

## Competing interpretations: how long is 'long enough' to be appointed to the post of president or member of the national competition authority?

11<sup>th</sup> January 2024

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On 8<sup>th</sup> December 2023, the Court of Appeal acting in its review jurisdiction (the '**Court**'), delivered an important judgment<sup>1</sup> with which it clarified the meaning of article 9(4) of the law on the Protection of Competition of 2008, Law 13(I)/2008 (the '**Law**'). Despite the fact that the Law has by now been repealed and has been substituted with the Law on the Protection of Competition of 2022, Law 13(I)/2022, the judgment is important in so far as the said provision has been retained in the currently applicable law and in view of its wide-ranging implications on all the decisions taken by the Commission (as this is defined below) acting with the composition which was challenged in court.

The appeal was directed against a decision of the first instance Court (the '**Appeal**') which had accepted the submissions of the Pancyprian Organisation of Cattle Farmers (POCF) Public Ltd. (the '**POCF**') concerning the due constitution of the Competition Commission (the '**CC**'/ the '**Commission**'). In particular, POCF had argued that the composition of the Commission was faulty as its president had been appointed to the Commission for one term as a member and for two further terms as its president, contrary to the limitation provisions of Article 9(4) of the Law. The first instance Court allowed the administrative recourse accepting this argument and thus refrained from examining the rest of the submissions on the substance of the case.

The Appeal filed by the CC turned against this first instance decision. The Court had to examine the meaning and scope of Articles 9(4) and 9(5)(a) of the Law.

The said articles provide as follows:

'9.(4) The term of the President and of the other four members of the Commission is for five years and may be renewed only once, without prejudice to the provisions of para. (2).

(5)(a) In case the post of the President or of another member of the Commission becomes vacant prior to the lapse of his/ her tenure, the Ministerial Council, following a proposal of the Minister, appoints a new President or other member for the remainder of the tenure of the President or of the other member, depending on the case, whose post has become vacant, without prejudice to the provisions of para. (2). The tenure of the President or of the other member of the Commission who is appointed pursuant to this paragraph, may be renewed twice, provided that during the first appointment the President or the other member is called to serve for a period less than two years and six months'.

Mrs. Loukia Christodoulou ('**LC**') had first been appointed to the Commission as a *member* on 14.05.2008 until 19.12.2011. She was then appointed on 20.12.2011 as *president* of the Commission in order to fill a vacancy of the said post, until 17.04.2013 (i.e. for a period of around one year and four months). On 18.04.2013 she was

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<sup>1</sup> Administrative recourse under number 1848/2018, *Commission for the Protection of Competition* vs. *Pancyprian Organisation of Cattle Farmers (POCF) Public Ltd.*

appointed as president of the Commission for a five-year term, until 17.04.2018. Then, on 24.04.2018 she was re-appointed to the position of president of the Commission for another five-year period, until 23.04.2023.

The first instance court had considered that provisions of Article 9(4) and (5) of the Law were to be interpreted as capturing *any* appointment of one to the Commission, irrespective of the particular post in question. Thus, the said court took the view that the appointment of LC first as a member and then as a president of the Commission (appointed once in order to fill a vacancy and two further 'regular' appointments), were to be calculated altogether and to be considered in the light of these provisions. The reasoning of the first instance court's decision lies in the interpretation attributed to the said provisions. The judge pointed out that the essence of the said provisions was to place a limit to the tenure of the members of the Commission- irrespective of the particular position they hold, either as president or as a member- to a total maximum of twelve and a half years.

According to the court of first instance, if a contrary interpretation was to be adopted, this would (a) defeat the obvious purpose of placing a limit to the duration of the tenure of a member of the Commission and (b) lead to the absurd conclusion that one would be eligible for perpetual appointment as a member of the Commission, through the appointment of one to alternate positions- that of a president and that of a member- as each time the maximum term of tenure would apply to the different position afresh (i.e. 12.5 years as president, then 12.5 years as a member, then 12.5 years as president, then 12.5 years as a member and so on).

The Court of Appeal disagreed with this interpretation stating that per the letter of the law, the said provisions were clear, thus a different method of interpretation- systemic or teleological- which would broaden the prohibitive scope of the said provisions was not warranted and indeed, was prohibited as it would tantamount to an inexcusable overstep upon the ambit of the powers of parliament, leading to a violation of the principle of separation of powers.

Characteristically, the Court of Appeal cited the following passage from ***Ghalanos Distributors Ltd v. Δημοκρατίας***<sup>2</sup>:

'The teleological, purposive interpretation permits, whenever the text of the law allows for such a discretion, the adoption of that interpretation which would most effectively promote the fulfillment of the apparent legislative intent. It does not justify however, neither is it possible nor permissible to deviate from the express provisions of the law or to amend the text thereof. Whenever the provisions of the law are clear the text alone constitutes the sole authentic guide as regards the legislative intent.

In the present case the provisions of the proviso are clear and may not be subject to any other interpretation other than the one given by the first instance Court. The Court does not pass judgment on the policy of the law neither does it attempt through interpretative means to give a wiser or a more just solution or even a more desirable one than the one provided by the section.'

The Court of Appeal, applying a linguistic interpretation, interpreted the wording of the provisions in question in their natural and usual manner taking into account their semantic and syntactic characteristics. It considered that

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<sup>2</sup> [\(2002\) 3 ΑΑΔ 528](#), 533

had the legislator wished to introduce a maximum tenure of one being a member of the Commission *in any post* (either that of president or that of a member of the Commission) for twelve and a half years as suggested by the lower court, a different language would have been used to render this clear beyond any doubt. To the extent that such language was missing, it was not possible to bestow a different interpretation to the provisions of the Law to the one prescribed by the Court of Appeal. The Court of Appeal placed emphasis on the language used in the said provisions and in particular, on the phrase '*renewal* of tenure'. Per the Court of Appeal this language was sufficiently clear to be understood as referring to the renewal of a *specific* position, i.e. that of either the president of the Commission or of a member of the Commission and was not meant to be understood as a renewal of one's appointment as a member (generally, without specifying whether this was in the capacity of a president or of a member) of the Commission.

This interpretation appears foolproof to the extent that (i) the two positions call for different qualifications per Article 9(2)(a) and (b) of the Law and (ii) when one talks of a 'renewal', the renewal would have to relate to the exact same position of appointment, not to the renewal of 'an appointment' in general. Thus, one would talk of a renewal of an appointment of the president of the Commission or of a renewal of an appointment of a member of the Commission.

The Court of Appeal made a further important clarification in response to the reasoning offered by the court of first instance. It clearly stated that the interpretation given to these provisions by the Court of Appeal would not lead to the possibility of appointments of a single person ad infinitum to the two positions of president and of member of the Commission, alternating between the two. The Court of Appeal pronounced unequivocally that the provisions should be understood as providing for the renewal of a specific position once (along with any permissible limited appointment for a vacancy) and in the event that a single person has been appointed to both positions thus, the right to appoint such a person further would be considered as having been exhausted.

The Court of Appeal thus seems to have clarified that potentially one person (assuming s/he is duly qualified per the provisions of the Law) may be appointed to the Commission- both as a president and as a member- for a total maximum of twenty-five years.

The question which arises here is whether the application of the linguistic interpretation which leads to the aforementioned result, is in line with the intent of the legislator as regards the need to insert a maximum limit to the tenure of a president of the Commission and of a member of the Commission, especially since the two methods of interpretation lead to very different results: one interpretation leads to a result of twelve and a half years whilst the other to twenty-five years.

The Law regrettably does not include any recitals which could have shed light upon the legislator's intent on this point. Equally regrettable is the fact that the Court of Appeal in its decision refrained from commenting on this crucial aspect underlying the rationale of the provisions it was called upon to interpret.

The decision would have been stronger had it addressed the rationale underpinning the limits placed on the tenure of a member of the Commission per the legislator's intent and had it illustrated how the Court of Appeal's interpretation of the said provisions was aligned with such intent. A dry pronouncement of how one may interpret the said provisions linguistically without any additional elaboration, falls short of convincing one of the view taken by the Court of Appeal on the matter, especially since it is evident that it was possible to attribute more than one acceptable interpretation to the provisions in question (see the differing views taken by the court of first instance

and the Court of Appeal). Moreover, it fails to clarify the reasoning of the legislator and pronounce clearly which interest is served with the provisions in question, thereby raising additional questions.

One may speculate that the legislator intended to place a limit on the tenure of one's appointment to the Commission (either as president and/ or as a member thereof) to safeguard the members' independence and in order to eliminate situations where a member would be conflicted when carrying out his/ her duties as a member (either as a president or as a member). For example, it would be easy to imagine a case where a member- acting either as president or member- would be willing to follow the government line in an attempt to secure re-appointment rather than exercising his/ her duties independently on the basis of purely scientific/ technical considerations.

Inevitably, the question concerning the optimal point at which the line should be drawn for a maximum tenure arises: is it at five years, at ten years, at twenty years, at the retiring age? Would it be desirable for one to act for the maximum capacity of both a member and of a president? Would this lead to an inordinate amount of time serving as a member of the Commission such that it could impair the said member's independence as well as create a conflict of interest?

These questions should have been addressed in the decision of the Court of Appeal. It is hoped that in the event that the matter reaches the Supreme Administrative Court that the latter would tackle these questions head-on and provide clear pronouncements on the meaning and limits of the Law.

It is interesting to note that there is no uniform approach adopted on this question around the world. One sees different solutions adopted, from a fixed single tenure (e.g. Italy and Spain), to a single renewal (e.g. Netherlands, Slovakia, Uruguay), to renewals of tenure without a specified limit (e.g. Singapore and Germany). Further, the term of tenure varies around the world, both in terms of duration (e.g. Mexico: 10 years, Italy: 7 years, Hungary: 6 years, Brazil: 4 years) and in terms of a distinction being made in the tenure of the president and of members- some jurisdictions provide for the same tenure for both the president and the members (e.g. Germany, Greece, Cyprus), whilst others make a distinction between the two (e.g. Netherlands).

Importantly, the ECN+ Directive<sup>3</sup> does not require of EU Member States to introduce or maintain a fixed tenure for members of the competent national competition authority (even though it is rare for a limit not to be in place) and in the same vein, there is no requirement for a maximum term of such a tenure. Moreover, the ECN+ Directive does not include any rules concerning the reappointment of the same person to the competent national competition authority. EU Member States have the discretion to choose which model/ mechanism works best for them.

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<sup>3</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market