Decision No 385/V/2008 of the Greek Competition Commission in the *Vivartia* Group case concerning the deep frozen vegetables distribution sector

1. Factual Background

General Foods S.A., a Greek company active in the market for production and distribution of deep frozen vegetables in Greece, was acquired by Greek Delta Holdings S.A. and the latter was renamed as Vivartia S.A. The Greek Competition Commission ('GCC') launched an investigation on its own initiative into the sector of production and distribution of deep frozen vegetables for potential infringements of Articles 1 and 2 of Greek Law 703/1977 and of Articles 81 and 82 EC.[1] Vivartia's activities were scrutinised as part of the GCC investigation and it was fined accordingly by the GCC for the abovementioned infringements as successor of General Foods S.A.

General Foods distributed its produce of frozen vegetables, both unpacked and packed, to supermarkets, catering companies and deep frozen products wholesale companies (DFPWCs), and with the latter (i.e. distributors) it entered into two types of agreements:

(a) Storage agreements, according to which the DFPWCs would store the quantities of frozen vegetables and deliver them to the customers of General Foods against a fee amounting to a percentage on the price of the products delivered according to the General Food pricelists to customers.

(b) Special Cooperation Agreements (SCAs) according to which the DFPWCs (23 in total) would purchase from General Foods at the wholesale prices determined in General Foods' wholesale pricelists and then sell to their customers at a retail price that had to match the official pricelist of General Foods; moreover, the wholesalers were restricted to distributing products in their allocated geographical area, without *'intervening or, directly or indirectly, influencing other areas'*. In addition, the SCAs were accompanied by a commercial circular distributed by General Foods which prohibited the purchasing and distribution by the DFPWCs of competitive products without General Foods' prior written consent.

2. Findings of the GCC

The GCC investigated five out of the 23 DFPWCs in order to find potential infringement of Greek and EC competition law, in particular regarding the resale price maintenance provisions in the SCAs for the years 2005-2007.

It was found that for the years 2004-2006 all DFPWCs would purchase at the same price on the basis of General Foods wholesale pricelists and mandatorily sell at the same price to retailers, reaping rebates (which were the same for all DFPWCs) agreed in the SCAs

[1]The text of articles 1 and 2 of Law 703/1977 reproduces articles 81 and 82 of the EC Treaty respectively, save for the effect on trade requirement.

and the commercial circular. The DFPWCs would not add a profit margin in the wholesale price lists received and thus would rarely grant rebates to retailers[2]; essentially the DFPWCs made a profit from the grants determined by General Foods.

The GCC moved on to define the relevant product and geographical market[3]; the relevant product market was defined as the wholesale market of deep frozen vegetables for domestic use and the relevant geographical market was defined as the Greek territory in its entirety. The GCC found that General Foods was dominant in the retail market of deep frozen vegetables since 2001, due to its high market share of 70% in that market and the strong brand name it enjoyed. Moreover, General Foods was also found to be dominant in the wholesale market of deep frozen vegetables. In coming to this conclusion the GCC took into account the market share of General Foods in the wholesale market of deep frozen vegetables and the way in which the products were made available in the retail market: on one hand, there were direct distribution agreements between General Foods and big supermarket chains and, on the other hand, distribution was effected through the DFPWCs to small retail shops (in which competitive products were rarely available); in addition, significance was attributed to the inelastic consumer demand resulting from the fact that small retail shops primarily offered General Foods vegetables due to the strong brand name and the high quality of the product.

(A) The GCC's legal assessment of the resale price maintenance and the market partitioning provisions in the SCAs

The GCC stated that the resale price maintenance vertical agreements, requiring the buyer to sell not below or at a particular price, as well as the market partitioning agreements were contrary to the Article 1 of Law 703/1977 and Article 81 EC. The SCAs were vertical agreements having as their direct object the restriction of competition as regards the provisions determining the resale price to retailers[4]. The fact that those agreements were of a standardised form and were circulated to all distributors was irrelevant, since the execution of such an agreement by the distributors clearly demonstrated a concurrence of wills to conduct themselves in the market in a specific way. The GCC underlined that agreements having as direct object the restriction of competition are considered anticompetitive irrespective of their actual implementation. The direct object of restriction of competition alone suffices to establish infringement of Law 703/77 and Article 81 EC[5].

Resale and price maintenance vertical agreements have as object the restriction of competition: they are capable by their very nature of restricting competition so there is no need to further prove their effect. As a result, they are classified as hardcore restrictions under the EC Block Exemption Regulation (BER) 2790/2004 (Article 4(a) thereof) and

[2]The retailers' prices would, however, vary substantially, as the relevant enquiry confirmed.
[3]In accordance with the Commission's Notice on the definition of relevant market for the purposes of Community competition law (OJ (1997) C 372/5 paragraphs 7 and 8).
[4]Paragraph 47 of European Commission Guidelines on Vertical Restraints – OJ (2000) C 291/1
[5]See T-67/01 *JCB Service v. Commission* [2004] E.C.R. II – 49 paragraphs 103 -107

are not entitled to an exemption under Article 81(3) EC. Consequently, the contested provisions in the SCAs, which actually determined the prices to retailers in a compulsory and not indicative manner (i.e. per se anticompetitive object), resulting in the fixing of price levels were void as being contrary to Article 1(1) of Law 703/77 and could not be exempted under Article 1(3) of Law 703/77.

Similarly, an agreement contemplating market partitioning is considered to have as its object the restriction of competition and constitutes a hardcore restriction under Article 4(b) of BER 2790/1999, which, again, does not allow exemption under Article 81(3) EC. The obligation on the DFPWCs not to sell their products outside their exclusive territory as determined by General Foods in the SCAs was restrictive of competition and consequently void as contrary to Article 1 of 703/77 .

As practices restrictive of competition covering the entire territory of a Member State can hinder the attainment of the single market objective of the EC, they may affect the pattern of trade between Member States. Therefore, the above agreements were also in breach of Article 81 of the EC Treaty.

Owing to the hardcore restrictions explored above, no exemption was provided under Article 81(3) as the required objective financial advantages and benefits that must be passed on to consumers were not met.

(B) The GCC's legal assessment of non-compete obligations

The commercial circular distributed to all DFPWCs prohibited them from distributing or trading competitive products; the GCC found this provision to be a non-compete obligation (single branding) as a result of unilateral conduct and went on to make a proper assessment.

Given the generality of the provision, the duration of the non-compete obligation (2004-2006) and the dominant position of General Foods in the relevant market, the implementation of such an obligation amounted to foreclosure of actual and potential competitors on a wholesale level, thus, constituting an abuse of dominant position in breach of Articles 2 of Law 703/77 and 82 EC . Consequently, such obligations were found to be objectionable.

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[6]See *Miller International Schallplatten GmbH v. Commission*, [1978] E.C.R. 131 paragraph 7

[7]See paragraphs 138 et seq. of the Guidelines on vertical restraints. Paragraph 141of the Guidelines shows that the same evaluation criteria apply for non-compete obligations imposed by dominant companies, as it is the intention of the Commission not to allow a behaviour that would be punished under Article 81 to escape being caught by the net of Article 82 EC.

[8]See *Hoffmann-La Roche v. Commission* [1979] E.C.R. 461 paragraph 89;T-65/89 *BPB Industries plc and British Gypsum Limited v. Commission* [1993] E.C.R. 11 – 389 paragraphs 65-70

3. Fines

The GCC decided firstly to exempt the DFPWCs from a fine, in line with the Commission's stance that when the initiative for entering into restrictive agreements lay with an incumbent party, it does not appear appropriate to impose fines on the weaker distributors (See *Mercedes Benz v. Commission* paragraph. 233, OJ 2002 L 257 p.1).

Given the duration and seriousness of the breach of Articles 1 and 2 of Law 703/77 and 81 and 82 EC, the fines imposed amounted to €468,870.

4. Comments

This decision is interesting for several reasons. First, it comes in the aftermath of the milk cartel case in Greece, whereby the decision of the GCC issued in December 2007 imposed a fine of 48.2 million Euros on the 5 largest milk producers in Greece (Vivartia being one of them and fined alone a total of €15,979,070). Secondly it supplements EC case-law regarding agreements containing an element of price fixing, which is considered by the European Commission to be one of the hardcore restrictions of Competition (BER 2790/99 Article 4(a) in conjunction with Guidelines on Vertical Restraints), thus affirming that breach of Article 81 EC is realised even if such an agreement is not implemented (See *Hasselblad v. Commission* [1984] E.C.R. 883, *Ahlström Oy. v. Commission* [1988] E.C.R. 5193).

Finally, it is worth noting that Articles 29 and 30 of Law 703/77 provide for the possibility to impose criminal sanctions upon the individuals managing firm(s) to which a breach is attributed; no such sanctions were imposed in the case however. Furthermore, the amount of the fines was reduced due to the cooperation of General Foods throughout the investigation and its move to strike out the arrangements under investigation prior to the issuing of the decision by the GCC.

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