Antitrust Briefing

HCC Rundown 2017

The Hellenic Competition Commission's (HCC) 2017 activity was marked by a landmark Settlement decision in the closure of its investigation for bid-rigging in the tendering of public infrastructure projects imposing record fines on the leading construction groups of Greece. Overall in antitrust, the HCC's emphasis was again on cartels with two decisions in the wholesale and retail cosmetics markets (HONDOS and Luxury wholesalers) but also on anticompetitive vertical restraints (Colgate's distribution practices and NEOSET's franchise network). In merger control, two noteworthy Phase II decisions were issued, in the consumer retail market's further consolidation (Sklavenitis/Marinopoulos) and in the market of dairy products (MEVGAL) under notable structural and behavioral remedies. In the area of advocacy, the HCC issued additional opinions regarding the conditions of access to certain professions.

Overall in 2017 the HCC deployed all procedural tools available to it for restoring competition in the market including acceptance of a leniency application, settlement of two horizontal cartel cases, amendment of commitments by the natural gas incumbent operator and interim measures aiming to inhibit the effects of anticompetitive Union announcements in the agricultural sector. In doing so, the HCC set significant precedents but at the same time issued more controversial decisions. In both cases, the authority adopted a realistic approach with respect to the fines imposed, by applying exceptional reductions on account of the ongoing economic crisis.

ANTITRUST DECISIONS

Horizontal Agreements

Collusion between cosmetics retailers (HCC 636/2017 and 645/2017)

The **first decision** issued by HCC under its new **settlement** procedure[1] concerns a case which dates back to the second of two complaints lodged by NOTOS (wholesaler and retailer of cosmetics) in 2006 against a number of wholesale and retail players in the cosmetics sector. In July 2016, an HCC Rapporteur notified nine companies, belonging to the HONDOS CENTER franchise[2] with a statement of objections (SO) alleging the conclusion of horizontal price-fixing agreements between them[3]. Eight companies participated in the settlement procedure (HCC 636/2017, issued in February 2017), and the ninth followed the standard hearing procedure (HCC 645/2017, issued in August 2017).

In the settlement procedure, the eight participating companies admitted that, rather than a HONDOS 'Group' of companies as such, there were a network of independent companies consisting of a HONDOS franchisor company[4] and several franchisee companies , owned either by each one of the Hondos brothers or other autonomous undertakings. The HCC therefore considered that, albeit owned by siblings, the companies involved were economically independent and could not fall under the concept of the '*single economic entity*' doctrine[5]. The HCC examined a series of e-mail messages and other

[1] See KG's relevant briefing on the HCC's new settlement procedure (HCC decision 628/2016).

[2] HONDOS CENTER is a leading retail chain of cosmetics and various consumer products. Each HONDOS company operated its own network of retail stores, and was owned by each one of five brothers, who were the board members and shareholders (each holding 20% of equity) in Hondos Company S.A. This was the joint venture that franchised the trademarks used by the HONDOS stores.

[3] It was the same SO that dealt with the alleged concertation between the wholesalers of luxury cosmetics. The two cases where subsequently separated.

[4] I.e. Hondos Center S.A., owned by the five Hondos brothers who participated to its BoD.

[5] See, indicatively, Case C-189/02P, paras 103 et seq.

correspondence between the nine companies which demonstrated that they pursued a coordinated pricing, commercial, and marketing policy starting in 2003, at the earliest, organized through a head office which guaranteed the optimum operation of the above policy. In their identical Settlement Offers, the companies unconditionally acknowledged that all the above constituted a horizontal agreement which restricted competition by object and infringed both EU and national competition law.

In determining the fines, the HCC resolved that the franchisor company's fine should be increased by an aggravating 20%, due to its key leading role in the cartel. The HCC acknowledged the ongoing economic crisis, the grave economic condition of the retail luxury cosmetics sector, liquidity and financing problems, as well as the importance of the 3,000 jobs held by employees of the companies, and accepted an exceptional reduction to the fines imposed, which preceded the 15% discount as a result of Settlement. The fines imposed on the eight companies amounted to a total of € 1.05 million.

The HCC acknowledged the ongoing economic crisis, the grave economic condition of the retail luxury cosmetics sector, liquidity and financing problems, as well as the importance of the 3,000 jobs held by employees of the companies, and accepted an exceptional reduction to the fines imposed, which preceded the 15% discount as a result of Settlement.

However, not all involved companies choose to settle. *In the standard hearing procedure*, the first company involved was a HONDOS franchisee which had not submitted a memorandum before the HCC, or appeared in the hearing to defend itself against claims of collusion with the rest of the HONDOS companies. The second company was the HONDOS franchisor (Hondos Center S.A.), which, albeit settling the horizontal case, also faced separate allegations of vertical price fixing (RPM).

Regarding the HONDOS franchisee, the HCC followed the reasoning adopted in the above settlement decision, since there were no counter-arguments presented before it in the procedure. Hence, a fine of € 154,000 was imposed on the company for participating in the HONDOS horizontal cartel.

In terms of evidence against the HONDOS franchisor company, the HCC invoked BoD decisions as well as internal and external correspondence, based on which Hondos Center compelled its franchisees to follow the recommended prices that cosmetics wholesalers addressed to Hondos Center. Consequently, it established that the company had committed RPM for a period spanning from 01.7.2003 to 30.06.2006, but, instead of imposing a fine, chose to take a more lenient approach and make a recommendation to the company to refrain from such conduct in the future. As the HCC's majority explained, the deterrent effect of competition law had been sufficiently ensured through the issuance of the settlement decision and the establishment of the horizontal price-fixing infringement.

In addition to the vertical relations, the HCC made reference , *inter alia*, to *Compagnie Maritime Belge*[6] and concluded that the HONDOS companies held a position of collective dominance[7], This collective dominance was, allegedly, the principal "vehicle" through which the anticompetitive horizontal cooperation materialized, and was held by the HONDOS companies for at least six years (2003 – 2008). However, the HCC did not establish an abuse of such position.

Finally, an important challenge which the HCC faced in this decision was the contention made by Hondos Center S.A. that the HCC's right to impose sanctions in 2017, for an alleged infringement ending in 2006, i.e. more than ten years before the issuing of the decision, had been **time-barred**. To this the HCC argued that no limitation period was provided for in the Greek law applicable at the time of the infringements and dismissed the applicability of the ten year limitation period provided for by Regulation 1/2003 (article 25) .

---

[6] Case C-395/96 P - Compagnie Maritime Belge Transports and Others v Commission.

[7] See HCC 452/V/2009 (*Floras – Efstathiades educational books*).

Settlement of the bid-rigging cartel for high value tenders (HCC 642/2017)

In August 2018, the HCC announced the imposition of hefty fines amounting to more than € 80 million on several construction groups, for collusive tendering in high value public infrastructure projects, following the successful conclusion of lengthy settlement talks with part of the involved companies. It successfully applied its leniency program and operated for the first time a settlement procedure through bilateral meetings with each interested party, avoiding a crowded, lengthy, and unpredictable hearing procedure. Settlement also led to the imposition of a € 38.5 million fine, namely the largest ever in its history imposed on one single undertaking. It further acknowledged the **systemic nature of collusive tendering in national public infrastructure projects**, and accepted equitable reductions of fines due to the financial crisis and as a result of inability-to-pay arguments.

The *magnum opus* of the HCC's antitrust investigations began following several reports in the news and complaints by public contracting authorities, alleging collusion between companies in the Greek construction sector. During the investigation, the HCC allocated a large part of its resources and looked into dozens of construction projects and tenders, some dating back to the 1980's. In February 2013, namely nine days after the first dawn raid, the companies belonging to the TECHNICAL OLYMPIC Group applied for leniency status, which they gained three months later. After several dawn raids, and many depositions of legal representatives and employees of the companies, the SO, issued in April 2016, accused almost the entire Greek construction sector and other European players for bid-rigging high value tenders for public infrastructure projects. The cartel allegedly spanned over an overwhelming 27-year period and concerned construction tenders for major highways, underground, suburban, and intercity railways, and PPP projects. Based on the evidence gathered in the investigation, the implicated construction companies coordinated their business conduct by submitting cover bids, suppressing bids, fixing the level of bids and agreeing to execute sub-contracts before submitting their respective bids.

Not long after the settlement option became available[8], companies belonging to the groups AKTOR, TERNA, INTRAKAT, J&P AVAX, TECHNICAL OLYMPIC, SIEMENS, VINCI CONCESSIONS, AEGEK, DOMIKI KRITIS, EKTER, ERETVO, THEMELI, and CH.D. KONSTANTINIDIS filed for settlement.

In its settlement decision adopted in March 2017, in plenum, the HCC categorized bid-rigging arrangements into two major temporal groups: (a) projects awarded before 2005, for which the HCC's right to impose a fine had been **time-barred**, and (b) projects awarded in the 2005-2012 period, which constituted a **single and continuous infringement**, on account of the common allocation techniques, objectives, and undertakings concerned, which were distinct from bid-rigging in previous periods.

During the investigation, the HCC allocated a large part of its resources and looked into dozens of construction projects and tenders, some dating back to the 1980's. It applied with success its leniency program and operated for the first time a settlement procedure through bilateral meetings with each interested party, avoiding a crowded, lengthy, and unpredictable hearing procedure. Settlement also led to the imposition of a € 38,500,000 fine, namely the largest ever in its history imposed on single undertaking. It further acknowledged the systemic nature of collusive tendering in national public infrastructure projects, and accepted equitable reductions of fines due to the financial crisis and as a result of inability-to-pay arguments.

In calculating the imposed fines, the HCC took into account the budget of each tender and each company's hypothetical share in the project's allocation in order to ascertain the financial benefit derived by each participant. After counting in aggravating and mitigating factors, the basic fine for three companies was caught by the 10% turnover

[8] See KG's relevant briefing on the HCC's new settlement procedure (HCC decision 628/2016).

cap. Further reductions due to the economic crisis, leniency (for TECHNICAL OLYMPIC group), and settlement (15%) were granted. **Most importantly, the HCC granted its first-ever reduction of fines due to an inability-to-pay to two companies involved**. The standard hearing procedure for the construction companies that did not opt for settlement took place in April-May 2017, and the decision has not been yet announced.

Bid-rigging in a local construction tender in Pella (HCC 644/2017)

The HCC's focus on bid-rigging in tenders for infrastructure works extended to a smaller tender of local interest which led again to the imposition of considerably smaller, yet still noteworthy, fines. In November 2010, in the city of Edessa (Central Macedonia), the Prefectural Committee of Pella organized a competitive public procurement procedure for the award of a € 4.5 million contract for the Environmental Restoration - Rehabilitation of Uncontrolled Waste Disposal Sites (HADA) of the Pella region. Following an anonymous complaint, the HCC initiated an ex officio investigation and the competent Rapporteur concluded that the public procurement procedure had been distorted by several construction undertakings that had entered into a bid rigging agreement in order to achieve the award of the contract to a specific contender with a 2.47% discount.

In its decision, issued in March 2017, the HCC held that the public procurement procedure had been rigged through cover bidding and bid suppression by nine construction companies.[9] According to the decision, representatives of these companies met the evening before the date of the tender submissions in a central hotel and agreed the bid rigging terms. The HCC based its conclusions on the hotel's invoices, conference room agenda, and on the personal agenda of a representative of one of the contestants. According to the HCC, the bid rigging agreement provided that MICHANIKI PERIVALLONTOS S.A. would be the successful tenderer and the remaining companies, be they cover or suppressed bidders, would share an amount of € 350,000. Interestingly enough, the HCC did not distinguish between the undertakings involved, albeit the arguments brought forward by certain companies, namely that they actually lacked the technical qualifications to participate in the tender and, thus, the incentive of the remaining companies to collude with them. In all, the HCC seemed to base its assumptions for certain players solely on the finding that their representatives spent the night on the same hotel that the conference room was booked in.

Total fines imposed on the nine companies involved exceeded € 800,000, with MICHANIKI, i.e. the winning bidder, facing the largest fine.

Horizontal concertation between wholesalers of luxury cosmetics & the 'vertical manifestation' (HCC 646/2017)

In a decision in plenum dated April 6th 2017, issued almost eleven years after the termination of the alleged violation, the HCC resolved that five wholesalers of luxury cosmetics had, between January 2005 and September 2006, agreed to fix retail discounts in the outlets of retailer (and rival wholesaler) NOTOS which resulted in the indirect fixing of the wholesalers' retail price range, in violation of Art. 101 TFEU and its Greek Competition Act equivalent. The fines imposed ranged from approximately € 1.8 million to € 5.4 million, depending on each company's specific turnover. In particular, during the sales period of February 2006, NOTOS, an exclusive wholesale distributor of several luxury cosmetics brands including *Chanel*, *Guerlain*, and *Kenzo,* and operator of department stores, offered a 60% retail discount in its stores for the products it exclusively distributed, and a 50% retail discount for the products of wholesale rivals Estée Lauder, Christian Dior, L'Oréal, Sarantis (*Roberto Cavalli*, *Prada* a.o.), and Gerolymatos (*Gucci*, *Trussardi* a.o.). The competing wholesalers then withdrew their beauty advisors from NOTOS' stores, protesting what they considered as unfair treatment. Pursuant to an exchange of extrajudicial declarations between the parties, NOTOS filed a complaint before the HCC, which in July 2006 triggered an *ex officio*

[9] Michaniki Perivallontos S.A., Ergasis Techniki S.A., Karkanias Technologia Perivallontos S.A., Axion T.S.A., Niovi T.S.A., Ergonter T.S.A., Limeniki O.S.A, Techniki Kavalas Ltd – Tsekmetzoglou Demetres a.o. Ltd. and Daskaloudis A. Theodosios.

investigation in the market of the wholesale trade of luxury cosmetics[10].

Based heavily on the content of an extrajudicial declaration sent by Christian Dior to NOTOS referring in vague terms to a prior agreement but also on the concurrent withdrawal of beauty advisors from the latter's stores, and the alleged refusal of sales discount support by some of the wholesalers, the HCC concluded (in a decision rife with dissenting opinions) that the reaction of the five wholesale companies to NOTOS' discount policy constituted a retaliation for its deviation from the cartel to fix retail discounts, which essentially constituted the 'vertical manifestation' of the alleged collusion. Moreover, the decision invokes in parallel evidence of RPM practices manifested through individual pricelists sent separately by each wholesaler, to retailers (in bilateral communications) and concludes that the retail prices referred therein were *de facto* not recommended but, rather, fixed prices. Making a rather original leap, the decision then maintains that this constituted yet another 'vertical manifestation' of the horizontal collusion between wholesalers, due to the fact that the alleged (at least indirect) imposition of these prices could not be explained based on the individual market share of each wholesaler and could only be attributed to the collective share of the cartel and its 'invisible grip' on the retailers who could not defy it; the decision does not quote specific evidence to that effect. Two dissenting opinions were expressed against these findings, one by two Members (one Rapporteur and another Member) providing that the evidence does not suffice for a finding of NOTOS' participation in a cartel, and another by one Member (same one as in the first dissenting opinion) regarding the content of the violation by the other five wholesale companies, stating that the contested behavior may be anticompetitive but cannot be deemed a cartel and it definitely did not lead to a restriction of competition.

An important issue which should be highlighted is the HCC's insistence to dismiss Decision 1976/2015 of the Supreme Administrative Court providing for the application of a limitation period by analogy (with reference to Article 25(1) of Regulation 1/2003) for cases not covered by the transitional provision of the Greek Competition Act, based on which the HCC's ability to impose a fine in this case has been time-barred as of September 2016.

Regarding the duration of the violation for each party, according to the majority opinion, it started on 01.01.2005 and ranged, based on the evidence, from one year and two months to one year and nine months, whereby the maximum duration, curiously enough, was established for just one company, which would seem to imply that in September 2006 the alleged cartel had only one member. The finding on duration was not unanimous either, as two Members expressed dissenting opinions; the first stating that the HCC did not discharge the requisite burden of proof regarding the starting point of the violation for each company, given that the law requires adequate and accurate evidence to establish that the violation took place at the specified time, such evidence not being present in this case. The second dissenting opinion referred to the ending date of the violation for NOTOS (marked by the filing of the complaint to the HCC, according to the majority view) as the company did not in fact distance itself from the cartel, but instead chose to retreat, this being the most profitable option for it.

Finally, the calculation of the fines was also rather unconventional as the HCC distinguished its approach between Estée Lauder, Christian Dior, L'Oréal on the one hand, and NOTOS, Sarantis and Gerolymatos, on the other, following its standard practice in the second case, as provided for in the HCC's 2006 Notice for the calculation of fines, but for the first one concluding directly (without any apparent calculation of the basic fine) that the 10% cap should apply, recognizing subsequently mitigating factors (financial difficulties due to the crisis) and applying a further discount.

Overall, this is a rather unconventional decision, evident also by the unprecedented number of

[10] It was in the context of the same investigation that the HCC assessed the alleged horizontal agreements between the HONDOS companies. The two cases where subsequently separated.

dissenting opinions expressed on various issues by several HCC members. On top of the questionable evidence for such a serious violation, and the, at times, difficult to follow legal assessment, another important issue which should be highlighted is the HCC's insistence to dismiss Decision 1976/2015 of the Supreme Administrative Court providing for the application of a limitation period by analogy (with reference to Article 25(1) of Regulation 1/2003) for cases not covered by the transitional provision of the Greek Competition Act[11], based on which the HCC's ability to impose a fine in this case has been time-barred as of September 2016. The HCC effectively argues that for certain violations, the ten year limitation period provisions cannot apply (even by analogy) and its powers to find an infringement and impose a fine can only be time-barred based on the general principle of 'reasonable action' of the administration, which, applied in the present case, shows that the authority's investigatory actions did not delay and took place within a reasonable period of time.

Interim action for retaliation measures against agricultural producers in Naxos (HCC 653/2017)

After a long period of inaction in the area of interim measures, the HCC convened at the expiration of last year to deal with a possible 101 TFEU (and its Greek Competition Act equivalent) violation by a local Union of agricultural producers. On 29 November 2017, the Union of Agricultural Cooperatives of Naxos Island (EAS Naxos) instructed all potato producers not to sell their winter crops earlier than 24 December 2017 for reasons of alleged public interest; if a producer ignored this direction, EAS Naxos, which purchases several goods from producers for resale, would purchase milk, in particular, at a lesser price by such producer. The HCC conducted a dawn raid investigation at EAS Naxos to examine whether its decision constituted an anti-competitive output restriction.

On 18 December, the HCC announced that it would convene three days later to decide on the adoption of interim measures against that action, which, in view of the upcoming holiday season, was capable of adversely affecting competition on both markets of potato and milk, and have negative implications for producers and consumers alike. On 21 December 2017, the HCC, in plenum, decided to accept commitments by EAS Naxos, whereby it would revoke its announcement, declare that producers are free of selling potatoes from the winter crops, with no further restriction, and publish a relevant announcement on its website, its journal, and a local daily newspaper. EAS Naxos would pay a fine of € 2,000, for each day of non-compliance with the commitments.

With this decision, the HCC swiftly dealt with an output restriction of local scale and addressed it with interim measures before it fully materialized, emphasizing also the deterrent over the punitive nature of its interim measure decisions.

Vertical Agreements[12]

Restriction of parallel trade clauses in Colgate's vertical agreements with retailers – Parental liability (HCC 610/2015)

In 2017, the HCC published its decision against members of the COLGATE-PALMOLIVE group of companies pursuant to an *ex officio* investigation in the detergents/cleaners for home use and cosmetics markets which was initiated in 2005, after consumers complained of the price differences between detergents/cleaners in Greece and other EU countries. The HCC resolved that, specific terms in the commercial agreements of COLGATE-PALMOLIVE HELLAS with several supermarkets, based on their economic context, interpretation and a 'by object' categorization, were intended directly to restrict parallel imports and therefore imposed a total fine of approximately € 8.7 million on the COLGATE-PALMOLIVE companies and fines ranging from € 1,944 to € 474,714 on the retailers, depending on their respective turnovers and years

[11] See the HONDOS case above (HCC 645/2017), issued one day earlier (April 5th 2017), providing identical reasoning on the limitation period.

[12] The HCC also dealt with a vertical restraints issue in the HONDOS case, though that was a predominantly horizontal concertation case.

of participation in the violation. In particular, having reviewed the commercial agreements between COLGATE-PALMOLIVE HELLAS and several supermarkets entered into from 1991 to 2008, the HCC found that COLGATE-PALMOLIVE and its US mother company COLGATE-PALMOLIVE Co, had, together with supermarket chains AB Vassilopoulos, MAKRO Cash&Carry, Sklavenitis, PENTE and Kypseli concluded bilateral anti-competitive agreements restricting retailers from carrying out parallel imports of COLGATE branded detergents and cosmetics products. The HCC also held that the COLGATE-PALMOLIVE companies abused their position of dominance in the market of glass cleaners and that their violations extended from 1999 to 2008, whereas those of retailers from 2001 to 2005, depending on each retailer.

The contested term found in COLGATE-PALMOLIVE's supply agreements (providing that the retailer "*will not proceed to parallel imports*", later revised to "*will not proceed to parallel imports of products that are similar to those distributed by the Company, but do not fulfill the provisions of Greek law*") was read by the HCC in juxtaposition with what the HCC considered to be an "*abundance of evidence*" of a wider plan to restrict parallel imports in Greece, leading to a unanimous decision. In doing so, the HCC rejected the parties' arguments that the terms essentially imposed on retailers a single sourcing obligation because of the applicable national regulatory provisions regarding detergents/cleaners which in effect rendered legal parallel imports impossible. In particular, the HCC argued, *inter alia*, that the same term in the agreement also applied to cosmetics, in which case such strict regulatory provisions were absent. The HCC also did not accept the companies' argument that the term intended to protect their reputation and that its true meaning was that retailers were obstructed from importing 'illegal' merchandise; to this the HCC argued in essence that this conflicted with the inclusion of specific sanctions in the agreement in case retailers defaulted on the respective clause. Finally, the HCC overruled the argument raised by all companies that there was no concurrence of will in the adoption of a clause with the specific meaning attributed to it by the HCC.

The majority view interpreted the evidentiary material as constituting sufficient evidence of the mother US based company's involvement in the conception, planning, observance and realization of the illegal conduct by their Greek subsidiaries whereas two Members (the Vice President and another Member), deemed that there was lack of evidence of specific guidance "specifically" for the inclusion of the contested clause in the agreements with the customers.

In assessing the parties' market power, the HCC found that the considerable negotiating power held by the supermarkets as a result of the sector's increasing consolidation and the powerful presence of at least five supermarket chains, was directly restricted in practice by the wide portfolio of COLGATE-PALMOLIVE products and its brand power in the channel, especially referring to 'AZAX' as a "*must-have*" brand. Consequently, the HCC held that the attempt to restrict parallel imports also constituted an abuse of dominance of COLGATE-PALMOLIVE's position in the market of glass cleaners and applied a separate fine of € 747,518.

On the issue of parental liability, the HCC did not reach a unanimous decision: The majority view interpreted the evidentiary material as constituting sufficient evidence of the mother US based company's involvement in the conception, planning, observance and realization of the illegal conduct by their Greek subsidiaries, whereas two Members (including the Vice Chairman of the HCC), deemed that there was lack of evidence of guidance by the parent company "specifically" for the inclusion of the contested clause in the agreements with the customers.

Finally, the HCC fined COLGATE-PALMOLIVE a total of € 400,000 for obstructing the investigation on account of its failure to produce its written agreement with one of its customers (MAKRO), later found to include the contested term and also because it produced a 'template agreement' which did not include the contested term(s), although later evidence proved that they actually were included in the signed versions.

With this decision the HCC reaffirms its firm stance against restrictions on parallel trade, invoking also its decisions in *LAVA*[13] and *Unilever*[14] according to which the prohibition of parallel imports constitutes a by object (*per se*) restriction of competition. It should also be mentioned that the attribution of parental liability on COLGATE-PALMOLIVE's US based mother company is one of the few decisions in which the HCC has extended liability for competition law violations to entities further up the corporate tree.

Vertical restraints in NEOSET's franchise network for furniture (HCC 622/2015)

NEOSET was an established manufacturer and distributor of furniture. Following a pecuniary dispute with DIAMESO (a franchisee), and the termination of their agreement in 2008, DIAMESO claimed damages from alleged RPM and cross-supply restrictions in NEOSET's franchise network. Civil courts had rejected these claims, finding that the clauses under examination aimed at protecting the commercial reputation of NEOSET's distribution network. The courts also held that the franchisees enjoyed sufficient freedom in their retail pricing and cross-supply activities. In late 2009, DIAMESO brought its claims before the HCC, alleging RPM, exclusive and cross supply restrictions, and export bans in NEOSET's franchise network. The HCC's decision, in chamber formation, was published on February 20, 2017.

For the initial contract period (2000-2003), the HCC held that the agreements included an outright hardcore RPM clause; the examination of the clause's actual anti-competitive effects was thus unnecessary. For subsequent contract period (2003-2009 and post-2009), the HCC ascertained that the clause had been replaced by recommended retail price (RRP) clauses, which were not restrictive by object; hence it went on to assess their actual effects and whether they operated as *de facto* RPM clauses. The assessment was exonerating for NEOSET. The HCC noted that NEOSET's software pricing systems allowed retailers to freely set retail prices and discounts, while NEOSET did provide software training and updates to its franchisees for the proper use of those systems. No evidence was brought forward that NEOSET monitored its franchisees' pricing and imposed sanctions for not complying with its RRPs. Instead, there were franchisees that undercut RRPs by 50%, without colluding with NEOSET.

On the allegations pertaining to cross-supply restrictions and export bans for the 2000-2003 agreements, NEOSET contractually restricted its franchisees to a single sourcing obligation i.e. an obligation to purchase only from NEOSET and to resell only at the retail level. Regardless of its actual application in practice, the clause was found to constitute a hardcore restriction of active and passive sales, which NEOSET could not justify by invoking the protection of its brand image. The same applied with regard to the export ban. In the agreements that followed, the exclusive supply obligations and the export ban had been removed,

> ***Due to the wording of the relevant clause, NEOSET was condemned for restricting cross-supplies* [...]*, although the HCC accepted, as the civil courts did, that such supplies were actually taking place, without NEOSET objecting thereto.***

yet franchisees were still forced to sell only to end users, which effectively meant that they could only source the products from NEOSET. Due to the wording of the clause, NEOSET was condemned for restricting cross-supplies for that period too, although the HCC accepted, as the civil courts did, that such supplies were actually taking place, without NEOSET objecting thereto.

For determining the fine imposed on NEOSET, the HCC took into account its turnover from sales to franchisees, excluding its vertically integrated distribution network. Considering the lack of evidence of any anticompetitive effects of the relevant practices, their *de minimis* nature (NEOSET's share in the relevant markets it was active never exceeded 5%), the company's state of insolvency, and the grave financial situation of the

[13] HCC 517/VII/2011.

[14] HCC 441/V/2009.

relevant sector, the HCC imposed a fine of € 88,814 on the company.[15]

The HCC's decision in NEOSET is an interesting example of a national competition authority's decision which ignored and ruled against the competition law assessment of civils courts, albeit taking into consideration several of their factual findings. It also highlights for suppliers the importance of having their distribution agreements assessed from a competition law perspective, and backed by solid evidence of *de facto* antitrust compliance.

Abuse of Dominance

Dismissal of allegations of excessive car parking prices in Macedonia Airport (HCC 630/2016)

In April 2008, Cargo Service, lessee and operator of the parking lots in the Thessaloniki International Airport "Macedonia", was accused by KEPKA (a consumer protection NGO) of abusing its dominant position through excessive pricing. The Hellenic Civil Aviation Authority (YPA) was also accused of facilitating these practices, from its position as a lessor of the parking spaces. The HCC, back then through its 456/V/2009 decision, had found that a monopoly had arisen in the airport's parking area, and that excessive price increases had harmed consumers. These increases, as the HCC had then noted, could be attributed to the structure of the procurement procedure and the regulated method of setting prices. The HCC referred therefore the case back to the General Directorate of Competition for further investigation. A new Report was issued in June 2016, and the HCC (chamber formation) convened to rule the case, absent KEPKA, which submitted that "*the situation has been restored in favor of consumers*". The HCC's decision was published in July 2017.

First, the HCC held that the matters regulated by the applicable procurement contracts were irrelevant from a competition law perspective. It then ruled that YPA does not constitute an undertaking for antitrust purposes, given that (a) it did not have economic autonomy, but its behavior was determined by the applicable regulatory framework, (b) its activity was not profit-making, and (c) it did not undertake any financial risks in the context of the relationship under examination. The HCC also pointed out that even if YPA constituted an undertaking, the theory of government compulsion would have applied.

Concerning Cargo Service, the HCC found that it holds a dominant position in the relevant market, due to the fact that it operates the only parking lots within the airport, and that it is capable of providing **valet services**, whereas most of its competitors only offer shuttle services. As to the establishment of abuse, the HCC made reference to several EU precedents, whereby dominant companies were condemned for excessive pricing in cases were the price of the product or service under examination was 40%, 100% or even 900% higher than its corresponding cost. In particular, the HCC sought to determine whether the *United Brands*[16] condition for the dominant company to have received "*excessive profit*" was satisfied. It thus examined whether Cargo Service's profit margins were excessive, or, alternatively, whether the difference between the costs actually incurred and the price actually charged was excessively disproportionate. In finding that the company's margins were either low (in 2007 and 2011) or negative (in the 2008-2010 period), and that its operation was generally loss-making, the HCC concluded that excessive pricing could not be established, based on the criteria of EU case law. It therefore dismissed KEPKA's complaint.

In finding that the company's margins were either low (in 2007 and 2011) or negative (in the 2008-2010 period), and that its operation was generally loss-making, the HCC concluded that excessive pricing could not be established, based on the criteria of EU case law. It therefore dismissed KEPKA's complaint.

The decision serves as a useful precedent into the HCC's sparse case law on exploitative abuses. It offers some rare insights into the economic test

[15] € 51,100.32 for the RPM and € 37,714.30 for the cross-supplies restrictions.

[16] Case C-27/76 - United Brands v Commission.

applied in cases of excessive pricing, and the very demanding criteria that need to be satisfied to establish such infringements. It shows that complainants must bring forward, or anticipate by the HCC, a thorough comparative and cost/price analysis of the dominant firm's commercial conduct for their allegations to be upheld.

Amendment of prior Commitments by the incumbent natural gas supplier regarding e-auctioned natural gas quantities (HCC 651/2017)

Once more, the commitments program of DEPA and its adjustments[17] feature in the HCC's annual list of decisions. This time, the HCC withdrew a provision in its 589/2015 decision, whereby the starting price of quarterly and annual gas auctions by DEPA reflected requests from DEPA's suppliers or DEPA itself to review the supply price of natural gas imported by DEPA through its long term supply contracts. In its relevant announcement, in November 2017, the HCC explained that the revision aims at "*reducing unexpected volatility regarding the auctions' starting price, while removing participants' uncertainty over its formulation*".

The decision, not yet published, entered into effect on January 1, 2018, and was reached in collaboration with the Hellenic Regulatory Authority for Energy, after an oral hearing of DEPA and its customers.

MERGER CONTROL

Supermarket chains acquisition cleared with remedies: SKLAVENITIS/ MARINOPOULOS (HCC 637/2017)

Picking up from where it left off in the on-going consolidation of the Greek super-market sector, the HCC was called, in January 2017, to clear the acquisition of control by *Sklavenitis*, a major super-market chain, of no less than 383 stores that formed part of the *Marinopoulos* group, the largest then retail chain in Greece. Marinopoulos had filed for the ratification of its bankruptcy and rehabilitation program in June 2016. The concentration consisted of several rehabilitation and business transfer agreements between a Sklavenitis subsidiary and Marinopoulos, whereby the former agreed to purchase most of the latter's assets and part of its liabilities. It also included the acquisition of four additional companies of the Marinopoulos group. From a merger control perspective, the transaction was arguably the most complex and challenging the HCC has faced in the sector over the last few years. The HCC's decision, in plenum, was issued in April 2017.

Although the exact market share figures of the undertakings concerned were not disclosed in the decision, it was mentioned that the post-merger share of Sklavenitis in the Greek market would surge to 25%-35%, and to 35%-45% in Attica, making it the largest Greek super-market chain. Regardless, since the relevant market in the super-market sector is defined on a narrower basis[18], the HCC's approach to tackle the competition concerns arisen by the new entity's high shares in certain geographic areas was to depict market concentration on the basis of areas defined by **postal code**. Further, it provided **market shares** separately on the basis of **turnover and surface (m^2)** of stores. Based on this segmentation, it discerned four districts[19], where Sklavenitis would acquire more than 50% turnover market share, but less than 50% in surface turnover. In those markets, it held that the high number of competitors (8-11) and competing stores (49-87) in each market, as well as the **potential to utilize store surface capacity**, ensured a sufficient number of post-merger competitive pressures exerted on Sklavenitis. However, there were 14 areas in Attica[20] where Sklavenitis' high turnover market shares (in some areas ranging in the 65-75% area) would be combined with surface market shares exceeding 50%. In these areas, the

[17] See HCC Decisions 551/VII/2012 and 589/2014 (published), and 596/2014, 618/2015, and 631/2016 (not yet published).

[18] Geographical market has been defined by the HCC on the basis of a 10' radius by car in cities and 30' in rural areas. See HCC Rundown 2016 (decisions METRO/VEROPOULOS and VASSILOPOULOS/KANAKIS).

[19] Districts in Kolonos, Palaio Faliro, Kallithea, and Agios Dimitrios.

[20] Four Piraeus districts, two in Palaio Faliro, and one in Kallithea, Vari, Chalandri, Aspropyrgos, Renti, Agios Dimitrios, Alimos, and Tavros.

The HCC provided market shares separately on the basis of turnover and surface (m^2) of stores. Based on this segmentation, it discerned four districts, where Sklavenitis would acquire more than 50% turnover market share, but less than 50% in surface turnover. In those markets, it held that the high number of competitors (8-11) and competing stores (49-87) in each market, as well as the potential to utilize store surface capacity, ensured a sufficient number of post-merger competitive pressures exerted on Sklavenitis.

HCC concluded that the concentration would create anticompetitive effects. By the same token, the HCC assessed the concentration's effects on competition in the prefectures of Heraklion, Lasithi, Chania, Rethymno, and Corinth, finding three areas in Heraklion and one in Lasithi, where Sklavenitis' post-merger market power would stifle competition.

Moreover, the HCC assessed the effects of the concentration on a national scale, stating that it would elevate Sklavenitis in the Greek supermarket pedestal, with a total of 544 stores, significantly more than its closest rival AB Vassilopoulos (368 stores). However, it held that the market is immature and is undergoing a major consolidation. It further invoked Commission case law, whereby the vertically integrated distribution model of supermarket chains allows them to swiftly and effectively react on competitive pressures. Reference was also made to private label products, where the major chains compete vigorously, and to consumer loyalty programs. These elements ensured, according to the HCC, that competitors and consumers would have an adequate arsenal for dealing with Sklavenitis' increased market power. As to the concentration's coordinated effects on the market, the HCC held that there is a high number of competitors with asymmetric market shares, capable of soothing the concerns raised.

Lastly, in the national procurement market, the HCC found that there is a limited number of large suppliers with *must-have* brands and high negotiating power, which Sklavenitis will still not be able to offset, hence no links of dependency to the retailer will be established as a result of the concentration.

On the basis of the above reasoning, that was made known to Sklavenitis by the SO, the company submitted in Phase II the following remedies, which the HCC accepted as proportional:

- Behavioral: For three years following the transaction, Sklavenitis will continue to purchase products from (a) suppliers that made more than 22% of their turnover in Sklavenitis and Marinopoulos, and (b) local suppliers, i.e. suppliers located near the newly acquired supermarkets. Certain exceptions were provided in case a product becomes obsolete or inappropriate.
- Structural: Within six months from the conclusion of the transaction, Sklavenitis undertakes to divest 22 stores in order to lower its market share in the affected markets below the 50% threshold.

The Phase II investigation and the subsequent clearance decision subject to remedies issued by the HCC demonstrate a flexible, yet thorough stance on merger control. Using the 50% market share threshold as a reliable denominator of substantial market power, the HCC was able to clear a giant concentration with significant implications for the retail market in Greece. It is further evident from the decision that when a supermarket's market share based on *turnover* exceeds its *store surface* market share, this indicates efficiency on the part of the retailer, and unused capacity on its competitors' part. Another interesting point is that, albeit Marinopoulos undergoing a bankruptcy and rehabilitation procedure, the HCC's overall reasoning in the case precluded the examination and application of a failing firm defense.

Packed food products merger cleared in Phase I: CHIPITA/ NIKAS (HCC 638/2016)

In this conglomerate concentration, Chipita S.A., producer and distributor of several snack brands (*Bake Rolls*, *Chipita* chips, *7Days*, *Molto* a.o.), filed a concentration notification, in January 2017, for the acquisition of sole control over Nikas A.V.E.E., a producer of cured meat, cheese products, and frozen food products with an annual turnover of € 23 million. Control was acquired through a share capital increase, in the context of a rehabilitation arrangement between Chipita, Nikas, and their creditors. Initially another investor, Impala Invest B.V. had co-signed a concentration notification with Chipita (March 2016) as acquiring joint control over Nikas, but subsequently withdrew its interest in the project.

The concentration did not give rise to competition concerns, due to the lack of overlaps in the activities of the undertakings concerned. Nikas was active in the product markets of cured meat, cheese products, and frozen dough products (e.g. pizzas), whereas Chipita was active in the markets of packaged cakes, savory snacks, chocolate confectionery, and marmalades.

The HCC held that there would be no negative impact of the concentration on the sources of supply and consumer choice, and cleared the concentration in Phase I, in February 2017.

Clearance of Joint Venture in the greenhouse production of agricultural products: Thermokipia Thrakis (HCC 649/2017)

Thrace Plastics Co S.A. (*Thrace Plastics*) and Elastron A.E.V.E. - Steel Products (*Elastron*) were two companies, each having a subsidiary active in the greenhouse production, distribution, and wholesale trade of fresh vegetables. Pursuant to the notified concentration, the target company *Thermokipia Thrakis S.A.* (the subsidiary of Thrace Plastics) would acquire and absorb *Elastron Agrotiki* (Elastron's subsidiary), while Elastron would acquire 49.09% of the target company, thus creating a joint venture between Thrace Plastics and Elastron. Leaving the activities of their merged subsidiaries aside, the two controlling parents were active in distinct markets[21].

In July 2017, the HCC (in plenum) confirmed that the concentration would lead to the acquisition of joint control, albeit Thrace Plastics holding the majority of shares in the J.V., given that an increased BoD majority was required for strategic decisions such as the approval of the company's balance sheet, business plan, and new investments.

The HCC discerned two relevant product markets, namely the market of fresh vegetable production and the market of distribution and wholesale of fresh vegetables, noting that further segmentation based on each vegetable (tomato, pepper) could be possible, but not essential for the outcome of the case. It further noted that the market was at least national in scope. That said, the HCC took into account data from the Hellenic Statistical Authority, and calculated the post-merger market share of the J.V. as not exceeding 5%.

It therefore unanimously cleared the merger, stating that it will not significantly affect competition in the relevant markets.

Joint Venture for Dairy products: Clearance of the MEVGAL acquisition in Phase II (HCC 650/2017)

DELTA FOODS S.A. and MEVGAL S.A. are two of the largest producers of dairy products in Greece. The acquisition of joint control over MEVGAL by DELTA and members of the Hatzakos family, was deemed a concentration with significant overlaps back in 2014 when DELTA had again attempted to acquire sole control over MEVGAL and the HCC had cleared the transaction with a different set of remedies[22]; the parties had subsequently abandoned the transaction which was never implemented. On June 2017, the HCC had announced its Phase II investigation of the concentration which was re-notified, mentioning the competent Rapporteur's concerns (similar to those raised in 2014) that the transaction would create or strengthen a position of dominance in the market of supply of raw cow's milk (nationally and in Northern Greece in particular), and the market of production and distribution of chocolate milk.

By its unanimous decision issued in October 2017, the HCC cleared the concentration after remedies were provided by the undertakings concerned addressing these concerns. Although the decision has not been published yet, the remedies that made

[21] Specifically, Elastron manufactures steel products and is also a producer of electricity through renewable energy sources. Thrace Plastics is active in the markets of packaging and textiles.

[22] See HCC Decision 515/VI/2011.

From producers in twelve prefectures that made more than 22% of their turnover in Delta and Mevgal, the two companies will purchase milk at prices that would be no lower than a minimum guaranteed price. Supply agreements will not be entered into for period exceeding one year, and will not include exclusivity and onerous guarantees.

the news were noteworthy yet with respect to MEVGAL's chocolate milk product 'Topino', less stringent as their 2014 counterparts, possibly given the changes in market conditions:

- Regarding the procurement of raw cow's milk: From producers in twelve prefectures[23] who made more than 22% of their turnover in Delta and Mevgal, the two companies will purchase milk at prices that would be no lower than a **minimum guaranteed price** set through a dynamic price formula which takes into consideration changes in the market. Supply agreements will not be entered into for a period exceeding one year, and will not include exclusivity and onerous guarantees.
- Regarding the market of chocolate milk: Delta and Mevgal will be separated in their respective activities in the markets of chocolate milk. Specifically, Delta will not participate in Mevgal's decision-making concerning chocolate milk, and **Chinese walls** will be created to prevent the release of commercially sensitive information. These walls will concern: (a) the staff involved in chocolate milk, which will be distinct, work in separate sites, and will not be solicited by the other company, (b) synergies between the two companies, which are excluded, save for the use of a common distribution network through third party independent players, (c) IT systems, which shall be autonomous, and (d) exclusivity in freezers, i.e. the two companies will remove such terms from their agreements with small outlets.

Both sets of remedies are important in different ways. Those concerning milk producers set minimum purchase prices, thus enforcing strict regulation of milk prices in twelve prefectures. It will be interesting to see the effects of such regulated price-fixing in competition, and how it will affect competitors outside the twelve prefectures. Those concerning the market of chocolate milk will certainly serve as an interesting precedent to the interpretation of 'Chinese walls' by the HCC.

Media: DIMERA/ EPSILON TV (HCC 652/2017)

In November 2017, the HCC, in plenum, unanimously cleared the acquisition of sole control over 'EPSILON TV' (owned by RADIOTILEOPTIKI S.A.) by DIMERA Media Investments Ltd. The post-merger market shares of Dimera would not reach levels of dominance neither in the TV nor in the newspaper sector. Thus, it did not raise serious competition concerns.

The concentration was cleared pursuant to the provisions of Law 3592/2007 on concentrations and licensing of Media corporations. The decision has not been published yet.

ADVOCACY

Within the context of the economic adjustment program, and the structural reforms pursued by the Greek Government, several laws and regulations have passed since 2010 promoting market liberalization, particularly in the exercise of professions and economic activity. The HCC's function in this endeavor is considered instrumental.

Specifically, prior State approval for the exercise of almost every professional activity has been repealed, and, instead, interested parties are required to present qualifications and documentation to a public authority, and, after a standard time period, the undertaking is automatically considered established and legally operational. With its three opinions issued in 2017, the HCC dealt with whether the requirements maintained for certain professions, are reasonable and proportional vis-à-vis public interest considerations, and do not impede free competition.

[23] Serres, Kilkis, Thessaloniki, Imathia, Kozani, Pella, Florina, Kavala, Xanthi, Grevena, Pieria, and Chalkidiki.

Concerning the profession of **Maritime Chemist (Opinion 35/2017)**, the HCC considered that the qualifications required are of qualitative and subjective nature and aim to assess the individual's experience, skills, abilities, and age. They were thus held reasonable and proportional in view of the public concern objectives pursued, namely public and maritime health & safety. As regards **breakdown services for motor vehicles (Opinion 36/2017)**, the HCC held that the requirement, even for existing undertakings, to re-submit all documentation each year is unjustified. It further ascertained that most of the quantitative requirements (being operational in multiple areas of Greece, possessing a minimum number of vehicles and waiting stations) could be replaced by qualitative restrictions referring to minimum response times. For remote island areas in particular, quantitative requirements might be acceptable, in order to cover areas where access is significantly impeded, but only subject to relevant substantiation that accounts for the specific needs of each particular territory. Finally, the HCC opined on the requirements for establishing five types of **Arts Schools (Opinion 37/2017)**, namely (a) Higher Vocational Drama Schools, (b) Higher Vocational Dancing Schools, Higher Vocational Cinema Schools, (d) Amateur Dancing Schools, and (e) Music Academies. The essential distinction made by the HCC in this opinion was between the skills and qualifications requirements imposed on the instructors/teachers, on the one hand, and on the founders of said schools, on the other. It reiterated the case law of the Supreme Administrative Court of Greece[24], whereby the relevant requirements on the founders and owners of these undertakings violate their economic freedoms, in a way that is not justified in view of the objective pursued. It therefore advocated in favor of removing the relevant requirements as far as the founders/owners of these schools are concerned.

UPCOMING DEVELOPMENTS

Antitrust: SOs announced in 2017

Press Distribution: The two press distribution agencies, ARGOS and EUROPI, face allegations of having infringed Articles 101(1) and 102 TFEU (and their Greek Competition Act counterparts), for having established a common commercial policy, downstream and upstream price fixing, supply limitations, exchange of commercial sensitive information, and downstream market allocation. A settlement hearing on the case took place in January 2018.

Kavala Truck Drivers: An SO, issued in December 2017, alleged that three transporting companies in Kavala, and their respective trade association, had been colluding, from 1995 to 2015, in order to fix transport rates for ELFE S.A., a leading fertilizers industry in Kavala (Eastern Macedonia). The alleged agreements also concerned their credit policy towards ELFE, the allocation of transports, and the foreclosure of competitors. The case is currently undergoing settlement.

Regional Associations of Electricians: Following an SO, issued in December 2017, the Panhellenic Federation of the Associations of Electricians (POSEH), twelve regional associations of electricians, and their respective funds and civil law partnerships face antitrust charges for having adopted minimum and fixed pricelists for the provision of electrical installation and certification services in Greece or locally, as the case may be, and put monitoring mechanisms in place to ensure compliance with said pricelists. Settlement hearings have been taking place since late January 2018.

Minerva's commercial practices in the butter and margarine markets: MINERVA, a member of the 'Paterson Zochonis' group of companies and leading distributor of olive oil, butter and other edible oils and products, allegedly imposed resale price maintenance on its wholesalers and restricted their passive sales outside their exclusive territories. The hearing of the case took place on February 15, 2018.

Merger control: Notifications announced in 2017

- Cheese products: Acquisition of joint control by EPIROS UK Ltd., OPTIMA, and Granarolo International S.r.l. over QUALITY BRANDS INTERNATIONAL

[24] ΣτΕ 141/2012.

- Aircraft rentals: Acquisition of sole control by Dubai Aerospace Enterprise Ltd. (Investment Corporation of Dubai) over AWAS Aviation Capital DAC
- Insurance: Acquisition of joint control by Exin Financial Services Holding B.V. and the National Bank of Greece (NBG) over ETHNIKI ASFALISTIKI (NBG subsidiary in the insurance sector)
- Sea passenger transport: Acquisition of sole control over Hellenic Seaways by ATTICA GROUP
- Car rentals: Acquisition of sole control over Olympic ETE S.A. by Lyralia Holdings Ltd. (Olympia Group)
- Hospital services: Acquisition of sole control over IASO General by Hellenic Healthcare S.a.r.l.
- Media: Acquisition of sole control over assets of DOL S.A. (*Mega Channel*) by ALTER EGO

Contact

For any further comment or query, please contact the KG lawyer you are in contact with or the Competition practice team.

Anastasia S. Dritsa - Partner
a.dritsa@kglawfirm.gr

Violeta Panagiotopoulou - Associate
v.panagiotopoulou@kglawfirm.gr

Konstantinos Sakellaris - Associate
k.sakellaris@kglawfirm.gr

Iakovos Sarmas - Associate
i.sarmas@kglawfirm.gr

Main (Athens) Offices
28, Dimitriou Soutsou str., 115 21, Athens, Greece, Tel: +30 210 8171500, Fax: +30 210 68 56 657/8
Thessaloniki Branch
17, Ethnikis Antistaseos str., 551 34, Thessaloniki, Greece, Tel: +30 2310 441552

www.kglawfirm.gr

Follow Us
