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The Hellenic Competition Commission fines five companies active in the fish farming sector for having formed a crisis-cartel (Nireus Aquaculture, Dias Aquaculture, Hellenic Fishfarming, Andromeda Fishfarming and Selonda Aquaculture)

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Hellenic Competition Commission (Epitropi Antagonismou), 23 June 2010, Case n 492/VI/2010, Nireus Aquaculture S.A., Dias Aquaculture S.A., Hellenic Fishfarming S.A., Andromeda Fishfarming S.A. and Selonda Aquaculture S.A.

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On 23rd June 2010, the Hellenic Competition Commission ("*Epitropi Antagonismou*", hereinafter: "HCC") issued a decision on the merits by which it imposed fines on five fish farming companies *(â€œNIREUS AQUACULTURE S.A.â€•, â€œDIAS AQUACULTURE S.A.â€•, â€œHELLENIC FISHFARMING S.A.â€•, â€œANDROMEDA FISHFARMING S.A.â€• and â€œSELONDA AQUACULTURE S.A.â€•*) for Article 1 para. 1 Law 703/77 (equivalent to Art. 101 para. 1 TFUE) and Article 101 TFEU violations. The violations established were effected through a Memorandum of Cooperation which contained, among others, provisions on minimum prices and sale quantities, aiming at addressing a recent crisis in the fish farming market. The fines imposed amounted totally to 677.885 Euros.

I. Background of HCC Decision No. 492/VI/2010

On 12.11.2008, the fish farming companies *â€œNIREUS AQUACULTURE S.A.â€•*, *â€œDIAS AQUACULTURE S.A.â€•*, *â€œHELLENIC FISHFARMING S.A.â€•*, *â€œANDROMEDA FISHFARMING S.A.â€•* and *â€œSELONDA AQUACULTURE S.A.â€•* notified to the Hellenic Competition Commission (hereinafter: HCC), pursuant to Art. 21 L. 703/1977, a Memorandum of Cooperation dated 6.11.2008 (hereinafter: MOC). The purpose of said MOC was, pursuant to its parties, to "*mutually exert every possible effort to cope with the crisis in the fish farming sector*", and accordingly, the parties requested the HCC to clear this agreement either pursuant to Art. 11 L. 703/77 or pursuant to Art. 1 para. 3 L. 703/77 (*i.e.* the equivalent of Art. 101 para. 3 TFEU).

Pursuant to the MOC, the excessive production, and hence the excessive supply of fish farming products, especially sea bream, by Greek and other Mediterranean companies (*e.g.* Spanish, Italian and Turkish) due to erred programming, in

combination with the general financial crisis and the reduction of loan working capitals from credit institutions, caused a deep crisis in the fish farming sector, which resulted in sales significantly below the average real cost (*i.e.* sales at circa 2,5 €/kgr, when the real average cost was circa 4 €/kgr excl. marketing/transport expenses), for a long period of time. As a result, the relevant prices had reached such low levels that, unless promptly reversed, would cause many undertakings to go out of business, given that the demand failed to increase despite the price reductions.

In view of the above, the MOC provided, among others, that the parties would: i) form a six-member committee by their Managing Directors and/or General Managers aiming at combating the crisis, with all means permitted by law, ii) determine and effect sales of the desirable quantities of products on a weekly basis, both in total and per company; and iii) determine the range of the desirable sales prices on a weekly basis, both in total and per company, in order to gradually stabilize the sale prices at levels coinciding at least with the commonly acceptable threshold of average real cost of ready product, namely four (4) Euros/kgr.

The MOC was agreed to be binding, a penalty clause of 100.000 Euros was agreed for any infringement thereof and its duration was agreed to be 6 months. Finally, it was agreed that the MOC would be notified both to the HCC and the competent of Minister of Agricultural Development and Food and indeed was. The latter supported the initiatives of the MOC parties and took steps to assist the market sector also through the Ministry of Economics, while the HCC issued a Statement of Objections, following which HCC Decision No. 492/VI/2010 was issued.

II. HCC Decision No. 492/VI/2010

The HCC held that the agreement on the determination of the desirable sale prices range on a weekly basis, in total and per company, which primarily aimed at setting such prices at least at the real average cost of four (4) Euros, directly limited the ability of the parties to independently determine their sale prices and thus violated Article 101 para. 1 TFEU and Article 1 para. 1 L. 703/77 (the equivalent of Art. 101 TFEU in Greek Law) by object. It also held that the regular exchange of information between the parties, on a weekly basis, as to the range of the desirable sale price of each party permitted them to monitor and predict the general pricing policy of their competitors, in order to coordinately safeguard the common goal of price increase.

As to the agreement on the determination and realization of sales at the desirable quantities, on a weekly basis, in total and per company, the HCC held that it directly restricted the ability of the parties to independently determine, within the frames of an autonomous business policy, the level and manner of selling (and producing) the relevant products, and thus also violated Article 101 para. 1 TFEU and Article 1 para. 1 L. 703/77 by object.

Also, the HCC rejected the parties' argument that the term in question did not fix prices but merely set a goal-price of 4 Euros and thus did not violate Article 101 para. 1 TFEU and Article 1 para. 1 L. 703/77, holding that, even if that were true, it is still an infringement by object. Similarly, the HCC considered ineffective and thus rejected the parties' arguments that the term on the limitation of sales did not concern future production but only the current one, and thus did not violate said provisions. On the contrary, the HCC held that, even if this were true, there is still an infringement by object, and in any event, the agreement in question indirectly signaled the need for limitation of oversupply and thus the production in the upstream market, namely the production and sale of young fish, which takes place 12-18 months prior to the sale of ready products. It also added that such limitation of sale quantities was directly connected with the price increase pursued, and thus it should be appraised within the total plan of the parties to coordinate their business strategy.

Invoking CFI and ECJ case-law, the HCC held that even if the parties to an agreement acted without immediate intention to restrict competition, but in order to address the crisis in a particular sector, such reasons are not taken into account for the analysis under Art. 101 para. 1 TFEU and Art. 1 para. 1 L. 703/77. It also noted that collusive behaviour may impede

competition by object, even if it also serves other purposes, whereas the mere existence of crisis in a given market does not suffice to remove the anticompetitive character of an agreement. Besides, the HCC noted, if an agreement restricts competition by object, it is irrelevant if the participation of an undertaking in an anti-competitive agreement was dictated by certain commercial reasons, or if it was financially rational or suitable.

The parties then argued that even if the MOC fell under Art. 101 TFEU and 1 L. 703/77, it still fulfilled the criteria of Art. 101 para. 3 TFEU and Art. 1 para. 3 L. 703/77, because it was short-term (6 months) and aimed at normalizing the flow of ready products as well as at reversing the sales prices to levels approaching the production cost. They also supported that the measures in question also sought to safeguard the reliability of their products, the image of which had significantly deteriorated due to the low sale prices, which falsely signalled bad quality. Finally, the parties supported that if the MOC achieved its short-term goal, it would benefit both competition and consumers, since the chances of viability would increase for more undertakings in the market, and therefore competition and consumer choice would increase in the post-MOC era.

The HCC rejected such arguments, holding that the parties did not present enough evidence to support such claim and that in any event, the agreement in question primarily aimed at safeguarding the parties' interests and not the consumers'. The HCC also rejected the parties' claim that selling below cost – as was the situation before the MOC – was prohibited by national law (L. 2941/2001 and L. 146/1914), and thus an agreement to sell at least around the real cost was necessary to stop such infringement. Invoking EC and national case-law, the HCC held that the need to stop violating an irrelevant provision could not constitute a reason for exemption under Art. 101 para. 3 TFEU and Art. 1 para. 3 L. 703/77, let alone a justification for hard-core restrictions of competition; instead, the parties should resort to the remedies provided by the same laws (*i.e.* L. 2941/2001 and 146/1914) and judicially seek compensation for such infringements rather than violating other provisions.

Furthermore, the HCC held that the obligation of competing undertakings to independently determine their business policy also covers periods when the supply and demand present circular variations, and therefore competitors are not allowed to artificially maintain prices at higher levels through horizontal agreements until the market conditions return to a balance. Pursuant to the HCC, the independent adaption of undertakings to the developing market conditions, even during a financial crisis, is an indispensable element of the competitive procedure. Finally, the HCC noted that the measures in question did not aim at addressing a long-term crisis on a permanent basis (restructuring), as *e.g.* by reducing the excess and thus inefficient production capacity on objective criteria, but merely sought to immediately stabilize/increase prices by controlling the quantities of sea bream sold to the market. Thus, an individual exemption under Art. 101 para. 3 TFEU and Art. 1 para. 3 L. 703/77 could not be granted, also because the exchange of information on pricing and sold quantities on a weekly basis between the parties, *i.e.* exchange of "business secrets" constitutes a *per se* a violation of competition rules which cannot allow the agreement to be considered a necessary or proportional means to achieve the efficiencies sought.

In view of the above, the HCC concluded that there had been a violation of Art. 101 para. 1 TFEU and Art. 1 para. 1 L. 703/77 and no exemption could be granted under para. 3 of the former provisions. Thus, it imposed a fine of 273,582 euros on *NIREUS AQUACULTURE S.A.*, a fine of 146,339 euros on *SELONDA AQUACULTURE S.A.*, a fine of 119,015 euros on *DIAS AQUACULTURE S.A.*, a fine of 42,905 euros on *ANDROMEDA FISHFARMING S.A.* and a fine of 96,044 euros on *HELLENIC FISHFARMING S.A.*

III. THE EC CASE-LAW ON CRISIS CARTELS AND ITS CONTEMPORARY RELEVANCE

The above HCC decision reflects the traditional approach of EC case-law on crisis cartels [1]: the fact that an industry

faces a crisis does not mean that undertakings can enter into agreements that restrict competition and claim immunity from Art. 101 TFEU. [2] As the former European Commissioner for Competition Policy, Ms. Neelie Kroes, noted during the current economic crisis: "there may be many temptations in 2009 to cut corners, but encouraging cartelists and others would be guaranteeing disaster. It would drag down recovery, increase consumer harm and create more cartel and cartel cases into the future. No-one wins—today's softness is tomorrow's nightmare" [3].

Only when the crisis has resulted in a structural, as opposed to cyclical, overcapacity in a given industry can agreements in restraint of competition be condoned, and only if they are aimed solely at achieving a coordinated reduction of overcapacity, and do not otherwise restrict free decision making by the firms involved [4]. In particular, the reorganization must not be achieved by unsuitable means such as price-fixing or quota agreements and, as always, all four conditions of Art. 101 para. 3 TFEU must be satisfied for an exemption to be granted [5].

The above prerequisites have rarely been satisfied over the past decades; exempting a crisis cartel under Art. 101 para. 3 TFEU is only the exception confirming the rule that anticompetitive agreements between undertakings cannot be tolerated, even in times of crisis. As the General Court noted in the *Imperial Chemicals* case, the poor financial state of a sector not only fails to justify forming a cartel, but also can hardly be regarded an attenuating circumstance, since "*as a general rule cartels come into being when a sector encounters problems. If the applicantâ€™s reasoning were to be followed, the fine would have to be reduced as a matter of course in virtually all cases*" [6].

However consistent the EC case- law on this point is, it has rarely dealt with cases where the crisis in a given market is coupled with such a profound and global financial downturn as the current one. The present economic circumstances, which have led countries such as Greece to the worst financial crisis since the end of World War II, have severely affected many market sectors with direct consequences on almost every form of business activity, such as fall in demand due to weakening of the buyer power, shortage of working capital, prohibitive lending terms from credit institutions, insolvency of debtors, etc.

Therefore, one could reasonably question whether the dicta of the existing case- law have any contemporary relevance with the current economic and financial circumstances, and, if so, to what degree. Today, a crisis that may strike a certain market sector, — even if it appears to be a case of cyclical overcapacity [7] which cannot, in principle, justify an exemption based on the existing case-law — cannot be presumed to be overturned by market forces alone, as the latter are almost impossible to interact in the same way as they do under normal market conditions. Besides, the strong interconnection of various sectors of the economy favors "domino effects" in times of recession, whereby a crisis in a given industry may rapidly extend to neighboring markets, even if the latter did not *a priori* appear to be directly affected by the downturn.

Given these economic circumstances, the work of competition authorities appears to be very difficult; all the more so, since in times of crisis, competition considerations must also take into account non-economic factors and/or objectives often dictated by the government, such as reducing employment losses, facilitating rationalization of a sector with excess capacity, promoting productivity improvements by facilitating cooperation with the workforce, stabilizing prices, and avoiding ruinous competition that denies firms the necessary profits for reinvestment—all while avoiding a widespread backlash against cartel law and their enforcement.

In the author's view, this task is so exigent that it cannot be successfully done following the traditional EC case-law on crisis cartels, which appears to reject any effects-based approach, when 'hard core restrictions' are involved: "*price-fixing and market sharing are certainly not legitimate means of combating difficult market conditions. Nor are undertakings entitled to flout [EU] competition rules because of alleged overcapacity*" [8].

This holds true if one considers the wording of Art. 101 TFEU and the way it is interpreted under normal market conditions,

but it may not be so if one considers the object of the agreement in question. As was the case in the Greek fish-farming cartel, often the object of the agreement is not the restriction of competition, but the survival of the parties, which will allow them to continue competing once the crisis is over.

The effects of such an agreement may be pro- or anticompetitive, but this may have to be assessed on a case-by-case basis; excluding such effects analysis altogether and, thus, the right to exemption, because a certain term would be considered “a restriction by object” in normal market conditions, appears too formalistic in times of crisis, where market conditions are distorted anyway. Besides, the essential objective of a typical restructuring agreement among crisis cartel parties is not achieving and sharing monopoly profit and forcing competitors to exit, but dividing loss to prevent exits from the market.

This difference is so crucial that it could itself justify a more lenient Art. 101 TFEU approach, at least before labelling an agreement as a “hard-core restriction” which disqualifies the right to exemption. This is not to say that cartels can never have anticompetitive effects; in fact in many cases they will actually do. But this is an empirical question, which does not seem to be appropriately answered judging only by the fact that they entail a restriction “by object.”

In the interest of transparency it should be disclosed that the author represented one of the firms involved in the fish-farming cartel case discussed in this paper; however, the views expressed are strictly personal.

[1] Indicatively, ECJ C-209/07, Irish Beef, ECJ C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P. C-250/99 P to C 252/99 P and C-254/99 P, LVM and other vs Commission, CFI T-217/03 and T-245/03, FNCBV and other vs Commission, Commission Decision COMP/C.38.279/F3, French Beef *etc*.

[2] Richard Whish, Competition Law, Sixth Edition, p. 600 et seq. (2008).

[3] SPEECH/09/454 Date: 08/10/2009, Tackling cartels http://europa.eu/rapid/pressRelease....

[4] XXiiird Commission Report on Competition Policy, at 84.

[5] Id. at 85

[6] CFI, March 10th, 1992, *Imperial Chemical Industries plc ; * ICI plc v. Commission*, Case T-13/89*, [1992] ECR II-1021*, para. 372.

[7] Namely when excess capacity is going up and down over time.

[8] ECJ, November 20th, 2008, *Beef Industry Development and Barry Brothers*, Case C-209/07, para. 40.

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