and accordingly to lignite-based electricity, the Hellenic Republic assured PPC [DEI] a privileged access to the cheapest available fuel for electricity production, which gave this company the possibility to maintain a dominant position in the wholesale electricity market at a level close to monopoly excluding or hindering market entry by new-comers" (COM (2008) 824, para. 238).

3.2. The judgment of the Court of Justice of the European Union

The CJEU (Judgment of the CJEU of 17 July 2014, Case C-553/12 P, DEI-lignite) tackled the central issue of the case: an infringement of Article 86 (1) and 82 EC (Now Articles106 (1) and 102 TFEU) may be established independently of whether there is an actual abusive behaviour; it is only critical for the Commission to define a potential or an actual consequence contrary to the rules of competition liable to occur from the state measure. "Such an infringement may thus be established where the State measures at issue affect the structure of the market by creating unequal conditions of competition between companies, by allowing the public undertaking or the undertaking which was granted special or exclusive rights to maintain (for example by hindering new entrants to the market), strengthen or extend its dominant position over another market, thereby restricting competition, without it being necessary to prove the existence of actual abuse" (Judgment of the CJEU of 17 July 2014, Case C-553/12 P, DEI-lignite, para. 46).

The CJEU, furthermore, underlined, that a. the actions of an undertaking with dominant position, which tend to extend this dominance in a neighbouring market, thus impeding competition, constitute abuse of dominant position under article 102 TFEU; and b. the extending of dominant position without any objective justification is forbidden per se under article 106 (1) in conjunction with article 102 TFEU when this extending is the result of a state measure. Following this, the CJEU opined that it is not necessary for the Commission to prove in every case: - that the undertaking concerned is a monopoly, or - that the state measure at stake confers to it special or exclusive rights in a neighbouring market, or - that the undertaking has a regulatory power, or - that the breach of Articles 106 (1) and 102 is harmful for the consumers' interest, given that this article may regard the practices that affect negatively the smooth function of competition (Judgment of the CJEU of 17 July 2014, Case C-553/12 P, DEI-lignite, paras. 66-68).

The CJEU referred the case back to the General Court (Judgment of the General Court of 15 December 2016, Case T-169/08, DEI-lignite) to address the remaining pleas. In alignment with the CJEU's decision, this time, the General Court held that DEI having privileged access to lignite exploitation through exclusive rights operated like a quasi-monopoly in the relevant market; and this dominant position gave to DEI the possibility to maintain its dominant position in the downstream/neighbouring market of wholesale electricity; this resulted in hindering the entry of new-comers to the market of wholesale electricity and it created a status of inequality of opportunity amongst competitors in this market because the rivals need access to lignite as it is the most attractive fuel to produce energy (Judgment of the General Court of 15 December 2016, Case T-169/08, DEI-lignite, paras. 205,213).

4. Conclusion

It follows from the above analysis that, according to the Court of Justice of the European Union, a public company that has been granted exclusive rights by the State on the market of lignite supply (extraction and exploitation of lignite) holds a dominant position on that market and by having this dominance on the upstream market uses it in order to strengthen or maintain its dominance on the downstream market of wholesale electricity. Such exclusive rights granted by the Greek State resulted in a violation of Article 106(1) in conjunction with Article 102 on behalf of the State, because by virtue of them, the undertaking extended its dominance to the downstream market, thus enabling DEI to hinder the entry for new-comers and creating inequality of opportunities between competitors. It seems that the CJEU considers the anti-competitive effects on the market that are created by the state measure as sufficient to constitute a breach of Article 106(1) in conjunction with Article 102 TFEU, as long as the undertaking holds a dominant position and is public or privileged, even if the undertaking has not been engaged in a type of conduct that can be classified as an abuse of its dominant position.

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