

Cartels

Enforcement, Appeals & Damages Actions

Fourth Edition

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Overview of the law and enforcement regime relating to cartels

Competition law in Cyprus is governed by the Law on the Protection of Competition of 2008- 2014, Law 13(I)/2008 (as amended) (the ‘Law’). The term ‘cartel’ is not mentioned as such in the Law, it is caught under the general formulation of the prohibition of anti-competitive agreements and concerted practices, under article 3 of the Law. Article 3 of the Law prohibits all agreements between undertakings and every concerted practice which ‘has as an object or effect the prevention, restriction or distortion of competition within the Republic’. Examples of such agreements and concerted practices include the fixing of the selling price or of other transaction terms, as well as the restriction or control of production, supply, technological development or investments, the geographical or other distribution of markets or supply sources. The only exception to this prohibition¹ is provided in article 4 of the Law which lays down three conditions which must apply cumulatively in order for the exemption to apply².

The Commission for the Protection of Competition (‘CPC’) is the administrative body responsible for enforcing and applying these statutory provisions pursuant to the Law³. The CPC is also responsible for applying the corresponding provision in the Treaty on the Functioning of the EU (‘TFEU’), article 101, on the prohibition of cartels.

The CPC is endowed with wide powers to investigate cases of cartels, either as a result of a complaint submitted to it by any affected party or as a result of an *ex officio* investigation undertaken by it at its own initiative⁴. The CPC may impose administrative fines on parties found guilty of an infringement of article 3 of the Law and/or article 101 TFEU, whilst any party seeking damages as a result of harm or economic loss arising due to a cartel found to infringe article 3 of the Law and/or article 101 TFEU, may rely on a final judgment issued by the CPC before any district court to prove his/her claim.

Overview of investigative powers in Cyprus

The CPC has wide powers of investigation to collect information and documents as evidence in order to carry out its duties. It may gather such information by addressing a written request for information to undertakings or other natural or legal questions as well as to public or private bodies⁵. Such requests must expressly state the purpose/matter in relation to which the information is being sought. Any information thus requested may only be used for the purposes for which it was requested, with the exception of cases where it is necessary to use such information to enforce Community law.

Moreover, the CPC has the power to interview any natural or legal person who consents to this, whilst investigating a case⁶.

Additionally, the CPC has the powers to carry out a search on the business premises of undertakings and to enter into offices, fields or motor vehicles of undertakings (excluding residential premises⁷) and to examine archives, records, books, accounts and any other document related to business activities, to take copies thereof, to seal premises, books, records, archives of any nature, for the period and to the extent required for the investigation at hand.

Any such on-site investigation must be duly authorised by the CPC in the form of a written mandate stipulating the object and purpose of the investigation and the date that such an investigation commences. These investigations take the form of the so-called ‘dawn raids’, i.e. they are unannounced.

A further relatively recent power granted to the CPC, is the right to carry out sector inquiries in specific sectors of the economy or into specific types of agreements over various sectors where there is a concern that there may be a restriction or distortion of competition⁸.

Overview of cartel enforcement activity during the last 12 months

On 21st September 2015 the CPC issued a decision for the imposition of an administrative fine against a respondent involved in a wider *ex officio* investigation currently under way against 16 concrete producers, which had commenced in 2012⁹. The case involves an investigation into a possible distortion of the competition conditions prevailing in public tenders through the offers submitted by the respondents in this case.

The decision is not on the merits of the case as the investigation is still under way. It rather concerns the refusal of the respondent to cooperate with the CPC upon a request by the latter for information and documents, the provision of misleading, false and/or tampered evidence, as well as the refusal of the respondent’s officers to cooperate with the Service of the CPC when the latter carried out a dawn raid at its business premises. The CPC in its judgment stressed the importance for it to be able to use all the investigative powers bestowed upon it by the Law in order to be in a position to carry out its work effectively. In addition, the CPC emphasised the gravity of an offence of non-cooperation with the officers of the CPC during dawn raids, as this inhibits the latter’s ability to effectively apply the Law.

No decision has been issued within 2015 on the merits of a cartel case.

An *ex officio* investigation into oil products was announced in December 2014, which is still ongoing. It is notable that the last decisions which had been issued by the CPC against the four major oil companies, i.e. Exxon Mobil Cyprus Limited, Hellenic Petroleum Cyprus Limited, Lukoil Cyprus Limited and Petrolina (Holdings) Public Limited in 2009, where the CPC imposed a fine of around €14,000,000.00 on each of the respondents, were each annulled by the Supreme Court of Cyprus in 2011 (full bench) acting in its administrative capacity, for reasons relating to the composition of the CPC, at the time it adopted the said decisions rather than on the substance of the cases. As such, the concerted practices found to have been employed by the said respondents, have not been sanctioned up to now.

On 13th May 2015 the CPC issued a decision further to an *ex officio* investigation it carried out against Cyprus Telecommunications Authority (‘CYTA’) and Forthnet A.C. group and/or Multichoice Hellas S.A. The investigation had begun in 2001 and centred on the agreement entered into between the said parties which provided for the exclusive supply of certain TV channels by Forthnet A.C. group and Multichoice to CYTA from the satellite platform ‘Novacyprus’, to ‘Cytavision’. It is noted here that prior to the conclusion of this agreement, the said programmes had been aired via another telecommunications provider

in Cyprus, a collaboration which had ended once the agreement under examination was entered into, as it provided for the exclusive supply of the programmes.

The agreement contained clauses for the indirect setting of prices and for the exchange of confidential information between the parties regarding their future trading policy, aiming thus at restricting the competitive conditions between them. The CPC found that these clauses by definition constituted an infringement of article 3 of the Law, since these terms take away from the parties their ability to act autonomously in the market and result in them aligning their behaviour in the retail market of pay TV. In this case, both CYTA and Forthnet A.C. were active in the pay TV market (subscription TV). The CPC stressed that horizontal restrictions in the form of direct or indirect price fixing have an anti-competitive effect and are of especial gravity since *per se*, it is taken that they have negative effects on the functioning of competition. In this case, there was a finding that such effects covered the whole of Cyprus.

As regards the exclusive supply of certain TV programmes to Cytavision, the CPC found that this does not constitute a *per se* infringement of competition, however, it came to a finding that the potential effect of this would be the loss of competition between the parties to the agreement who would be competing against each other, bar the conclusion of the agreement.

In imposing the fine, the CPC took into consideration the duration of the infringement, which was found to be around four years. As mitigating factors, the CPC considered that the parties had no prior conviction for a competition offence and that they fully cooperated with the CPC during the investigation. It took into consideration the turnover ending in 2011 and for: (a) indirect price fixing and exchange of sensitive information regarding future commercial policy it imposed a fine of €1,400,000.00; whilst for (b) the exclusive supply of subscription channels and no competition agreement between the parties, it imposed a fine of €300,000.00; and (c) regarding the gentlemen's agreement not to compete on existing TV rights that each party had or was to secure regarding football matches, it imposed a fine of €1,200,000.00.

Key issues in relation to enforcement policy

According to its decision of 19th December 2014 on the determination of priority criteria to be applied by the CPC when examining complaints or acting on its own accord, the CPC set the 'public interest' as one of the primary objectives to be served, in particular the need to maintain conditions of effective competition and such as to maximise consumer utility. Thus, the investigation into possible cartels constitutes one of the main priorities of the CPC which shall give a priority to complaints regarding cartels. Of interest is the 'Cartel Hotline' set up on the website of the CPC for the submission of complaints and/or of any information which may prove useful to the discovery of a cartel¹⁰. This was set up in an effort to encourage persons to come forward with information which invariably, would be of a confidential nature.

As per the said decision, a number of criteria have been set which the CPC may use to prioritise, at its discretion, the examination of cases. The listed criteria are the following: the serving of the public interest; the assessment of the impact that an agreement or practice shall have on competition; the assessment of the impact that an agreement or practice shall have on consumers; whether a case is deemed by the CPC to be of 'strategic importance'; whether the CPC has sufficient and suitably qualified human resources to deal with any given case efficiently and effectively; as well as the limitation period applicable to any given offence being complained of or investigated. These criteria are not exhaustive nor

binding; the CPC may take into consideration other criteria as well for the purposes of prioritising and managing its workload. Moreover, the order in which these criteria are listed here is not indicative of the priority given to them by the CPC, nor of their gravity.

The CPC has notably been understaffed and under-resourced, a factor which has an impact on the volume, complexity and speed with which the CPC may investigate cases. This has not been alleviated by the austerity measures which the Republic of Cyprus has taken in the past couple of years. Thus, we see decisions being issued within a period of two, three even four years from the time that investigations commence. The CPC, as an administrative body, is obliged to investigate cases and issue its decisions within a 'reasonable' period of time, given the particular circumstances of the case at hand.

Within 2015, up to the point that this note is being written, no decisions have been issued in respect of cartel cases. There is at least one decision pending, relating to a possible cartel between concrete producers in relation to offers submitted for public tenders, whilst an *ex officio* investigation in respect of oil products, as mentioned above, is currently under way.

Key issues in relation to investigation and decision-making procedures

In the course of investigating complaints, the CPC has the right to request in writing the submission of information/ documents and to demand responses to specific questions. This request for information must clearly set out the purpose of the request, it must set out a reasonable timeframe for a response (which cannot be less than 20 days), as well as stipulate the possible sanctions in the event of non-compliance.

Importantly, the CPC may carry out interviews as well as conduct sector inquiries in specific sectors of the economy where it considers that there is a restriction or distortion of competition. It may also collect and gather information in its own name and/or on behalf of other EU competition authorities which have requested the support of the CPC in any given investigation *vis-à-vis* Cyprus.

As regards dawn raids, the CPC must have a clear mandate in writing of its right to carry out same, which would stipulate with precision the object and purpose of the investigation in question and indicate the legal basis upon which the CPC derives its power to carry out the dawn raid. Dawn raids may be carried out by the Service of the CPC, who may if necessary, be accompanied by other civil servants and/or other officers of the wider public sector with specialist knowledge. It is important that any evidence collected during a dawn raid is relevant to the investigation carried out as per the scope of the mandate granted by the CPC, otherwise any evidence collected which is found to be outside the said scope may be challenged and be inadmissible.

All procedural questions which may arise during proceedings before the CPC are decided upon by the CPC, as any review by the Supreme Court acting in its administrative capacity is limited to administrative law grounds of review¹¹. Parties have 75 days from the issue of a decision to file an administrative recourse.

The Law provides for powers of the CPC to impose an administrative fine upon undertakings which refrain from providing the information requested in writing within the set timeframe or who intentionally or negligently provide false, incomplete, inaccurate or misleading information equal to 1% of the undertaking's turnover during the preceding financial year. In addition, in the event where an undertaking refrains from providing the information requested in writing within the set timeframe, the CPC may in addition impose a fine of 5% on the average daily turnover during the previous financial year for each day that the infringement persists.

As regards cases where during dawn raids, undertakings furnish the CPC with incomplete or tampered evidence, records, etc. either intentionally or negligently and/or refuse to cooperate with it, the CPC has the power to impose administrative fines equal to 1% of the undertaking's turnover during the previous financial year. In the case where the undertaking fails to comply with an order of the CPC relating to an investigation, the CPC may in addition impose a fine equal to 5% of its turnover during the previous financial year for each day that the infringement persists.

Failure of employees of undertakings under an investigation during a dawn raid to facilitate the investigation or to provide any information requested by an investigating officer of the CPC, constitutes a criminal offence punishable with imprisonment of up to one year or a fine up to €85,000 or to a combination of both. It is also a criminal offence punishable with similar sanctions to hide, destroy or tamper information, accounts, books, or other documents related to business activities which are subject to an investigation.

Leniency/amnesty regime

On 11th November 2011, the regulations pursuant to article 46 of the Law were published relating to the leniency programme provided in article 24 of the Law. Article 24 of the Law sets out the powers of the CPC to impose administrative fines for any infringement of, amongst others, article 3 of the Law and article 101 TFEU, with the proviso that this imposition of a fine may either be pardoned altogether or be reduced in accordance with any applicable leniency programme.

To date there has been no recorded case of the use of the said leniency programme.

Potential applicants for leniency are undertakings or associations of undertakings who have been involved in a cartel. Applications cannot be made jointly. No leniency may be applied for any fine which may be imposed upon a respondent by another competition authority.

Full leniency for the non-imposition of any fine may be applied by the CPC whenever an undertaking first provides such evidence which enables the CPC to either commence an investigation or which proves an infringement of article 3 of the Law and/or of article 101 TFEU. Further, in order for full leniency to apply, the undertaking in question must cease its participation in the cartel, it must cooperate throughout and it must not have encouraged others to participate in the cartel.

For a reduction of a fine, the undertaking seeking leniency should furnish the CPC with evidence with a significant added evidentiary value in proving the infringement. There is a scale applied for the leniency provided to any applicants following the first, pursuant to which the first applicant may receive a reduction from 30-50%, the second from 20-30%, and the third up to 20%. The CPC takes into consideration the time that this information is provided to it, along with the degree of the added evidentiary value of such evidence.

Administrative settlement of cases

There is no provision for an administrative settlement of cases before the CPC. Nevertheless, pursuant to article 25 of the Law, at the stage before the CPC is about to issue its decision ordering the termination of an infringement of article 3 and/or article 101 TFEU (amongst others) and the undertakings concerned offer to undertake certain commitments which meet the objections of the CPC according to its preliminary findings, the CPC may issue a decision rendering such commitments obligatory and concluding that there are no longer any reasons to take any further action *vis-à-vis* the matter.

In the event that undertakings bound by commitments fail to meet them, they may be subject to an administrative fine up to 10% of the turnover realised in the preceding year. Moreover, in the event that a significant fact upon which the CPC issued its commitments decision is altered or if the terms imposed by the CPC have not been complied with, or if the decision on commitments was based upon inaccurate, false, incomplete or misleading information, or if the undertakings in question fail or refuse to comply with the measures, the CPC may recall or amend its decision on commitments.

Third party complaints

Any third party who has a 'legitimate interest' may submit a complaint relating to, amongst others, an alleged infringement of article 3 of the Law and/or of article 101 TFEU¹². A person is said to have a legitimate interest when s/he is able to prove that s/he has suffered, or that there is a serious or probable danger that s/he shall suffer significant economic damage, or that there is a serious or probable danger that s/he shall be placed into a disadvantageous position in competition as a direct result of the alleged infringement.

In order for the CPC to examine the lodged complaint, the latter must be filed using the complaint form provided for in the Law, which is found on the CPC's website¹³. In the event all the requested information is not filed, the CPC may ask for further information to enable it to commence investigation of the complaint. The CPC takes a preliminary view as to whether the lodged complaint falls within its competences or not. Thereafter, the CPC instructs the Service of the CPC to commence investigation of the complaint; pursuant to the results of the Service's investigation, the CPC informs the complainant whether there is indeed a *prima facie* infringement of any provision of the Law, in which case it shall commence a full-blown investigation, or whether there is no case to be investigated further.

In the case of an investigation, the CPC sends out statements of objections to the undertakings against whom the complaint has been lodged, who have the right to reply in writing within a timeframe set by the CPC. It is up to the CPC to decide whether it shall invite the parties before it in an oral hearing, further to the submission of the written statements.

During these proceedings the CPC has the discretion to decide whether to allow access to the whole file of the case to the person(s) against whom the complaint has been filed. However, the Law stipulates that the CPC has an obligation to notify to the respondent those documents in the case file on the basis of which it plans to base its decision, except for those documents which are privileged. Any document which is not thus notified to the respondent cannot be relied upon by the CPC when issuing its decision.

As indicated hereinabove, the CPC has the powers and discretion to prioritise its workload and decide which cases it shall give priority.

In the event the CPC decides that the case does not fall within its competences or that the complaint does not raise a reasonable suspicion for a possible infringement, it issues a decision. This decision is an administrative act and may thus be appealed against via an administrative recourse.

Civil penalties and sanctions

The CPC may impose administrative fines for an infringement, amongst others, of article 3 of the Law and of article 101 TFEU. The fine is determined by reference to the gravity and the duration of the infringement and may be up to 10% of the undertaking's turnover

during the immediately preceding financial year, or up to the sum of 10% of the turnover of each undertaking which is a member of the association of undertakings, if the case concerns the latter¹⁴. Fines may be reduced on grounds which the CPC finds to constitute mitigating factors and/or in the event leniency is applied.

Respondents have a right to be heard before the CPC issues a ruling on any administrative fine¹⁵ and the CPC must inform the respondent of the reasons leading it to impose an administrative fine. The respondent customarily has 30 days to present arguments on this point.

The time that the CPC takes in order to investigate a case and reach the stage of issuing a decision and imposing a fine, are not taken into consideration when determining the level of a fine¹⁶, always subject to the proviso that any decision issued by the CPC is issued within a 'reasonable' period of time, given the circumstances of the case (i.e. complexity, volume of evidence, time needed for collection of evidence, etc.).

In the context of the factors mentioned hereinabove when determining the level of the fine, the CPC considers the type of the infringement, the conditions of each particular case and the special gravity of the participation of an undertaking in the infringement. Further, the CPC takes into consideration: the impact of the infringement and/or the impact that the infringement continues to have on the market; the anti-competitive results which may have been caused or which may be caused in the market, given also the economic power of the undertakings which have infringed the competition rules in the relevant market; and the extent of it. As such, any economic benefit or other benefit that such undertakings may have gained or sought to have gained, is also factored into the consideration.

Mitigating factors include the absence of any prior infringement of competition rules by an undertaking, the fact that an undertaking does not repeat a previous offence, and the cooperative behaviour of an undertaking with the CPC during the proceedings.

Aggravating factors include a prior offence, repeat offences and the fact that the undertaking in question could have foreseen the consequences of its action given its circumstances, assuming that it is 'normally informed and sufficiently attentive'¹⁷.

Right of appeal against civil liability and penalties

Any decision issued by the CPC may be subject to an appeal, via an administrative recourse before the Supreme Court, acting in its administrative capacity. Such an appeal may be filed within 75 days from the date the decision of the CPC is issued.

Importantly, on 21st July 2015 the Law on the Establishment and Operation of an Administrative Court, Law 131(I)/2015 came into force, providing for the creation of an administrative court. The creation of this new court is expected to alleviate the heavy workload of the Supreme Court, which currently acts as both the Supreme Court of the land, as well as the administrative court.

The new administrative court shall have jurisdiction to hear cases pursuant to article 146 of the Constitution and thus have the power to examine the legality of actions or omissions of any organ, authority or person exercising executive or administrative authority, as well as the power to validate or nullify any such decision, action or omission. Accordingly, it shall have the power to ratify, in whole or in part, the decision, or to nullify it or amend it.

Any decision of the administrative court may be appealed against to the Supreme Court of Cyprus within 42 days from the date that the decision is issued and such an appeal may only be made on legal points. The decision of the Supreme Court would be final.

The said court has not yet commenced its operations. Once the court begins its work, all current recourses pending before the Supreme Court acting in its administrative capacity, shall be transferred to the new administrative court.

Criminal sanctions

Any person who fails to comply with or acts against a decision of the CPC issued pursuant to articles 23-25 of the Law (which include a decision on an infringement of article 3 of the Law and of article 101 TFEU) is committing a criminal offence which is punishable with imprisonment not over two years, or with a fine not over €340,000, or to a combination of both of these sentences.

The same sanctions apply in the case where a person fails to comply or acts against a decision issued by the CPC regarding interim measures.

Cross-border issues

According to article 23(B), the CPC has the power to cooperate with other EU competition authorities which exercise control over specific sectors of the economy in the Republic and to offer its support when thus asked. Conversely, the CPC may ask the contribution of other EU competition authorities which exercise control over specific sectors of their economy, for assistance.

Moreover, the CPC may enter into Cooperation Protocols with other EU national competition authorities.

The CPC is a member of the European Competition Network and entered into a Cooperation Protocol with the Greek Competition Commission in October 2014.

The investigative powers vested in the CPC in article 30 of the Law may be exercised by the CPC either under its own name, or on behalf of and for other EU national competition authorities who have asked it to do so.

Developments in private enforcement of antitrust laws

The power to enforce article 3 of the Law rests with the CPC, as per article 23 of the Law.

According to article 40 of the Law, any party who has suffered harm and/or economic loss due to actions or omissions of undertakings acting in contravention, amongst others, of article 3 of the Law and of article 101 TFEU, may rely on a decision issued by the CPC declaring the finding of an infringement, in court. The decision constitutes a rebuttable proof of the truth of its contents.

No class actions are permissible within the Cyprus legal system. Multiple actions may be consolidated however, under Order 14 of the Civil Procedure Rules; where two or more actions are pending in the same court (between the same or different claimant or defendants) which involve a common question of law or fact of such importance in proportion to the rest of the matters, the court may order that the actions are consolidated on the application of one of the parties to the actions.

Reform proposals

The Law has undergone a major overhaul in 2014, thus no further reforms are expected imminently. It remains to be seen in practice how effective and expedient these recent changes will be. The same applies for the leniency programme which has not been utilised up to now.

The CPC has expressed its commitment to the public enforcement of competition rules for the prevention and deterrence of infringements for the benefit of the economy and consumers. It has further expressed its aspiration and commitment to investigating ‘all complaints submitted despite the limited resources available to the CPC’.

The Chairman of the CPC, Mrs. Loukia Christodoulou, has expressed the following policy priorities for 2016:

- ‘enhance [the] advocacy role [of the CPC] and promote competition culture and compliance with competition rules in Cyprus;
- promote [the] cooperation [of the CPC] with the Hellenic Competition Authority, particularly in terms of knowledge and experience exchange; and
- continue its market monitoring for any impediments or restrictions of competition in crucial sectors of the economy’¹⁸.

* * *

Endnotes

1. In addition, there are certain block exemption regulations, namely the regulatory administrative acts under numbers 139, 140 and 141 of 2014.
2. (a) It contributes to the improvement of production or distribution of goods or to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit; (b) it does not impose on the undertakings concerned, restrictions which are not indispensable to the attainment of these objectives; and (c) it does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the product in question.
3. Article 23 of the Law.
4. *Ibid.*
5. Article 30 of the Law.
6. Article 30A of the Law.
7. For entry and investigation in any other premises as well as to residential premises, a search warrant must first be obtained.
8. To date the CPC has announced the commencement of one sector inquiry into the field of oil products which, according to its decision of 17.12.2014, shall cover all different levels of the markets, from importation, transportation, storage, wholesale to retail, and will cover all players in the market, from importers to wholesalers, gas stations and any other undertaking involved in this market. The decision for this sector inquiry was based on complaints received by the CPC relating to the fact that whilst oil prices internationally were decreasing, the prices for oil products in Cyprus were not decreasing correspondingly. Further, the CPC noticed that during periods when the costs of production were increasing, oil prices shot up, whilst during periods that the costs of production were decreasing, oil prices were decreasing at a slower rate (the so-called ‘rockets and feathers’ phenomenon).
9. *Ex officio* investigation in the market of production, trading, supply, placement of concrete, case 32/2015.
10. http://www.competition.gov.cy/competition/Competition.nsf/page30_en/page30_en?OpenDocument.
11. These include checks on the constitutionality of a decision, on whether a decision was adopted in violation of a law, or whether the body taking the decision acted *ultra vires*.

12. Article 35 of the Law.
13. http://www.competition.gov.cy/competition/competition.nsf/page23_en/page23_en?OpenDocument.
14. Article 24 of the Law.
15. Article 42 of the Law.
16. Complaint of Chrs. Kapodistrias & Sons Ltd and Kyros Auto Service Ltd against AG and Cyprus Import Corporation Ltd, Case 11/2015- 23.4.2015.
17. *Ibid.*
18. The European Antitrust Review 2016, Cyprus chapter.

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Maria joined the Firm in 2007, initially as a Group Leader in the Corporate Law Department and is now leading the Commercial, Regulatory and EU Law Department. Maria has extensive experience in corporate and commercial law. She handles a wide variety of transactional work and advises on competition law and on areas of EU law.

Maria achieved an LL.B. (Hons – Upper Second) at the London School of Economics and Political Science (L.S.E.) and an LL.M. (Merit) again at the L.S.E., with a specialisation in International and Comparative Intellectual Property Law. She further obtained an LL.M. from Utrecht University, Netherlands with a specialisation in EU Law.

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