GETTING THE DEAL THROUGH

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GLOBAL COMPETITION REVIEW

Vertical Agreements

The regulation of distribution practices in 42 jurisdictions worldwide

2010

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Contributing editor:
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Sidley Austin LLP

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Joseph Samuel

Marketing managers
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Tamzin Mahmoud
Ellie Notley

Subscriptions manager
Nadine Radcliffe
Subscriptions@GettingTheDealThrough.com

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Callum Campbell

Publisher
Richard Davey

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87 Lancaster Road
London, W11 1QQ, UK
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Fax: +44 20 7229 6910

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Law Business Research

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Greece

Christos Golfinopoulos

Golfinopoulos Law Office

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 No. 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 No. 3,784/2009 (7 August 2009). The codified version of the law that is available in Greek on the Hellenic Competition Commission's (the HCC) website (www.epant.gr/img/x2/categories/ctg243_3_1193312537.pdf) does not incorporate this last amendment.

In line with article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (formerly 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.

Agreements, decisions or concerted practices that fall within the prohibition of article 1(1) are wholly or partly valid under article 1(3) of the Law, provided the agreement under examination meets all the following conditions:

- it 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;
- it contains only those restrictions absolutely necessary for the attainment of the above objectives; and
- it 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 No. 2,790/1999 on the application of article 101(3) TFEU 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 No. 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 promote or 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 authorities

4 Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, 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 9 of the Law). The HCC is an authority with administrative and economic independence, under the supervision of the minister of economy, competitiveness and marine (formerly minister of development) and is subject to parliamentary control. It consists of nine regular members, which include the president and four rapporteurs. The HCC staff is organised under a directorate-general for competition and an independent office of internal affairs. The directorate-general for competition further consists of four directorates, the legal analysis directorate, two economic analysis directorates and the financial and administrative support directorate plus one independent media section.

Following the latest modification of the Law in 2009, it is only the HCC, acting in plenary session, and not the minister, that may allow the block exemption of categories of agreements on the basis of article 1(3) and may also define categories or types of agreements that are not caught by article 1(1) of the Law. However, by ministerial decision, issued following an HCC opinion, public undertakings and public utilities companies or categories of such undertakings may be excluded from the application of the Law (see question 6). The supervising minister may also apply to the HCC for interim measures, which may only be adopted by the HCC, either following such

an application or ex officio. Further intervention of the minister is limited to administrative and organisational matters of the HCC.

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? Has it been applied in a pure internet context and if so what factors were deemed relevant when considering jurisdiction?

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 ministerial decision, issued following an HCC opinion, such undertakings or categories of such undertakings may be excluded 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 (motor cars, insurance, etc)? 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 (post-Lisbon, article 101(1) TFEU) (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 hard-core 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 authority take into account that some agreements may form part of a larger 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 Court of Justice of the European Union, 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. Most recently, in case 455/V/2009, the HCC examined the cumulative effect of parallel exclusive distribution agreements in the foreign book market between publishing houses and wholesale distributors and found that the agreements led to a foreclosure effect in the relevant market. The HCC took into account the high combined market shares of the distributors (65 per cent), the significant buyer power of the particular distributors, due to their extensive distribution network, their exclusive suppliers' combined market share of 45 per cent, the fact that they also distributed titles for competing publishing houses as principal or de facto exclusive distributors and the high entry barriers in the relevant market.

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 (ECJ), 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 on vertical restraints 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 or 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)?

If the granting of IPRs is not the main object of the agreement under examination, the HCC will apply the antitrust law on vertical restraints. The clauses that concern the transfer of IPRs must not have the same object or effect with any of the prohibited restrictions on vertical restraints. The HCC's practice and case law to date offer no significant 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 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 Court of Justice of the European Union.

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 has not always 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 falls within the exemption of 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 still be 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 on 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.

14 To what extent does the authority 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? Does it analyse whether certain types of agreement or restriction are widely used in the market?

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 the vast majority of cases 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 by reference to market shares. If the market share of the supplier is above 30 per cent or the duration of the restrictions is longer than five years, the HCC will carefully examine 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. Buyer power and competing suppliers' market shares have been taken into account in the context of examining the cumulative foreclosure effect of similar exclusive distribution agreements between few players in both the upstream and downstream markets.

When assessing individual restraints, the HCC closely follows the available guidance and precedents from 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 No. 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 the authorities considered in their decisions resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

There is no relevant guidance. The HCC is expected to follow the relevant European legislation and case law on this point.

18 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* or the European Commission's review of its Vertical Block Exemption Regulation and associated guidelines?

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, and in more recent decisions, the HCC has been very clear that it considers direct and indirect resale price maintenance as hard-core – therefore 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.

19 Have decisions relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

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's 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).

20 Have decisions relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

The HCC considers that cost efficiencies resulting from the mere exercise of market power should not be taken into account, especially when examining agreements containing hard-core restrictions such as resale price maintenance. The burden lies on the undertakings concerned to prove that their distribution system may bring about benefits that satisfy the conditions for an exemption.

In case 376/V/08, the HCC exempted under article 1(3) of the Law a price fixing agreement between the IKA and a number of banks, taking account of the efficiencies that arose out of the particular agreement (see question 19).

21 How is restricting the territory into which a buyer may resell contract products assessed? 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 another 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.

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

See question 21.

23 How is restricting the uses to which a buyer puts the contract products assessed?

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.

24 How is restricting the buyer's ability to generate sales via the internet assessed? Have the authorities issued decisions or guidance in relation to restrictions on using the internet for advertising or selling? Has there been antitrust-based litigation resulting in court judgments regarding restrictions on internet sales? If so, what are the key principles encapsulated in such guidelines and judgments?

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.

25 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

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.

26 Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

Selective distribution 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 objective 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.

27 Regarding selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

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.

28 Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

The HCC has ruled on selective distribution cases either following a notification of the agreement at the time of its conclusion or following complaints by distributors against suppliers for violation of contractual obligations or for refusal to supply. Hence, there is no particular guidance on this point.

29 Does the relevant authority 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.

30 Has the authority 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.

31 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

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.

'English clauses', under which the buyer must notify his supplier and may accept a competing offer from another supplier only if the terms of that offer are more favourable, have been found to be abusive as akin to non-competition clauses (case 434/V/2009).

32 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

The HCC's practice and case law to date offers no relevant guidance.

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

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).

34 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

The HCC considers such clauses as non-competition restrictions and follows the European Commission analysis on this point.

However, in the context of franchise agreements, the HCC accepts that such restrictions do not fall within the prohibition of article 1 of the Law, even where the supplier imposes on the franhisee the obligation to purchase all of its products from the franchisor for the whole duration of the agreement. The justification is that these restrictions are considered necessary for the preservation of the identity and the reputation of the franchise network. Similarly, clauses where reasonable minimum turnover targets are imposed have occasionally been examined and have been found to be proportionate in the context of franchise agreements. Such restrictions have been accepted as lawful cases of default, granting the supplier the right to terminate an agreement.

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

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 ECJ on this point.

36 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?

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 to safeguard 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 extend to supplies from other franchisees (case 252/1995). A five-year duration of said restrictions is normally considered as justified.

37 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. 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

38 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

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. The information to be notified is the identity of the participating undertakings, the object of the agreement, the relevant market, the time of entry into the agreement and its duration. The notification form is available in Greek on the HCC's website at: www.epant.gr/entypa.php?Lang=gr&id=37. There is a filing fee of €300. The notification requirement is fulfilled if at least one of the participating undertakings notifies the agreement. Agreements of minor importance (de minimis) need not be notified.

Failure to notify is punished with 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.

The HCC is not obliged or required to examine the notified agreement (article 23 of the Law). It may, however, examine each particular agreement at any time whether ex officio or following a complaint. 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.

Following the entry into force of Law No. 3784/2009, the HCC no longer issues individual exemption decisions under article 1 paragraph 3 of the law or negative clearances. The relevant articles 10 and 11 of the law have been abolished.

Authority guidance

39 If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

Not applicable.

Complaints procedure for private parties

40 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful 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 101 TFEU. 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.

Enforcement

41 How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

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

42 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.

43 May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? 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 101 TFEU, the HCC may by decision:

- order the undertakings to bring the infringement to an end and refrain from it in the future;
- 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.

If, during an investigation the HCC considers that a violation of article 1 is likely to exist, it may also accept commitments from the undertakings concerned to end the suspected violation, making those commitments binding for them, even if only for a short period of time.

The fine for a violation of article 1 of the Law may reach 15 per cent of the gross turnover of the undertaking for the year during which the violation ceased. If the violation continues until the time of the decision, it is the gross turnover for the current or the previous financial year that is taken into account. 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 pecuniary sanction of €10,000 per day may be imposed in cases of delay to comply with a decision, according to its provisions. A notice on the calculation of fines is available at www.epant.gr/img/x2/categories/ctg250_3_1193315361.pdf

The HCC may also impose a fine of up to 10 per cent of the gross turnover of an undertaking for the current or the previous year when the violation occured, in cases of non-compliance with a previous decision.

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 101 TFEU 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.

It should also be noted that the Law provides for criminal sanctions. Those who, whether individually or as representatives of legal entities, violate article 1 of the Law or article 101 TFEU face imprisonment of at least six months and a fine ranging from €15,000 to €150,000. There is also a sentence of at least six-months' imprisonment for those who obstruct an investigation, refuse to supply information or supply false information, and a fine for same offences which ranges from €10,000 to €50,000.

Investigative powers of the authority

44 What investigative powers does the authority responsible for antitrust enforcement 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 that failed to provide the information.

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

- inspect and receive copies or extracts of any kind of books, information, communications and documents of the undertakings concerned, even if they are in possession of their directors or any other personnel, regardless of their physical or electronic form or place of storage;
- 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.

GOLFINOPOULOS
LAW OFFICE

Christos Golfinopoulos **christos@golfinopoulos.com**

Pantanassis 64
26221 Patra
Greece

Tel: +30 2610 272628
Fax: +30 2610 272553
www.golfinopoulos.com

Private enforcement

45 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

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

Article 18a of Law No. 146/1914 on unfair competition 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. Said prohibition has been moved from Law No. 703/77 to Law No. 146/1914.

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