Moving towards the digital era in the radio-television setting: The challenges to competition law[1]

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1. Television (TV) broadcasting is and should not be free. This is an old premise, which, somehow, was never realized in the fairest way for all parties involved. TV broadcasting is provided by public and mostly private enterprises using public resources and although their activity seeks to serve pluralism and other constitutional values, it is nowadays, more than ever, primarily a question of business and economics. This is why the operation of broadcasting enterprises can no more be left outside state regulation and control, in particular through licensing. The Council of State of Greece has been called to rule upon different aspects of the problem many times during its recent history. Council of State decisions 2594-2596/2015 provide a good chronicle of the Greek situation. These cases concerned the constitutionality and conformity with EU law of the imposition on TV nationwide stations, by way of ministerial decision, of a charge (fee) to be paid in return for the use of radio-frequency channels, during the years 1995 – 1997, in order to broadcast TV programs to a wide range of viewers.[2] It all started with Law 1866/1989, which abolished the state monopoly in radio-television and allowed for the direct state licensing of public limited companies (SA) and local municipalities and according to which the companies that were granted licenses for direct television emissions through previously determined radio-frequencies or radio-frequency zones, concluded with the Greek State a contract that placed them under the obligation to assign every year to the State a certain percentage of their net profit, the amount of which was set in the contracts. Subsequent Law 2328/1995 governed the terms and regulations of television licensing, which was to be made on the basis of an invitation to tender for an exact number of license positions determined according to the category of stations (nationwide, regional and local level) and also according to prospective

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[2] Council of State decisions 3828-3830/2014 dealt with similar issues regarding the constitutionality and conformity with EU law of a user charge imposed on TV channels, by way of decision of the National Telecommunications and Post Commission, for the use of radio-frequencies in order to transmit (analog) TV signal from the point of the production of a TV program to the point of the center of the emission.

candidates and after selection of successful candidates on the basis of criteria set by law (relating to capital concentration, denomination of shares and transparency of the economic means of stations and of their shareholders). A sum of money amounting to the 2% of the gross income of the TV station was determined by the above Law as a minimum annual return to be paid by private enterprises (but not by the enterprises belonging to municipalities) to the Greek State for the use of one or more radio-frequency channels. This sum could be adjusted by ministerial decision and collected as state revenue. The licenses granted on the basis of the provisions of Law 1866/1989 were to be revised within a year since the entrance into force of Law 2328/1995, according to the criteria set by this last Law. TV channels that were to be found not to conform to the above criteria would face the revocation of their license after the expiration of a set time limit within which they would be asked to conform. However a competition for the granting of licenses never took place. The duration of the aforementioned, so-called "first licenses' was extended for a period of 9 months with Law 2438/1996, during which (time) all TV channels (old and new license-holders) were obliged to pay the 2% on their annual gross profit as a condition for the continuation of the use of the radio-frequencies awarded to them. The operation of TV channels, which had obtained directly by the State a nationwide license that meanwhile expired or which had started to operate with a local or regional license that was later on converted into a nationwide license, continued on the basis of extensions granted to them by different subsequent Laws.

2. Based on the provisions of Laws 2867/2000 and 2246/1994 which characterized the radio-frequency spectrum as scarce resource, the management of which constituted a sovereign right of the State, as well as on the basis of the provisions of subsequent Laws 3431/2006 and 4070/2012, the Council of State ruled, with decisions 2594-6/2015, that the radio-frequency spectrum is a public good of significant economic value, since the licensed use of the spectrum gives to the holder of the license the possibility to gain considerable economic benefits and advantages over other entrepreneurs who would also have wished to use and exploit the same resource. This fact justified the imposition of a user charge (essentially a rent) which reflected *inter alia* the value of the use of this scarce resource and for that reason it constituted neither a tax nor a state fee imposed to cover the costs of a public service especially provided to the ones that had to pay the fee. This user charge, which was imposed to the aim of optimal exploitation of this scarce resource, constituted also a legitimate restriction of the economic freedom of enterprises, linked to the exploitation of the public resource. The amount of the charge, which was set to the 2% of the financial turnover of an enterprise (derived from both television emissions and other TV services like

the selling of TV products), was held not to contravene the principle of proportionality either, since it was deemed as a simple, transparent and expedient method of calculation of the fee to be charged for the use of the radio-frequency spectrum and since it was combined with the efficiency of the radio-frequencies, while at the same time it left a margin of development to private television and prevented the concentration of private television to economically powerful interested parties. The Council of State also rejected arguments that the imposition of the user charge, only on private TV channels and not on the state and municipality channels, contravened the constitutional principle of equality, by invoking the different institutional structure of public television on one hand (non-licensed, public enterprise under state control bearing the constitutional role of providing information, education and entertainment to Greek people) and private television on the other (licensed entrepreneurial type of activity). The Court also rejected arguments that the imposition of this fee violated competition among private channels and also between private channels and public television, since it found the conditions for the application of Art. 101-102 of the TFEU were not met. Finally the Court rejected arguments that the exclusion of state and municipality television from this fee constituted illegal state aid, since the product of the imposition of this fee was not destined to finance the state aid, neither did it affect the amount stated.

3. The Law that provided again for the licensing of private television, changed in 2007. Statute 3592/2007 introduced a new competition procedure for TV stations using analog signal / free broadcasting, as well as for the providers of terrestrial digital television broadcasting content. This new competition procedure was to be conducted by the National Radio-Television Council. The difference between analog and digital signal technology is, in broad terms, that in the first case each radio-frequency channel can host only one TV channel while in the latter case each channel can host the signal of multiple TV programs; the digital signal is decoded only when it reaches the receiver, i.e. the home television set. The number of signals hosted by each radio-frequency channel may vary according to the quality of the picture produced (high definition or standard definition) and to the technology used for the decoding of the signal and in any case according to the international agreements adopted by the Greek State as to the sharing of the radio-frequency spectrum by the private TV channels, by public television and by mobile phone services. The regime of providing digital TV services changed the operation of TV channels: From that moment onwards the provision of radio-television services via terrestrial digital technology with the use of radio-frequencies granted for the emission of radio-television signal would presuppose the separation between the provider of network and the provider of content. The radio-

frequencies would be granted to the network provider by the National Telecommunications and Post Committee following a competition procedure and upon a price. The content providers, that is, the TV channels would no more be granted frequencies but a license which would entitle them to conclude a contract with the network provider, who would in turn undertake the management of the radio-frequencies and the transmission of the signal of the TV station to the receivers (television sets). At the same time this same Law included a provision for the "legitimization" of all TV stations that were functioning without a license. The Council of State (decision 3578/2010 in plenary session) deemed unconstitutional the continuous tolerance of the functioning of regional TV channels without a license granted after previous competition and without a set time limit for the completion of all pending licensing procedures.

4. Notwithstanding this decision, the implementation of Law 3592/2007 was delayed with different subsequent Laws until Statute 4339/2015. Taking into account the entrance into the digital era of radio-television, this latest Law (4339/2015) provided for a different, auction competition procedure for the granting of licenses to providers of free, nationwide, general information, terrestrial digital television broadcasting content for high-definition transmission, which was characterized as provision of service of general economic interest. Taking into account the fact that the spectrum constitutes a scarce resource and the number of licenses granted could not be infinite, the competition procedure would now be carried out through an auction upon the determination - by ministerial decision reached on the basis of an opinion of the National Radio-television Council and after public consultation - of the number of available licenses and of the starting price of the auction (except for the first application of this provision whereby the number of available licenses was to be determined by Law). Given the fact that there was no more a provision for the award of points (of previous experience etc.) to candidates (like in previous Laws 3592/2007 and 2328/1995), it was expected that the results of such a competition would highlight the market value of radio-frequencies. In any case the starting price was to be based upon the expected revenue of the successful TV channels throughout the period of duration of the license (10 years). Subsequent Law 4367/2016 granted the Minister for Press and Mass Media the competence for the conduct of the relevant competition, albeit without involving the National Radio-television Council (which until then was unable to constitute as a body) and it also limited to 4 the number of the available licenses for nationwide television emission. All preparatory acts of the competition were annulled by the Council of State on the grounds of the unconstitutionality of the circumvention of the National Radio-television Council in the carrying-out of the competition (Decisions 95/2017 etc in plenary session). After the

annulment on the aforementioned grounds the Court did not proceed to the examination of the other issues of EU law posed by the design of a new competition arena in the field of TV-digital technology. Lately, in July 2017, the National Radio-Television Council, after undertaking wide consultation with all political parties, decided that the number of licenses for national broadcasting of general content should reach the number of 7 and that the initial price of the license for the next competition should be set at 35 million euros. The government adopted this decision which was seen by the public as a sincere attempt to compromise all interests involved.

5. The distribution of radio-television frequencies to existing and prospective or aspiring TV channels demands the striking of a fair balance between considerations of legality, technological restrictions based on international agreements and the need to nurture viable and politically independent enterprises, with the aim to accomplish the optimal and most profitable exploitation of the public resource of the radio-frequency spectrum. It is interesting to see that in the case of radio-television the evolution of digital technology may lead to the shrinking of pluralism and polyphony instead of its expansion. However moving backwards to a pay-as-you-go system is not an option, neither is promoting pluralism in the mass media by tolerating conditions of operation of TV channels that developed in an arbitrary and anarchic way. And we have to believe that healthy competition develops from the observance of law and not from the uncontrolled accumulation of wealth and also that the exercise of competition may never result in the creation of mass media with a dominant position in the market and with a tendency to abuse this position. Taking into account competition law concerns also means that procedures in the carrying-out of the expected competition should be observed to the last detail. In this context the State has also a legitimate interest to secure the optimal price for the licenses as a matter of public interest. I wonder, who would be so brave as to solve this equation?