
THE PUBLIC COMPETITION ENFORCEMENT REVIEW

SECOND EDITION

EDITOR
SHAUN GOODMAN

LAW BUSINESS RESEARCH

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REVIEW

Second Edition

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CONTENTS

Editor's Preface	vii
<i>Shaun Goodman</i>	
Chapter 1 Argentina	1
<i>Alfredo O'Farrell & Miguel del Pino</i>	
Chapter 2 Australia	12
<i>Zaven Mardirossian</i>	
Chapter 3 Austria	31
<i>Franz Urlesberger and Anastasios Xeniadis</i>	
Chapter 4 Brazil	45
<i>André Marques Gilberto and Natália Oliveira Felix</i>	
Chapter 5 Bulgaria	56
<i>Christoph Haid and Mariya Papazova</i>	
Chapter 6 Canada	64
<i>Randal T Hughes, Donald B Houston and Oliver J Borgers</i>	
Chapter 7 Chile	81
<i>Sander van der Voorde and Diego Hernández</i>	
Chapter 8 China	90
<i>Wu Peng, Michael ZP Gu and Xue Yi</i>	
Chapter 9 Croatia	104
<i>Christoph Haid</i>	
Chapter 10 Cyprus	115
<i>Stephanos Mavrokefalos</i>	
Chapter 11 Czech Republic	122
<i>Martin Nedelka and Jitka Linhartová</i>	
Chapter 12 Denmark	130
<i>Henrik Peytz</i>	
Chapter 13 European Union	143
<i>Shaun Goodman and Collette Rawnsley</i>	

Chapter 14	France	158
	<i>Audrey Amsellem and Julie Catala Marty</i>	
Chapter 15	Germany	171
	<i>Philipp Werner</i>	
Chapter 16	Greece	184
	<i>Emmanuel Dryllerakis</i>	
Chapter 17	Hungary	192
	<i>Christoph Haid and Miklós Molnár</i>	
Chapter 18	India	204
	<i>Manas Kumar Chaudhuri</i>	
Chapter 19	Ireland	214
	<i>Pat O'Brien and Fiona McKeever</i>	
Chapter 20	Italy	226
	<i>Francesco Carloni</i>	
Chapter 21	Japan	237
	<i>Kozo Kawai, Futaba Hirano and Kojiro Fujii</i>	
Chapter 22	Korea	252
	<i>Young Chul Yim and John H Choi</i>	
Chapter 23	Luxembourg	264
	<i>Léon Gloden and Stéphanie Damien</i>	
Chapter 24	Mexico	276
	<i>Octavio Olivo Villa</i>	
Chapter 25	New Zealand	289
	<i>Peter Hinton, Anne Callinan, Elisabeth Welton and James Craig</i>	
Chapter 26	Norway	301
	<i>Anne Grete Larsen Hestnes and Christian Bjørtuft Ellingsen</i>	
Chapter 27	Paraguay	313
	<i>José Ignacio Olmedo, Fernando Serrati and Alejandra Olmedo</i>	
Chapter 28	Portugal	322
	<i>Frederico Pereira Coutinho, Rita Leandro Vasconcelos and Ana Kéri</i>	
Chapter 29	Romania	334
	<i>Christoph Haid and Cristina Pana</i>	

Chapter 30	Serbia	345
	<i>Christoph Haid and Srđana Petronijević</i>	
Chapter 31	Slovakia	357
	<i>Martin Nedelka and Jitka Linhartová</i>	
Chapter 32	Slovenia	363
	<i>Christoph Haid and Vid Kobe</i>	
Chapter 33	South Africa	375
	<i>Andile M Nikani</i>	
Chapter 34	Spain	390
	<i>Juan Jiménez-Laiglesia, Arantzazu Ruiz, Alfonso Ois, Jorge Masía and Luis Sotelo</i>	
Chapter 35	Switzerland	404
	<i>Alessandro Celli, Boris Wenger and Nicolas Diebold</i>	
Chapter 36	Ukraine	415
	<i>Christoph Haid and Pavel Grushko</i>	
Chapter 37	United Kingdom	422
	<i>Shaun Goodman and Collette Rawnsley</i>	
Chapter 38	United States	438
	<i>Andreas Stargard</i>	
Chapter 39	Uruguay	452
	<i>Leonardo Melos</i>	
Chapter 40	Venezuela	462
	<i>José H Frías</i>	
Appendix 1	ABOUT THE AUTHORS	471
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS	493

EDITOR'S PREFACE

2009 saw unprecedented challenges to the global economy. For the first time in half a century, these challenges led western governments to question the free market principles on which their economies are based, and to consider whether longer-term economic stability and, with it, consumer welfare, can only be delivered with increased regulatory intervention. Nowhere was this tension between market economics and wider public interest principles more apparent than in the unconditional approval in the United Kingdom of the merger between retail banks Lloyds TSB and HBOS. While approval of that transaction was considered necessary in the short term to maintain financial stability, that was achieved at a significant cost to longer-term competition in the retail banking industry. The wisdom of that approval will no doubt continue to be questioned and debated, and it may be that the European state aid regime will provide a mechanism for reassessing and, potentially, restructuring the European banking industry with the benefit of hindsight. What is certainly true is that governments' natural tendency in difficult economic periods to revert to protectionist measures and to promote national champions has imposed on competition authorities an obligation vigorously to defend the importance of strong competition in delivering efficient markets and safeguarding consumer welfare.

That obligation has come at a period of considerable change for the agencies themselves. As the US administration enters its second year under President Obama, the European Commission has also witnessed a change in leadership with the appointment of Joaquín Almunia as the new Commissioner for Competition. Unlike his predecessor, Neelie Kroes, who enjoyed a successful business career prior to her appointment, Commissioner Almunia is a career politician, having been a leading member of the Spanish socialist party and a former socialist candidate for prime minister in Spain.

Although it has been suggested that, given his political background, he may be somewhat more sensitive to industrial policy and employment considerations, there are no indications that he intends to deviate to any material extent from the policies of his predecessors.

There is equally little sign that the difficult economic circumstances of the past year have led to any softening in the enforcement policies of the leading antitrust agencies. In May 2009, the European Commission imposed its largest ever fine on a single company of €1.06 billion on Intel Corporation for allegedly violating EU antitrust rules on the abuse of a dominant market position by engaging in illegal anti-competitive practices to exclude competitors from the market for computer chips. Just two months later, in July 2009, the Commission fined energy giants E.ON AG of Germany and GDF Suez SA of France €1.1 billion for agreeing not to compete on sales of natural gas in each other's home markets. While the deterrent effect of fines on this scale is unquestionable, it is less obvious that the same deterrent effect could not be achieved with more moderate sanctions and there is a risk that they reflect, at least in part, competition on the part of the agencies themselves to be seen as strict guardians of the consumer interest. The US agencies have been equally aggressive in seeking sanctions: in the past three years, over \$2 billion in criminal fines and more than 162 years of prison time have been imposed in cases prosecuted by the Department of Justice's Antitrust Division. Meanwhile, the US Federal Trade Commission enforcement action against Intel raises profound issues concerning the scope of its powers to give a construction to Section 5 of the Federal Trade Commission Act that goes beyond the antitrust reach of the Sherman Act.

The defence of firms alleged to have participated in antitrust infringements is becoming increasingly complex, with a need carefully to balance the possible benefits of the leniency and settlement regimes operated by public competition authorities against the risks of wider public enforcement (including in developing regimes such as China and India, which are quickly emerging as serious players on the antitrust stage) and private litigation (which is becoming more common, even in the absence of European legislation).

I would like to thank all of the contributors for their support and cooperation in preparing this Review, and the publishing team at Law Business Research for their tireless encouragement and enthusiasm.

Shaun Goodman

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Chapter 10

CYPRUS

*Stephanos Mavrokefalos**

I OVERVIEW

The Cyprus Commission for the Protection of Competition ('the Commission') is the regulatory authority both for purposes of the Law on the Protection of Competition of 2008 ('the Law'), which regulates abuses of market power, and prohibits any abuse of a dominant position by one or more enterprises in a market for a product or service, as well as for purposes of merger control pursuant to the Law on the Control of Concentrations between the Enterprises of 1999. The Commission is a member of the European Competition Network, the European Competition Authorities Network and the International Competition Network.

It is within the Commission's competence to examine complaints submitted by third parties, and also to initiate investigations on its own initiative, into formal or informal restrictive agreements and practices that have as their object or effect the elimination, restriction or distortion of competition, and in particular agreements that either (1) fix, directly or indirectly, the purchase or selling prices or other terms of transaction, (2) restrict or control production, supply, technological development or investments, (3) share markets or other resources of supply geographically or otherwise, (4) apply different terms for identical transactions so that certain enterprises are placed at a disadvantage in relation to competition, or (5) make the entering into contracts conditional on the acceptance by the other parties of additional obligations that, by their nature or according to commercial usage, have no connection with the subject matter of the contract.

The Commission does not have strict timetables for its investigations or, before issuing any decision, requests from interested parties to submit information and observations; it also holds proceedings in the form of hearings. The Commission has the power to order interim measures during its investigation, such as requiring an enterprise

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to suspend a specific activity or agreement; a number of applications for such interim measures were submitted to the Commission for examination during 2009, but without success. The Commission's decisions, which are subject to appeal through judicial review proceedings at the Supreme Court of Cyprus, are published in the Official Gazette as well as on the Commission's official website.

In June 2009 the Commission issued its annual report for 2008. During 2008 the Commission dealt with 97 complaints for abuse of dominant position, four applications for interim measures in connection with complaints, the launching of 11 *ad hoc* investigations and 33 notifications of concentrations.

There was no new legislation (either primary or secondary) during 2009. Some observers were anticipating the introduction of an official leniency programme, but as yet there is no news on that front. On the other hand, some important decisions were issued by the Commission during the past year, not least on account of the fines imposed, which were quite substantial by Cyprus standards.

II CARTELS

There was only one notable case during 2009 whereby the Commission finalised the investigation into one of the most critical financial sectors of the island, that of the retail sales of petrol and diesel fuel.

On 20 October 2009 the Commission issued four decisions¹ after an investigation of the Commission's own initiative into the practices of the respondents in the market for petrol products.

Specifically, the respondents were investigated for applying a concerted practice by indirectly fixing retail prices for unleaded petrol and diesel fuel between 1 October 2004 and 22 December 2006, and entering into agreements with petrol station owners for the direct or indirect fixing of retail prices for unleaded petrol and diesel fuel during the same time period. The investigation was initiated by the Commission exactly four years before the issuance of its decisions.

The Commission found that each of the respondents entered into vertical agreements with the owners of petrol stations whereby they, without objective reasons, fixed the retail prices of fuel through the circulation of 'suggested' or 'recommended' price lists, which were effectively imposed upon the gas station owners, thus negating competition in the market of retail sale of fuel. The Commission stressed the importance of maintaining healthy competitive conditions in the market of petrol and diesel fuel, especially since Cyprus's economy is heavily dependent upon private transport due to the limited availability and low market penetration of public transport. As there is a risk of considerable loss to the general public if anti-competitive practices are allowed to continue in the market in question, the Commission took the view that the respondents should be made to realise that their practices injured the general public interest. The

1 Decisions Nos. 66/2009, 67/2009, 68/2009 and 69/2009 against Exxon Mobil Cyprus Ltd, Petrolina (Holdings) Public Ltd, Hellenic Petroleum Cyprus Ltd and Lukoil Cyprus Ltd respectively.

Commission thus imposed fines of €134 million on Exxon Mobil Cyprus Ltd, €125 million to Petrolina (Holdings) Public Ltd, €14.3million on Hellenic Petroleum Cyprus Ltd and €27 million on Lukoil Cyprus Ltd. The press coverage for this decision was extensive, especially due to the extent of the fines (totalling almost €43 million). One could argue that the fine itself should not be the sole objective, but rather the Commission should follow up its decision, especially drawing from its experience into the information received through the process, in order to keep monitoring the specific and other related markets.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

From a procedural point of view, no regulations or directions to confer any sort of guidance have been introduced. It currently takes more than two years for complaints to be examined by the Commission, mainly due to its considerable workload, which cannot be easily met through the available resources and personnel. During 2009, however, the Commission issued a number of interesting decisions, the most notable of which are as follows.

i Andros Kiosk Ltd v. Fereos Ltd

In a quite interesting decision of the Commission,² the respondents Fereos Ltd were fined in the amount of €409,151 on account of their terminating a two-year-old agreement and refusing to supply the complainants, Andros Kiosk Ltd, with Cuban cigars and other related tobacco products. The respondents are a well-known import and distribution company for cigars, cigarettes and other tobacco products. The complainants are a company operating a kiosk to which the respondents, by virtue of a distribution agreement, delivered and sold cigars, of which they were exclusive importers for the country.

In 2005 the respondents stopped deliveries of products to the complainants on the grounds that they engaged in parallel sales of seemingly identical but in reality counterfeit products. The Commission, in deciding that the respondents failed to prove these allegations, considered that the respondents engaged in abusive practices in violation of Section 6(2) of the Law. Section 6(2) of the Law prohibits the improper exploitation by one or more enterprises of the financial relationship of dependency between one or more such enterprises and an enterprise that is a customer, supplier, producer, representative, distributor or commercial co-operator thereof, even regarding a particular kind of product or services, and which does not have a corresponding alternative solution. Such improper exploitation of the financial relationship of dependency may exist especially of the discontinuance of commercial relations by the sudden and unjustified discontinuance of long-term commercial relations.

The Commission thus held that the retail seller (the kiosk) was dependent upon the respondents for their supply of exclusively distributed products, and that the two years that their agreement had run was sufficiently long-term to trigger the

² (Decision No. 3/2009, dated 15 May 2009).

operation of the Law. It is notable that the respondents had offered to sell the products to the complainants through the respondents' warehouses that were approximately 50 kilometres from their point of sale, but the Commission took the view that such a distance is too big for the kiosk owner to visit once a week.

ii *Akis Panayiotou & Sons Ltd v. Wyeth Hellas AEBE Pharmaceutical Products (Cyprus Branch) and Phadisco Ltd*

In its decision,³ the Commission fined the two respondents Wyeth Hellas AEBE Pharmaceutical Products (Cyprus Branch) and Phadisco Ltd in the amounts of €15,363 and €384,637 respectively for abuse of a dominant position in the market for vaccines against the pneumococcal and meningococcal diseases. In particular, the two respondents were found to have coordinated in the provision to doctors of free supplies of Menigetek vaccines (preventing meningococcal disease) together with the sales of Menigetek and Prevenar vaccines (preventing pneumococcal disease) from 2005 to February 2006. The complainant, Akis Panayiotou & Sons Ltd, was the supplier of the Menjugate vaccine, which was a direct competitor to the Menigetek vaccine. The respondents' practices were not objectively justified and had the effect of 'tying in' their customers and of pushing their competitors completely out of the market by 2008.

iii *Engomi (Nicosia) Co-operative Savings Bank Ltd and the Co-operative Savings Fund of the Greek Middle School Teachers of Cyprus (STELMEK) v. the Audit Service of the Cooperative Companies*

In this decision,⁴ the Commission fined the respondent, the Audit Service of the Cooperative Companies, in the amount of €10,000 for abuse of a dominant position in fixing unfair prices in the form of their audit fees, and for applying different terms for identical transactions, in consideration for the provision by the respondents of audit services to the complainants. The respondent is a state legal entity, constituted by operation of law and comprising individuals appointed by the Council of Ministers, and it is within its competence to conduct accounts auditing on behalf of registered cooperative institutions in Cyprus. The Commission decided that the relevant market was the provision of accounting and auditing services of financial reports and statements of cooperative credit institutions. By law, the respondent was entitled to charge fees that were either 15 per cent of the complainants' profits or an amount equal to 1 per mil of their total assets. It transpired that the respondent's fees were not connected with the work undertaken or the services offered, nor did they relate to the time expended by the respondent's employees during the provision of their services, but rather were so calculated as to cover their annual budget.

3 Decision No. 14/2009 (dated 19 May 2009).

4 Decision No. 26/2009 (dated 24 June 2009).

iv Theodoros Kapnisis and Aristotelis Meletiou v. the Limassol Licensed Porters Association

In this case,⁵ the Commission fined the respondents, the Limassol Licensed Porters Association, in the amount of €250,000 for restrictive enterprise agreements and abuse of a dominant position in the provision of porters' services at the Limassol commercial port. The respondent is an unincorporated association of approximately 58 licensed porters to which each licensed porter participates by payment of a specific contribution, and the association then purchases, or provides securities for obtaining financing for the purchase of, specialised equipment and machinery necessary for the loading and unloading of commercial or trade vessels. The respondent joined in the provision of porters' services at the Limassol port, jointly coordinating, arranging and sharing the supply of services to incoming and outgoing vessels at the Limassol port and by giving access to the aforementioned specialised equipment and machinery solely to its members and its 80 or so employees. The complainants, Theodoros Kapnisis and Aristotelis Meletiou, are licensed porters (having obtained their licence from the relevant licensing authority, which in the present case is the Cyprus Ports Authority), but who were refused membership by the general assembly of the members of the respondent. The complainants claimed that due to the fact that the specialised equipment and machinery necessary for the work of a porter at the Limassol port is extremely expensive, the respondent's refusal to grant them membership, thus refusing them access to an essential service, meant that they could not in effect exercise their profession or offer their services. The Commission decided that each and every porter and member of the respondent was an 'enterprise' for purposes of the Law, and that the respondent itself was a group enterprise active in the relevant market for the provision of services of transport and delivery of cargo by licensed porters, and the administration and use of specialised equipment or installations that are essential to the provision of the aforementioned services. The respondent failed to convince the Commission that there was an objective reason for its refusal to grant membership to the complainants and by extension services that are essential to the provision of porter services, thus setting up an unlawful barrier to the provision of services in the relevant market.

IV STATE AID

State aid is regulated by a separate and distinct legislative framework and a separate and distinct independent authority. Pursuant to the State Aid Control Laws of 2001 to 2009, the Council of Ministers of the Republic of Cyprus appoints a Commissioner for State Aid Control whose main competences and responsibilities are as follows:

- a* examining and issuing legally binding decisions on the compatibility with state aid rules of draft aid measures;
- b* carrying out a preliminary assessment and issuing reasoned opinions on the compatibility with state aid rules of all other draft aid measures;

5 Decision No. 46/2009 (dated 27 July 2009).

- c* applying the provisions of Council Regulation No. 659/1999 and the implementing of provisions adopted by the European Commission according to Article 27 of the Regulation;
- d* monitoring the implementation and the final impact of all aid granted;
- e* collecting progress reports from all aid-granting authorities in order to monitor the implementation and the final impact of all aid granted;
- f* submitting to the European Commission all information required including information regarding state aid granted in Cyprus;
- g* collecting, compiling and monitoring all information concerning state aid;
- h* preparing and keeping an up-to-date inventory of all state aid schemes;
- i* observing national cumulative limits pursuant to Commission Regulation No. 1535/2007 and Commission Regulation No. 875/2007 for any period of three fiscal years;
- j* training all authorities granting aid and other parties involved on state aid matters;
- k* preparing and submitting to the President of the Republic of Cyprus an annual report on his or her work with observations and suggestions, including a statistical analysis for the granting of state aid; and
- l* representing Cyprus in the EU Advisory Committee on State Aid as well as in any other committees and working groups dealing with the development or the implementation of state aid policy taking place in Cyprus or abroad.

The Office of the Commissioner for State Aid Control is staffed by a total of nine people, of which six are scientific staff members and three administrative staff members.

During 2009 the Commissioner for State Aid Control issued a number of decisions for various government programmes and schemes, such as control of cattle infected by brucellosis, control of the spread of salmonella within the avian population, a scheme to subsidise the conservation of energy and the use of renewable energy sources, multidiscipline programmes for continuing education, schemes promoting research technological development and innovation, granting of incentives for the employment of persons with disabilities, the promotion of induction of unemployed persons in existing business through the provision of individual training, and compensation of cattle-breeders for losses due to cattle illness, etc.

In July 2009 the Commissioner for State Aid Control published his report for 2008 which states that his office issued 19 decisions, two reasoned opinions and 72 opinions. There was a marked decrease in the number of state aid programmes and individual state aid (just 33 active during 2008).

V CONCLUSIONS

During 2009, the Commission managed to overcome and settle a great number of overdue pending cases. These were left as a legacy by previous compositions of the Commission, which were found by the Supreme Court to have been unlawfully constituted, and which thus ordered the re-examination of a considerable number of

cases. Since 2009, in addition to its current workload, the Commission has had to deal with 95 cases, which were originally filed during the period 2001 to 2007.

In addition to the speedy manner by which the Commission has managed to expedite the examination of the backlog of cases, another positive step forward for the Commission has been the recent recruitment of much-needed new personnel for the secretariat and the service of the Commission.

STEPHANOS MAVROKEFALOS

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Stephanos Mavrokefalos is a graduate of the University of East Anglia (LLB, 1995) and the London School of Economics and Political Science (LLM in labour law, 1996). He has been a member of the Cyprus Bar Association and of the Nicosia Bar Association since 1997, and is currently serving a second term as a member of the Council of the Nicosia Bar Association. He is also a founding member of the Cyprus Young Lawyers Association, of which he also served as a treasurer and member in the Council. He is also a member of the board of judges of the Nicosia Football Union, has served as a legal counsellor and member of the National Council of the Junior Chamber of Cyprus and is currently a member of the Cyprus Intellectual Property Authority by Presidential appointment.

He has extensive practical experience in matters of competition law and is a repeating contributor to Kluwer Law International's *A Practical Guide to National Competition Rules Across Europe*, to Law Business Research's *The Public Competition Enforcement Review* and to the PLC *Cross-Border Competition Handbook*.

He joined L Papaphilippou & Co. in 2004⁷² and has been a partner since 2003.

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