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## Important changes in competition and distribution Law in Europe and worldwide

by Louis and Joseph Vogel

2022 will be a year of important changes in competition law and distribution law in Europe and worldwide.

- **Changes in competition procedures**

In terms of procedure, the ECN Directive has been enacted in the national law of many EU Member States. You will find in this Newsletter of our network the contributions of our colleagues from Cyprus and Greece showing the impact that this transposition can have on the procedural provisions of competition law in practice. In France, the main change is that professional organizations are now subject to a new ceiling of fines up to 10% of the turnover of their members instead of EUR3 million before. The overall effect will be an increase of potential fines. The first applications of the new procedural rules by the French Competition Authority confirm this trend.

- **Changes regarding vertical restraints**

In terms of substance, the main reform in Europe concerns the revision of the vertical block exemption in the EU which will enter into force on June 1, 2022. All distribution networks are waiting for the final text of the new BER and the Guidelines that are expected in May. It will be interesting to compare the new EU BER with the UK rules set to replace EU law. Our British colleagues have summarized the background and key changes of the UK draft Vertical Agreements Block Exemption Order (VABEO) which will replace the retained EU Vertical Block Exemption Regulation (VABER) when it expires on 31 May 2022. We will dedicate our next Newsletter in a comment of the new VABER and VABEO. We participated to the workshop on "The challenges of the revision of the regulations on vertical restraints" organised on the "Competition day"

held in Paris at the Ministry of the Economy on 8th April. The main topics concerned dual distribution, parity obligations, shared exclusivity and online sales (especially dual pricing).

- **A new member in our network, comprising now 60 law firms worldwide**

We would also like to take this opportunity to inform you that a new member has joined our network, Torbey & Partners, active in Lebanon. Karim Torbey and his team are specialized in distribution law in Lebanon and the Middle East. He is the 60th member of our network. Please find enclosed his contribution regarding the current situation of franchising in Lebanon.

## CYPRUS



### Cyprus Competition Law of 2022

by Xenia Kantounal

The new Cyprus Competition Law 2022 was recently enacted, repealing the Cyprus Competition Law 2008 and transposing Directive (EU) 2019/1 (the ENC+ Directive)<sup>1</sup> into national law.

The ENC+ Directive's aspiration to ensure efficient and effective execution of EU-wide competition law policy is mirrored in the Competition Law 2022 which retains the substantive elements of the previous legal framework, finetuned to grant additional investigatory powers to the CPC, enable interstate cooperation on competition law enforcement, streamline the complaints process, strike a balance between effective infringement investigation and protection of commercially sensitive information, and ensure the protection of personal data in line with established EU principles.

The CPC, now vested with increased agency, may exercise its discretion to continue an investigation despite the

opening complaint being withdrawn, and has been granted a broad discretion to summon any persons to give statements or information pertaining to ongoing investigations. Further, the CPC may issue recommendations, guidelines, and notices to inform interested parties of pending investigations, its competences, and its methods of evaluating the factors informing the level of administrative fines imposed.

A much-needed step towards sharp efficient competition law enforcement, the CPC's power to summon persons for interview extends beyond the material scope of its own investigations, and may be exercised on behalf of a foreign NCA in aid of their national competition law investigations. In the same spirit, the Competition Law 2022 vests in the CPC the power to collect evidence and execute dawn-raids on behalf of foreign NCAs, and facilitates enforcement by providing for cross-border execution of NCAs' decisions to impose fines on undertakings.

While the Competition Law 2022 does not amend the substantive provisions of the previous legal framework,

it does introduce important procedural provisions. For example, the complaint document has been simplified and persons wishing to lodge a complaint receive instructions ensuring its correct submission; this is bound to result in better communication between market agents and the CPC, translating to better access to competition law protection for Cypriot undertakings. We also note that the Competition Law 2022 is littered with references to personal data protection which qualify the CPC's powers, ensuring it adheres to strict standards of EU privacy protection in the course of carrying out its mandate. Finally, the enacted legislation ensures that commercially sensitive information be protected from disclosure in the course of the CPC's investigations, by allowing interested parties to submit requests to classify information as such. While the CPC retains the right to deny such a request, this provision nonetheless ensures that those market agents with better insight on the commercially sensitive nature of information may voice their views to better inform the CPC's decisions.

<sup>1</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

## GREECE

### BERNITSAS

### Recent reform of competition law in Greece

by Marina Androulakakis and Tania Patsalia

The Greek competition law landscape was reformed recently by means of Law 4886/2022 (GG A 12/24.01.2022) (the Amending Act), the latter being adopted with a twofold aim: to harmonize the Greek legislation with the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 (Directive ECN+) and to modernize the Greek competition rules in view of the challenges posed in the digital economy.

Amongst the most substantial changes that were brought to the Greek Competition Act (Law 3959/2011 "on the protection of free competition", as in force) by the Amending Act is undoubtedly the newly added provision of Article 1A involving the prohibition of (a) an invitation to collude, and of (b) price

signaling. After 1st July 2022, when the new provision enters into force, those two types of unilateral conduct will become punishable and subject to the fining powers of the HCC. Undertakings with less than EUR 50m turnover and less than 250 employees are exempted. Applicability of the new provision will also be excluded in case of enforcement of other competition rules (Articles 1 and 2 of Greek Competition Act and/ or Article 101 and 102 TFEU).

In addition to the above, the Amending Act has introduced other important amendments, such as by (i) establishing the possibility of offering remedies during the Phase I merger review period, (ii) extending the scope of the settlement procedure/ leniency program

to also cover other than horizontal collusion cases (abuse of dominance, vertical agreements, practices of invitation to collude/price signalling), (iii) enhancing HCC powers (e.g., powers on interim relief, including power to issue a provisional order), including its fining and its investigatory powers, (iv) introducing an innovative, simplified procedure regarding the issuance of a "no action letter" for public interest reasons (including sustainable development goals), and (v) by further enhancing leniency and immunity protection against the imposition of fines and criminal sanctions.

## LEBANON

### The Current Situation of Franchising in Lebanon

by Karim Torbey

Over the past thirty years, franchising in Lebanon has progressed a lot. This development was firstly prompted by the establishment of foreign franchises on the local market, and secondly, by international development in addition to that of the internal Lebanese brands market. This success came as a consequence of the flexibility generated by the absence of any law on franchising, along with the systematization of the concept that arose in 2006 with the creation of the Lebanese Franchise Association which adopted a Code of Ethics similar to that of the LFA. This momentum continued with the emergence of a case law which defined the franchise contract, highlighted its prominent characteristics, from which the communication of know-how and assistance stems, and sanctioned their absence by termination of the contract (Beirut Court of First Instance, Jan. 17, 2008, *Al Adl* review of the Beirut Bar Association, 2008, p. 798). In practice, the conclusion of a franchise agreement is preceded by a period of negotiations that is marked by a certain number of legal acts: the signing of a Memorandum of Understanding (MOU) by which the future franchisee specifically undertakes to carry out a market study in addition to settling a down payment for the first entry fee. In return, the franchisor reserves him the exclusivity of the negotiations.

The franchisee pays the franchisor an entry fee, which amount depends on the extent of the territory granted to him (with or without exclusivity). Moreover, during the term of the contract, he must pay the fees which vary between 4 and 6% of its turnover excluding taxes, in addition to an advertising fee (1%). In Lebanon the practice consist of reconciles franchising and management. This formula is known as “la manchise”: the franchisee equips his unit according to the franchisor’s recommendations and entrusts him with its management for a few years. In exchange, the franchisor will receive management fees. This formula allows the franchisor to “start up” the franchised unit and simultaneously, to train the staff of its co-contractor on site. Although it is contrary to the principle of the independence of the franchisee, this formula has shown some success in practice. Nevertheless, in our opinion, it opens the door to a reclassification of the franchisor by actually managing the franchisee. The franchise industry reached its peak when the financial and economic crisis erupted in Lebanon. Indeed, Lebanese franchisees who import their products have suffered severely from the devaluation of the currency and the reduction in the purchasing power of the Lebanese population. The general manager of the Lebanese Franchise Association

Raja Habr estimates that retail sales have been reduced by more than 50% compared to what they were in 2012. Furthermore, the emergence of the COVID-19 pandemic has amplified an already gloomy picture. LFA President Yehya Kassaa points out that unlike other countries which have imposed lockdown, Lebanon has not backed these measures with compensations for traders. The health crisis has therefore accentuated the losses. The coup de grace occurred on August 4, 2020, when 2,700 tons of improperly stored ammonium nitrate at the port of Beirut exploded in a cataclysm that destroyed half of the capital, leaving 206 dead and more than 6,500 injured. According to the executive director of the LFA, more than 10,000 businesses were partially or totally destroyed and 100,000 people lost their jobs. In addition, with price inflation, the reconstruction was ruinous, especially since the insurance companies awaiting the results of the investigation did not cover it. In this lunar economic landscape, the hopes of Lebanese traders turn to foreign currency earnings or what is commonly called “fresh money”. Lebanese brands are therefore seeking to develop internationally in order to compensate for their losses on the local market through fees collected from abroad.



## UK Government publishes Draft Vertical Agreements Block Exemption Order set to replace retained EU law

by Gordon Downie and Ashley French

The UK Government has published a draft Vertical Agreements Block Exemption Order (VABEO), which will replace the retained EU Vertical Agreements Block Exemption Regulation (VABER) when it expires on 31 May 2022. The purpose of the VABEO is to ensure that businesses in a 'vertical' relationship with each other are not prevented or disincentivised from entering into agreements that the Competition and Markets Authority (CMA) considers to be overall beneficial and not anti-competitive.

This article summarises the background and key changes.

### Background

Competition law seeks to ensure market failures are prevented or remedied by prohibiting agreements between businesses that prevent, restrict or distort competition. However, certain categories of agreements may be exempted from the prohibition where their pro-competitive benefits outweigh their anti-competitive effects. This includes vertical agreements that meet certain conditions.

A "vertical agreement" is one entered into between two or more parties, each of which operates at a different level of the production chain, and that relates to the conditions under which the parties may purchase, sell or resell certain goods or services.

Prior to the UK's withdrawal from the EU, block exemption regulations under VABER that exempt certain categories of agreement from the Article 101(1) TFEU prohibition were applied to the Chapter I prohibition as parallel exemptions. VABER was retained under domestic law following the UK's exit, and will continue to form part of UK law until it expires on 31 May 2022.

In November 2021, the CMA issued its recommendation to the Secretary of State for Business, Energy and Industrial Strategy (BEIS) to replace the retained VABER with a block exemption order under the Competition Act 1998. The CMA recommended that the new provision should largely preserve the existing

exemption for vertical agreements, while also identifying some important amendments to improve on the existing legal framework and ensure the rules are the most effective and appropriate for the UK market.

BEIS has now published its draft VABEO for consultation. Once in force, compliance with VABEO will ensure a company can market its products or services without provisions in its distribution agreements infringing competition law, ensuring they are legally enforceable and not subject to potential fines.

### Key changes

The draft largely preserves the existing approach to vertical agreements under the retained VABER, in accordance with the CMA's recommendation. The key changes are summarised below.

- **Wide retail parity obligations/most favoured nation clauses.** Wide parity clauses that restrict the offering of better terms on any sales channel have been the subject of multiple investigations in recent years and are now generally viewed as anti-competitive. Under the draft VABEO, wide parity clauses are to be treated as hardcore restrictions, i.e. terms that are presumed illegal, which cannot benefit from exemption. Importantly, this will not apply in business-to-business markets.

- **Online sales restrictions.** Recognising the growth of online sales and increased challenges faced by high street retailers, the draft VABEO seeks to create a more level playing field by expanding the exemptions to cover agreements that treat online and offline sales differently. Dual pricing is no longer to be regarded as a hardcore restriction of competition. Suppliers will be able to set a higher price for products intended to be resold online than for products intended to be sold offline by the same distributor. Imposing different criteria for online and offline sales in the context of a selective distribution system will also no longer be a hardcore restriction.

- **Territorial and customer restrictions.** To allow businesses more flexibility in

designing their distribution systems, the draft VABEO includes new exceptions that permit:

- o the allocation of "shared exclusivity" for a particular territory or customer group (for example, allowing the allocation of one territory to more than one "exclusive" buyer); the combination of exclusive and selective distribution networks in the same or different territories; and

- o protection for members of selective distribution systems from sales made outside of their territory to unauthorised resellers/distributors in their territory.

- **Dual distribution.** The draft VABEO retains an exception for "dual distribution" that grants the benefit of the safe harbour to non-reciprocal agreements between competitors, for example, where the supplier is a manufacturer and distributor of goods, while the buyer is a distributor and not a competing manufacturer. The exception is extended under the draft VABEO to capture dual distribution agreements between wholesalers and importers.

In accordance with the CMA's recommendation, the new UK rules largely preserve the existing approach. There are, however, some important amendments to ensure the rules align with the needs of UK businesses and consumers. The UK Government is consulting on the legal wording of the draft VABEO and parties who wish to respond had to do so by 16 March 2022. It is anticipated that the CMA will also publish further guidance to accompany the legislation in due course.

There is to be a transitional period of one year to allow businesses to adapt their practices, which would mean, in effect, that agreements already in force on expiry of the retained VABER will not fall foul of competition law. Despite this transition period, businesses may wish to begin factoring in the upcoming changes as contracts come up for renewal. It is important to bear in mind however, that EU exemption rules may still apply in parallel to those agreements.



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