GETTING THE DEAL THROUGH

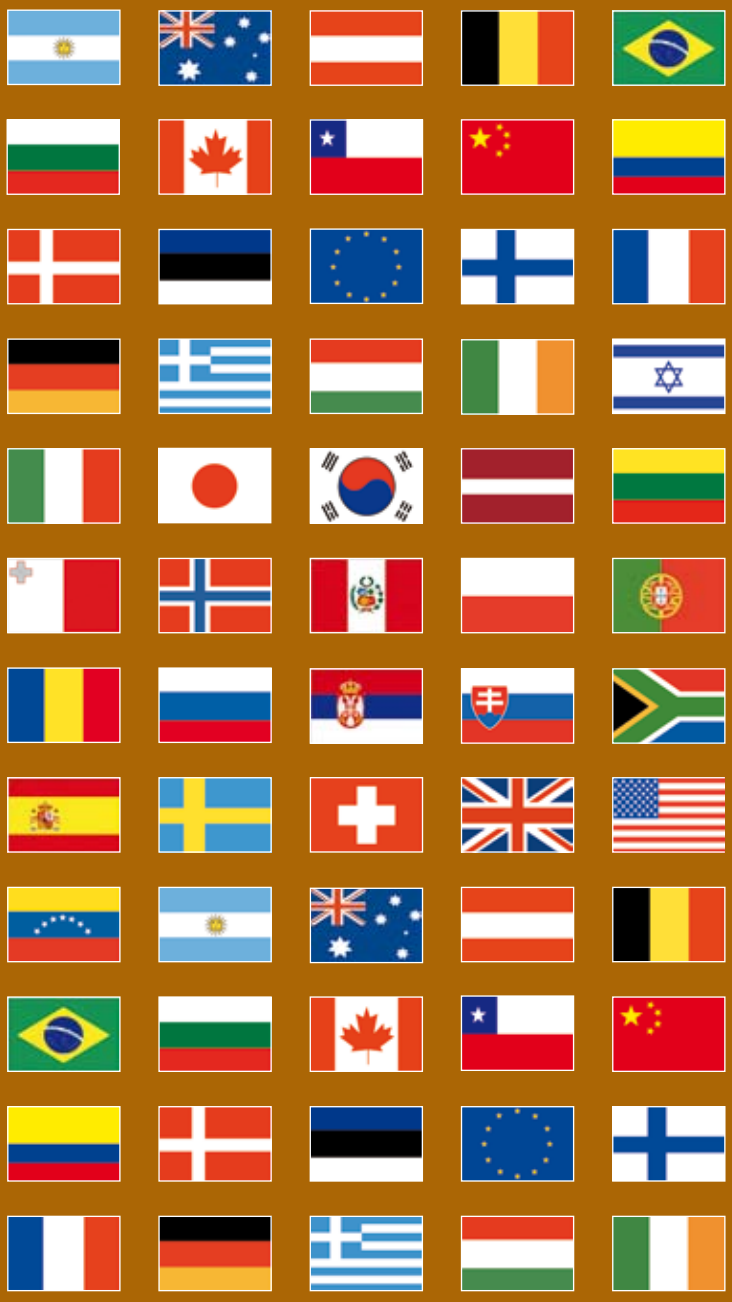
GCR
GLOBAL COMPETITION REVIEW

Vertical Agreements

The regulation of distribution practices in 41 jurisdictions worldwide

2009

Contributing editor: Stephen Kinsella OBE



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Greece

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Antitrust law

1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

The legal source that sets out the antitrust law applicable to vertical restraints is Law 703/1977 on Control of Monopolies and Oligopolies and Protection of Free Competition (the Law). Since its entry into force in September 1977, it has been amended several times, most recently by Law 3,373/2005 (2 August 2005). The full codified text is available in Greek on the Hellenic Competition Commission's website at: www.epant.gr/img/x2/categories/ctg243_3_1193312537.pdf.

In line with article 81(1) of the EC Treaty, article 1(1) of the Law prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices of any kind, that have as their object or effect the prevention, restriction or distortion of competition.

Article 1(3) of the Law empowers the Hellenic Competition Commission (HCC) to exempt agreements, decisions or concerted practices that fall within the prohibition of article 1(1), provided the agreement under examination:

- contributes to the improvement of production or distribution of goods or to the promotion of technical or economic progress, allowing consumers a fair share of the resulting benefits;
- contains only those restrictions absolutely necessary for the attainment of the above objectives; and
- does not allow the undertakings concerned to eliminate competition in a substantial part of the relevant market.

Types of vertical restraint

2 List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

The prohibition of article 1(1) of the Law extends to agreements consisting, particularly, in:

- directly or indirectly determining selling or purchase prices or any other trading condition;
- limiting or controlling production, supply, technological development or investments;
- sharing of markets or sources of supply;
- applying dissimilar trading conditions to equivalent transactions, in a way that hinders the operation of competition, in particular the unjustifiable refusal to sell, purchase or enter into any other transaction; or
- making the conclusion of contracts subject to acceptance by the other contracting parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Restrictions between undertakings operating at a different level of the production or distribution chain, whose object or effect may fall within any of the prohibitions listed above, constitute vertical restraints covered by antitrust law. The list is indicative and therefore non-exhaustive. The most common vertical restraints dealt with by the HCC include resale price maintenance, territorial and customer restrictions, exclusive supply and dealing. In practice, the HCC applies by analogy the criteria set out in EC Regulation 2,790/1999 on the application of article 81(3) of the EC Treaty to categories of vertical agreements and concerted practices and the relevant European Commission Guidelines on Vertical Restraints (see HCC announcement (17 December 2001) on the application of EC Regulation 2,790/1999 at: www.epant.gr/img/x2/categories/ctg277_3_1196950972.pdf).

Legal objective

3 Is the only objective pursued by the law on vertical restraints economic, or does it also seek to protect other interests?

As is evident from the wording of article 1, the objective pursued by the Law is economic, namely the protection of competition. In this respect, consumer benefit is also taken into consideration for an exemption under article 1(3) of the Law.

Responsible agencies

4 What agency is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible agencies, how are cases allocated? Do governments or ministers have a role?

The HCC is responsible for enforcing article 1 of the Law (articles 8 to 10 of the Law). The HCC is an authority with administrative and economic independence, under the supervision of the minister of development. It consists of the president, an 11-member commission and the directorate-general for competition.

Under article 8a of the Law, the minister for development may allow the block exemption of categories of agreements on the basis of article 1(3). He may also define, by decision, categories or types of agreements that are not caught by article 1(1) of the Law. A positive opinion by the HCC is required in both cases. The minister of development may also apply to the HCC for interim measures. Under the latest modification of the Law, interim measures may be adopted by the HCC either following an application from the minister of development or ex officio.

Actions for annulment of the HCC's decisions may be brought before the Athens Administrative Court of Appeals.

Jurisdiction

5 What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially?

Under article 32 of the Law, article 1 covers all restrictions of competition that have or may have any impact or effect within the Greek territory, regardless of factors such as the place of execution of the agreement, or the parties' domicile or establishment.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

Under article 6(1), the provisions of the Law also apply to public undertakings and public utilities companies. By joint decision, the ministers of finance and development may exclude such undertakings or categories of such undertakings from the application of the Law, for reasons of their greater importance to national economy.

Sector-specific rules

7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry? Please identify the rules and the sectors they cover.

No particular rules exist with regards to the assessment of vertical restrains in specific sectors of industry. Where appropriate for the analysis, the HCC will normally refer to the provisions of the existing EC Regulations (eg, in the motor-vehicle sector).

General exceptions

8 Are there any general exceptions from antitrust law for certain types of vertical restraints? If so, please describe.

On 2 March 2006, the HCC issued a Notice on agreements of minor importance (de minimis), available at www.epant.gr/img/x2/categories/ctg250_3_1200308071.pdf. In this notice, the HCC uses market share thresholds to quantify what is not an appreciable restriction of competition under article 1 of the Law, in which case such agreements shall not be caught by the prohibition of article 1(1) of the Law. The Greek De Minimis Notice follows the European Commission Notice on agreements of minor importance that do not appreciably restrict competition under article 81(1) of the EC Treaty (OJ C 368, 22 December 2001, p13).

The general rule is that, according to the HCC's view, an agreement between undertakings does not appreciably restrict competition within the meaning of article 1(1) of the Law in the following situations:

- if the aggregate market share held by the parties to the agreement does not exceed 5 per cent on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of these markets (agreements between competitors); or
- if the market share held by each of the parties to the agreement does not exceed 10 per cent on any of the relevant markets affected by the agreement, where the agreement is made between undertakings that are not actual or potential competitors on any of these markets (agreements between non-competitors).

Furthermore, the Notice offers guidance on the calculation and application of these market share thresholds in various situations. Agreements containing hardcore restrictions, as defined in point 11 of the Notice such as price fixing and market sharing, cannot benefit from an exemption under the Notice.

Another exception is introduced by article 7 of the Law, under which the article 1(1) prohibition does not cover agreements, decisions or concerted practices that aim exclusively at strengthening, promoting and securing exports, unless stated otherwise for categories of agreements or products by joint decision of the ministers of finance and development, following an opinion by the HCC. The above is without prejudice to Greece's international obligations.

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction? When assessing vertical restraints under antitrust law does the agency take into account that some agreements may form part of a larger, interrelated network of agreements or is each agreement assessed in isolation?

There is no definition of 'agreement' in the antitrust legal texts. By reference to settled case law of the European Court of Justice (and Court of First Instance), the HCC accepts that in order for there to be an 'agreement' within the meaning of article 1(1) of the Law, it is sufficient that the undertakings in question have expressed their joint intention to conduct themselves on the market in a specific way. The form in which that common intention is expressed is irrelevant, so long as it expresses the parties' intention to behave on the market in accordance with the terms of the 'agreement'. The concept is based on a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention (Decision 385/V/2008, by reference to EU case-law 41/69, *Chemiefarma v Commission*, T-41/96, *Bayer v Commission*, T-208/01, *Volkswagen v Commission*). The HCC's assessment may vary in each case depending on whether a network of interrelated or similar agreements exists in the relevant market. According to early case law (66/89), the HCC had to re-examine a selective distribution agreement to which negative clearance was initially granted, following the notification of a significant number of similar agreements covering an important part of the relevant market, thus changing the conditions of competition as a result of the cumulative effect of those agreements.

The Greek de minimis Notice (see question 8) contains an explicit reference to parallel networks of agreements that may have a cumulative foreclosure effect in the relevant market. In these cases, the market share threshold below which an agreement will not be considered to appreciably restrict competition is set at 5 per cent.

Parent and related-company agreements

10 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

The HCC applies the 'single economic entity doctrine', by reference to case law of the European Court of Justice, according to which vertical agreements between parent and subsidiary are not caught by the prohibition of article 1(1) of the Law, as they are considered to constitute an allocation of roles, efforts or functions within a single economic entity. The HCC will also examine whether the parent company directly or indirectly exercises control over a related undertaking, namely whether it has the power to exercise more than half the voting rights, or has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or has the right to manage the undertaking's affairs.

Agent–principal agreements

11 In what circumstances does antitrust law apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a commission payment?

Article 1 of the Law applies to agency agreements whereby the agent undertakes at least some of the risk or costs associated with carrying out its obligations under the agreement, for example, transportation costs, advertising costs, costs for storage and maintenance of stock as well as financing or investment costs. The determining factor is whether the agent operates autonomously as an independent distributor carrying the related commercial and financial risks of his business, is free to decide his business strategy and is able to recover the investment costs that occurred in execution of the 'agency' agreement. Such cases are considered by the HCC, the Greek courts and commercial legal theory as non-genuine agency/distribution agreements, which are caught by article 1(1) of the Law.

Intellectual property rights

12 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

The HCC's practice and case law to date offer no relevant guidance. It is expected to follow the relevant European legislation and case law on this point.

Analytical framework for assessment

13 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

In its analysis on vertical restraints, the HCC largely follows the EU legislation and case law. This applies not only to the general legal framework but also to the competitive assessment of particular types of restraints. It is common for the HCC in its decisions to cite and apply the analysis relied on by the European Commission and the European Court of Justice (and Court of First Instance).

In that context, the HCC will consider those vertical restraints that have as their object the restriction or distortion of competition in the relevant market as most serious and will consider them as unlawful per se. Such restraints primarily consist in restricting the buyer's ability to determine resale prices (either by imposing fixed prices or maintaining minimum resale prices), allowing for absolute territorial protection by imposing restrictions on passive sales or restricting members of a selective distribution system supplying each other or end-users.

The HCC practice so far has not been uniform. According to early case law, agreements containing hard-core restrictions such as those mentioned above would escape the prohibition of article 1(1) where the parties' market shares and turnovers in the relevant were insignificant, thus allowing for a conclusion that no restriction or distortion of competition was likely to occur in the relevant market. However, since the formal introduction of the De Minimis Notice (see question 8), hard-core restrictions such as those mentioned in point 11 of the Notice cannot be exempted and will always be considered unlawful per se.

Further, the HCC will examine whether an agreement will be eligible for an exemption under article 1(3) of the Law. Agreements, decisions and concerted practices or categories thereof falling into the scope of article 1(1) of the Law may be exempted by decision of the HCC as partly or wholly valid, provided that all the following conditions are met:

- they contribute in the improvement of production or distribution of products, or in the promotion of technological or economic progress, while allowing consumers a fair share of the resulting benefit;
- they do not impose restrictions to the relevant undertakings apart from those absolutely necessary for the realisation of the aforementioned objectives; and
- they do not afford such undertakings the possibility to remove competition from a considerable part of the relevant market.

Exemption is possible only when agreements have been duly notified to the HCC (see question 34).

14 To what extent does the agency consider market shares, market structures and other economic factors when assessing the legality of individual restraints? Does it consider the market positions and conduct of other suppliers and buyers in its analysis?

The HCC has largely exempted agreements under article 1(3) of the Law containing restrictions other than those considered as unlawful per se, mainly on the basis of the low market shares of the undertakings concerned in the relevant market – which in almost every recorded case were below the de-minimis threshold -– while reserving its right to withdraw the benefit of the exemption if market conditions change in the future. Incidentally, the HCC has considered whether long-term restrictions were necessary for the achievement of pro-competitive objectives and allowed consumers a fair share of the benefit.

The HCC has examined in a number of cases the legality of non-competition clauses. If the market share of the supplier is above 30 per cent or the duration of the restrictions is longer than five years, HCC will carefully examination the legality of the individual restraint in the context of the facts of each case. Normally, if the supplier has a dominant position, if there exists a very dense exclusive distribution network with small areas assigned to each distributor or if exclusive distribution is combined with exclusive supply, the non-competition clause is unlikely to qualify for an exemption.

When assessing individual restraints, the HCC closely follows the available guidance and precedents from the EU legislation and case law, while it often cites the analysis for individual restraints in the European Commission's Vertical Guidelines.

Block exemption and safe harbour

15 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

No block exemption or safe harbour exists in the sense of EC Regulation 2,790/1999. However, undertakings may expect the HCC to apply article 1 of the Law to vertical restraints by reference to the provisions of the EC Regulation, the EC guidelines on vertical restraints and relevant case law.

Types of restraint

16 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

Price fixing and setting minimum prices, whether directly or indirectly, are unlawful per se (see question 13). Indicative prices were also found to fall within the retail price maintenance restriction in cases where the supplier had the right under the agreement to claim compensation in the event of non-compliance of the retailer with the indicative price catalogue.

17 Have there been any developments in your jurisdiction in relation to resale price maintenance restrictions in light of the landmark US Supreme Court judgment in *Leegin Creative Leather Products Inc v PSKS Inc*. If not, is any development in this area anticipated? Has there been any more general discussion by the relevant agency (or any other influential stakeholder) of the policy in your jurisdiction regarding resale price maintenance?

In one particular case (Decision 370/V/2007, where the HCC examined a distribution agreement in the motor-vehicle sector by applying the provisions of the relevant EU Regulation), one party argued that retail price fixing is not unlawful per se, but should be judged in the context of the applicable economic and legal framework. By reference to the objectives of the applicable EU motor-vehicle regulation, the HCC noted that the undertaking concerned in that particular case directly undermined those objectives since its behaviour aimed at eliminating intra-brand competition in the markets for spare parts, maintenance and after-sales services. The HCC concluded that had it conducted a rule-of-reason analysis, it would still have reached the same conclusion, ie, that the undertaking concerned violated article 1(1) of the Law by unlawfully imposing retail prices. In its decision, as well as in more recent decisions, the HCC has been very clear that it considers direct or indirect resale price maintenance as hardcore, and as such unlawful restrictions.

It is expected that the HCC will agree to a rule-of-reason type analysis when assessing vertical restraints, should the European Commission and Court of Justice decide to adopt such an approach.

18 Have decisions relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint? Have the decisions addressed the efficiencies that it is alleged can arise out of such restrictions?

On the contrary, when examining a cartel case in the dairy products sector, the HCC decided to consider the vertical agreements between dairy companies and distributors separately and in isolation from the horizontal agreements between the same dairy companies, adopting separate fining decisions in each case.

In one case (376/V/08), the HCC examined an agreement between Greece main public social security organisation (IKA) and a number of banks for the collection of the employers' contributions. The parties had agreed to a fixed fee for the banks' intervention of €1 per transaction and three working days' *valeur*. The HCC found that this term fell within the prohibition of article 1(1) of the Law, as it constituted direct price fixing, however it decided to exempt the agreement (individual exemption) under article 1(3) of the Law (not on the basis of a rule-of-reason analysis) due to the efficiencies that arose out of the agreement such as:

- the use of an automated and effective inter-banking system, where the uniform fee structure guaranteed the secure and smooth operation of the system and removed the burden of separate and time-consuming negotiations between the parties involved;
- all users of the system saved time and resources through the simplified procedures of the system; and
- the agreement concerned only the fees that IKA had to pay to the banks (and not the employers' costs), it was a result of a separate negotiation between IKA and the banks and respected the public policy principles (single fee paid from a public sector body to all the banks in exchange for comparable transactions)

19 How is restricting the territory into which a buyer may resell contract products assessed under antitrust law? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

Agreements that directly or indirectly have as their object the restriction of sales within the territory of the buyer or to customers to which the buyer may sell its products or services are considered serious restrictions of competition and will be found unlawful per se (see question 13).

However, a supplier may restrict the active sales of his direct buyers in the territory or to groups of customers which have exclusively been allocated to other buyer or which have been reserved for the supplier. These restrictions may not extend to passive sales within that territory or to those groups of customers. Passive sales restrictions result in market partitioning, impede intra-brand competition and may lead to maintaining price differentials within territories or group of customers, either in the wholesale or in the retail level of trade.

20 Explain how restricting the customers to whom a buyer may resell contract products is assessed under antitrust law. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

See question 19.

21 How is restricting the uses to which a buyer puts the contract products assessed under antitrust law?

The HCC's practice and case law to date offers no relevant guidance. It is expected to follow the relevant European legislation and case law on this point.

22 How is restricting the buyer's ability to generate sales via the internet assessed under antitrust law? Have the agencies issued decisions or guidance in relation to restrictions on internet selling? If so, what are the key principles?

The HCC's practice and case law to date offers no relevant guidance. It is expected to follow the relevant European legislation and case law on this point.

23 Briefly explain how agreements establishing 'selective' distribution systems are assessed differently under antitrust law.

Clauses that are considered necessary for the establishment and effective operation of selective distribution systems and require an agreement between supplier and distributor such as product marketing, advertising promotions, obligation to purchase a production line or to stock minimum quantities have been found to fall outside article 1(1) of the Law. The supplier may rely on these conditions to refuse a distributor to enter into the selective distribution system, provided these are applied uniformly to all authorised distributors and there is an objective justification for the refusal.

Regarding vertical restraints that are caught by antitrust law, the HCC applies the general analysis described in this chapter, closely following the European legislation and case law.

24 Are selective distribution systems more likely to comply with antitrust law where they relate to certain types of product? If so, which types of product and why?

Selective distributions systems are more likely to comply with antitrust law when they relate to branded products of high quality and brand image or technically complex products. Because of the nature of the products concerned, certain objec-

tive restrictions will normally be allowed, especially those that may guarantee wide distribution of said products and strengthening their brand image, such as the qualities of the distributor (technical capabilities and professional qualifications), the premises of the distributor (appearance etc), the protection of the product (storage and packaging conditions) and after-sales support.

25 Regarding selective distribution systems, are restrictions on internet sales by approved distributors permitted? If so, in what circumstances? Must internet sales criteria mirror offline sales criteria or would discrepancies be permitted?

The HCC's practice and case law to date offers no relevant guidance. It is expected to follow the relevant European legislation and case law on this point.

26 Does the relevant agency take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

In its early case law (66/89), the HCC had to re-examine a selective distribution agreement to which negative clearance was initially granted, following the notification of a significant number of similar agreements covering an important part of the relevant market, thus changing the conditions of competition as a result of the cumulative effect of those agreements.

27 Has the agency taken decisions dealing with the possible links between selective distribution systems and resale price maintenance policies? If so, what are the key principles in such decisions?

The HCC has adopted decisions condemning resale price maintenance restrictions and practices within selective distribution systems, without, however, laying down a set of principles or guidance specifically addressing the links between RPM and selective distribution.

28 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed under antitrust law?

The HCC considered such restrictions in a number of franchise agreements and declared them illegal (cases 51/1997 and 128/98). To the extent that the contract products are available through an authorised distribution channel that is not controlled by the supplier, any prohibition on the buyer's ability to obtain products from alternative sources will be found to restrict competition and will be considered invalid.

29 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed under antitrust law.

This question was considered by the HCC in the context of a selective distribution system. It found that refusal of entry into the system was contrary to article 1(1) of the Law, insofar as the only justification behind the refusal was that the candidate distributor would not comply with the restriction not to stock competing products (case 271/2004).

30 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products assessed under antitrust law?

No significant guidance exists on this point. Such clauses have occasionally been examined and have been found to be proportionate, in the context of franchise agreements where reasonable minimum turnover targets are imposed. These restrictions have been accepted as lawful cases of default, granting the supplier the right to terminate an agreement.

31 Explain how restricting the supplier's ability to supply to other resellers, or sell directly to consumers, is assessed under antitrust law.

In cases of exclusive supply, the HCC will consider the market position of the supplier and the buyer in the relevant markets as well as the term of exclusivity (case 267/2004). A 10-year duration exclusivity clause was found to restrict the buyer's ability to source his supplies from other suppliers as well as the opportunity to potential suppliers to provide their goods or services to the buyer and as such it was caught by the prohibition of article 1(1) of the Law.

An exemption under article 1(3) may be justified, even for a 10-year term, where that period is necessary for the contracting parties to recover the costs of significant investments in a very competitive market. Factors such as the level and the expected pay-off of the investment, the parties' market shares as well as estimated consumer benefit will also be taken into consideration. The HCC largely relies on the analysis of the European Commission and the European Court of Justice on this point.

32 To what extent are franchise agreements incorporating licences of IPRs relating to trademarks or signs and know-how for the use and distribution of products assessed differently from 'simple' distribution agreements under antitrust law?

Unlike simple distribution agreements, a franchise agreement, which is often combined with the supply of products, aims at the transfer of know-how, marketing, administrative and commercial methods and means, trademark licensing and the brand name of the supplier. In order to achieve its purpose, the franchisor must ensure that IP, expertise and methods transferred to the franchisee will not become widely known, to the benefit of his competitors and the franchisor must be able to take appropriate measures to safeguard the good reputation and of his network, his brand name, trademark and corporate identity. Clauses that aim at safeguarding the above conditions will not be found to distort competition within the meaning of article 1(1) of the Law.

Furthermore, exclusive supply clauses in the context of franchise agreements may qualify for an exemption under article 1(3) of the Law, where no objective product-standards exist, in order to safeguard the quality of the product, the brand-name of the franchisor and his good reputation. Such restrictions may not however extend to supplies from other franchisees (case 252/1995). A five-year duration of said restrictions is normally considered as justified.

33 Explain how a supplier's warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer or that it will not supply the contract products on more favourable terms to other buyers is assessed under antitrust law. Would the analysis differ where the buyer commits to 'most favoured' terms in favour of the supplier?

Most favoured customer clauses have been considered in cases of selective distribution systems as restrictive of competition and thus unlawful (case 66/89), on the basis that buyers unable to fulfil those terms set by the supplier will find themselves at a competitive disadvantage to the rest of the resellers of the same products in the relevant market.

Notifying agreements

34 Is there a formal procedure for notifying agreements containing vertical restraints to the agency? Is it necessary or advisable to notify it of any particular categories of agreement? If there is a formal notification procedure, how does it work? What type of ruling (if any) does the agency deliver at the end of the procedure? And how long does this take? Is a reasoned decision published at the end of the procedure?

Under article 21 of the Law, the agreements, decisions or concerted practices of article 1(1) of the Law, must be notified by the contracting parties to the HCC within 30 days from their conclusion, adoption or execution. Failure to notify results in loss for each contracting party of the benefit of an exemption under article 1(3) of the Law and a fine of at least €15,000 and up to 10 per cent of the gross turnover of the undertaking for the current or the previous financial year. Although the Law does not specify, the practice to date shows that it is the national, not the worldwide, turnover of the undertaking concerned that is taken into account.

Under article 11 of the Law, following an application to the HCC's directorate general for competition by any interested party for negative clearance, the HCC may certify that, according to the information and evidence in its possession, no violation of article 1(1) of the Law exists. The application for a negative clearance is submitted simultaneously with the notification of an agreement. Negative clearance may also be applied for agreements that will be concluded in the future.

Finally, undertakings entering into agreements may apply for an exemption decision under article 1(3) of the Law and in accordance with article 10 of the Law. The application for an exemption under article 1(3) of the Law may be submitted at any time provided the notification obligation has been met.

The notifying parties, that is, the participating undertakings, must complete and submit to the HCC a detailed form, which is available on the HCC's website, in Greek, at: www.epant.gr/entypa.php?Lang=gr&id=37. There is a filing fee of €300. Under article 21 of the Law, the HCC is not obliged or required to examine the notified agreement, which for this reason shall not be considered automatically as (provisionally) valid.

The HCC's examination procedure may involve requesting additional information from the notifying and third parties. It is concluded with a reasoned recommendation by the Directorate General of Competition to the HCC. The Directorate's recommendation is notified to the parties together with the date of discussion of the case before the HCC. The parties have the right to submit their written observations at least 30 days prior to the date of discussion and must declare – stating reasons – whether they wish to exercise their right to be heard during the discussion (oral hearing). The HCC reserves the right to decide whether to accept oral presentations.

If an agreement qualifies for an exemption under article 1(3) of the Law, the HCC, following an application by the notifying parties, will issue an exemption decision that sets out the date of entry into force, its duration and, potentially, the conditions that the applicants must respect. There is no time limit for the adoption of such a decision by the HCC.

Following an application for negative clearance, the HCC certifies within two months from the date of application whether there exists, on the basis of the information and evidence before it at that time, a violation of article 1(1) of the Law. In case of negative clearance, the contracting undertakings are not subject to the consequences and sanctions of the Law, until the HCC issues an opposite decision, unless they deliberately provide the HCC with false or misleading or withheld information and evidence.

Agency guidance

35 If there is no formal procedure for notification, is it possible to obtain guidance from the agency as to the antitrust assessment of a particular agreement in certain circumstances?

Not applicable.

Complaints procedure for private parties

36 Is there a procedure whereby private parties can complain to the agency about alleged vertical restraints?

Under article 24(1) of the Law, any natural or legal person has the right to file a complaint against an infringement of article 1(1) and (2) of the Law as well as of article 81 of the EC Treaty. The HCC is required to issue a decision within six months of the date the complaint was filed, with the possibility of a further extension of the above deadline by two months in exceptional cases where further investigation is necessary. The above time limit is not strictly complied with by the HCC.

Enforcement

37 How frequently is antitrust law applied to vertical restraints by the agency? What are the main enforcement priorities regarding vertical agreements?

Vertical restraints cover a very small part of the HCC's workload, with just a few decisions issued each year.

38 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

The specific restrictions of the agreement are null and void. The validity of an agreement is not affected where the HCC considers the unlawful clauses to be independent of the rest of the contract. Under article 181 of the Greek Civil Code, the remaining clauses of the agreement are valid and enforceable if the parties would have entered into the agreement even without the clauses that were declared unlawful.

39 May the agency impose penalties itself or must it petition the courts or another administrative or government agency? What sanctions and remedies can the agency or the courts impose when enforcing the prohibition of vertical restraints? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

The HCC itself has the power to impose penalties, fines and pecuniary sanctions that are provided for in the provisions of the Law. In finding of a breach of article 1 of the Law or article 81 of the EC Treaty, the HCC may by decision:

- order the undertakings to bring the infringement to an end and refrain from it in the future;
- accept commitments from the undertakings concerned to end the breach, making those commitments binding for them;
- impose behavioural or structural measures, which must be necessary and expedient for the termination of the infringement and proportionate to the type and gravity of the infringement;
- address recommendations to the undertakings concerned and threaten with a fine, pecuniary sanction or both, in case of continuation or repetition of an infringement;
- consider that a fine or pecuniary sanction has been forfeited, when by decision it finds the continuation or repetition of an infringement; and
- impose a fine on the infringing undertakings.

The fine may reach 15 per cent of the gross turnover of the undertaking for the current or previous financial year. The Law does not clarify whether it is the national or the worldwide turnover that will be taken into account, however to date the fines imposed have been calculated on the basis of national turnover. A fine of €10,000 per day may be imposed in cases of non-compliance with a decision. A notice on the calculation of fines is available at www.epant.gr/img/x2/categories/ctg250_3_1193315361.pdf

The HCC may also order interim measures ex officio or following a request from the minister of development, in cases where a violation of article 1 of the Law or article 81 of the EC Treaty is likely and there is an urgent case to avert imminent risk of irreparable damage to the public interest. A fine of €5,000 per day may be imposed in cases of non-compliance with such a decision.

In one of its most publicised cases on vertical agreements, the HCC imposed (December 2007) total fines of €28.5 million on supermarkets and dairy processors for resale price maintenance and passive sales restrictions. However, no particular trend can be established regarding the HCC's fining policy, considering the very few fining decisions on vertical restraints cases that the HCC has adopted to date. In those cases, the level of fines ranged up to 2 per cent of the national turnover of the undertaking concerned.

Investigative powers of the agency

40 What investigative powers does the agency have when enforcing the prohibition of vertical restraints?

The HCC may conduct investigations on its own initiative, following a complaint or following a request by the minister of development.

Acting within its investigative powers, the president of the HCC or a HCC official duly authorised by him may request information in writing from any person, undertaking or public authority. Failure by a natural person or an undertaking to fully comply with such an information request within the time limit set by the HCC may incur a fine of at least €15,000 and up to 1 per cent of the national turnover of the undertaking which failed to provide the information.

Furthermore, in order to investigate a possible breach of article 1(1) and (2), HCC officials, acting within the powers of tax inspectors, have the power to:

- inspect any kind of books, information and documents of the undertakings concerned, regardless of their physical form or place of storage, and receive copies or extracts;
- conduct investigations at the offices and other premises and means of transportation of the undertakings concerned;
- secure any business premises, books or documents during the investigation;
- conduct searches at the private homes of managers, directors, administrators and, in general, persons entrusted with the management of a business, provided there is reasonable suspicion that books or other documents which belong to the undertaking concerned and are relevant to the investigation are kept there; and
- take sworn or unsworn testimonies, ask for explanations and record the relevant answers.

Obstructing the HCC's investigation or refusing to present the requested documents and information and provide copies incurs a fine of between €15,000 and €100,000. It is not uncommon that the HCC asks for the public prosecutor to be present during investigations.

Private enforcement

41 To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

The legal basis for bringing an action for damages in Greece is article 914 of the Civil Code establishing tort liability, under which anyone can claim damages provided the following conditions are met:

- unlawful act;
- fault (intent or negligence);
- damage; and
- causal link between the unlawful act and the damage.

The civil courts have jurisdiction to hear such actions and may adjudicate compensation and reasonable pecuniary satisfaction in case of moral damage (article 932 of the Civil Code). Compensation may be awarded in the form of pecuniary damages or in natural restitution, depending on the specific circumstances of the case (article 297 of the Civil Code).

It may take up to two or three years for a court ruling on a private enforcement action in the first instance. The successful party may recover the legal costs that were necessary for supporting their action and minimum legal fees, according to the limitations provided by law.

Other issues

42 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

Article 2a of the Law prohibits abusive behaviour towards economically dependent undertakings in vertical relationships, irrespective of the existence of a dominant position. For this reason, it is often referred to as part of the vertical agreements legal framework.

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