

Cartel Regulation

Getting the fine down
in 41 jurisdictions worldwide

2011

Contributing editor: Martin Low QC



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Cyprus

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Legislation and jurisdiction

1 Relevant legislation

What is the relevant legislation and who enforces it?

The Protection of Competition Law 13(I)/2008 (the Law) is the applicable legislation in Cyprus. The Law has incorporated the provisions of Council Regulation 1/2003 into the national legal order and has re-established the Commission for the Protection of Competition (the CPC), which is the competent body for the enforcement of the legislation.

The Law provides, inter alia, for the determination of the CPC as the national competition authority of the Republic responsible for the application of the Law, of Regulation 1/2003 and of articles 101 and 102 TFEU (ex 81 and 82 EC), where necessary. Specifically, it should be noted that the Law provides for the CPC's competences and powers in line with article 5 of Regulation 1/2003.

The CPC consists of five members, namely the chairperson and four members who are appointed by a decision of the Council of Ministers on a proposal of the minister of commerce, industry and tourism. The chairperson must be a lawyer of high standing and is appointed on a full-time basis. The members, at least two of whom must come from the private sector, must have specialist knowledge and experience in law, economics, commerce or industry and are appointed on a full-time basis for a five-year term that is renewable once. The CPC is assisted in the execution of its duties by its Service, which is composed of the secretary, the officers and the secretarial staff.

2 Proposals for change

Have there been any recent changes or proposals for change to the regime?

The legal regime is considered up to date and there are no current plans to introduce any amendments to it.

3 Substantive law

What is the substantive law on cartels in the jurisdiction?

Section 3 of the Law (which reflects article 101 TFEU) provides that all agreements between undertakings or associations of undertakings, all decisions of associations of undertakings and any concerted practices, having as their object or effect the elimination, restriction or distortion of competition within the Republic shall be prohibited and shall be void ab initio. Section 3(1) of the Law specifies such prohibited agreements, decisions or concerted practices as including:

- direct or indirect fixing of purchase or sale prices or other trading conditions;
- limiting or controlling production, distribution, technical development or investment;
- sharing markets or supply sources, geographically or otherwise;
- applying dissimilar conditions to equivalent transactions; and

- making the conclusion of contracts subject to acceptance by other parties of supplementary obligations that by their nature or according to commercial practices have no connection with the subject matter of such contracts.

Agreements, decisions and concerted practices prohibited under section 3(1) fall under the notion of 'collusion' defined pursuant to section 2 of the Law. Under the said definition, collusion can constitute any agreement, formal or informal, written or unwritten, executed by the law or not, the concerted practice of two or more undertakings or associations of undertakings or the decision of an association of undertakings.

An 'agreement' is further defined pursuant to section 2 of the Law as being any arrangement between at least two undertakings or associations of undertakings, by virtue of which one of the parties has willingly undertaken the obligation to restrict its freedom to act in respect of one of the other parties.

Pursuant to section 2, 'concerted practice' is defined as a form of collusion between undertakings that, without having been taken to the stage where an agreement per se has been concluded, knowingly substitutes for the risks of competition. It should not be considered a straightforward task for the CPC to prove on the evidence of parallel behaviour on the market that a concerted practice exists, as this can simply be the natural commercial behaviour of undertakings that are trying to match the behaviour of their competitors so that their business does not suffer.

Pursuant to section 4 of the Law, conjunctive requirements can lead an agreement, decision or concerted practice prohibited by virtue of section 3(1) to evade such prohibition and be valid without necessitating the CPC to issue a decision in that regard. These requirements, which must be conjunctively met, are that the agreement, decision or concerted practice:

- contributes, while allowing consumers a fair share of the resulting benefit, to the improvement of production or distribution of goods or to the promotion of technical or economic progress;
- does not impose, on the undertakings concerned, unnecessary restrictions towards achievement of the above-mentioned purposes; and
- does not afford the undertakings, to which the agreement relates, the possibility to eliminate competition from a substantial part of the market of the product concerned.

4 Industry-specific offences and defences

Are there any industry-specific offences and defences?

Under section 7 of the Law, agreements that refer to salaries and conditions of employment and undertakings that are responsible for the administration of services of general economic interest or that have the nature of a public monopoly are excluded from the prohibition of section 3.

Block exemptions can be granted pursuant to section 5(1), which provides for the issuing of an order by the Council of Ministers to that effect, following a justified opinion by the CPC. Even before the enforcement of the 2008 legislation, under the previous regime, orders covering various industry sectors and providing for exemptions subject to the satisfaction of certain conditions had been enacted. Such exemptions in force at present include, inter alia, the following:

- certain categories of agreements relating to technology-transfer;
- certain categories of agreements relating to research and development;
- certain categories of franchising agreements;
- certain categories of agreements, decisions and concerted practices in the insurance sector;
- certain categories of agreements relating to distribution, service and sale of motor vehicles;
- certain collaborations in relation to technical cooperation in the field of air transport and electronic systems for seat reservations;
- agreements, decisions and concerted practices in relation to the production or trade in agricultural products; and
- conferences in maritime transport.

Moreover, the Cypriot legal order is subject to the provisions of the relevant EU Regulations in force providing for various block exemptions in particular industry sectors.

5 Application of the law

Does the law apply to individuals or corporations or both?

The Law applies to ‘undertakings’, defined under section 2 thereof as including every natural or legal person that exercises economic or commercial activities, irrespective of whether these activities are profitable or not. It also includes every undertaking regulated by private or public law over which the state can have a decisive impact either directly or indirectly by virtue of ownership, economic contribution or the provisions regulating it.

Collaboration between undertakings forming a uniform economic entity, such as between a parent and a subsidiary company that does not enjoy real freedom of determination over its own activities or concerning the allocation of activities between the parent and the subsidiary company, or between two or more subsidiary companies, does not fall under the concept of collaboration prohibited by virtue section 3 of the Law.

6 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction?

The Law applies to actions outside the jurisdiction of Cyprus that have as their object or effect the prevention, restriction or distortion of competition within the Republic.

Moreover, pursuant to the provisions of Regulation 1/2003 and in relation to instances where agreements, decisions by associations of undertakings or concerted practices may affect trade between member states within the meaning of the provisions of article 101 TFEU, the CPC has competence and shall also apply article 101 TFEU to such agreements, decisions or concerted practices. Upon establishing an infringement of article 101 TFEU, the CPC can impose the sanctions provided under section 24 of the Law upon the involved undertakings, which are the same sanctions it is able to impose for infringement of the Law’s provisions under section 3, as discussed above.

Investigation

7 Steps in an investigation

What are the typical steps in an investigation?

The CPC, either acting on its own initiative or following a complaint, will instruct its Service to conduct an investigation on behalf of the CPC if it is of the view that there is a prima facie case. The CPC has the necessary powers to obtain the information or data that will enable the Service to carry out the investigation.

Specifically, for the purposes of its investigations, the CPC is entitled to collect all the necessary information by addressing a relevant written request to undertakings or other natural or legal persons. The request must clearly state the required information, the provisions of the Law or of Regulation 1/2003 upon which the request is based, the grounds for the request, a reasonable time limit for the provision of information (which may not be shorter than 20 days) and the possible sanctions in that event there is no compliance with the obligation to provide information. The addressee of the request is required to provide the requested information in a timely, full and precise manner, unless the provision of the information prejudices any professional or other secret protected by law. The CPC is under a duty to ensure adequate protection for the rights of the undertakings under investigation, in particular as to secrecy and confidentiality of the information provided, and to use the information purely for the purposes of the investigation.

Upon conclusion of the preliminary investigation, the Service will prepare and submit its report to the CPC and the latter, upon establishing the existence of a prima facie infringement, will forward a statement of complaint to the undertakings concerned. The undertaking is also allowed to have full access to the case file and to the documents upon which the CPC will base its case. The formal hearing of the matter proceeds by way of written submissions, while the involved undertakings have a right to appear before the CPC for oral submissions upon obtaining the relevant leave of the CPC to do so.

Upon conclusion of all the procedural stages described, the CPC issues a fully reasoned decision. A decision of the CPC is subject to administrative recourse before the Supreme Court. The decision of the Supreme Court is final.

8 Investigative powers of the authorities

What investigative powers do the authorities have?

The CPC can collect information necessary for the carrying out of its powers under the Law by addressing a written request to this effect to any person. If information is not provided within the specified timeframe or the information is inaccurate or misleading, the CPC may impose monetary fines.

The CPC has the power to make all the necessary inquiries of undertakings or association of undertakings and for this purpose to inspect books and other professional documents, receive copies or extracts of books or professional documents, require on-the-spot oral clarifications and enter all of the offices, premises and means of transportation of the undertakings. The CPC’s request must be in writing and accurately define the subject matter and purpose of the inquiry, fix the date of commencement of the inquiry, state the provision on which the investigative power of the CPC is based and mention the possible sanctions in the event that the undertaking refuses to comply with the request.

The CPC may conduct unannounced visits (dawn raids) to the premises of undertakings in order to obtain information it needs or to follow up a written request for information. Officers of the Service of the CPC conduct such visits following written authorisation by the CPC. The term ‘premises’ is prescribed by the Law to include, inter alia, business premises and vehicles of undertakings. Searches at residential premises can only be carried out upon obtaining a court order.

On arrival at the premises, the investigating officers must show evidence of their identity and authorisation and hand over a notice explaining the subject matter and purpose of the unannounced visit. Undertakings subjected to such visits may consult their lawyers during the visits, but omitting to do so does not invalidate the visit, nor does it constitute a defence for not conforming to the visiting officers' requirements.

The investigating officers have statutory power to enter the premises and can require the undertaking to halt its business or part thereof until completion of the unannounced visit. Once they have gained access, they can require anyone present to produce any documents (and in any form, electronic or otherwise) that they consider is relevant to the subject matter of the investigation. This may include letters, diaries, travel records and other documents, which the officers conducting the visit can copy irrespective of the medium in which these are stored.

The investigating officers can also ask for oral explanations on the spot. A person who receives a request from the CPC to provide information must provide the information within the time limits stipulated in the request and make a full and frank disclosure, unless any rules on privilege apply. In the case of an omission to provide the requested information within the specified time or intentionally or negligently providing inaccurate or misleading information, the CPC has the authority to impose a maximum fine of €85,000 on the concerned undertaking. In addition, the CPC may impose a fine of €17,000 for every day that the said undertaking omits to comply with the CPC's investigative request.

An undertaking that intentionally or negligently produces incomplete books or professional documents, refuses to comply with a request for information by the CPC or destroys, falsifies or withholds books or records shall be liable on conviction to a term of imprisonment not exceeding one year or a fine of up to €85,000, or both.

International cooperation

9 Inter-agency cooperation

Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

The CPC is a member of the European Competition Network (ECN), a network of national competition authorities established to agree on working arrangements and cooperation methods, in keeping with Regulation 1/2003, and to provide an efficient framework for the obligatory and optional information mechanisms. The CPC is also a member of the International Competition Network (ICN) and the European Competition Authorities (ECA).

10 Interplay between jurisdictions

How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

The circumstances where there may be interplay between jurisdictions are those prescribed under the provisions of Regulation 1/2003, when the CPC is applying article 101 (and/or 102) TFEU. Within that context, the CPC can exchange information with the European Commission regarding a matter under investigation, or vice versa. Pursuant to the provisions of Regulation 1/2003, particularly article 11 thereof, the CPC is obliged to cooperate closely with the European Commission when applying EU Competition rules. The CPC is under an obligation to inform the Commission when acting under article 101 or 102 TFEU (or both).

Parallel proceedings in different jurisdictions are also regulated by provisions of Regulation 1/2003. When the CPC and another national competition authority (or more) receive a complaint or are acting on their own initiative under article 101 (or 102) TFEU against the same agreement, decision or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the

proceedings before them or to reject the complaint. When another national competition authority has already dealt with a complaint, the CPC may reject a complaint against the same agreement, decision or concerted practice. The described interplay between jurisdictions ensures that consistency and conformity exists in the application of Community competition rules by national authorities. It ensures that undertakings will be not subject to an abuse of process for the same issue before both the CPC and other competition authorities.

11 Adjudication

How is a cartel matter adjudicated?

A cartel matter is adjudicated by the CPC pursuant to the procedures described in question 7. Upon the conclusion of the investigation, a hearing of the matter takes place before the CPC by way of written submissions. The involved undertakings have a right to appear before the CPC for oral submissions upon obtaining the relevant leave of the CPC to do so.

12 Appeal process

What is the appeal process?

The CPC's decisions may be challenged by means of recourse before the Supreme Court, the rulings of which are final. The party challenging the CPC's decision before the Supreme Court must file such recourse within 75 days of publication of the CPC's decision or of receiving notification of same.

13 Burden of proof

With which party is the burden of proof?

The burden of proof is with the party appealing the decision to the Supreme Court.

Sanctions

14 Criminal sanctions

What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

Any person who omits to comply with or acts contrary to an issued decision of the CPC regarding an infringement of section 3 of the Law, including interim measures, shall commit a criminal offence punishable with imprisonment of up to one year or with a pecuniary penalty not exceeding €430,000, or both.

An undertaking that intentionally or negligently produces incomplete books or professional documents, refuses to comply with a request for information by the CPC or destroys, falsifies or withholds books or records shall be liable on conviction to a term of imprisonment not exceeding one year or a fine of up to €85,000, or both.

Criminal sanctions provided under the Law can be directed not just against the undertaking concerned but also against all members of its board of directors and its managing director.

15 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Upon finding an infringement of section 3 of the Law or article 101 TFEU, or both, the CPC has the power to impose the following sanctions:

- (a) impose an administrative fine, according to the gravity and duration of the infringement, not exceeding 10 per cent of the combined annual revenue of the undertaking concerned or not exceeding 10 per cent of the revenue of every undertaking member of the association of undertakings, in the year within which the infringement took place or in the year that immediately preceded the infringement;

- (b) require that the undertakings or association of undertakings bring the infringement to an end within the set time period and avoid repetition in the future. Where the infringement has been brought to an end before the decision of the CPC, the CPC may condemn the undertakings with a reconnoitring decision;
- (c) impose terms and behaviour or structural remedies, or both, according to the infringement necessary to bring the infringement to an end;
- (d) where the infringement continues by the participating undertakings or association of undertakings, the CPC may impose and administer a fine of up to €85,000 for every day the infringement continues;
- (e) where the Commission intends to adopt a decision requiring that the infringement is brought to an end and the undertakings concerned provide commitments to meet the concerns expressed to them by the CPC in its preliminary assessment, the CPC may decide to make those commitments binding on the undertakings. Such a decision may be adopted for a specific period and shall conclude that there is no longer action by the CPC; and
- (f) in the event of refusal or by negligence of the undertakings or association of undertakings concerned to comply with the measures set by the CPC pursuant to points (b) or (e) above, the CPC may impose an administrative fine up to €85,000 for every day the infringement continues.

16 Civil and administrative sanctions

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Sanctions for cartel activity can be civil and criminal and can be pursued for the same activity under the procedures, conditions and circumstances described above. The CPC is competent to decide which sanctions to pursue.

17 Private damage claims and class actions

Are private damage claims or class actions possible?

A person suffering loss as a result of the conduct of a cartel has a right of action for damages for the losses suffered as a result of the cartel conduct. Such claims can be raised within the context of a civil action before the competent district court in Cyprus. The Law provides that the decision of the CPC finding an infringement of section 3 and therefore the existence of the cartel in relation to which any such claimant intends to claim damages constitutes rebuttable evidence in that regard.

A claimant pursuing damages for loss suffered as a result of a cartel the CPC has adjudicated on may apply to the competent court for an injunction to stop the continuance of such cartel. Class actions are not expressly provided under the Civil Procedure Rules, but any such actions could be joined under leave of the court upon a relevant application.

18 Recent fines and penalties

What recent fines or other penalties are noteworthy? What is the history of fines? How many times have fines been levied? What is the maximum fine possible and how are fines calculated? What is the history of criminal sanctions against individuals?

The CPC has recently been more willing to impose deterrent fines. Section 24(a) of the Law provides that the fines the CPC is empowered to impose shall be imposed according to the gravity and duration of the infringement and shall not exceed 10 per cent of the combined annual revenue of the undertaking, or not exceed 10 per cent of the revenue of every undertaking member of the association of undertakings in the year within which the infringement took place or in the year which immediately preceded the infringement.

In late 2009, the CPC imposed the largest fine in its history in the 'oil companies case', totalling €42,904,000. The said amount is the aggregate of the separate fines imposed on each of the four undertakings that the CPC found to have violated section 3(1)(a) of the Law over both the engagement in a concerted practice between them having as its object the fixing of fuel prices and the conclusion of agreements with their resellers (gas stations) on that basis and with the same object. This violation constituted a serious infringement of competition rules and as such carries monetary fines of the highest levels, within the context of the CPC's competence as such derives by the Law.

Thus far, there have been no instances of criminal sanctions having been pursued against either natural or legal persons.

Sentencing

19 Sentencing guidelines

Do sentencing guidelines exist?

There are no sentencing guidelines in place.

20 Sentencing guidelines and the adjudicator

Are sentencing guidelines binding on the adjudicator?

Not applicable.

21 Leniency and immunity programmes

Is there a leniency or immunity programme?

An immunity and leniency programme exists, outlining the policy and procedures entailed in applying to the CPC for immunity from fines and reduction of fines in cartel cases. The programme, waiting to be enforced as secondary legislation pursuant to the provisions of the Law, is based on the assumption that some undertakings that participate in cartels wish to end their participation and provide evidence for its existence and operation, but are concerned over the sanctions they will suffer. As per the CPC's latest Annual Report, it considers that 'rewarding' these undertakings is necessary in the public interest and that it will urge them to cooperate with the CPC and contribute to the investigation and establishment of an anti-competitive practice. At the time of writing the programme had not yet been enforced, but is expected to be in place during 2011.

22 Elements of a leniency or immunity programme

What are the basic elements of a leniency or immunity programme?

The leniency programme awaiting enforcement (see question 21) is largely based on the European Competition Network Model Leniency Programme. Subject to the requirements set in the final enforced text of the programme, the CPC is expected to be able to grant immunity if the applicant is the first to come forward and submit evidence that, in the CPC's view, may enable it to find an infringement in connection with an alleged cartel within the legislative provisions.

Reduction of the fine that would normally be imposed upon the applicant should a cartel be found to exist should also be expected, varying according to the time of each applicant's contact and provision of evidence to the CPC. However, nothing in the programme should be expected to affect the discretion of the CPC in the exercise of its competence.

23 First in

What is the importance of being 'first in' to cooperate?

See questions 21 and 22.

24 Going in second

What is the importance of going in second? Is there an 'immunity plus' or 'amnesty plus' option?

See questions 21 and 22.

25 Approaching the authorities

What is the best time to approach the authorities when seeking leniency or immunity?

See questions 21 and 22.

26 Confidentiality

What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

See questions 21 and 22.

27 Successful leniency or immunity applicant

What is needed to be a successful leniency or immunity applicant?

See questions 21 and 22.

28 Plea bargains

Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

There are no express settlement or plea bargaining procedures provided for in the Law. However, it lies with the CPC's discretionary powers to examine mitigating arguments prior to the imposition of any penalty. Moreover, pursuant to the legislative provisions and in relation to associations of undertakings, the CPC will not require payment from a participating undertaking that is able to evidence that it did not implement the decision of the association that was found in breach of the Law and that it was not aware of the existence of such infringement or that they distanced themselves actively from the association prior to the commencement of the CPC investigation.

29 Corporate defendant and employees

What is the effect of leniency or immunity granted to a corporate defendant on its employees?

See questions 21 and 22.

Update and trends

The CPC has recently demonstrated an increased willingness to thoroughly investigate, identify and punish cartels among undertakings. Its fine in the 'oil companies case' totalling €42,904,000, and other decisions such as the one against the Association of Porters with a fine of €250,000, highlight the CPC's aggressive approach in eliminating cartels. It has also recently found a prima facie case regarding the existence of a cartel in the milk industry and a relevant decision might establish the existence of yet another large-scale cartel.

30 Cooperation

What guarantee of leniency or immunity exists if a party cooperates?

See questions 21 and 22. It is expected that the CPC will widely implement its leniency programme to cooperating undertakings.

31 Dealing with the enforcement agency

What are the practical steps in dealing with the enforcement agency?

See questions 21 and 22.

32 Ongoing policy assessments and reviews

Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

The leniency policy of the CPC has been prepared to become secondary legislation and its enforcement is expected during 2011.

Defending a case**33 Representation**

May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

Legal counsel can act for the undertaking as well as its employees and officers. There is no requirement for separate legal representation.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants?

Legal counsel may act for multiple corporate defendants provided that all such defendants agree to single representation and authorise such qualified counsel to represent them.



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35 Payment of legal costs

May a corporation pay the legal costs of and penalties imposed on its employees?

An undertaking can pay the legal costs and fines of its officers and employees.

36 Getting the fine down

What is the optimal way in which to get the fine down?

It would seem that the CPC's approach and policy encourages cooperation on behalf of undertakings. Thus, the optimal way of getting the fine down is to cooperate to the largest possible extent with the CPC and make full disclosure during its investigation. The leniency programme shall also provide ways to reduce a potential fine; see questions 21, 22 and 28.

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