GETTING THE DEAL THROUGH

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GLOBAL COMPETITION REVIEW

Vertical Agreements

The regulation of distribution practices in 36 jurisdictions worldwide

2013

Contributing editor: Stephen Kinsella OBE

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Contributing editor
Steven Kinsella OBE
Sidley Austin LLP

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Alan Lee
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Marketing assistants
Megan Friedman
Zosia Demkowicz
Cady Atkinson
Robin Synnot

Administrative assistants
Parween Bains
Sophie Hickey

Marketing manager (subscriptions)
Rachel Nurse
subscriptions@
gettingthedealthrough.com

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Harry Phillips
Tim Beaver

Editor-in-chief
Callum Campbell

Publisher
Richard Davey

Vertical Agreements 2013
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

ISSN 1753-9250

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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. 3959/2011 on Protection of Free Competition (the Law), which entered into force on 20 April 2011 and replaced Law No. 703/1977 on Control of Monopolies and Oligopolies and Protection of Free Competition. It has been amended by Law No. 4013/2011 (15 September 2011). The text of the law and its amendment is available in Greek on the Hellenic Competition Commission's (the HCC) website at www.epant.gr/nsubcategory.php?Lang=gr&id=240.

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 and concerted practices between undertakings and decisions by associations of undertakings, that have as their object or effect the prevention, restriction or distortion of competition within the Greek territory.

Agreements, decisions or concerted practices that fall within the prohibition of article 1(1) are exempted under article 1(3) of the Law, provided the agreement, decision or concerted practice under examination:

- contributes to the improvement of production or distribution of goods or to the promotion of technical or economic progress;
- ensures at the same time a fair share of the resulting benefits to consumers;
- 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, and exclusive supply and dealing.

In practice, the HCC has applied by analogy the criteria set out in EC Regulation No. 2790/1999 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. 2790/1999 at www.epant.gr/img/x2/categories/ctg277_3_1196950972.pdf). Article 1(4) of the Law now explicitly provides that the provisions of the EU Regulations on the application of article 101(3) TFEU shall apply by analogy when examining the application of article 1(3) of the Law to agreements, decisions and concerted practices that are not likely to affect trade between member states.

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 when applying 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 (article 14 of the Law). The HCC is an authority with legal personality, 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 eight regular members, which include the president, the vice 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 services directorate, two operational directorates and the administrative and financial support directorate, plus a media sector unit and a research and

processing of information unit. The HCC president's office and the legal support office also report directly to the president.

Since 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). The supervising minister may 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 46 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) of the previous Law No. 703/1977, the provisions of the Law explicitly applied to public undertakings and public utilities companies. It was also possible by ministerial decision, issued following an HCC opinion, to exclude such undertakings or categories of such undertakings from the application of the Law, for reasons of their greater importance to the national economy. Both provisions have been omitted from Law No. 3959/2011. Since there is no exception, the provisions of the Law will apply to public undertakings and public utilities companies in connection with their economic activities.

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 restraints 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 agreement containing 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, page 13).

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.

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

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.

10 In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

The form of the agreement is irrelevant. It may be an oral agreement, an agreement that was entered into by the parties 'silently' or an agreement that was not concluded in the specific form required by law. The form in which the agreement is manifested is unimportant so long as it constitutes the faithful expression of the parties' intention.

The HCC has found that agreements existed – as opposed to unilateral conduct falling outside the prohibition of article 1(1) of the Law – in situations where the distributors adapted their behaviour according to requests, circulars and guidelines that were communicated to them by their supplier. According to the HCC, the purpose of such communications was to specify the contractual terms of an informal (oral) long-term and uniform distribution network. 'Gentlemen's agreements' are also considered to accurately express the joint intention of the contracting parties. The mere participation of an undertaking in a meeting where an informal agreement or general consensus was reached may be sufficient to conclude that it was party to that agreement, in the absence of any public indication to the contrary.

Parent and related-company agreements

11 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

12 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 sales-based 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, transport 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.

13 Where antitrust rules do not apply (or apply differently) to agent–principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent–principal relationship for these purposes?

In contrast with non-genuine agency agreements (see question 12), antitrust rules do not apply to agent–principal relationships where the agent acts in the name and on behalf of the principal, so that the agent itself bears no business risk resulting from the agent–principal agreement and has no business independence (Case No. 392/V/2008). In such cases, the agent is not considered as an economically independent undertaking, hence article 1(1) of the Law does not apply. In Case No. 430/V/2009, the HCC found that the undertakings under question were genuine agents (and therefore antitrust rules did not apply) since they did not purchase any of the contract goods for resale and they did not undertake any of the risks, costs or investments characterising independent distributors (see question 12).

Intellectual property rights

14 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 EU legislation and case law on this point.

Analytical framework for assessment

15 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, the General Court 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.

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 share and turnover in the relevant market 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 are not prohibited, provided that all the conditions of article 1(3) are met (see question 1).

16 To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

The HCC has largely exempted agreements under article 1(3) of the former legal regime (Law No. 703/1977, in force until 20 April 2011) 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-compete 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. Restrictions of duration from two to five years may also fail to qualify for an exemption, especially if the supplier has a dominant position in the relevant market. 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, non-compete

clauses are unlikely to qualify for an exemption. Competing suppliers' market shares have also 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.

17 To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely agreed to by buyers in the market?

The HCC considers that buying power may amplify the anti-competitive effects of restrictions in exclusive distribution agreements that are imposed by important buyers on one or several suppliers.

Buying power has 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 (Case 455/V/2009). Market shares between 27 and 45 per cent were sufficient to indicate significant buying power in a market where all the other competitors' market shares were below 10 per cent.

Following the adoption of EU Regulation No. 330/2010, which introduced a safe harbour buyer marker share threshold of up to 30 per cent, the HCC will apply the same criteria when assessing individual restraints.

Block exemption and safe harbour

18 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. 2790/1999 and EU Regulation No. 330/2010. However, in order to ensure a uniform application of national and EC law, the HCC interprets 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, as explicitly provided by article 1(4) of the Law.

Types of restraint

19 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 (see question 15). Such restrictions constitute the most serious violations of the antitrust law and may not fall within the exemption under article 1(3) of the Law. 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.

20 Have the authorities considered in their decisions or guidelines 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 EU legislation and case law on this point.

21 Have decisions or guidelines 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' value. 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).

22 Have decisions or guidelines 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 21).

23 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 15).

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, and are treated as hard-core restrictions by the HCC and the Greek courts (see, for instance, Athens Administrative Court of Appeals judgment No. 1244/2011).

24 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 23.

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

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

26 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

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

27 Have decisions or guidelines on vertical restraints distinguished in any way between different types of internet sales channel?

No relevant guidance exists to date.

28 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 EU legislation and case law.

29 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 strengthen 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.

30 In 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 offer no relevant guidance. It is expected to follow the relevant EU legislation and case law on this point.

31 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.

32 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.

33 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.

34 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

In Case No. 332/V/2007, the HCC noted, by reference to a contractual obligation on distributors to sell the products only through retails shops, that selected distributors must be free to conduct active or passive sales to end-users in the area of another member of the selective distribution network, even if they are not allowed to open a retail shop in that area.

In the motor vehicle sector, the HCC has examined distribution agreements whereby members of a selective distribution network were restricted to reselling the products in particular geographical areas and found such agreements to be in line with the provisions of the Commission Regulation 1475/1995, according to which exclusive and selective distribution clauses were regarded as indispensable measures of rationalisation in the motor vehicle industry.

35 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.

The HCC has examined exclusive supply clauses in conjunction with exclusive distribution and single-branding obligations imposed by a dominant supplier on its buyers at the wholesale level and found those restrictions to result in market partitioning, since the combination of such exclusivity clauses had the result of removing intra-brand and interbrand competition (case 520/VI/2011).

'English clauses', under which the buyer must notify their 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-compete clauses (case 434/V/2009).

36 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 offer no relevant guidance.

37 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).

38 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-compete restrictions and follows the European Commission analysis on this point (case 520/VI/2011).

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 franchisee 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.

39 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 its 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.

The application of 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 and 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.

40 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 have qualified for an exemption under article 1(3) of the Law (under the previous legal regime), where no objective product standards exist, in order to safeguard the quality of the product, the brand name of the franchisor and its 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.

41 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.

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.

In the highly concentrated electricity market, the obligation on the supplier not to supply other buyers on most favourable terms where the buyer holds a dominant position was considered as a significant barrier to entry (case 458/V/2009). Nevertheless, the agreement qualified for an exemption under article 1(3) of the previous Law on the grounds that the market share of the particular supplier was insignificant (below 1 per cent) and the duration of the agreement was short (three years).

42 Explain whether and in what circumstances a supplier may apply different prices or conditions to similarly placed buyers and explain how, in such circumstances, the application of different prices or conditions is assessed?

No relevant guidance exists to date.

43 Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier or that it will not purchase the contract products on more favourable terms from other suppliers is assessed.

No particular guidance exists on this point.

Update and trends

By decision No. 520/VI/2011 issued on 5 May 2011 (Official Gazette publication No. 320/B of 14 February 2012) the Hellenic Competition Commission (HCC) imposed on a dominant manufacturer and supplier in the savoury snacks sector a fine of approximately €4.4 million for violations of article 1 of the Law on Protection of Free Competition and article 101 TFEU, in addition to a fine of approximately €11.7 million for violations of article 2 of the Law and article 102 TFEU, for imposing cumulatively single-branding and exclusive-supply obligations on all its distributors in the context of a nationwide exclusive distribution system which also included a rebate scheme, with the aim and effect of excluding its competitors from the relevant market for a continuous period of nine years (2000–2008).

By judgment No. 2780/2012, the Council of State (Supreme Administrative Court of Greece) dismissed an action for the reversal of judgment No. 2560/2009 of the Administrative Court of Appeals, which had upheld the findings of the HCC in its most publicised fining decision in 2007 against supermarkets and dairy processors for resale price maintenance and passive sales restrictions.

The Athens Administrative Court of Appeals by judgment No. 458/2011 annulled decision No. 437/V/2009 of the HCC, whereby a fine of €9.5 million was imposed on a supplier of motor vehicles and spare parts for imposing very low profit margins on its distributors, in effect restricting intra-brand competition, and fixing resale prices for spare parts and man-hour charges for repair and servicing. The Court took into account that: the distribution agreement between the supplier and the distributor did not contain any price-setting obligations, on the contrary it was explicitly stated that the distributor was free to set its own prices; said agreement did not allow for rewards in case of compliance with pricing policies or for penalties in cases of disobedience; there was no evidence (document, circular or announcement) of price fixing; and the fixing of the distributor's commission does not imply, neither evidences an agreement to fix sales prices of vehicles to consumers. On the basis of the above, the Court found that the supplier's intervention consisted in setting its own prices, in compiling recommended retail price lists and in creating and operating its own finance system. For this reason the supplier's influence on retail prices was important but in a way that a manufacturer's influence is important when one recommends retail prices, fixes prices for selling within one's network by analogy to the desirable retail prices and finances those sales, providing the option of subsidising the interest. Furthermore, while the retail price lists seriously urged distributors to follow them, it was not proven that they were obligatory.

Following the entry into force of the new Law in 2011, no significant amendments are expected to the Law.

Notifying agreements

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

With the entry into force of Law No. 3959/2011 on 20 April 2011, the formal notification procedure under article 21 of the previous Law No. 703/1977 was abolished.

Authority guidance

45 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?

There is currently no legal provision or informal procedure allowing interested parties to obtain guidance on the legality of a particular agreement.

Complaints procedure for private parties

46 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Under article 36(1) of the Law, any natural or legal person has the right to file a complaint against an infringement of article 1 of the Law and article 101 TFEU. The HCC has published general criteria for the prioritisation of the cases before it and generally has discretion as to which complaints to pursue.

Enforcement

47 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.

48 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.

49 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:

- address recommendations;
- order the undertakings or the associations of undertakings concerned 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;
- impose a fine to the infringing undertakings or associations of undertakings or to those that do not comply with commitments undertaken, pecuniary sanction or both, in case of continuation or repetition of an infringement;
- threaten with a fine in case of continuation or repetition of an infringement; and
- impose the fine threatened, when by decision it finds the continuation or repetition of an infringement or the non-fulfilment of a commitment.

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 time.

The fine for a violation of article 1 of the Law may reach 10 per cent of the turnover of the undertaking for the year during which the violation ceased. When a violation committed by an association of undertakings is linked with the activities of its members, the fine threatened or imposed may reach 10 per cent of the total turnover of its members. If the violation continues until the time of the decision, it is the turnover for the 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 fine 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/ctg253_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 occurred, in cases of non-compliance with a previous decision.

The legal representatives of the undertakings concerned as well as those persons responsible for carrying out the relevant decisions are held jointly and severally liable, with their own personal property, to pay the fine. An additional fine ranging from €200,000 to €2 million may be imposed on the above individuals if they participated in preparing, organising or committing the infringement.

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 €10,000 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 a fine ranging from €15,000 to €150,000. If the infringing act concerns undertakings that are actual or potential competitors, the fine ranges from €100,000 to €1 million and a sentence of imprisonment of at least two years also applies.

Investigative powers of the authority

50 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 an 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), 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;
- confiscate books, documents and other evidence as well as electronic means for the storage and transfer of data that constitute professional information;
- inspect and collect information and data of mobile terminals, portable devices and their servers, even if they are located outside the buildings of the undertakings under investigation;
- 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 Patras
Greece

Tel: +30 2610 272 628
Fax: +30 2610 272 553
www.golfinopoulos.com

Private enforcement

51 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 limits set by law.

Other issues

52 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.

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VERTICAL AGREEMENTS 2013 ISSN 1753-9250