CASE CARD | 2 May 2024

Germanos (625/2016)

Resale price maintenance; restriction of cross-supplies and non-compete obligation

1. CASE SUMMARY

A. Summary of facts

Germanos, a subsidiary of the mobile telephony company Cosmote, is a leading telecommunications retailer which operates a franchising system involving a nationwide operation of shops selling land line, mobile telephone and internet equipment and services.

Between 2009 and 2012, five franchisees filed informal complaints against Germanos with the Hellenic Competition Commission ('HCC') regarding their franchise agreements. Consequently, the HCC initiated an *ex officio* investigation to examine whether Germanos:

- determined resale prices for franchisees, both directly through contractual terms and indirectly through operating procedures;
- enforced exclusive purchasing agreements, limiting franchisees from sourcing products from sources other than Germanos, thus inhibiting cross-supply within the network; and
- imposed an overly broad post-term non-compete obligation.

On 15 November 2013, the HCC issued decision no. 580/2013, finding Germanos guilty of the aforementioned practices, in violation of Article 1 of the Greek Competition Act and Article 101 TFEU. Germanos was fined 10,251,548 EUR for these infringements. The decision was appealed before the Athens Administrative Appeal Court, which upheld the decision as to the infringements, but annulled the determination of the fine. The case was referred back to the HCC for recalculation of the fine.

B. Legal analysis

Administrative Court ruling on the fines and HCC decision no. 625/2016 (decision regarding the recalculation of the fine)

The Administrative Court ruled that fines imposed by the HCC on a company must be calculated separately for each type of violation of competition law. Hence, according to the Administrative Court, the violations found in the present case regarding (i) resale price maintenance, (ii) the restriction of cross-supplies between distributors-licensees, and (iii) the imposition of a non-compete clause are independent and subject to the ceiling defined in

the Greek Competition Act individually. Additionally, the Court determined that the maximum fine for each violation should be based on the principles of proportionality, effectiveness, and sufficient deterrence.

In decision no. 625/2016, the HCC considered several factors, including:

- The gravity of the infringements: the HCC identified resale price maintenance as the most serious infringement, followed by the restriction of cross-supplies between distributors-licensees, and then the imposition of a broad post-term non-compete obligation.
- Actual or potential effects on competition of the infringements: resale price maintenance and the restriction of cross-supplies are 'by object restrictions' inherently affecting competition.

The HCC imposed the following fines on Germanos for the three individual infringements:

- Resale price maintenance: 6,150,930 EUR
- Prohibition of cross-supplies between distributors-licensees: 3,075,464 EUR
- Post-term non-compete obligation: 1,025,154 EUR.

Administrative Court upholding infringements found in the infringement decision

The Administrative Court upheld the following findings.

The HCC determined that the relationship between Germanos and the distributors did not constitute a genuine agency relationship. Instead, the agreements between Germanos and the distributors were part of a selective distribution system for the following reasons:

- Distributors incurred various costs, including for training personnel, stocking products, assistance provided by Germanos for meeting sales targets and investing in equipment.
- Agreements stipulated royalties paid by distributors to Germanos, along with instruction on store setup and adherence to Germanos' marketing directions.
- Germanos imposed criteria on distributors and prohibited sales to unauthorised distributors.

Regarding resale price maintenance, the HCC found that Germanos engaged in this practice because:

- Instructions distributed to franchisees indicated strict compliance with Germanos' commercial and pricing policy.
- Germanos monitored store pricing through its IT systems and sent letters to non-compliant franchisees.
- Emails informed franchisees of new prices and the exact date as of which these prices would become effective.

The prohibition of cross-supplies between selective distributors-licensees resulted from clauses in franchise agreements requiring exclusive supply from Germanos and penalising breaches, thus hindering intra-brand competition.

Lastly, the HCC found that the post-term non-compete clauses were overly broad, prohibiting distributors from operating in any area for a year (in some cases even 18 months) following contract termination, which violated Article 1(1) of the Greek Competition Act (and Article 101(1) TFEU).

2. RELEVANT LEGISLATION

- Article 1 of Law 3959/2011
- Article 101 TFEU
- Regulation 330/2010
- Vertical Guidelines

3. PRACTICAL SIGNIFICANCE

This is one of the few HCC decisions that have been appealed before the Administrative Courts, where the latter have provided guidance regarding the calculation of fines.