



INTERNATIONAL  
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**Legal aspects of di(sin)vestment of  
PPC lignite power plants in the  
light of the 3rd liberalization  
package for the European Energy  
Market**

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I hereby declare that the work submitted is mine and that where I have made use of another's work, I have attributed the source(s) according to the Regulations set in the Student's Handbook.

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## Abstract

This dissertation was written as part of the LLM in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law at the International Hellenic University.

The present dissertation deals with the (still pending) di(sin)vestment of Public Power Corporation lignite power plant portfolio in the light of the 3rd liberalization package of the EU Energy law. After a long period of internal (as far as Greece is concerned) and external meditation, negotiations and self-postponing reasons of unfortunately and leniently bad strategic interference of the company directly with the political background and indirectly with the shadow syndicate interests, *alea jacta est* for the PPC to be privatized.

Although the privatization procedure of PPC seems not to be taking place from scratch, since similar cases of State-monopolies have already been subject of the ECJ case law, the particular factor which may characterize this situation as “unique” or “one of a kind” is the one dimensional for decades lasting fuel mix of Greece which based its energy capacity completely, even obsessively on lignite. In fact, the whole political and sovereign debt issue that the country faces, bears lignite traces of easy money, corruption, environmental pollution, unjust cost allocation and finally false energy lasting profile consideration to be developed in a manner that “I will rely on lignite as soon as I have it available in huge deposits”.

Keywords: (Lignite, di(sin)vestment, EU Energy/Competition Law, Liberalization)

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## **Preface**

The present dissertation focuses on the most essential legal topics of the upcoming disinvestment, road-mapped by the fair-balance of the ECJ ruling mainly in the field of how competition law affects and crucially influences European Energy law, which in turn will regulate energy efficiency and reserves for the future generations to live in peace, combining the new 20-20-20 RES-wise target model with the earlier tensions of traditional fossil fuels, in terms of equality of opportunity and sufficiency.

Finally, it was an honor to me that Dr. Theodor Panagos accepted to be my supervisor through this legally stimulating journey. In search of the complexities of energy and based on his instructions, I gained a lot of it (energy).



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## Abbreviations

EC	European Community
ECJ	European Court of Justice
EU	European Union
DG Comp.	Directorate General for Competition
GCEU	General Court of the European Union
GWh	Gigawatthour
HR	Hellenic Republic
HTSO	Hellenic Transmission System Operator
MOU	Memorandum of Understanding
NOME	New Organization of Electricity Markets
MWh	Megawatthour
OECD	Organization of Economic Cooperation And Development
PPC	Puplic Power Corporation
PSO	Public Service Obligation
RAE	Regulatory Authority of Energy
RES	Renewable Energy Sources
RWE	Rheinisch-Westfälisches Elektrizitätswerk
SCP	System Ceiling Price
TFEU	Treaty Of The Functioning Of the European Union
TPA	Third Party Access
US	United States (of America)

# **1. THE LEGAL FRAMEWORK OF EUROPEAN ENERGY AND COMETITION LAW**

## **1.1 European Energy and Competition Law**

1. Since the early 1990s, the European Union assisted by the judgments of the ECJ has launched a process of liberalization of the energy market, businesses, which were traditionally under state control<sup>1</sup>. For a long time the energy sector was treated as a "natural monopoly", in the sense that the operation of networks and the provision of services by a single undertaking rather than more was considered more cost-effective and more efficient<sup>2</sup>. At the initiative of the European Commission, which vigorously promoted the policy of building the internal market at all levels, the first "package" of energy directives was adopted in 1996-1998<sup>3</sup>. Market liberalization policy continued with the second package of legislative energy interventions in 2003, which included - inter alia - the gradual expansion of market liberalization to all consumers, the legal separation of the management of transport networks from the procurement activity, the strengthening of the role of regulators set up in the Member States in line with the requirements of the first directives, as well as measures for security of supply and the strengthening of services of PSOs<sup>4</sup>. The Commission's sector inquiry, the results of which were published in January 2007<sup>5</sup>, demonstrated systemic dysfunctions in the energy market and led to the adoption of a third legislative package in 2009<sup>6</sup>. Better

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<sup>1</sup> See also "the liberalization of public service monopolies and Community law" [2000] WEU, p. 1473; VELEKKIS, *EM*, Deregulation of State Monopolies and Electricity [2005], p. 1498

<sup>2</sup> See also MARINOS, *M.-TH.*, Access to an energy grid - the liberalization of the electricity market, Ant. N. Sakkoulas, Athens-Komotini, 2003, p. 13 et seq.)

<sup>3</sup> Directives of the European Parliament and of the Council 1996/92 of 19 December 1996 (Electricity) OJ L 27/20 and 1998/30 / EC of 22 June 1998 (natural gas), OJ L 204/1.

<sup>4</sup> Directives 2003/54 of 26 June 2003 (electricity) OJ L 176/37 and 2003/55 / EC of 26 June 2003 (natural gas), OJ L 176/57 replacing Directives 1996/92 and 1998/30 / EC respectively. Also: Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity, OJ L 176/1; Regulation (EC) 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks, EEL 289/1

<sup>5</sup> Commission notice, Research pursuant to Article 17 of Council Regulation (EC) 1/2003 to the European Gas and Electricity Sector (Final Report), SEC (2006) 1724

<sup>6</sup> European Parliament and Council Directives 2009/72 of 13 July 2009 (Electricity) OJ L 211/55 and 2003/73 / EC of 13 July 2009 (gas), OJ L 211/94 which replaced the Directives 2003/54 and 2003/55 / EC respectively. (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L 211/1; July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) 1228/2003, OJ L 211/15. Regulation (EC) 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, OJ L 211/36. See, in detail, in this volume, *Iliadou, EIK*, liberalization of the energy market in European and national law, *Koutzoukos, G., Aslanoglou, M. & Trokoudi, A.*, The Internal



segregation of transmission system operators from energy production and supply activities, facilitating cross-border trade, achieving greater market transparency and establishing an Agency for the Cooperation of Energy Regulators, while further strengthening national supervisory authorities, are the key features of this latest regulatory intervention at Union level. In November 2010, the Commission presented its energy strategy for the next decade as part of its overall Europe 2020 strategy. According to the assessment, "an open and competitive single market for energy is expected to contribute to lasting and safe energy supply at competitive prices, encouraging the rapid deployment of renewable energy sources and promoting the development of new eco-friendly technologies"<sup>7</sup>.

2. In the complex and multilevel environment of energy targets at EU level, the structure of the relevant market is added, as outlined in the Commission's sector inquiry, which impedes the development of competition. Markets continue to remain largely national and dominated by incumbents, which are a transformation of historic monopoly public energy companies. In spite of the gradual liberalization of the market, historical providers retain their dominant position because of their large customer base, the important infrastructure they still control and their commercial reputation, which at least in part has to be redeemed for decades, have a monopoly presence at all stages of the market, from generation to supply to final consumers. The above advantages of the largely monopolized, formerly monopolistic enterprises, combined with the significant investment costs required by the High Power Industry and their little reflections to uncertain depreciation, make it difficult for new players to enter the market. According to the findings of the Commission's investigation, entry barriers exacerbate the chronic shortage of liquidity on the wholesale electricity and gas markets, which are distinguished by the lack of investment and the limited interconnection capacity. The 3rd liberalization package seems not to function properly the way it is implemented.

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Market for Electricity from the First to the Third Energy Bundle and Role of the Regulator and the Administrator.

<sup>7</sup> A resource-efficient Europe, Report of the European Commission on Competition Policy 2010, p. 31

## **1.2 Third Liberalization Package of Energy Law and the Energy Stock Market**

3. The 3rd Energy Package that was adopted on 2009 consisted of five primary documents: two Directives and three Regulations. The primary aspects of the policy included within the package were related to the unbundling of energy supply and network distribution, increased transparency of retail markets and more effective oversight by independent market supervisors, the national regulation authorities and better cross-border collaboration and investment between Member States<sup>8</sup>.

4. The electricity directive addresses a number of market issues and defines specific common rules for the generation, transmission, distribution and supply of electricity and accordingly it banks on previous instruments which mainly include the following: the exclusion of supply price regulation, an unbundling regime, a system on third-party access to transmission and distribution networks, an ex-ante regulation of transmission and distribution tariffs and the right of customers to freely choose their electricity supplier. Apart from these determinations which primarily serve the strengthening of competition and consumer protection, the Electricity Directive sets forth further determination with a view to improve security of supply, environmental protection and consumer protection<sup>9</sup>.

5. The 3rd Package Directive 2009/72/EC was adopted by the Greek State by law 4001/2011 and among other targets of this law, provisions for the real alternative choices for all consumers, new business opportunities on the sector and the increase of cross-border trade were included, in order to achieve significant profits, competitive prices and higher standards of services, while at the same time it reinforced the security of energy supply and its sustainability<sup>10</sup>.

6. At the time being, the new law 4512/2018 has been adopted by the HR, following a public consultation launched by the Greek Market Operator on 18 December 2017, introducing the new market codes resulting from the transition to the *target model*. These are:

- A. The Code for the Wholesale Market of Future Power Products
- B. The accompanying text with a detailed analysis of the operation of the Wholesale Market of Future Power Products,
- C. the Day Ahead Market Code,
- D. The accompanying text with a detailed analysis of the operation of the Next Day Market,
- E. The Interim Market Code,
- F. The accompanying text with a detailed analysis of the functioning of the Intraday Market,

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<sup>8</sup> *Dutton Joseph*, Eu Energy policy and the Third Package, EPG Working Paper 1505, University of EXTER, Energy Policy Group, July 2015, p.34

<sup>9</sup> *Heiko Kruger*, European Energy Law and Policy, An introduction, 2016, p. 115, 116

<sup>10</sup> *Michail L. Polemis*, Competition in the relevant Electricity Markets in Greece: Utopia or Reality, Energy, Networks and Infrastructure, Legal Library, 2014, p. 7

G. the Codex with the Rules for Registration and Participation in the Wholesale Market of Future Electricity Products, the Day Ahead Market and the Intraday Market<sup>11</sup>.

7. The establishment and operation of Energy Financial Markets will be subject to the supervision of the Securities and Exchange Commission as the competent authority for that purpose.

8. For this purpose, a special spin-off procedure is introduced, by which the company under the name of "Electricity Market Operator SA" (LAGIE) delegates the responsibilities of the operation of the existing energy market to the "Hellenic Energy Stock SA". This process has always been considered necessary by the legislator in order to create the appropriate background for the transition to an energy market regime with all the modern features of a stock market governed by the relevant Union and national rules and will allow for full alignment with the policy of the European Union for the completion of the single European energy market and the introduction of uniform mandatory rules of organization and operation at European level.

9. Furthermore, the new law regulates issues regarding the compliance of market participants with the Energy Exchange Regulation, protection against market abuse and pre-trade and post-trade transparency of the market. The arrangements are designed to ensure the necessary conditions for the energy market to be able to operate on a transparent basis.

10. With the above provisions the Energy Stock Exchange is created, based on the following pillars: firstly, on the creation of functioning wholesale gas markets, which will be effective mechanisms for shaping the price of gas on the basis of supply and demand for the benefit of the final consumer and secondly, on the linking of wholesale gas markets to the uninterrupted flow of gas from EU borders to any of the individual wholesale markets within the EU, and between them, depending on supply and demand, can ensure convergence at EU level of gas prices<sup>12</sup>. In any case, EU Energy Market is believed to be unchained from abuse of dominant position practices.

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<sup>11</sup> LAGIE: The Public Consultation for the introduction of the codes for the new energy markets, towards the target model, <https://energypress.gr/news/lagie-se-diavoyleysi-oi-kodikis-ton-neon-agoron-toy-target-model>

<sup>12</sup> How the Energy Stock Exchange will work, <http://www.tovima.gr/finance/article/?aid=905508>

### **1.3 Abuse of Dominant Position**

11. A dominant position relates to a position of economic strength which enables an undertaking to prevent effective competition by giving it the power to behave to an appreciable extent independently of its competitors, customers, and consumers<sup>13</sup>. However holding a dominant position by one or more undertakings *per se* is not illegal, rather there must be an abuse of such position that additionally may affect trade between member states<sup>14</sup>.

12. An abuse includes any behavior of company in a dominant position that may influence the structure of a market, as a result of the very presence of the company in question, the degree of competition is already weakened and which through recourse to unusual methods has the effect of hindering the maintenance of the degree of competition still existing or the growth of that competition<sup>15</sup>. First of all we must define the relevant markets. The relevant market involves a product dimension and a geographical dimension<sup>16</sup>. The respective product market presupposes that there is sufficient degree of interchangeability between all the products forming the same market<sup>17</sup>. The European Commission particularly considers the markets for electricity, gas and district heating as separate markets as there is very low substitutability<sup>18</sup>.

13. Initially, it should be made clear that market power, which is in fact, established by incumbents, does not in itself conflict with the competition rules. However, their dominant position, namely that they have significant market power over a reasonable period of time, entails a special responsibility for the above entities. They must refrain from any conduct which is likely to result in the exclusion of competitors from the market<sup>19</sup>. This anti-competitive behavior, which has the effect of preventing or frustrating effective access to actual or potential competitors on the market, may take various forms, not always easily identifiable by the supervisory authorities. This is because a number of actions and practices come from companies in a dominant position in the energy market, such as not investing in specific infrastructure (gas pipelines), production reduction or limitation (interconnection or storage capacity). On the one hand, this behavior could be integrated into normal commercial operations of the market operators and, in spite of the fact that they lead to price increases for both

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<sup>13</sup> ECJ Case 22/76 United Brands [1978] ECR, para. 65

<sup>14</sup> Heiko Kruger - European Energy Law and Policy, An introduction, 2016, p.71

<sup>15</sup> ECJ case 85/76 La Roche [1979] ECR 461, PARA 91

<sup>16</sup> A Jones and B Sufrin, EC Competition Law: Texts, Cases and Materials (3rd edition, OUP 2008) 352 et seq.

<sup>17</sup> ECJ Case 85/76 Hoffman-La Roche [1979] ECR 461, para 28., ( A Jones and B Sufrin, EC Competition Law: Texts, Cases and Materials (3rd edition, OUP 2008) 353

<sup>18</sup> European Commission press release IP/94/805 of 2 September 1994. See also M Roggenkamp, C Redgwell, Ide Guayo and A Ronne, Energy Law in Europe, 264 et seq.)

<sup>19</sup> Commission communication - Guidelines on the Commission's priorities for joint enforcement of Article 82 of the EC Treaty on abusive exclusionary conduct by dominant undertakings, C (2009) 864 final, points 9-10 and the WEU case-law cited there. Case T-83/91 Tetra Pak v Commission (Tetra Pak II, Coll., 1993, p. 11- 755, paragraph 114; Case T-111/96 Promedia v Commission [1998] ECR H-2937. Case T-228/97 Irish Sugar v Commission [1999] ECR II-2969, paragraph 112; and Case T-203/01 Michelin v Commission [Michelin II, , paragraph 97

end users and intermediate consumers may be attributed to reasons relating to the safety of the plant and the product offered, the failure of materials or even the observance of environmental legislation<sup>20</sup>. On the other hand, these practices, depending on their intensity, their duration, and the specific market conditions in which they occur, may lead to distortions of competition and partitioning of the market.

14. In particular, the privileged rights granted to PPC, for the exploitation of lignite in Greece, produces discrepancies of opportunities among the economic operators regarding their accessibility to primary fuels for the production of electricity. Consequently, the hindered incentives for entering the Greek wholesale electricity market lead to the dominant position of PPC maintained or even reinforced.

15. The anti-competitive effect of PPC's privileged access to lignite was already identified by the OECD in its 2001 report on "Regulatory Reform" in Greece which underlined that "PPC's favorable access to lignite may discourage competitive entry, not only because an entrant might want to use lignite-fired plants, but also because the entrant would have to be able to supply electricity that can compete successfully against power generated using low-cost lignite. Offering to sell lignite to other generating companies would allow the state to set a market price for licences, which would also end concerns that the zero-royalty price might constitute State-aid". And PPC itself recognized in all its annual reports: "PPC S.A. ... enjoys a low cost competitive advantage due to the use of lignite for electricity production."

16. Competitors of PPC need lignite-fired capacity first, because they need to have baseload capacity in their generation portfolio by the time that there is little other baseload capacity available and secondly, because they need to be able to exercise competitive pressure on PPC during off-peak periods (where lignite-fired capacity is expected to set the price provided that a constraint on lignite-fired production does not force recourse to much more expensive gas-fired plants) as lignite-fired capacity represents most of baseload generation in Greece, the rest being covered by hydro (partly) and RES<sup>21</sup>.

17. The price of short-term electricity markets is determined based on the variable costs of plants, ranked in the order of their variable costs so that the price is equal to the variable cost of the most expensive plants called to meet demand in the merit order of the plants. This price mechanism however ensures the coverage of fixed costs of the most investment-intensive technologies<sup>22</sup> because the technologies with the highest fixed costs are the ones with the lowest variable costs, whereas the technologies with the lowest fixed costs are the ones with the highest variable costs

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<sup>20</sup> *Levbeque, R*, La mise en oeuvre du droit de la concurrence dans les industries electriques et gazières, 2 Concurrences 2006, p. 28; SPECTOR, D., op., P. 52).

<sup>21</sup> Commission Decision of 5 March 2008 on the granting or maintaining in force by the Hellenic Republic of rights in favour of Public Power Corporation S.A. for extraction of lignite.

<sup>22</sup> This was corroborated in a study of six European wholesale markets commissioned by the Commission and published on 20 April 2007: see the report by London Economics available at <http://ec.europa.eu/comm/competition/sectors/energy/inquiry/index.html>

and because demand varies between peak and off-peak hours, ensuring thus that there are always a number of hours where "other plants" are setting the price<sup>23</sup>.

18. In parallel, for a certain period, regulated tariffs were based on the cost of generation of PPC, including low-cost lignite-fired generation which the competitors of PPC could not enjoy. The tariffs were computed on the basis of generation costs of PPC. The approval is based on the method of incremental cost-plus: PPC provides evidence of annual growth of cost elements, such as inflation rates and changes in energy fuel prices. The decision takes the form of an allowed percentage change of all tariff levels and parameters. The tariffs are defined per category of consumer<sup>24</sup>, so the regulated tariffs have strengthened the competitive advantage enjoyed by PPC with lignite-fired generation. In the absence of a comparable generation portfolio, new entrants had difficulty to compete with PPC for retail supply.

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<sup>23</sup> The plants with the highest variable costs are usually old plants whose fixed-costs are fully amortised and which do not need thus to have contribution to fixed cost, COMMISSION DECISION of 5 March 2008 on the granting or maintaining in force by the Hellenic Republic of rights in favour of Public Power Corporation S.A. for extraction of lignite.

<sup>24</sup> e.g. industrial, commercial, domestic, etc, COMMISSION DECISION of 5 March 2008 on the granting or maintaining in force by the Hellenic Republic of rights in favour of Public Power Corporation S.A. for extraction of lignite.

## **1.4 Third Party Access**

19. The third party access constitutes one of the specific rights deriving from the European Energy legislation<sup>25</sup>. One may assert that the TPA is the main right and the basic pillar of the liberalized electricity market and the electricity Directive set out specific provisions for its exercise and protection<sup>26</sup>.

20. The sector inquiry of the Commission and the specific legislative framework for energy emphasize the access of new entrants to basic infrastructures and in particular the electricity and gas networks. This is because vertically integrated companies with a historical presence on the market control access to critical parts of the network such as storage facilities, transit pipelines and liquefied natural gas terminals as well as interconnections and power transmission networks. The ability of non-incumbent companies to make use of the above-mentioned infrastructures in terms no less favorable than those applicable to incumbents is essential for customer demand in downstream markets through the provision of competitive services.

21. The question of whether opening up the market will benefit the final consumer is mainly related to the existence of competition at retail level. The presence of companies in downstream markets that will be able to effectively compete with the historical providers depends in turn, to a large extent, on the effective intervention of ex ante regulators and competition authorities - principally but not exclusively - ex post, in order to ensure equal access for all enterprises to these core infrastructures. Practices with which dominant undertakings may hamper this approach take on a variety of forms: (a) from denying access to networks and basic infrastructures or (b) granting inconclusive access and the accumulation of network and (c) storage capacity to the lack of investment in networks, with the aim of excluding alternative benefits.

22. According to the prevailing view, the theory of basic / essential Facilities is based both onto the specific rules of the sectorial legislative framework (TPA) and on European Commission's competition law decisions. According to this theory, basic infrastructure such as electricity transmission networks or gas pipelines controlled by a dominant undertaking should be made available to its competitors insofar as they are not in a position to create their own infrastructure or if such an investment is extremely costly<sup>27</sup>. The theory originates from American jurisprudence, although the *Trinko* judgment of the US Supreme Court has cast doubt on its existence. At a European level, the view is that the theory is one of the examples of the foreclosure practices listed in Article 102 TFEU (refusal to supply), as the recent Commission Communication on abusive exclusionary conduct adopted by dominant undertakings<sup>28</sup>.

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<sup>25</sup> See ECJ C-87/2005, C-439/2006, C-170/2006, C-239/2007, C-274/2008, Commercial Solvents in 1974 (ECR 250-1, 1974, 1 CMLR 340-1, 1974, United Brands (ECR 217, 1978, 1 CMLR 435, 1978)

<sup>26</sup> Art. 32 of the Electricity Directive

<sup>27</sup> *Hatzopoulos, V.*, The Basic Facilities Rule in European and National Competition Law, Ant. N. Sakkoulas, Athens-Komotini, 2002

<sup>28</sup> See also the Commission communication on Article 82 (now 102 TFEU), point 83. *Ooiou, O'Donoghue, R., Padilla, A.*, The Law and Economics of Article 82, Hart Publishing, 2007, p. 408.

23. Access to third parties has shifted the center of gravity of the supervisor's interventions to the level of access charges. The *Direct Energie* decision of the French Competition Authority is essential, which in fact required EDF's historic provider to provide its competitors with the power produced by its nuclear plants at a cost price in order to eliminate the squeeze of the profit margins in the retail market<sup>29</sup>. More recently, the Commission accepted commitments from RWE, which committed infringements of Article 102 TFEU, inter alia because of the downgrading of competitors' profit margins in the downstream market and the increase in cost of third secondary market for balancing services<sup>30</sup>. According to the Commission, RWE may have abused its dominant position on German gas markets with various types of anticompetitive behavior, mainly because it refused to provide gas transport services to third parties and adopted behavior aimed at reducing margins of the downstream competitors in the gas market ("margin squeeze"). As far as the margin squeeze strategy is concerned, there was evidence that RWE deliberately set the transport tariffs to artificially high levels in order to squeeze the margins of its rivals. According to the summary of the Commission's decision, this behavior has the effect of preventing even effective competitors from effectively competing in the downstream gas supply markets or limiting the ability of its competitors to remain in the market or potential market players to enter the market. As a matter of fact, the pipeline network of that company is a basic infrastructure, since access to that network is necessary for entry into the relevant retail market<sup>31</sup>.

24. That being said, there are no decisions at national level concerning the denial of access to networks or the granting of non-discriminatory terms. The national authorities resort to the WEU case-law and the Commission's decisions to require access to the networks of vertically integrated undertakings as well as basic infrastructures that are not necessarily controlled by the latter (underground galleries, cable installations)<sup>32</sup>. Indicative element of the evolution of the markets is the fact that there are progressive differences in third party access to affiliate markets such as information systems and databases<sup>33</sup>.

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<sup>29</sup> Decision of 10 December 2007, Conseil de la concurrence, n° 07-D-43, *Direct Energie*, available on the website of the French competition authority, <http://www.autoritedelaconcurrence.fr>. For a commentary on the case, *GALANIS, Th.* [2009] 10 *Energy and Law*, p. 65

<sup>30</sup> COMP / 39.402, RWE, judgment of 18.3.2009, OJ C 133 / 10.12 / 6/2009 (summary of decision)

<sup>31</sup> *Koch O., Nagy, K., Pucinskaite, I., Tretton, W.*, The RWE gas foreclosure case: Another energy network divestiture to address foreclosure concerns [2009] 2 *Competition Policy Newsletter*, p. 32

<sup>32</sup> See also The Lithuanian AA has issued a decision on access to underground tunnels: Vilnius Energija (2007), available at [www.konkuren.lt/index.php?how=nut\\_view&nut\\_id=689](http://www.konkuren.lt/index.php?how=nut_view&nut_id=689). For access to cable installations, the decision of the Bulgarian authorities dated 3 June 2010, number 617, ENV Bulgaria Electrorazpredelenie AD, Toure, I., op. p. 3

<sup>33</sup> See also for example the decision of the UK regulator, which also has competence to apply competition rules to energy markets: OFGEM, decision of 24 February 2008, access to the National Grid meters. The decision was ratified by the District Court of Appeal. Competition Appeal Tribunal (CAT, 29/4/2010) and then Court of Appeal, UK Court of Appeals (23/2/3010, OFGEM v. National Grid). In this regard, for access to information systems, Decision of the Spanish AP of 2 April 2009, Case 641/2008, Centrica / Electra de Viesgo - SIPS, available on the Authority's website: <http://www.cncompetencia.es>.



25. The European Commission has also dealt with relevant practices. Relative assumptions date back to 1993, even if they concern the fuel sector, and were examined in the light of Article 81 (now 101 TFEU)<sup>34</sup>. Furthermore, in the 1990s, the European authority received a complaint from a new entrant concerning the lack of transparency regarding the conditions of access to natural gas networks of a series of incumbents (assumed Marathon)<sup>35</sup>. The cases were eventually filed, after commitments by other companies for disclosure of data on access to networks, the development of better congestion management methods and the improvement of balancing services provided. Refusal of access to raw materials may also trigger the application of Article 102 TFEU. In one of the few cases of Greek interest, the Commission found that the HR had infringed Article 102 in conjunction with Article 106 (1) TFEU in that it granted and maintained in favor of PPC privileged access to the exploitation of lignite. This preferential treatment of PPC, in accordance with the relevant decision, has led to inequality of opportunity between undertakings in access to primary fuels for the production of electricity and to the Greek company being able to maintain or to strengthen the dominant position on the domestic wholesale market by blocking or preventing entry of new competitors<sup>36</sup>.

26. In fact, the phenomenon of non-pricing of lignite and water value is a critical comparative advantage over PPC's potential competitors, who have virtually no choice but natural gas as the fuel of their production units. Natural gas units have lower construction costs than lignite, but this favored advantage is canceled due to the practically dampened lignite units that can operate at a very low variable cost. Furthermore, the price of natural gas is chained to the reaction effects of global market in contrast with lignite and water, the value of which is determined at national level, allowing for the minimization of price volatility in relation to natural gas. As the case appears to be, lignite-fired power stations, which almost always offer their electricity at a price below the SCP, inject electricity on the mandatory day market at a very high percentage of their capacity and are profitable at all hours of the day and night<sup>37</sup>. During the night, when demand for electricity is lower, the electricity sold comes from lignite, something that proves that it can be sold on the market without competition from electricity produced using other fuels, but it is only during the day, when demand is higher, that, in addition to electricity produced from lignite, other power stations using other fuels are in a position to dispose of their production on the Greek market, as during those periods the SCP is generally higher than the variable costs of those power stations<sup>38</sup>.

27. In the light of PPC divestment, the new(coming) entrants in the Greek electricity market, by investing in lignite production and supply of electricity, will definitely be in need of the grid of transmission and distribution to claim their market

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<sup>34</sup> DISMA, XXIII Commission Report on Competition Policy (1993), paragraph 223

<sup>35</sup> COMP / 36246, Matathon / Ruhrgas / GDF et al. See also the Commission's press releases, IP / 01/1641, 23/11/2011, Marathon / Thyssengas, IP / 03 / 547,16 / 4/2003, Marathon / Gasunie, IP / 03/1129 29/7/2003, Marathon / BEB, IP / 04 / 573,30 / 4/2004, Marathon Gas / Ruhrgas

<sup>36</sup> Commission Decision of 4 August 2009, COMP / B-1 / 38.700, OJ C 243/5, 10/10/2009 (summary of decision). Against the above decision, an appeal is pending before the General Court (T-169/08)

<sup>37</sup> Case T-421/09, The Judgment of the General Court of 15 December 2016, par. 159

<sup>38</sup> Ibid

share. At the time being, the grid of distribution is wholly-owned by DEDDIE (DSO) which is a subsidiary of PPC following the legal, accounting and functional unbundling which took place according to the law 4001/2011 of the HR. Respectively, the HTSO (ADMIE) is owned by the HR at a percentage of 51%, by DES ADMIE SA (25%) and by the Chinese STATE GRID (24%). Both the above activities are considered to be monopolistic and according to the PSO rule they serve, they are not entitled to deny access to new entrants. They have to operate, expand, maintain and keep the grid viable and sustainable, providing access to users and suppliers, pursuing to the economic purpose of marginal profit.

28. The lignite portfolio of PPC which will be on sale<sup>39</sup>, will reduce PPC's retail market share, setting the ground for healthy competition and fair and equal opportunity for all market players. The stigma of the super-dominant player will be erased. Moreover, following the recent legislative introduction of the target-model into the Greek national law, there is the possibility of forward contracts conclusion between producers and large consumers. These bilateral contracts will enable producers and suppliers to trade directly (through the stock exchange at specific fixed prices) that will give stability and security to both sides: a) the producer will be assured that his production will be absorbed and that a part of his portfolio for which he has concluded a contract, will operate and b) the consumer (whether it is an industry or a supplier that manages the demand for a consumer portfolio) has the potential for a part or all of the demand not to be affected by market fluctuations. All the above theory can be better consolidated if we examine the recent Greek Lignite Case and the finding of the ECJ.

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<sup>39</sup> see chapter 4.5

## **2. THE GREEK LIGNITE CASE**

### **2.1. The Establishment of PPC/Historical and Legal Background**

29. PPC was established by Greek Law No 1468 of 2 and 7 August 1950, as a public undertaking wholly owned by the Hellenic Republic and later it was transformed into a joint stock company by Greek Law No 2414/1996 on the modernization of public undertakings, although the Hellenic Republic continued to be the one and only shareholder<sup>40</sup>.

30. It enjoyed the exclusive right to produce, transmit and supply electricity in Greece until the first measures were adopted to liberalize the Greek electricity market, under Greek Law No 2773/1999 on the liberalization of the market for electricity, which in particular transposed Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity<sup>41</sup>, so in accordance with that law and with Greek Presidential Decree No 333/2000, PPC was transformed into a joint stock company from 1 January 2001, in which, pursuant to Article 43(3) of Law No 2773/1999, the Hellenic Republic's shareholding could not be less than 51% of the voting shares<sup>42</sup>.

31. The Hellenic Republic has allocated to PPC exploration and exploitation rights for lignite in respect of mines the reserves of which amount to about 2 200 million tons whereas 85 million tons of reserves belong to private third parties and about 220 million tons of reserves are public deposits which are explored and exploited by private third parties, but which partially supply the power stations of PPC<sup>43</sup>.

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<sup>40</sup> Judgment Of the General Court (First Chamber) 15 December 2016 Case T 169/08 RENV

<sup>41</sup> OJ 1997 L 27, p. 20

<sup>42</sup> Ibid

<sup>43</sup> Ibid

## **2.2. How it started**

32. The European Commission, following a complaint, found that since 1975, the HR has transferred to PPC extraction rights for the wide existing public mines in its area which PPC has not already exploited and while at the same time it has assigned exclusively to PPC without a tender new prospecting and exploitation rights for public lignite deposits, with the exception of very small deposits. As a result, with the exception of some very small mines and two medium-sized mines for which rights were allocated to third parties before the Second World war, virtually all lignite reserves in Greece are under the control of PPC. In particular, the Commission found that PPC now holds the search rights for almost all public reserves for which a search license has been granted. In addition, PPC owns the exploitation rights for the majority of the publicly licensed reserves. There are some exploitable reserves for which no license has yet been granted. Therefore, PPC currently owns the exploitation rights of more than 60% of the exploitable reserves.

33. Thereafter, the Commission issued a letter of formal notice which provided Greece with a two-month deadline within which Greece had to either provide a satisfactory justification for these rights or to abolish them. The key responses of the Hellenic Republic focused on the lignite supply market, PPC's rights to lignite, lignite electricity generation and more specifically:

A) In its letter of 5 July 2004, the HR contended that the Commission had not taken account of the specific characteristics of the Greek lignite supply market and, in particular, that PPC's total lignite production is used for its own production units which are located next to the lignite mines and are designed to meet the specific characteristics of the lignite fields where they are constructed. Furthermore, the HR was of the opinion that lignite exploitation presupposes long-term investment, the duration of which is the same as that of the lignite-fired power plant, and that the difficulties involved in the transport of lignite necessitate vertical integration. The HR had come to the conclusion that PPC may not be considered to dominate a market in which it does not actually and potentially act as a seller.

B) The HR claimed that the rights granted to PPC are not determinative for the entire Greek territory, but they are exclusively limited to specific lignite deposits. The national authorities explain that the long duration of lignite exploitation rights is linked to achieving a reasonable return on the investments concerned. In particular, they specify that exploitation rights are in any case based on a lifetime of half a century, based on the life expectancy of an energy plant, and in this sense, the resources allocated to PPC are not preferential treatment. They also pointed out that a 6% charge on private mines is imposed when lignite is sold to third parties and not when it is intended for *individual* use, as in the case of PPC.

C) The HR argued that there is no legislative ban on the construction of lignite-based power plants and that any new entrant can apply for a license to construct such units.

It also took the view that new entrants prefer to use other types of fuel, such as gas, because the types require less time-consuming and smaller-scale investments.

34. In the present case, the Commission relied on Articles 86 (1) and 82 (and already Article 106 (1) and 102 TFEU). Article 86 (1) of the EC Treaty provides that Member States shall not adopt or maintain measures contrary to the rules of the Treaty, in particular those of Articles 12 and 81 to 89, in respect of public undertakings and undertakings to which they grant special or exclusive rights.

35. Article 86 (1) applies to public undertakings and undertakings to which Member States grant special or exclusive rights. The ECJ has consistently defined the public undertaking as "any undertaking in which the State may exercise directly or indirectly a decisive influence. It is supposed to be decisive when the State directly or indirectly owns the majority of the capital ..."<sup>44</sup>. The Commission concluded that PPC is a public undertaking as it is fully controlled by the Hellenic Republic and that the measures taken by the Hellenic Republic in favor of PPC fall therefore under Article 86 (1)<sup>45</sup>.

36. Article 82 of the Treaty provides that the abuse by one or more undertakings of their dominant position within the common market or a substantial part of it is incompatible with the common market and it is prohibited in so far as it may affect trade between Member States. According to the case law of the ECJ, a Member State measure infringes Article 86 (1) in conjunction with Article 82 where the exclusive exercise of the exclusive rights conferred on the undertaking concerned leads it to an abuse of its dominant position when those rights are capable of creating such a situation, which *de facto* leads such an undertaking to such abusive conduct<sup>46</sup>. The Court has also held that if the inequality of opportunities between traders and, consequently, the distortion of competition is the consequence of a State measure, this measure constitutes an infringement of Article 86 (1) in conjunction with Article 82.

37. The Commission then examines the conditions for the application of Article 82 of the Treaty considers that the State measure in question concerns the lignite supply market and the wholesale electricity market. The relevant product market includes all products and services considered as interchangeable or substitutable by consumers due to the characteristics of the products, their prices and their intended use. With regard to the relevant geographical areas the Commission considered that the geographic scope of the lignite supply market did not exceed the national level and that the geographic scope of the electricity supply market was identical to the territorial coverage of the interconnected system that is mainland Greece. The relevant geographical area includes the area where the companies concerned are active in the supply and demand of products or services in which the conditions of

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<sup>45</sup> ECJ 12-2-1998 Raso and Others, Case C-163/96, Reports of Judgments I-533

<sup>46</sup> ECJ 6-7-1982, France, Italy and the United Kingdom v Commission, Cases 188-190 / 1980, Collection of Judgments p. 2545

competition are sufficiently homogeneous and can be distinguished from neighbouring regions because the conditions of competition are appreciably different in these areas<sup>47</sup>.

38. The Commission considered that PPC held a dominant position in the Greek lignite supply market and in the wholesale electricity supply market in Greece. The affected market is the Greek wholesale electricity supply market in the interconnected system, which is an important part of the common market.

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<sup>47</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03)

### **2.3 The Commission Decision of 5 March 2008**

39. The Commission finally concluded in its decision of 5 March 2008 that Article 22 (1) of Law 4029/1959, Article 3 (1) of Law 134/1975 and the Ministerial Decisions of 1976, 1988 and 1994 Government Gazette B ' 282/1976, Government Gazette B '596/1988 and Government Gazette B' 633/1994 are contrary to Article 86 (1) in conjunction with Article 82 of the Treaty. According to the Commission, the Hellenic Republic maintained these measures by not granting rights to any significant deposits, despite the possibilities provided by the Mining Code and instead of effectively implementing the Mining Code, granted rights to other companies only for deposits with negligible reserves.

40. Since, PPC is the former monopoly in electricity generation and supply, it can be argued that it is not possible to conclude that the State measures in question enabled PPC to create or strengthen its dominant position. Nonetheless, State measures have in any case the direct consequence of preventing new entrants from entering the market, thus enhancing or maintaining PPC's position in the wholesale electricity supply market. Indeed, after more than five years of liberalization, only one company built a new power plant to compete PPC in the wholesale supply market, while the State is obliged to conduct state subsidy tenders to enhance security of supply, in order to motivate PPC's competitors for the construction of new plants. The State measures under consideration significantly enhance market entry barriers and put competitors at a competitive disadvantage by generating unequal opportunities between different companies to access primary fuels for electricity generation. This is true regardless of the other barriers that may hinder entry into that market. Such State measures would also constitute a barrier to entry, even assuming that PPC would pay a fee or rights, since it would remain the element of unequal treatment.

41. The Commission concludes that the Hellenic Republic, by granting and maintaining quasi-monopoly rights for lignite prospecting and exploitation and thus privileged access to the cheapest electricity source, has created a situation of unequal opportunities between the various operators in the wholesale market the supply of electricity resulting in a distortion of competition for PPC's public company and the consequent strengthening of its dominant position on the market of electricity.

## **2.4 The Judgment of the General Court of 20 September 2012**

42. PPC appealed against the decision of the European Commission of 5 March 2008 before the General Court, which, in its judgment of 20 September 2012 in Case T-169/08<sup>48</sup>, annulled the Commission's decision. In particular, the General Court held that PPC is not responsible for the inability of other companies to access the available lignite deposits, since the granting of lignite licenses depends solely on the "will" of the Hellenic Republic. Furthermore, the General Court considered that the Commission had not demonstrated that privileged access to lignite would create a situation in which PPC, could misus its dominant position on the wholesale electricity supply market or could lead to such abusive behavior on that market by simply exercising its allocated rights. The Court also took the view that the Commission accused PPC of extending, without objectively justifying its dominant position, the lignite supply market in the wholesale electricity supply market. Accordingly, the Commission, simply finding that PPC, a former monopoly undertaking, continues to maintain a dominant position on the wholesale electricity supply market, due to the advantage conferred by privileged access to lignite and that this situation creates the inequality of opportunities on that market between PPC and the other undertakings did not sufficiently identify or demonstrate by law the abuse within the meaning of Article 82 EC, in which the State measure at issue led or could lead PPC.

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<sup>48</sup> Collection of Judgments 2012 - 00000



## **2.5 The Judgment of the Court of the European Union of 17 July 2014**

43. The European Commission filed a notice of appeal against this decision in an appeal before the Court of Justice of the European Union, which, in its judgment of 17 July 2014, *European Commission v Public Power Corporation (PPC) and Hellenic Republic*, in Case C- 554/12 P dismissed the above judgment of the General Court and referred the case to the General Court of the European Union in order to examine the pleas put forward before it and on which the Court of Justice of the European Union did not.

44. In particular, the Court has held that a Member State is in breach of the prohibitions imposed by Article 86 (1) EC, read in conjunction with Article 82 EC, when it adopts a legislative, regulatory or administrative measure creating a situation in which an undertaking which has been granted special or exclusive rights walks into the path of abusive conduct simply by the exercise of the exclusive rights conferred upon it, or where such rights are capable of creating a situation resulting in making that undertaking subject to such abusive conduct without being necessary for the abusive conduct to occur. It follows that there is a breach of those provisions if a measure attributable to a Member State creates a risk of abuse of dominant position. This is because, as is clear from the case-law of the ECJ, a system of undistorted competition, such as that provided for in the EC Treaty, can only be achieved by ensuring equal opportunities between the various undertakings. Therefore, if the situation of inequality of opportunity between undertakings and, consequently, the distortion of competition is the consequence of a State measure, that measure constitutes an infringement of Article 86 (1) EC, read in conjunction with Article 82 EC.

45. The Court also held that the Commission was not required to prove in all cases that the undertaking in question had a monopoly or that the State measure in question granted it exclusive or special rights in a neighboring and distinct market or that it had any regulatory powers. Finally, the Court held that it was not necessary for the Commission to prove the effect of the infringement of Article 86 (1) EC and Article 82 EC on the interests of consumers, since that article may also relate to practices which cause damage by disturbing situations of healthy competition.

## **2.6 The Judgment of the General Court of 15 December 2016**

46. The General Court of the European Union was called upon to examine four grounds for cancellation, which were filed by PPC, of which the principal one was the error of law in the application of the abuse of dominant position. For the assessment of the alleged error the GCEU first considered the Commission's definition for the two markets in question. With regard to the primary market, PPC argued that the lignite supply is not a distinct product market with only a national dimension but that instead the relevant market should include all fuels. However, since lignite-fired plants are required to be used being the primary, if not exclusive, market for lignite suppliers, GCEU considered that the primary market was well defined. It is also noted that, despite the theoretical possibility of supplying lignite from non-Greek deposits, this alternative is not a realistic one because of its natural characteristics of lignite unsuitability to be transported over long distances.

47. With regard to the secondary market, PPC argued that the Commission did not take into account the degree of liberalization of this market by introducing the mandatory daily system and the competitive pressure exerted by the imported fuel by type of fuel. GCEU confirmed the Commission's position by arguing that there is no lack of sufficient evidence from the Commission and that this very limited amount of imported electricity is not enough to displace lignite as a highly attractive fuel.

48. As to the error of law, the GCEU then analyzed the existence of inequality of opportunity for new competitors. PPC put forward five arguments: (a) at the time of the facts at issue, a significant number of lignite reserves remained unexploitable because the rights had not yet been granted; (b) the non-granting of permits for the construction of lignite plants was due to objective reasons, (c) adequate access to lignite as a fuel could be ensured by purchasing or cooperating with companies that already dispose of it (d) the Commission considered that there was an opportunity gap based only on PPC's dominant position on the primary market; (e) since open calls for lignite deposits had already been announced, PPC had not been granted new exploitation rights and its competitors preferred construction of units using other fuels does not confer preferential access to the most attractive fuel.

49. GCEU rejected PPC's arguments and confirmed the existence of inequality of opportunities at the expense of new competitors and the privileged access of PPC to lignite. In particular, it pointed out that neither the abolition of the legal status of the relevant privileges to PPC nor the theoretical possibility for the granting of exploitation rights for lignite deposits to third parties would suffice to effectively remove the existing inequality, as in practice PPC remained the sole enterprise that could exploit a significant amount of lignite in the primary market. Besides, the current design of the mandatory daily market benefits low variable cost units, such as lignite. Thus, PPC has the ultimate potential to sell at a profit and therefore to cover the significant fixed costs.

50. Finally, GCEU did not find any deficiencies in the data examined by the Commission and in relation to the measures adopted, in particular the exclusion of PPC from tenders for the construction of power plants operating with fuels other than lignite, observing that the small reduction of PPC share does not substantially affect its dominant position. Accordingly, the so-called di(sin)vestment process has been ratified as a crucial act from the HR and PPC in order to make healthy competition happen in the Greek Electricity market, far from policies of abuse and price manipulation without legal certainty for the final consumer. The European Commission had won the battle.

### **3. DI(SIN)VESTMENT**

#### **3.1 Definition, Necessity, Justification**

51. Investment means expanding and expanding, while disinvestment entails a widening of activities and focusing on the most basic functions, as the business cope with the difficult economic phase and succeeds in surviving, thus avoiding bankruptcy. In any case, economic performance and economic failure are used extensively in analyzing the phenomenon of disintegration. Surely poor economic performance and low profitability are not the sole cause of disinvestment, as it can also result from the strategic reorientation of the business, as well as from the fact that the company can produce goods that are in an advanced phase of their life cycle, but in particular, disinvestment involves restricting the activities of the business group, relocating production units, closing and liquidating unprofitable factories, and selling subsidiaries to third parties in the context of acquisitions<sup>49</sup>.

52. By virtue of the recent judgments of the European Courts with regard to Commission's decisions C (2008) 824 and C (2009) 6244 on lignite, it emerged that the divestment of PPC's lignite fired power plants is a critical issue so accordingly, PPC must proceed to a divestment representing around 40% of its lignite-fired generation capacity to existing or new suppliers and other investors, having at the same time zero links or participation in any divested entity, while at the same time the interested purchasers must comply with the criteria stipulated in the MOU, and more specifically they must:

- (a) be independent to PPC and its undertakings,
- (b) be qualified in terms of experience, resources and expertise to undertake required operations,
- (c) not create competition issues due to access to information or delays in the implementation of the measures<sup>50</sup>.

53. The lignite plant portfolio which will be on sale has been the object of an agreement between the HR and DG Comp as it will be further analyzed.

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<sup>49</sup> *Georgopoulos, Antonios*, Liberalization of the markets, business privatization and reorganization p. 35 Highlights of the Energy (Electricity) Reforms in Greece,  
<sup>50</sup><http://www.kglawfirm.gr/search.php?s=Highlights+of+the+Energy+%28Electricity%29>

### **3.2 From State Monopoly to Privatization**

54. After decades of low return and ineffective action by state-owned enterprises, the governments of many countries around the world, including EU Member States, have systematically adopted privatization. Privatization means the transfer of ownership to the private sector of certain state-owned enterprises or other state-owned activities and assets. Starting in the 1980s, dozens of state-owned enterprises were privatized both in Europe and internationally. From 1984 to 1996, the participation of developed countries in state-owned enterprises of these countries declined from 8.5% to 5% of the Gross Domestic Product. State revenue has been increasing steadily as this privatization trend widened, reaching to a peak in 1998 when annual global privatization revenues exceeded \$100 billion<sup>51</sup>.

55. The strong tendency to privatize was based on the well-documented low profitability and inadequacy of state-owned enterprises<sup>52</sup>, as well as on the development that followed for the privatization after the privatization<sup>53</sup>. The low profitability and weaknesses of state-owned enterprises have been attributed to the inadequacy of their management. It was very common for state firms not to be quoted on the stock exchange and there was no risk of their aggressive redemption because corporate control was in the hands of the state. In addition, many of these companies only received state loans and state aid, without their management being concerned about securing alternative sources of credit. Consequently, these privatization programs were aimed at creating a more competitive market and the need for more effective competition rules.

56. The case-law of the Court of Justice on the application of fundamental freedoms in the energy sector is of great interest because it forms an important part of the Court's overall approach to "special (or golden) shares". The case law of the Court of Justice on the issue of special shares seems to be now consolidated and this is a positive development. The Court of Justice in the cases in question refers to the smooth operation of the internal market in order to conclude that national state intervention measures constitute obstacles to the fundamental freedoms which

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<sup>51</sup> *Ramammurti R.*, The search for remedies in: *Ramammurti R. & Vernon R.* (ed.) *Privatization and control of state-owned enterprises*. Economic Development Institute of the World Bank, Washington D.C. 1991,1, 7. For a review of cases I have privatized, *MACGEORGE R.*, An examination of the causes and outcomes associated with the restructuring and privatization of energy markets during the 1990s, source: <<http://www.ridgway.co.nz/files/energy-reform-history.pdf>>.)

<sup>52</sup> It is argued that the inadequacy and disadvantages of state-owned enterprises could be addressed, in addition to privatizations, and by improving the government's control over these state-owned enterprises, provided that privatizations in these cases are impossible or undesirable. See also *HEALD D.*, Will the privatization of public enterprises solve the problem of control? [1985] *Public Administration* 7-22.)

<sup>53</sup> See also *Farinos*, Operational and Stock Market Performance of State-Owned Enterprise Privatizations: The Spanish Experience [2007] *IntRevFinAn* 367-389. It is argued that privatization did not always lead to the benefits of these former state-owned enterprises: *HALL D. et al*, Public resistance to privatization in water and energy [2005] *Development in Practice* 286-301, *JUPE R.*, The privatization of British Energy: risk transfer and the state, Kent Business School Working Paper No. 221.

cannot be justified. It thus ensures the exercise of fundamental freedoms and comprises a barrier to Member States' attempts to introduce protective measures. This also establishes a "privatization policy"<sup>54</sup> at EU level. Furthermore, the case-law demonstrates the protectionism that distinguishes the European market for corporate control. Member State governments encourage their companies to proceed to acquisitions and mergers with companies from other Member States, but if a foreign firm tries to redeem a company established in their territory then they raise any barriers to this merger. This kind of policy of some Member States applies, as has been shown by the above hypothesis, especially in the sensitive energy sector. With regard to Greece, a country with fiscal problems the solution of privatization comes to the surface in order for additional revenue to be obtained and of course the energy sector could not be absent from this project. A typical example in Greece is the Public Power Corporation (PPC). The Commission has taken steps to ensure the free movement of capital by referring Greece to the European Court of Justice for the 5% voting power of PPC. The Presidential Decree 333/2000 establishes the Articles of Association of PPC Electricity Company. Pursuant to Article 1 of the Presidential Decree, article 8 of the Articles of Association of PPC restricts the voting rights of non-state shareholders to a 5% percentage. The Commission considered that these special rights act as a barrier to investors from other Member States and in conjunction with the final decision of the ECJ in the Greek lignite case, it is more than evident that the roadmap for the privatization of PPC has been hammered both on strict judicial jurisprudence and on legal assumptions in the light of several MOUs.

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<sup>54</sup> *Roggenkamp M.*, Implications of Privatisation, Liberalisation and Integration of Network bound Energy Systems [1997] *JEnergyNatResourcesL* 51, *Arocena P.* Privatization policy in Spain: Stuck between liberalization and the protection of national interests, CESIFO Working Paper, No. 1187, 2003, See also LONDON ECONOMICS, Final Report to EC DG Internal Market & Services-Analysis of developments in the fields of direct-investment and M&A, Report 2010.

### **3.3 The Memoranda of Financial Stability**

57. In 2012 the Greek government signed with Troika a Memorandum of Understanding that became also national law of the country<sup>55</sup>, according to which the Greek government undertook the following obligations to boost competition in energy market:

1. To finalize the remedies in order to ensure access of third parties to lignite-fired electricity generation,
2. To start implementing measures which safeguard the access by third parties to lignite-fired electricity generation,
3. To implement measures in order to ensure access by competitors of PPC to lignite-fired generation in the Greek Market.

58. Following the 2012 MOU the HR signed another one with the European Institutions in the summer of 2015 under the provisions of which it undertook further measures regarding the liberalization of electricity market, such as the implementation of a scheme for the temporary and permanent capacity payment system, the modification of electricity market rules in order to avoid that any plant is forced to operate below their variable cost. Furthermore, interruptible contracts as approved by the European Commission should be implemented and PPC tariffs should be revised based on costs, including replacement of the discount for energy-intensive users with tariffs based on marginal generation costs.

59. From February until May 2018, the government will have to implement a series of prerequisites for liberalizing the energy market, according to the Supplemental Memorandum of Understanding of 9 December 2017 which was concluded during the session of the Euroworking Group.

60. One of biggest issues is the beginning of PPC lignite plant sales processes in May 2018 after the necessary legislative and administrative arrangements for their spin-off and concession.

61. There is also a number of measures leading to the opening of the electricity market. Thus, NOME auctions will continue taking place with the introduction of a six-monthly tracking mechanism and, in particular, the reduction of PPC's share of the market. A first evaluation will be carried out in February 2018, after which the position of the public company will be taken into account after the structural measures for the sale of lignite units, the introduction of the target model and the possibility of additional structural measures being required in the portfolio of PPC production. If the latter loses its share then the auctioned volumes will be reduced.

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<sup>55</sup> Greek Law No. 4046/2012

### **3.4 NOME**

62. RAE following decision no. 353/2016 determined the annual report of electricity that would be available through auction sales of electricity products based on the French model of concluding bilateral agreements between the electricity production and distribution industries and it was adopted inter alia to implement the EU's 3rd Energy Package<sup>56</sup>.

63. NOME are energy-efficient products with the attempt to transfer the "goodwill" acquired by PPC from the use of lignite to third-party suppliers, so that they are able to be provided with cheaper energy than what they can buy from the wholesale market.

64. The key features raised by NOME law<sup>57</sup> concern the achievement of its main objectives, namely: (a) to strengthen competition, (b) to protect electricity consumers from significant price increases and (c) to reinforce incentives for investment in new plants and to develop supply innovations. NOME is a very intrusive measure, because the low-cost generating units controlled by the dominant producer cannot be considered as essential facilities and therefore no third party's access is justified. It also has a high implementation cost because it requires the collection of many data on production costs, market shares, demand and with high precision, while at the same time it is necessary to adjust constantly important parameters such as access price or the alternative producer to the new data prices, as well as the agreement between the parties involved to calculate objectively the access price. In Greece, the liberalization of the energy market and the operation of the mandatory pool scheme has in recent years led to significant investments in the production stage by third parties, but no incentive to act on the supply market has been provided and as a result especially in the case of Greece, such an arrangement is primarily an intermediate step which can have the following significant effects:

1. To allow third parties to significantly increase their share of the supply, as long as, for one reason or another, PPC's retail prices continue to be cost-oriented,
2. to contribute to the reduction of the price increase in the retail market if / when PPC retail prices stop being cost-oriented,
3. long lead to more effective and healthy competition at all stages of the energy production chain<sup>58</sup>.

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<sup>56</sup> MacroPolis, NOME auctions as a mechanism to strengthen competition in the Greek Electricity Market, 27.10.2016

<sup>57</sup> Article 3 of Law 4336/2015 (Government Gazette 94 / 14.08.2015, p. 1029)

<sup>58</sup> [www.rae.gr/site/system/docs/misc1/elecmarktreorg/file2.csp?viewMode=normal](http://www.rae.gr/site/system/docs/misc1/elecmarktreorg/file2.csp?viewMode=normal)



### **3.5 The Lignite Plants on sale/Yet another Debate-HR v DG Comp.**

65. The main issues at stake in the debate between the Hellenic Republic and DG Comp concerning the lignite power plants which are going to be on sale, according to the ECJ decision, came through many filters of socioeconomic 2nd thoughts from both sides. Except from the lignite portfolio of newer power plants to be on sale, DG Comp pursued to achieve a hydro privatization as well. On the other hand, PPC considered that a possible sale of Agios Dimitrios (operation permit until 2040) and of hydro units would crucially risk the company's future in terms of viability and financial existence. At the same time, according to PPC's and the Hellenic Republic's perspective, the lignite power plant of Amynteon appeared to be the ultimate meeting point for the competition issue at stake of market share in the wholesale market. However the Commission claimed that it would not be willing to accept Amynteon alternative due to the oldness of the plant, its old-fashioned combustion profile and its necessity of investment lifting in the way that no investor would seem to express its interest in buying it. On the other hand PPC and the HR counterclaimed that as soon as PPC has to invest in Amynteon the same obligation may confer upon the emerging investor in order to be treated with equality as well.

66. In particular PPC had to deal the following legal issues: Extension of the opt-out regime for the two obsolete PPC stations, Kardias and Amynteon. In its proposal, the Ministry of Energy and Competition requested an extension of the opt out alternative, from the current 17,500 hours to 32,000, something which actually means that the two obsolete stations that should normally be withdrawn in 2020 will remain active until 2022 until the new large power plant of Ptolemaida V is completed and fully operational. The Greek argument was that, on the one hand, PPC cannot be left until 2022 with only one essentially competitive unit, Ag. Dimitrios 5, on the other hand that the operation of Kardias and Amynteon is essential for the area as they supply the district heating system of many cities of Macedonia.

67. It was possible to include in the proposal that PPC would send to DG Comp and sell a PPC customer package. The aim is to reduce PPC's share faster than the current slow pace through NOME auctions, with the ultimate goal of re-examining PPC's obligation to sell low-priced energy at competitive prices through NOME-type auctions in order to reduce the its share to less than 49% at the end of 2019, according to the MOU.

68. On 9 November 2017, after almost three years of meetings and negotiations, the agreement of the three European institutions took finally place. Undoubtedly, the most important development for Greece is that lignite stations will not eventually receive emission allowances. The finalization of non-allocation of free allowances in Greece is a major blow to the sustainability of lignite units.

69. Withdrawal of lignite units should be done in a timely manner and a hasty exit that would further damage the competitiveness of Greek industry with the risk of moving production to neighboring countries outside the European Union due to CO<sub>2</sub>

costs. This risk must be addressed by the implementation of appropriate mechanisms within the European Union and the pressure for a worldwide application of common pricing.

### **3.6 Market Test**

70. Both the Ministry for Energy and Competition and PPC management “have in mind” that, even if an investor wants to acquire lignite units and mines to enter the Greek market and control himself the cost of the electricity he may sell, he is not willing to put his arm deep into his pocket.

71. European policy on climate change has made fossil fuel investment unprofitable. Today, the cost of production for a PPC lignite plant is estimated at 50€ per MWh but in 2030 according to the principle “*the pollutant pays*” it is expected to have elapsed close to 100€. In other words, no lignite plant and mine purchase may attract investors’ interest, unless the price is low. And the question is whether both the Board of Directors of PPC, which is accountable to its shareholders, as well as banks can accept a low price bid while at the same time as the case appears to be they may find themselves in the difficult situation of observing their assets being devaluated again after the spin-off.

72. Beyond that, even if the market earns positive feedback, the sale of PPC units is extremely complex, as the separation of these assets from the current body of the company is required and there must be approval by PPC's management boards and the general meetings of the shareholders procedures, which may be contested by unions through strikes and squats.

73. It is perfectly natural for the new owner of Megalopolis and Meliti pursuing to three strategic goals: to shed labor costs, to change the working order so that they could ensure higher returns, but also to maintain a good relationship with employees, in order to maintain working peace.

74. In addition, another debate arises concerning funding, as European banks have ceased to finance projects in this category due to the unprofitable character of coal investment. The difficulty of accessing western banks for funding means that only third-country banks appear to represent a realistic financial oasis.

75. The invitation to participate in the market test will be addressed to energy companies from every continent. In particular, the invitation will be addressed to companies from EU, China, Japan and the US, and of course to Greek players, among who the contacts have recently been intensified. PPC has already addressed a call to the industry to exploit developments and ensure predictable and competitive energy costs. In this pattern, contacts will be concluded between power generators and energy-intensive groups, such as Mytilineos Group of Companies, in order to jointly claim one of PPC's two "packages" on the grounds that large and constant consumption such as industry can ensure the viability of the lignite units for sale.

76. The participants will submit the proposals on the terms of the tender that DG COMP will propose, such as whether they will be sold all together or in separate North and South packages.

## **4. LIGNITE, NUMBERS AND SOCIAL CONSIDERATIONS**

### **4.1 Employment and GDP**

77. According to a research by the Technical Chamber of Western Macedonia the economic well-being of the region continues to be based on the exploitation of lignite.

78. For each permanent staff position in mines and production plants, 3.28 jobs are created and maintained in the local labor market and for each euro spent by PPC on salaries and contracts, more than three euros are induced in the local economy cycle<sup>59</sup>.

79. For the region of Western Macedonia the exploitation of lignite reserves almost exclusively in power generation has been the most important and dominant industrial venture of the last five decades, as the vertically integrated lignite industry catalyzed and shaped the development of the wider area of Amynteo-Ptolemaida-Kozani energy axis.

80. The Technical Chamber came to the following conclusions:

- Of a total of 6,882 permanent and temporary PPC employees in the region, a total of 22,573 jobs are maintained at the level of Western Macedonia, the net annual disposable income of which elevates up to 387 million €, as well as all kinds of contracts and services to mines and production plants generate a wealth of 1,198 million € for the entire local economy meaning in practice that more than 25% of regional GDP is unambiguously generated by the productive activities of lignite industry<sup>60</sup>,
- For each ton of lignite mined in Western Macedonia, the local economy earns a total of 23.81 euros, while for every one thousand tons of lignite 0.45 jobs are maintained<sup>61</sup>,
- Withdrawal of 300 MW of lignite power in the region will deprive the local economy of 83 million € annually and will lead to a loss of 1,559 jobs and, above all, mainly outside PPC. If 2,400 MW are withdrawn without equivalent measures to support the local economy, the figures may prove to be nightmarish and irreversible for the region<sup>62</sup>,

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<sup>59</sup> Technical Chamber of Greece, Department of Western Macedonia "Estimation of the cost of transition of Western Macedonia to low lignite production", July 2012, p.10

<sup>60</sup> Technical Chamber of Greece, Department of Western Macedonia "Estimation of the cost of transition of Western Macedonia to low lignite production", July 2012, p.11

<sup>61</sup> Technical Chamber of Greece, Department of Western Macedonia "Estimation of the cost of transition of Western Macedonia to low lignite production", July 2012, p.12

<sup>62</sup> Technical Chamber of Greece, Department of Western Macedonia "Estimation of the cost of transition of Western Macedonia to low lignite production", July 2012, p.13

- Replacing lignite power with input from imported gas at a price of € 10 per ton of CO<sub>2</sub> emission allowances would result in a loss of 83 million € per year for Western Macedonia and additionally 22.8 million € annual losses for the national economy<sup>63</sup>,
- The cumulative value of lignite mined between 1960 and 2011 offered West Macedonia a total wealth of 35 billion euros and the exploitation of the remaining lignite reserves will total up to 20 billion euros 2054, until the last lignite unit of the region is planned to be withdrawn<sup>64</sup>,
- A critical and crucial turning point for the region is estimated to be in 2021, when a significant part of jobs and income from lignite activity will have been lost<sup>65</sup>,
- At a national economy level, the total lignite extracted from 1960 to 2009 in the region was converted to electricity of 562,000 GWh, prevented the import of 154,000,000 tons of oil equivalent and offered the national economy 49.7 billion euro<sup>66</sup>.

All the above findings come to underline the dominantly one-dimensional perspective of economic development based on lignite industry, the fast reduction of which may leave as souvenir big numbers of unemployment and lack of actual response to the question of the next day development issue.

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<sup>63</sup> Technical Chamber of Greece, Department of Western Macedonia "Estimation of the cost of transition of Western Macedonia to low lignite production", July 2012, p.18

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

## **4.2 Health facts and Social Considerations**

81. Despite the fact that the lignite units and mines have been operating in the Western Macedonia region for over 60 years, it was not until early 2010 that an epidemiological study concerning the health impacts on the local population was assigned to a research team, led by Medical School Professor, Dr. Linou<sup>67</sup>. At all events, empirical evidence shows an increased rate of occurrence of air quality-related diseases in the Kozani prefecture, compared to the neighboring Grevena prefecture, as is also evident from the results of a relevant study<sup>68</sup>, presented below:

### **Respiratory system disease occurrence in children of the Western Macedonia region<sup>69</sup>**

Symptom	Ptolemaida	Kozani	Grevena
Rhinitis	40.3%	35.2%	21,2%
Infectious Bronchitis	12.1%	8,1%	6,7%
Acute Bronchitis	17%	12,3%	7,1%

82. At the same time, a study conducted in the Krokos, Aiani and Tranovalto Kozanis villages by the AHEPA Hospital of Thessaloniki found<sup>70</sup> an increase in the number of deaths resulting from thromboembolism by 50%, 43% and 55% respectively, during 1992-2007. Finally, a study conducted by the Bodossakio General Hospital of Ptolemaida revealed<sup>71</sup> that the allergic rhinitis rate in Ptolemaida is three times the Greek national average. Of particular interest is a recent analysis<sup>72</sup> by Greenpeace Greece, which made use of the data and methodologies described in the European Environment Agency report "Revealing the costs of air pollution from industrial facilities in Europe"<sup>73</sup>. According to the analysis, the air pollution caused by the Western Macedonia lignite units was responsible for 461 deaths in 2009 and for the loss of 1,113,176 work days.

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<sup>67</sup> Linou A., Riza E., "Epidemiological study in the Kozani prefecture", presentation [http://www.kepekozani.gr/pdf/parous\\_meletis.pdf](http://www.kepekozani.gr/pdf/parous_meletis.pdf)

<sup>68</sup> Sichletidis et al, "The effects of environmental pollution on the respiratory system of children in Western Macedonia, Greece", 2005 <http://www.jiaci.org/issues/vol15issue02/6.pdf>

<sup>69</sup> Sichletidis et al., 2005

<sup>70</sup> Kathimerini, "Incontestable evidence that pollution kills", 15.09.2007 [http://news.kathimerini.gr/4dcgi/\\_w\\_articles\\_ell\\_620920\\_15/09/2007\\_241382](http://news.kathimerini.gr/4dcgi/_w_articles_ell_620920_15/09/2007_241382)

<sup>71</sup> Ethnos, "Allergy... disease in Kozani", 10.05.2010 <http://www.ethnos.gr/article.asp?catid=23106&subid=2&pubid=11815044>

<sup>72</sup> Greenpeace, "Greece's seven wounds", [http://www.greenpeace.org/greece/Global/greece/image/2012/climate/dei/img/20120214\\_Human\\_and\\_economic\\_cost\\_of\\_lignite.pdf](http://www.greenpeace.org/greece/Global/greece/image/2012/climate/dei/img/20120214_Human_and_economic_cost_of_lignite.pdf)

<sup>73</sup> EEA 2012, "Revealing the costs of air pollution from industrial facilities in Europe", <http://www.eea.europa.eu/pressroom/newsreleases/industrial-air-pollution-cost-europe>

83. The effects of gaseous pollutants on the human respiratory system are well documented in the international literature. Indeed, a recent report by the OECD and the World Health Organization has proven that 8-9.000 premature deaths in Greece per year are due solely to emissions of microparticles<sup>74</sup>.

84. The embarrassing truth is that the above numbers may prove a negatively impressing biological outcome. The so-called monoculture of lignite since 1950s has formed a stable ground for respiratory and cancer-like diseases which might have intruded into the DNA chain of local people, something that rings the bell of future generations' health considerations. The way the circumstances have already been shaped onto the "easy money" of lignite exploitation, the big cost of medical and medicinal service has been conferred upon the Greek National Health System. In other words, the Greek taxpayer has funded a whole medical industry to counter-fight the above-mentioned diseases, for more than half a century. Of course we could have tried to fight the cause and not the symptom. It is said that 1 gr. of prevention equals to 1 ton of repression. Unfortunately, we found ourselves in the 1 ton side. It is so evident that healthy competition goes hand in hand with a life in health.

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<sup>74</sup> World Health Organization, 2015: Economic cost of the health impact of air pollution in Europe: Clean air, health and wealth, p. 8, [http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0004/276772/Economic-cost-health-impact-air-pollution-en.pdf?ua=1](http://www.euro.who.int/__data/assets/pdf_file/0004/276772/Economic-cost-health-impact-air-pollution-en.pdf?ua=1)

## Conclusions

85. From all the above it becomes clear that healthy competition in Greek electricity market dictates that traders must be at the same time producers at a competitive cost, as long as gas remains cheap. In the near future PPC or whichever electricity producer, based on lignite, may not be able to fight this penetration at retail market. Independent producers will be rapidly able to reach a retail share at least equal to the power of their units, something that comprises really healthy competition because it is carried out between companies that integrate electricity production and supply, while at the same time there is no power availability enhancement. In these circumstances, the retail sector itself evolves into a balance where the lignite-like profile producers will transact with customers in an amount of energy equal to their production without state interference and without asymmetrical market regulation.

86. At the same time, the wholesale market has to be self-regulated. To the extent that independent producers sell energy as well as the energy they produce by recovering total costs from customers, these producers seem untouched by wholesale prices. This is the ideal condition for competition in both wholesale and retail market. The ideal self-regulation that has been described is also the great advantage of market design in Greece introduced by law 3175/2003, which has been so much challenged to date.

87. Therefore the development of the energy market is crucial for the development model of Greece aiming at creating wealth by maximizing domestic potential<sup>75</sup>. However the EU should take into consideration that every state and especially Greece is in need of different arrangements in order to handle local circumstances such as different market structures and high obsolete consumption<sup>76</sup>. The target of the Commission is to assure that the competition is actually established and as a result consumers would have the possibility to receive the expected benefits from liberalization<sup>77</sup>.

88. In fact, the cost of electricity and gas for the Greek energy-intensive industry is significantly higher in Greece compared to European and international competitors. This disadvantage is even increasing, as the cost over time in Greece is rising in a period where global trends are diminishing. The potential for improving competitiveness must be sought in the main factors that shape the cost, in the case of electricity, of the mix of fuels used in power generation, the maintenance of monopoly practices and the imposition of higher regulated tariffs than other markets.

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<sup>75</sup> *Euripides Ioannou and Dimitra Paclouti, Editor: David Scharz, The energy Regulation and Market Review- Greece, Chapter 9, Law Business Research Ltd, 2012, p.108*

<sup>76</sup> *Martin Ahlert, Samuel de Haas, Prof. Georg Gotz, Thibault Henri, Christian Lebelhuber, Lazlo Szabo, STUDY ON "BARRIERS TO CROSS-BORDER ENTRY INTO RETAIL ENERGY MARKETS", E-Bridge Consulting, Bonn, Germany. 23 July 2014, p.60*

<sup>77</sup> *Neelie Kroes, Improving Competition in European Energy Markets Through Effective Unbundling Fordham International Law Journal [Vol. 31:1387, 2007 p.1440-1441*



89. From the monitoring of the Greek market it has been noted that lignite units operate even at a loss to prevent the operation of other units, while at the same time, the fact that a compulsory quantity of electricity from units in prolonged test operation, such as Aliveri, Megalopolis and Hilarion, in the daily energy planning can be treated as distortion of competition. Furthermore, it is questioned whether the quantities of RES injected are the correct ones in terms of predictions made by ADMIE and there is a doubt as to whether or not the procedure favors the dominant company.

90. The price of electricity can be reduced by improving the efficiency of distribution, by limiting regulatory charges and by creating conditions of really healthy competition. The European expectation of increasing competitiveness through the creation of a free, privatized and competitive energy market can have beneficial effects in our country by providing clarity and rationality on the way and scope of energy price use as a tool for social policy.

91. For gas, relatively high costs can be reduced by access to international procurement markets and ensuring competitive internal distribution costs. Once oil and gas prices rise again, the access to lignite and hydroelectric power will again reveal its strong advantage. Again, the units of the individual producers would be at risk and they would not be able to attract customers to recover the total cost directly from them. As soon as gas prices continue to be low for a long time, and until carbon prices start rising significantly then healthy competition can last and become stronger. This position brings onto the surface the debate about the new lignite plants of PPC, Ptolemaida V and Meliti II.

92. According to PPC, a Ptolemaida V sustainability study has been carried out which has examined very high CO<sub>2</sub> scenarios, up to € 20 per ton for 2020 and above € 30 per ton in 2030<sup>78</sup>. However, it is more that evident that if the price per ton climbs up to 30 €, Ptolemaida V will be displaced by gas units in the daily wholesale energy market where it deals with all the electricity produced, imported and consumed in the interconnected system of the country. In the same line, a study conducted on behalf of WWF Hellas in 2013 claims that even for very moderate scenarios of CO<sub>2</sub> price developments, the economic viability of both PPC's new lignite plants (Ptolemaida V and Meliti II) will be doubtful<sup>79</sup>.

93. However in the industrial segment of the market, lignite production is the sole solution that can be viable and realistic, through bilateral contracts in a level of elementary competitive prices for the energy-intensive industry. If the current lignite bids on the wholesale market actually reflect the variable cost of running lignite units, then lignite based electricity does not appear to be a viable solution. When carbon dioxide prices start rising, lignite will be banned for industry. The only long-term energy-finding solution with a competitive price for industry is to integrate the Greek electricity market into a truly single market with sufficient electricity interconnections. Perhaps an active turn to the Balkan countries with the aim of rapidly implementing

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<sup>78</sup> Lignite: The cost of charcoal, <https://insidestory.gr/article/lignitis-dei>

<sup>79</sup> Ptolemaida V and Meliti II, "Economic viability report of the new lignite units", July 2013, p.32.

the single market in the model adopted by the EU is the long-term solution for independent companies and the industry. This policy will give a long-term perspective to competition by shielding against fluctuations in gas prices, whereas gas plants will remain valuable to the system as renewable energy sources grow and as carbon dioxide prices rise.

94. One significant impediment to the achievement of the liberalization of the electricity market is the reluctance of the consumers because of prior private energy companies that collapsed, such as Energa and Hellas Power and the lack of confidence of Greek people to the private sector in comparison with public owned companies, even if they complain about the malfunctioning of the public sector. Consumer's skepticism is the result of political instability, lack of transparency and the inability of the Greek government to control efficiently private-owned companies functioning in the neuralgic sector of electricity.

95. Given the entry into the market of an adequate number of new producers who will start to compete each other and not with PPC, coupled with the implementation of a consistent pricing regulatory policy, we will achieve a market equilibrium which will lead to long-lasting coordination of tariffs of the retail market with the average long-run cost of electricity generation. It will be rendered quite evident that by the time that the distortion of the dominant PPC in the wholesale market so far (which is actually being reflected in the retail electricity market) is about to cease, it will not be necessary to take complex regulatory measures, rather than strictly monitoring and supervising the way in which the market participants operate. If the market itself, having overcome the initial stage of entry of new producers, operates under the conditions of free competition then we will be able to speak of an efficient operation of the electricity sector.

96. New entrants, who are now limited to the risk of abuse of dominant player, will gradually attempt to offset the cost-intensive business fluctuations in the long run of the system's marginal price and seek long-term electricity contracts with retail customers, something that the recently adopted Greek Law for the Energy Stock Market has already permitted. Due to the competition, they will transfer part of their efficiency to the prices they will offer to their final customers who will in turn negotiate better prices and stability in their long-term contracts with the producers. It appears that the new provisions of the target model will progressively develop a long-term forward market that can effectively manage market risks whether they stem from fluctuations in international fuel prices or from sudden changes in capital markets. Perhaps it is an over-optimistic perspective of the present dissertation that we are walking near the path of making the provisions of Directive 2003/54 / EC for fair competition conditions come true. The crack in the abusive conduct of PPC is about to occur and as Leonard Cohen would remind us, "there is a crack in everything; this is how the *light* gets in".

## **Bibliography**

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### **Primary Sources**

#### **European Legislation**

1. Directives of the European Parliament and of the Council 1996/92 of 19 December 1996 (Electricity) OJ L 27/20 and 1998/30 / EC of 22 June 1998 (natural gas), OJ L 204/1.
2. Directives 2003/54 of 26 June 2003 (electricity) OJ L 176/37 and 2003/55 / EC of 26 June 2003, OJ L 176/57 replacing Directives 1996/92 and 1998/30 / EC respectively.
3. Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity, OJ L 176/1,
4. Regulation (EC) 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks, EEL 289/1
5. Commission notice, Research pursuant to Article 17 of Council Regulation (EC) 1/2003 to the European Gas and Electricity Sector (Final Report), SEC (2006) 1724,
6. European Parliament and Council Directives 2009/72 of 13 July 2009 (Electricity) OJ L 211/55 and 2003/73 / EC of 13 July 2009 (gas), OJ L 211/94 which replaced the Directives 2003/54 and 2003/55 / EC respectively.
7. (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L 211/1; July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) 1228/2003, OJ L 211/15.
8. Regulation (EC) 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, OJ L 211/36
9. European Commission press release IP/94/805 of 2 September 1994. See also
10. Commission communication - Guidelines on the Commission's priorities for joint enforcement of Article 82 of the EC Treaty on abusive exclusionary conduct by dominant undertakings,
11. Commission Decision of 5 March 2008 on the granting or maintaining in force by the Hellenic Republic of rights in favour of Public Power Corporation S.A. for extraction of lignite,
12. Commission communication on Article 82 (now 102 TFEU), point 83,
13. Commission Decision of 4 August 2009, COMP / B-1 / 38.700, OJ C 243/5, 10/10/2009 (summary of decision).
14. ISMA, XXIII Commission Report on Competition Policy (1993), paragraph 223

15. Memorandum of Understanding between the European Commission acting on behalf of the European Stability Mechanism and the Hellenic Republic and the Bank of Greece, 2012
16. Memorandum of Understanding between the European Commission acting on behalf of the European Stability Mechanism and the Hellenic Republic and the Bank of Greece, 2015
17. Supplemental Memorandum of Understanding between the European Commission acting on behalf of the European Stability Mechanism and the Hellenic Republic and the Bank of Greece, 2016

## **Case Law**

1. ECJ Case 22/76 United Brands [1978] ECR, para. 65,
2. ECJ case 85/76 La Roche [1979] ECR 461, Para 91,
3. ECJ Case 85/76 Hoffman-La Roche [1979] ECR 461, para 28,
4. C (2009) 864 final, points 9-10,
5. Case T-83/91 Tetra Pak v Commission (Tetra Pak II, Coll., 1993, p. 11- 755, paragraph 114
6. Case T-111/96 Promedia v Commission [1998] ECR H-2937,
7. Case T-228/97 Irish Sugar v Commission [1999] ECR II-2969, paragraph 112; and Case T-203/01 Michelin v Commission [Michelin II, , paragraph 97,]
8. C-274/2008, Commercial Solvents in 1974 (ECR 250-1,1974, 1CMLR ,340-1, 1974, United Brands (ECR 217,1978, 1 CMLR 435,1978)
9. Decision of 10 December 2007, Conseil de la concurrence, n ° 07-D-43, Direct Energie,
10. The Lithuanian AA decision on access to underground tunnels: Vilniaus Energija (2007)
11. The decision of the UK regulator, OFGEM, decision of 24 February 2008, Competition Appeal Tribunal (CAT, 29/4/2010) and then Court of Appeal, UK Court of Appeals (23/2/3010, OFGEM v. National Grid),
12. Decision of the Spanish AP of 2 April 2009, Case 641/2008, Centrica / Electra de Viesgo - SIPS,
13. COMP / 36246, Matathon / Ruhrgas / GDF et al. See also the Commission's press releases, IP / 01/1641, 23/11/2011, Marathon / Thyssengas, IP / 03 / 547,16 / 4/2003, Marathon / Gasunie, IP / 03/1129 29/7/2003, Marathon / BEB, IP / 04 / 573,30 / 4/2004, Marathon Gas / Ruhrgas
14. Case T-421/09, The Judgment of the General Court of 15 December 2016, par. 159
15. Judgment Of the General Court (First Chamber) 15 December 2016, Case T 169/08 RENV
16. ECJ 12-2-1998 Raso and Others, Case C-163/96, Reports of Judgments I-533
17. ECJ 6-7-1982, France, Italy and the United Kingdom v Commission, Cases 188-190 / 1980, Collection of Judgments p. 2545
18. COMP / 39.402, RWE, judgment of 18.3.2009, OJ C 133 / 10.12 / 6/2009

## Secondary Sources

### Books

1. *Velekkis, Em.*, "The liberalization of public service monopolies and Community law", [2000] WEU,
2. *Velekkis, Em.*, "Deregulation of State Monopolies and Electricity [2005]
3. *Marinos, M.-Th.*, Access to an energy grid - the liberalization of the electricity market, Ant. N. Sakkoulas, Athens-Komotini, [2003],
4. *Koutzoukos, G., Aslanoglou, M. & Trokoudi, A.*, "The Internal Market for Electricity from the First to the Third Energy Bundle and Role of the Regulator and the Administrator".
5. *Heiko Kruger*, European Energy Law and Policy, An introduction, 2016,
6. *Michail L. Polemis*, Competition in the relevant Electricity Markets in Greece: Utopia or Reality, Energy, Networks and Infrastructure, Legal Library, 2014,
7. A Jones and B Sufrin, EC Competition Law: Texts, Cases and Materials (3rd edition, OUP 2008) 352 et seq.
8. *M Roggenkamp, C Redgwell, Ide Guayo and A Ronne*, Energy Law in Europe, 264 et seq.)
9. *Levbeque, R*, La mise en oeuvre du droit de la concurrence dans les industries electriques et gazieres, 2 Concurrences 2006,; SPECTOR, D., op., P. 52).
10. <sup>1</sup>*Hatzopoulos, V.*, The Basic Facilities Rule in European and National Competition Law, Ant. N. Sakkoulas, Athens-Komotini, 2002
11. *Koch O., Nagy, K., Pucinskaite, I., Tretton, W.*, The RWE gas foreclosure case: Another energy network divestiture to address foreclosure concerns [2009] 2 Competition Policy Newsletter,
12. *O'Donoghue, R., Padilla, A.*, The Law and Economics of Article 82, Hart Publishing, 2007, p. 408.
13. *Georgopoulos, Antonios*, Liberalization of the markets, business privatization and reorganization,
14. *Ramammurti R.*, The search for remedies in: *RAMAMURTI R. & VERNON R.* (ed.) Privatization and control of state-owned enterprises. Economic Development Institute of the World Bank, Washington D.C. 1991,
15. Newbery D. : Privatization, Restructuring and Regulation, MIT Editions, 1999
16. *Heald D.*, Will the privatization of public enterprises solve the problem of control? [1985] Public Administration 7-22.)
17. *Roggenkamp M.*, Implications of Privatisation, Liberalisation and Integration of Network bound Energy Systems [1997],
18. Panagos Th. : The Legal Framework of the Energy Market, Sakkoulas Editions, 2012
19. *Arocena P.* Privatization policy in Spain: Stuck between liberalization and the protection of national interests<sup>1</sup>
20. *Euripides Ioannou and Dimitra Paclouti*, Editor: *David Schartz*, The energy Regulation and Market Review- Greece, Chapter 9, Law Bussiness Research Ltd, 2012,

21. *Batram, G.S; Bhatia, B.S.*, Disinvestment of Public Enterprises equity: A Restructuring Strategy, (MDI) 2006,
22. *Vijaya Kimiar, A*, Privatisation of Public Sector Enterprises - Issues and prospects. Southern Economist 36(9) 1 September 1997
23. *Martin Ahlert, Samuel de Haas, Prof. Georg Gotz, Thibault Henri, Christian Lebelhuber, Lazlo Szabo*, STUDY ON "BARRIERS TO CROSS-BORDER ENTRY INTO RETAIL ENERGY MARKETS", E-Bridge Consulting, Bonn, Germany. 23 July 2014,
24. *Neelie Kroes*, Improving Competition in European Energy Markets Through Effective Unbundling FORDHAM INTERNATIONAL LAW JOURNAL [Vol. 31:1387, 2007],
25. *A Jones and B Sufrin*, EC Competition Law: Texts, Cases and Materials (3rd edition, OUP 2008),
26. *Farinos*, Operational and Stock Market Performance of State-Owned Enterprise Privatizations: The Spanish Experience [2007]
27. *Hall D. et al*, Public resistance to privatization in water and energy [2005]
28. *Galanis, Th.* [2009] 10 Energy and Law, p. 65
29. *Cameron P.* : Competition in Energy Markets, Oxford University Press, 2nd Edition, 2007

## Journals

1. JEnergyNatResourcesL 51, CESIFO Working Paper, No. 1187, 2003,
2. LONDON ECONOMICS, Final Report to EC DG Internal Market & Services-Analysis of developments in the fields of direct-investment and M&A, Report 2010.
3. Development in Practice 286-301, JUPE R., The privatization of British Energy: risk transfer and the state, Kent Business School Working Paper No. 221.
4. Technical Chamber of Greece, Department of Western Macedonia "Estimation of the cost of transition of Western Macedonia to low lignite production", July 2012,
5. Ptolemaida V and Meliti II, "Economic viability report of the new lignite units", July 2013,
6. *Dutton Joseph*, "Eu Energy policy and the Third Package, EPG Working Paper 1505, University of EXTER, Energy Policy Group, July 2015
7. European Law Review, 2015, Case Comment, The Greek Lignite case: a (questionable) victory of the "effects theory", *Eleni Manaridou*, E.L. Rev. 424
8. European Competition Law Review, ,2014, Case Comment, European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI), Robert Miklós Babirad, E.C.L.R. 613
9. A resource-efficient Europe, Report of the European Commission on Competition Policy 2010.

## Electronic sources

1. Lagie: The Public Consultation for the introduction of the codes for the new energy markets, towards the target model, <https://energypress.gr/news/lagie-se-diavoyleysi-oi-kodikis-ton-neon-agon-toy-target-model>
2. How the Energy Stock Exchange will work, <http://www.tovima.gr/finance/article/?aid=905508>
3. Report by London Economics available at <http://ec.europa.eu/comm/competition/sectors/energy/inquiry/index.html>
4. The website of the French competition authority, <http://www.autoritedelaconurrence.fr>
5. Highlights of the Energy (Electricity) Reforms in Greece, <sup>1</sup><http://www.kglawfirm.gr/search.php?s=Highlights+of+the+Energy+%28Electricity%29>
6. Linou A., Riza E., "Epidemiological study in the Kozani prefecture", presentation [http://www.kepekozani.gr/pdf/parous\\_meletis.pdf](http://www.kepekozani.gr/pdf/parous_meletis.pdf),
7. <sup>1</sup> Sichelidis et al, "The effects of environmental pollution on the respiratory system of children in Western Macedonia, Greece", 2005 <http://www.jiaci.org/issues/vol15issue02/6.pdf>
8. <http://www.ethnos.gr/article.asp?catid=23106&subid=2&pubid=11815044>
9. [http://www.greenpeace.org/greece/Global/greece/image/2012/climate/dei/img/20120214\\_Human\\_and\\_economic\\_cost\\_of\\_lignite.pdf](http://www.greenpeace.org/greece/Global/greece/image/2012/climate/dei/img/20120214_Human_and_economic_cost_of_lignite.pdf),
10. EEA 2012, "Revealing the costs of air pollution from industrial facilities in Europe", <http://www.eea.europa.eu/pressroom/newsreleases/industrial-air-pollution-cost-europe>,
11. World Health Organization, 2015: Economic cost of the health impact of air pollution in Europe: Clean air, health and wealth, p. 8, [http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0004/276772/Economic-cost-health-impact-air-pollution-en.pdf?ua=1](http://www.euro.who.int/__data/assets/pdf_file/0004/276772/Economic-cost-health-impact-air-pollution-en.pdf?ua=1)
12. Lignite: The cost of charcoal, <https://insidestory.gr/article/lignitis-dei>
13. [www.konkuren.lt/index.php?how=nut\\_view&nut\\_id=689](http://www.konkuren.lt/index.php?how=nut_view&nut_id=689)
14. *Macgeorge R.*, An examination of the causes and outcomes associated with the restructuring and privatization of energy markets during the 1990s, source: <http://www.ridgway.co.nz/files/energy-reform-history.pdf>,
15. [http://news.kathimerini.gr/4dcgi/\\_w\\_articles\\_ell\\_620920\\_15/09/2007\\_241382](http://news.kathimerini.gr/4dcgi/_w_articles_ell_620920_15/09/2007_241382),
16. [www.rae.gr/site/system/docs/misc1/elecmarktreorg/file2.csp?viewMode=normal](http://www.rae.gr/site/system/docs/misc1/elecmarktreorg/file2.csp?viewMode=normal)