

The Hellenic Competition Commission fines a retailer for resale price maintenance and other infringements within its franchise network (Carrefour Marinopoulos)

Greece, Anticompetitive practices, Franchising, Resale price maintenance, Exclusivity clause, Vertical restrictions, Distribution/Retail

Hellenic Competition Commission (Epitropi Antagonismou), 6 July 2010, Case n° 495/VI/2010, Siskos Group S.A. and Akritas Development S.A. vs Carrefour Marinopoulos S.A., "Carrefour franchise case"

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On 6th April 2010, the Hellenic Competition Commission ("Epitropi Antagonismou", hereinafter: "HCC") issued a decision on the merits by which it imposed a fine on the retailer Carrefour Marinopoulos S.A. (hereinafter: "Carrefour") for infringements detected within its franchise network, namely resale price maintenance, restriction of cross-supplies between members of the network, coupled with exclusive supply obligations and abuse of economic dependence. The fines imposed amounted totally to € 12,5 million.

In late 2005 and 2006 two groups of franchisees filed a complaint with the HCC against Carrefour for alleged infringements of Article 1 para. 1 Law 703/77 (equivalent to Art. 101 para. 1 TFUE), as well as Article 2a Law 703/77. The latter provision was a peculiarity of Greek Competition Law, which prohibited the abuse of a relation of "economic dependence" by undertakings which, albeit not dominant, were considered to enjoy particular economic strength in the market. Such provision has now been transferred to Law 146/1914 on Unfair Competition, by virtue of Law 3784/2009.

The complaints in question concerned the "Marinopoulos 5" supermarkets operated by Carrefour, namely the 'neighborhood' type supermarkets, measuring 600 m² to 900 m², with a variety of approx. 5.000 products. The complainants asserted that Carrefour imposed fixed prices, even below cost, both directly through the franchise agreements, and indirectly through its commercial management software.

The HCC first defined the relevant product market as the retail market of products sold in supermarket environment, which included both products of private label and branded products, with the exception of retail shops which were considered "specialized". The relevant geographic market was held to be Greece, due to the uniform nature of the commercial behaviour in question, while the market share of Carrefour was defined as "above 20%". Finally, the HCC concluded that the behaviour in question had a community dimension, given that it concerned an entire member-state (Greece) and that several multinational companies had entered the relevant geographic market over the last years.

Then, the HCC went on to appraise the nature of Carrefour's agreements with the members of its 'Marinopoulos 5' network, concluding that they were franchise agreements, namely selective distribution agreements which contained

non-compete obligations, and that therefore the EC Guidelines on said vertical restraints should apply. The HCC noted that the agreements in question were not to receive any preferential treatment due to their "franchise" character, but that the vertical restraints contained therein should be appraised individually.

Carrefour objected the above and sustained that its distribution network was a pure "franchising system", as opposed to selective distribution, given that the qualitative specifications applied were not that strong as to render the system "a selective distribution network". On the contrary, Carrefour asserted, these were typical criteria necessary for any commercial cooperation.

The HCC rejected such claims, invoking the definition of selective distribution of Art. 1 d) BER 2790/99 (now Art.1e. Regulation 330/2010), namely a distribution system where distributors are chosen based on specific criteria and are prohibited from selling the products to resellers outside the system, and concluded that both criteria were satisfied in the franchising system in question.

Having defined said distribution system as both a franchise and a selective distribution system, the HCC proceeded to examine whether there had been a violation of Art. 1 L. 703/77 and Art. 101 TFUE, and in particular whether retail prices were fixed by Carrefour.

The franchise agreements in question provided that the franchisor would provide recommended resale prices to the franchisees, while Annex A of the agreements stated that the prices recommended by Carrefour are normally followed as resale prices. Moreover, the agreements provided that the franchisor had the right to be informed about the prices applied by the franchisees, through its IT system, with the sole purpose of appraising the "appropriateness" of such retail prices in relation with the total pricing policy of the network.

The HCC held that the combination of the aforementioned provisions constituted a general obligatory rule for the franchisees to follow Carrefour's recommended retail prices, to which only exceptions could exist. The HCC also held that said provisions imposed an obligation to the franchisees to follow the pricing policy applied within the entire network, which Carrefour had an explicit right to monitor through its IT system. Finally, the HCC held that the obligatory character of these provisions was reinforced by the provision of art. 10 of the agreements, which provided that an eventual violation of the rules laid in said Annex A gave Carrefour the right to terminate them.

Carrefour objected that the above rules were a mere and vague invitation to the franchisees to be in line with the general pricing policy of the network and that they did not constitute a definitive rule. It also added that the franchisees were only required to respect the image of the 'Marinopoulos 5' stores, but were free to determine their pricing policy, adding that Carrefour's right to be informed about the resale prices was inherent to the franchise nature of the system, and by no means a strict price monitoring mechanism.

The HCC rejected such claims, holding that although respect for the system uniformity and price recommendations were normal for a franchise network, in this particular case the wording of the crucial provisions equaled resale price fixing. In the HCC's view, following the recommended prices was the rule and any amendment thereof was exceptional. Moreover, the HCC held that the franchisees were practically obliged to follow the pricing policy of the network, and any deviation therefrom was monitored by Carrefour. The latter provision, pursuant to the HCC, operated as a disincentive to any franchisee who wished to amend the recommended prices, given that such amendment could be considered 'inappropriate' by Carrefour and therefore a violation of the agreement.

Thus, the HCC concluded that there was a violation of Art. 1 L. 703/77 and Art. 101 TFUE by object. Given this conclusion, it was not necessary to consider whether these anticompetitive provisions were applied in practice, but nevertheless, the HCC did examine whether the franchisees adhered to this resale price fixing through their commercial

management software system.

During the proceedings, Carrefour displayed a simulation of the crucial commercial management software. The HCC concluded that there was not sufficient evidence to prove a technical impossibility for the franchisees to change the products prices, but such change was practically so difficult and time-consuming, that it exacerbated the rigidity of the prices recommended by Carrefour.

The next issue which the HCC examined was the complaint about the alleged prohibition of cross-supplies within the franchise network, taking into account its former conclusion that this was also a selective distribution network. The HCC examined in particular the provisions of the franchise agreements which obliged the franchisees to have "Carrefour-Marinopoulos" as their sole supplier, prohibiting the purchase of products from other suppliers, unless Carrefour had approved it in writing. The agreements also provided that the franchisees would not sell their products in any way outside their normal framework of activity, which was defined as "retail sales".

In view of the above, the HCC concluded that said exclusive supply obligation from Carrefour equaled a prohibition of supply from other franchisees (restriction of cross-supplies), which was reinforced by the obligation for retail sales only, and the prior written approval of Carrefour in case of supply from another source. Therefore, the HCC concluded that there was another violation of Art. 1 L. 703/77 and Art. 101 TFUE by object, given that both active and passive sales were prohibited within the franchise network.

Carrefour repeated its view that the franchise system in question did not present characteristics of a selective distribution system, and therefore the relevant rule about cross-supplies between the members of the system should not apply. Carrefour also sustained that the non-compete obligations were in line with Art. 5a) of BER 2790/99 and in any event, they could not be considered as a hard-core restriction.

The HCC rejected said claims, mainly on the grounds that the distribution system in question was a selective distribution system, and therefore all the relevant rules of the BER should apply, irrespective of the fact that it was also a franchise system. The HCC also rejected Carrefour's claim that the provisions in question effectively were a lawful non-compete obligation, holding that they constituted an explicit exclusive supply obligation, and not a prohibition of selling competing products. Finally, the HCC held that even if the system was not regarded a selective distribution system, said provisions would violate Art. 4b BER 2790/99 anyway, given that passive sales were prohibited altogether. Consequently, the HCC reiterated its conclusion that Art. 1 L. 703/77 and Art. 101 TFUE were violated by object and to some degree, also by effect.

Subsequently, the HCC appraised a non-compete obligation contained in the same agreements, which prohibited the franchisees from exercising similar commercial activities for one year following the termination of the franchise agreements, either in person or through another entity, and from participating in any other commercial organization, with a penalty of € 5.000 a day for each competing store they would operate.

The HCC held that this provision was contrary to Art. 1 L. 703/77 and Art. 101 TFUE, despite the fact that its duration was one year, because it did not serve to protect the franchisor's know-how not yet in the public domain, but it prohibited the exercise of commercial activity altogether, without any reference to such know-how. Moreover, such non-compete obligation extended to all territories and not solely to the territory where the franchisee exercised its activity.

Carrefour claimed that such non-compete obligation was lawful in view of the need to protect its know-how, and therefore it did not fall under Art. 1 L. 703/77 and Art. 101 TFUE. Nevertheless, said claims were rejected on the grounds mentioned above.

In view of the above findings, the HCC concluded that the conditions for individual exemption pursuant to Art. 1 para. 3 L. 703/77 and Art. 101 para. 3 TFUE were not satisfied, especially given the "hard-core restriction" nature of the crucial terms, and it went on to examine whether there was also a violation of Art. 2a) Law 703/77.

Said provision, which was a peculiarity of Greek Competition Law until recently (it has already been transferred to Law 146/1914 on Unfair Competition by virtue of Law 3784/2009), prohibited the abuse of a relation of "economic dependence" by undertakings which, albeit not dominant, were in a position of such economic/business superiority compared to their counterparties, that caused the latter to be dependent on them.

The HCC held that in this case, the relation between Carrefour and its franchisees presented the characteristics of economic dependence, as the franchisees could not turn to alternative supply sources without enduring financial sacrifices, especially in view of their investments, their adaption to the distribution needs of Carrefour, and the exclusive supply and non-compete obligations. Based on this, as well as its findings on resale price maintenance and restriction of cross-supplies within the network, the HCC concluded that Carrefour had abused its position of economic dependence against its franchisees, thus infringing Art. 2a L. 703/77 (as was in force).

Finally, the HCC rejected the proposed commitments of Carrefour, holding basically that the infringements were hard-core and more than one, so no commitments should be accepted, and that the commitments offered were vague and essentially constituted a mere commitment to abide by the law, which is obligatory for all undertakings anyway.

The fine was calculated pursuant to the Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 [1] and was based on the revenue of Carrefour corresponding to its franchise network. The HCC found no aggravating circumstances, but on the contrary considered that Carrefour's cooperation during the investigation constituted a mitigating circumstance, granting therefore a 10% discount on the proposed fine.

The final fines imposed were € 6,728,272.97 for the resale price maintenance and € 5,784,576.66 for the restriction of cross-supplies, in total € 12,512,849.63 Euros, coupled with a threat for a periodic penalty payment of 10 thousand Euros in case of non-compliance.

I. The first point which is worth commenting with regard to this decision is the HCC analysis of the legal nature of the franchise system and the applicable rules. Although the HCC conceded that the relevant distribution network was a franchise, which is explicitly acknowledged by both EC and Greek legislation as a distinct type of distribution system [2], typically a combination of exclusive distribution, selective distribution, non-compete and IP licensing, the HCC seemed to disregard such individuality and held that the applicable rules were the ones of selective distribution. It also concluded, rather paradoxically, that said distribution system was at the same time a franchise and a selective distribution network, although it is clear that franchise agreements inevitably contain elements of selective distribution, but also elements of other types of agreements e.g. exclusive distribution, IP licensing etc. Therefore, franchise agreements should be appraised based on a combination of rules, and not arbitrarily based on just one set thereof, disregarding the rest.

In essence, the HCC applied to the franchise agreements in question the rules developed for another type of distribution agreements (selective distribution), which are clearly more general than the ones that should apply to more complex types of agreements, and thus inaccurate for the relevant legal analysis. Contrary to the HCC, the European Commission has acknowledged the fact that franchise agreements not only constitute a distinct type of agreements, but in some cases they may be appraised more favourably than other types of agreements. It is indicative that in its recent Guidelines on Vertical Restraints [3], the European Commission considered that price-fixing could be permitted for a limited period of time [4], explicitly with regard to franchise agreements, acknowledging that the need for uniformity within the network could permit stricter vertical restraints.

It is doubtful whether the HCC would have reached a different conclusion as to whether there had been a violation of Art. 1 Law 703/77 and Art. 101 TFUE by Carrefour's pricing policy, had it appraised the agreements taking into account their franchise nature. In the author's opinion, the HCC would have concluded the same *de lege lata*, given that the alleged price-fixing did not last "for a limited period of time", but supposedly for 6 years. Such justification would seem legally more accurate than the one provided.

Nevertheless, in the author's opinion, *de lege ferenda* price fixing could be allowed for a longer period of time, at least if one takes into account how franchising operates in the real world. One cannot deny that the essence of franchising is the uniformity of the network, which also constitutes an important element of its goodwill. Such uniformity cannot be maintained if the product prices present wide deviations among the individual franchise stores, namely if the franchisees do not apply in practice the prices recommended by the franchisor. Empirical evidence also confirms that most franchise shops apply the same product prices, which cannot be attributed without fail to a respective obligation imposed by the franchisor. Such practice may merely constitute rational business behaviour on part of the franchisees, which does not necessarily make them parties to an anticompetitive agreement to fix prices.

II. Another point which is worth commenting with regard to the same decision, is the aggregate application of both Article 1 Law 703/77 and Article 2a) Law 703/77 on the same behaviour, which seems to run contrary to *ne bis in idem* principle. As was mentioned above, Art. 2a Law 703/77 concerned unilateral behaviour, namely the abuse of economic strength by an undertaking, to the detriment of its weaker counterparty. Such abuse usually took the form of unilateral imposition of unfavourable terms to such weak party.

In this particular case, the HCC held that Carrefour had violated Art. 1 Law 703/77 and Art. 101 TFUE, namely that it "agreed" terms with its franchisees which impeded competition. At the same time, the HCC held that Carrefour had also violated Art. 2a Law 703/77, because it "imposed" - as opposed to "agreed" - the terms in question. It is evident though, that the application of both provisions is contradictory, as the agreement of specific terms presupposes the consensual participation of the parties to such agreement, while the unilateral imposition the lack thereof.

In any event, the HCC did not impose any fine on the franchisees which were parties to such anticompetitive agreements, because it held that Carrefour, due to its economic strength, had the initiative for the agreement of such anticompetitive terms. On the exact same grounds, the HCC found an infringement of Art. 2a Law 703/77. It is obvious that the application of both provisions (Art 1 and 2a Law 703/77) for the same behaviour and with the same justification, runs contrary to the *ne bis in idem* principle, something that the HCC seems to have tacitly acknowledged, since it did not impose an extra fine for the violation of Art. 2a Law 703/77, but merely ordered the ceasing of such violation in the future.

III. Finally, the HCC justification for the rejection of Carrefour's commitments, not only appears weak, but maybe also contrary to the very institution of commitments, provided by Council Regulation 1/2003.

The first ground for rejection, namely that the infringements in question were hard-core and therefore no commitments should be accepted, cannot be founded on Council Regulation 1/2003, especially Art. 9 which sets the conditions for the acceptance on commitments. Such provision does not differentiate between infringements according to their gravity, nor does it render the "non-hard core" character of the infringements a condition for the acceptance of commitments. On the contrary, Council Regulation 1/2003 permits such acceptance and the closing of proceedings, if the Commission concludes that the commitments are able to meet its concerns - irrespective of the gravity of the infringement.

The HCC though, added an extra prerequisite for the acceptance of commitments, namely the lack of "hard core" restrictions, and consequently concluded that the gravity of the infringements in question disallowed the acceptance thereof. This approach is evidently stricter than the one adopted by Council Regulation 1/2003 and clearly poses questions as to its conformity therewith.

Besides, this strict HCC approach seems also ironic, if one takes into account the previous HCC decision in the DIAS ATM , DIAS DEBIT and DIAS TRANSFER case [5] (associations of banks), where the HCC accepted the commitments offered by the member-banks, although they were found to horizontally set their interchange fees, to the detriment of consumers. It is evident that this infringement of Art. 1 Law 703/77 and 101 TFUE was more severe than the one in question, but nevertheless the HCC accepted the commitments and closed its ex officio investigation. Consequently, the rejection of Carrefour commitments in the present case due to "the gravity of its infringements" - all of which were vertical restraints - seems at least disproportionate.

Finally, the second reason for the rejection of Carrefour's commitments, namely they were vague and essentially constituted a mere commitment to abide by the law, which is obligatory anyway, also seems to run contrary to Council Regulation 1/2003. Pursuant to said Regulation, the commitments must aim at bringing an infringement to an end, in other words at meeting the concerns of the competition authority which initiated the proceedings. In the case in question, Carrefour committed to amend the terms of its agreements and its commercial management software, pursuant to the HCC instructions. Such commitments do not appear as vague as the HCC held, given that they seemed targeted to meet the HCC concerns, while also entailing a promise to follow its directions.

Besides, the HCC view that a promise to abide by the law cannot be sufficient as a commitment, because this constitutes a general obligation for all undertakings, challenges the very point of commitments, provided by Council Regulation 1/2003, since all commitments inevitably promise the rectification of an anticompetitive behaviour, and yet - pursuant to the European Council - they can have the effect of bringing the proceedings to an end.

[1] Council Regulation (EC) n° 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJEU L 1, 4 January 2003, p. 1-25).

[2] See Commission Guidelines on Vertical Restraints; (OJ C 130, 19.5.2010, p. 1-46).

[3] Ibid.

[4] Ibid at para. 225

[5] See http://www.epant.gr/news_details.ph...

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