Distribution Law Center
DRIVEN BY CONTRAST

KYRIAKIDES GEORGOPOULOS Law Firm

CASE CARD | 19 March 2024

Roma Pizza (639/2017)

Resale price maintenance; sales and supply restrictions and non-compete obligation

1. CASE SUMMARY

A. Summary of facts

On 3 February 2017, the Hellenic Competition Commission ('HCC') published its commitments decision by virtue of which it accepted the commitments proposed by Roma Pizza to address any suspected anti-competitive contractual terms and/or practices within its franchise network.

The HCC investigation was triggered by a complaint filed by seven franchisees of Roma Pizza's franchise network for anticompetitive terms in the franchise agreements and anticompetitive practices in its commercial relationship with its franchisees in breach of Article 1 of Law 703/1977, Article 1 of Law 3959/2011 (the Greek Competition Act) and Article 101 TFEU.

During the investigation, the HCC sent requests for information to the parties concerned, as well as to other franchisees of the network. Additionally, on 16 July 2014, the HCC carried out an unannounced on-site inspection at the offices of Roma Pizza in Chalkidiki and Alimos, Attica.

After the investigation was completed, the HCC found that certain clauses in Roma Pizza's franchise agreements were problematic from a competition law perspective as they could lead to retail price maintenance ('RPM'), single branding, restriction of active and/or passive sales, and restriction of cross-supplies within the franchise network. Due to the acceptance of the respondent's commitments, the HCC refrained from reaching a final decision on the potential establishment of the infringements under investigation. Lastly, it was decided that said commitments shall remain in force for ten years.

B. Legal analysis

The HCC investigation concerned the national (Greek) market of fast-food services. Roma Pizza operates a franchise network of pizza restaurants which also offer home delivery and takeaway services. The HCC found that the Roma Pizza distribution network under investigation bears the essential features of a franchise network with a combination of selective and exclusive distribution system elements. The HCC investigated the following types of vertical restraints which, according to the complainants, appeared to have been taking place since the franchise network started operating in 1994:

- With regard to RPM allegations, the investigation did not reveal any evidence pointing to Roma Pizza (as the franchisor) setting standard or minimum resale prices for its fast-food services throughout the operation of its franchise system. In the same vein, no evidence was found that the use of its software system and call centre constituted in itself indirect RPM, nor did it artificially exacerbate the structural rigidity of prices within the franchise network under consideration. However, there were indications that the issuance of a single price list and promotional brochures, which were subject to the approval of the franchisor may indirectly influence the intensity of intra-brand competition at the price level.
- Regarding territorial protection allegations, the HCC found that a contractual clause in the franchise agreement in force since 2011 was capable of restricting active sales by network members to consumers. On the contrary, there was no evidence that active and/or passive sales were restricted through the use of the respondent's call centre for orders, or its software system or any of its advertising tools/terms.
- With respect to single branding allegations, the HCC investigation revealed individual elements that point to Roma Pizza adopting the restrictive practice of single branding only in respect of certain categories of accompanying products (soft drinks, beverages, and water) throughout the operation of its franchise network. As regards the main categories of contractual products (including all types of raw materials, such as dough and various types of sauces), the exclusive supply from the franchisor or from suppliers approved by the franchisor was justified by the HCC for reasons of maintenance of certain quality standards and of the reputation and common identity of the network at issue.
- As to the suspected restriction of cross-supplies within the network, there was evidence of a potential restriction of cross-supplies between the franchisees since 2011 due to the contractual terms of (i) exclusive supply within the selective distribution system in question, and (ii) obligatory resale of the products by the franchisees at the retail level only. The HCC conclusion was not affected either by the argument that the franchisees did not interpret the contractual term at issue as a restriction of cross-supplies, or by the fact that limited and occasional cross-supplies of raw materials took place between the franchisees.
- Concerning post-contractual non-compete clauses, the HCC found that certain franchise agreements contained such clauses with a duration of five and two years respectively.

Regarding the potential application of Article 101 TFEU, the HCC concluded the agreements in question were not capable of having an appreciable effect on intra-Community trade, since the franchisor's turnover was below 40 million EUR and the aggregate market share of the parties within the relevant market in the EU did not exceed 5%.

To address the aforementioned concerns of the HCC, Roma Pizza proposed, and the HCC unanimously approved the following commitments with a duration of ten years in order to restore and preserve free competition

in the relevant market:

- In relation to RPM concerns: amendment of the relevant contractual term to clarify the franchisee's ability to sell at prices below the suggested maximum prices, to make special offers to customers through brochures and/or the Internet, and to participate, at their discretion, in the franchisor's time-limited occasional special offers.
- In relation to territorial protection concerns:
  - Removal of the contractual term restricting the active sales of the network members to other allocated territories or customer groups.
  - Clarification of the contractual term for online sales via the franchisee's website/ third-party online platforms, so that it is clear that the obligation of prior approval by the franchisor relates only to potential quality standards set by the latter with regard to the operation of such websites/platforms.
- In relation to single branding concerns: clarification of the relevant contractual terms under which exclusive supply of certain products (raw materials) is necessary (in line with the principle of proportionality) and thus justified to ensure the quality and homogeneity of the network as well as the protection of its reputation.
- In relation to restriction of cross-supplies concerns: amendment of the contractual term of cross-supplies to clarify that each franchisee can supply all other network franchisees if it so wishes.
- Amendment of certain problematic post-contractual non-compete clauses to clarify that this obligation lasts for one year after the expiry or termination of the agreement and is limited exclusively to the physical premises where the franchisee was operating, and not to the wider geographic area.

2. QUOTES

"*In the light of the foregoing, the franchise network under consideration has elements of both selective (nature of franchising, criteria for entry into the network, etc.) and exclusive distribution, given that the franchisees meet certain qualitative criteria but at the same time enjoy a certain degree of territorial protection, as will be explained below. The latter condition also gives the network in question the character of exclusive distribution, in the sense that the supplier is contractually bound to sell its products only to one distributor for resale in a particular geographic area (territorial protection) and that the distributor is restricted in its active sales in other areas (which are exclusively granted), so that it is more appropriate to characterise the network in question as a combination of selective and exclusive distribution.*" (free translation of §127)

"*It should be noted that the franchisor's right to control the promotional activities of franchisees does not in itself*

constitute an infringement of competition law, in so far as it takes place in the context of the protection of the identity and reputation of the network, provided that it is limited to the nature and character of those activities and does not extend to the pricing of products." (free translation of §140)

3. RELEVANT LEGISLATION

- Article 1 of Law 703/1977 (not in force)
- Article 1 of Law 3959/2011
- Article 101 TFEU
- Regulation 330/2010
- Vertical Guidelines

4. PRACTICAL SIGNIFICANCE

Significant case where numerous vertical restraints in the context of franchising were investigated by the HCC and commitments were accepted. Single branding was challenged to the extent that it does not concern the main contractual products (pizza dough and sauces versus soft drinks, beverages, and water).