COMPETITION newsletter
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The Administrative Court of Appeals affirms the Hellenic Competition Commission's decision on abusive practices in the beer market

Introduction – Overview

Following the issuance of a Decision by the Hellenic Competition Commission (hereinafter referred to as the "HCC"), which found that Athens Brewery S.A. (hereinafter referred to as "AB") abused its dominant position by engaging in a series of abusive and exclusionary practices and, therefore, infringed the provisions of Article 2 of the Greek Competition Act (i.e. Law 3959/2011) and Article 102 TFEU, AB filed an appeal with the Athens Administrative Court of Appeals (hereinafter referred to as the "CoA"). The Decision on the appeal was issued in July 2017 and partially affirmed the HCC Decision. Although the HCC had imposed a historically high fine to AB (Euro 31,451,211 - for the sake of preciseness it should be noted that it is the highest fine ever imposed by the HCC to a single company), the CoA only slightly lowered the imposed fine by roughly Euro 4,71m on the basis of the principle of proportionality, having also taken into account the absence of recidivism on behalf of AB and the restraining and pre-emptive nature of the sanction.

The sequence of events

On 11 December 2015, the HCC issued a decision finding that AB over a period of 16 years abused its dominant position, by engaging in a series of abusive and exclusionary practices both on the retail and the wholesale level and, therefore, infringed the provisions of Article 2 of the Greek Competition Act and Article 102 TFEU. The HCC identified the relevant market as the domestic market for beer production and/or import as well as the distribution of beer at the wholesale and retail level; in addition, the HCC characterized the relevant market as largely concentrated and noted that over time AB had enjoyed a dominant presence therein (market shares of AB ranged from 75-85% in the 2000s and 45-65% in the early 2010s). The following AB's abusive practices were outlined on three pillars, (on-site consumption & points-of-sale/POS, super markets, and wholesale): (a) exclusivity and related practices in the market of on-site consumption for key accounts and for other POS - indicatively including exclusive supply, provision of financial incentives on the premise of exclusivity, punishing behaviour and threats; (b) special discounts for extra ("satisfactory") space on the super market shelves; and (c) credit policy in the wholesale market: indicatively, using credit terms (lowering the credit limit and/or accelerating payment dates) as a basis for intimidating wholesalers to exclude competing beers. According to the HCC, the above separate practices appeared to constitute a single infringement, targeted to serve AB's overall strategy to foreclose competition. Namely, the HCC

submitted that the above practices culminated to an overall business strategy and each practice, although separate from the other, constituted a pillar of a single and on-going strategic plan, and imposed, besides certain remedies, a fine amounting to Euro 31,451,211 in total to AB for the above-described infringements of Article 2 of the Greek Competition Act and Article 102 TFEU; it should be noted that in calculating the fine, the HCC applied the statutory 10% cap to the annual turnover of AB in the year 2013.

The CoA partially affirmed the HCC Decision and readjusted the 10% cap to 8.5% on AB's 2013 turnover, as a basis for calculating to fine to be imposed. Consequently, the fine was only slightly lowered to Euro 26,733,529.18.

The CoA rulings on specific grounds of the AB appeal

AB founded its appeal on eleven grounds, some of which being of procedural nature. Particular attention should be drawn to the following ones as well as to the CoA rulings pursuant to which the latter rejected them.

Alleged violation of the right of access to the case file – Illegal use of evidence never notified to AB – Violation of defence and fair trial rights

First and foremost, the CoA recognized that an undertaking, faced with sanctions for antitrust infringements and therefore summoned to appear before the HCC, has, in principle, the right to access the file of the case; this right is associated with the relevant defense right, also protected on the EU level, and refers to all documents in the file that are useful for the defense, incriminating or exculpatory. However, such right is not absolute, but, on the contrary, it is restricted by the need for the safeguard of business secrecy, protected by the EU Law, and the confidentiality of the identity of the persons that participated in the questionnaires or deposited within the context of the proceedings. When this right is illegally impaired, then the administrative act is void and null, provided that the undertaking has indeed suffered damage. The CoA also pointed out that such a ground of an appeal is deemed as unavailingly projected, when the appellant entitled to gain access to confidential evidence, as per the Code of Administrative Procedure, fails to allege in a detailed, defined and sufficiently justified way, that the crucial information, to which it was illegally denied access during the administrative procedure, could indeed be useful for its defense before the HCC.

The CoA ruled that AB had access to the totality of the contents of the file, excluding *only* the documents bearing confidential information and the HCC internal documentation. Access to these documents had been *legally* not granted, pursuant to the HCC Functioning Regulation, because of their classification as confidential. More specifically the CoA ruled that the non-disclosure of the identity of the persons that participated in the questionnaires or deposited within the context of the proceedings is both justified and legal, having taken into consideration the respective risk of retaliation. Moreover, the CoA also pointed out that, when an appeal against the HCC is brought before It, It has the competence to examine the contested decision both on its merits and as a matter of law (always within the limits set by the appeal). That means that it can evaluate the entirety of the

evidence, on which the HCC has founded its ruling, in which confidential documentation is also included, without, however, making such confidential evidence available to the litigants without setting forth such confidential information in its ruling.

Alleged violation of the principle of reasonable duration of the investigational procedure – Violation of defence rights and of the right to an effective trial

AB claimed that the principle of the reasonable duration of the administrative procedure constitutes an aspect of the "security of law" principle, whereby the EU Commission as well as the National Competition Authorities are supposed to finalize their decisions within reasonable time. In support of this argument, AB invoked the settled case law of the CoA, which has steadily held that the HCC should hand down its decision within 5 years at the maximum. AB also asserted that the reasonable time of an administrative process is to be assessed in two stages; the first covering the initiation of the investigation up to the HCC preliminary assessment (culminating with the statement of objections) and the second covering the post-preliminary assessment stage up to the final decision. Should the duration of any of these stages contravene with the reasonable time principle, this allegedly amounts to an infringement of the respective right of defence.

In the case at hand, the investigation of the HCC started on 04 July 2001 and the preliminary assessment was delivered 12 years later, on 20 December 2013. The second stage in turn was completed two years from the delivery of the preliminary assessment on 01 December 2015. The total time needed for the examination (along with the judgment of the CoA) amounted to 16 years. AB claimed that the HCC is the sole responsible party for this delay and that therefore it infringed the principles of fair administration and of the non-abusive exercise of rights.

The CoA rejected that ground, too, and ruled that the duration of the investigational procedure was indeed reasonable, having taken into consideration: (a) the complexity of the examined case, the nature and the peculiarity of the infringements at stake, (b) the extension of the investigation to many on-site consumption POS, diner chains, supermarkets and wholesalers all over Greece *(i.e. the HCC conducted 59 on-site controls at 23 wholesalers, 33 on-site consumption businesses and 1 supermarket, and addressed 113 questionnaires)*, (c) the incorporation of all the data generated by the investigation into the Statement of Objections, which mentions 50 key-accounts and more than 150 POS, (d) the fact that the appellant itself caused a 3-year delay to the procedure by challenging the HCC decision joining an ex officio investigation and a proceeding further to a competitor complaint all the way to the Supreme Administrative Court. The CoA also cited case law of the Community Courts and the European Court of Human Rights, which has accepted that the reasonable nature of the duration of a judicial or administrative proceeding should be examined in conjunction with the particular circumstances of each case, i.e. the interests of the party that are at stake, the complexity of the case, the behaviour of the applicant and that of the authorities. The CoA also ruled that AB failed to prove that the alleged lengthy duration of the procedure affected its ability to defend itself or that it suffered any damages because of it or even that the ruling the HCC reached would be different, should the procedure be shorter.

Alleged erroneous establishment of the uniform character of the violation ("single and continuous infringement")

In contrast to the view of HCC that all the abusive practices of AB constituted a single and continuous practice throughout the entire time period under investigation (1998-2013), AB argued that (a) the abusive practices had been implemented during different time periods *(i.e. with respect to shelf-space the infringement was limited to the year 2000, with respect to key accounts only to 1999-2013, while a certain abusive marketing method only during late 2005-early 2006)*, (b) there had been no single concrete target of the abusive practices during the fifteen-year term, which coincided with a concrete competitive threat in the market, (c) there had been no evidence on the relation of complementarity between the abusive practices and (d) the abusive practices had been implemented by different commercial departments of AB thus substantiating the lack of the element of common monitoring and steering. As a conclusion of the above, AB argued that the HCC had failed to establish the theory of a uniform and long-lasting practice by AB that could support the concept of the single and continuous infringement.

The CoA rejected that ground as well, since it found that AB's conduct indeed constituted a single and continuous infringement. More specifically, the CoA took into consideration that: (a) AB in order to maintain and reinforce its dominant position through the foreclosure of competitors both on the retail and wholesale level applied specific sale strategies from 2005 onwards that aimed towards the reinforcement of the presence of its beer products at the on-site consumption businesses; (b) at the on-site-consumption POS AB concluded agreements that included *–literally imposed-* exclusivity and competitor foreclosing clauses as well as provisions for respectable financial offers in various forms, sometimes described as "store improvement" or "advertising leaflets", which, however, were not connected to a particular consideration of an equivalent value; (c) AB offered extensive financial incentives to secure a satisfactory "shelf" space for its products in return for the provision of a further special discount; (d) in conjunction with AB's market share in the relevant market and its undeniable dominant position, its competitors were unable to provide their retail or wholesale customers with similar financial or other incentives due to their low market shares; and (e) AB possessed the most extensive and famous gamut of products within the reference market, had set up the most extensive sale and distribution network, had invested great amounts in marketing and advertising, which had been of crucial importance for the effective promotion of its product in the relevant market, and, as result, AB had become an "unavoidable trading partner" for many wholesalers, making, thus, impossible for its competitors to compete with it with regards to attracting customers. Consequently, the CoA found that all mentioned practices presented time coherence and duration, covered a wide number of customers in the market of the on-site and future consumption across the Greek territory and constituted parts of a uniform plan, a uniform strategy, within the context of contractual obligations and incentives. The CoA ruled that all these practices were part of a uniform, targeted and complex commercial strategy that aimed to foreclose competitors, to impair sound competition and, therefore, deprived the consumers of *-or at least weakened-* the ability to choose their sources of supply.

AB's anticompetitive commercial strategy – particular forms of implementation

As noted above and according to what the CoA ruled, AB had been implementing over a span of numerous years a uniform, targeted and complex commercial strategy that aimed to foreclose competitors and to impair sound competition. Although this strategy comprised of various practices, particular attention could be paid to the following anticompetitive types of AB's conduct, which were found by the CoA (and the HCC) to have taken place:

- AB engaged in "bullying" practices against customers aiming to exclusivity, which, among others, affected the credit terms applied to the customers. More specifically, in case a customer did business with AB's competitors as well, AB proceeded with lowering the credit limit the customer enjoyed, decreasing the credit period and accelerating payment dates (which was also dependent on the invoiced value), imposing obligations for cash payments, ceasing triangle sales (or threatening to do so) and generally applying discriminatory credit policy among customers depending on their commitment to AB both on the wholesale and the retail level.
- AB in order to attain supply exclusivity, i.e. to secure the exclusive presence of its products, offered to smaller POS, such as coffee shops, bars and restaurants, advance payments in return for alleged "promotional and advertising actions"; such payments were almost equal to or even superseded the value of the purchases placed by the businesses.
- AB imposed a clause to contracting super markets for satisfactory "shelf" space, defined at its discretion, for its products. In return of that, AB would periodically offer special discounts amounting to a percentage of the particular customer aggregate turnover on AB's products, provided that such satisfactory "shelf" space is indeed observed and checked by AB's authorized employees.

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