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WESTERN EUROPE
AND THE USA



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CYP/C
Cyprus/Commentary

by

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CYP/C

1 Introduction

Cyprus first enacted legislation for the protection of competition in 1983, with the adoption of the Competition Law, Law 63/1983. The necessity to enact this legislation, apart from being market driven, was imposed by the commitment undertaken by Cyprus towards the then European Economic Community in a two-phase Association Agreement concluded on 19 December 1972, the purpose of which was to consolidate and promote trade and economic relations between Cyprus and the European Economic Community. The 1983 Law was replaced by the Protection of Competition Law, Law 207(I) of 1989, which was in turn replaced by the recently enacted Law for the Protection of Competition 13(I) of 2008 (the ‘Competition Law’). Today, the Competition Law, together with the Control of Concentrations between Enterprises Law, Law 22(I) of 1999 (the ‘Control of Concentrations Law’) form the framework of rules and principles underlying the protection of effective competition within the Cypriot market.

1.1 Competition Law

The laws of Cyprus are today fully aligned with EU legislation. More specifically, the Competition Law transposes all the relevant provisions of EC Regulation 1/2003, and re-establishes the Commission for the Protection of Competition (the ‘CPC’) which was first established in 1990, as the supervisory authority with exclusive competence for enforcing Articles 81 and 82 EC and Regulation 1/2003. The CPC controls restrictive practices and practices of undertakings, abuse of a dominant position and the control of concentrations. Recent years have witnessed a dramatic surge of investigations conducted by the CPC, the vast majority of which concern section 6 of the Competition Law which relates to abuse of a dominant position. Recently one of the largest awards for a Cypriot competition law case was awarded in the collusion of four oil companies which were found to violate section 3(1)(a) of the Competition Law.

In accordance with section 3(1) of the Competition Law all agreements between undertakings, decisions by association of undertakings and concerted practices that have as an object or effect the prevention, restriction or distortion of competition within Cyprus are prohibited and particularly those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, market, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by other parties, of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Section 4(1) of the Competition Law allows for a proviso that an agreement, decision and concerted practice caught by section 3(1) may nevertheless be permissible if it satisfies the following conditions:

- (a) it contributes to the reasonable participation of the consumers, in the resulting benefit, in the development of production or distribution of goods, or in the promotion of technical or financial development;
- (b) it does not impose restrictions on the undertakings concerned unless they are absolutely necessary for the achievement of the above-mentioned purposes; and

(c) it does not afford the undertakings to which the agreement relates the possibility to eliminate competition from a substantial part of the market product concerned. The Cypriot legislation closely mirrors its European counterpart with the prohibition on cartels in section 3(1) emanating from Article 81(1) of the EC Treaty which prohibits agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition and the exemptions from this general prohibition in section 4(1) emanating from Article 83(1) of the Treaty.

1.2 Merger Control

The Control of Concentrations Law which is based on EC Regulation 4064/89 entered into force on 19 March 1999 and was amended by Laws 107(1)/99 and 54(1)/2000. It aims to control concentrations of undertakings and in particular to prevent those concentrations which create a dominant position in the market and deter effective competition in the relevant sectors. The term ‘control’ means any rights arising from laws or contracts that entitle a legal or natural person to exert a decisive influence over the activity of the undertaking, including ownership or the right to use all or part of the assets of the undertaking and other rights that confer a decisive influence on the decision-making or the composition of an undertaking’s managing bodies.

All concentrations of undertakings exceeding the turnover thresholds defined below must be notified to and receive approval from the CPC (note that the CPC has the right to control concentrations that fall below the following indicated turnover thresholds and the Minister of Commerce, Industry and Tourism may also declare a concentration by Order):

- (a) the aggregate turnover achieved by at least two of the participating enterprises exceeds, in relation to each one of them, EUR 3,417,200; and
- (b) at least one of the participating enterprises engages in commercial activities within Cyprus; and
- (c) at least EUR 3,417,200 out of the aggregate turnover of all the participating enterprises relate to the disposal of goods or the supply of services within Cyprus.

Omitting to notify a concentration may attract a fine of up to EUR 85,430 and an additional fine of EUR 8,543 for each day the infringement continues.

The Competition Law has abolished the pre-existing system of individual exemptions. Block exemptions are available pursuant to section 5(1), which provides for Orders being issued by the Council of Ministers. Specifically, section 5(1) provides that the Council of Ministers, following a previous reasoned opinion of the Commission, may issue an Order published in the Official Gazette of the Republic, exempting the application of section 3 to certain categories of agreements. Section 5(2) provides that in the case of practices for which the national legislation and not the community law on competition is applied, the Regulation issued pursuant to Article 81(3) EC will be applied proportionately, as long as it does not come in conflict with an Order issued on the basis of section 5(1) of the State Aid Laws (as defined below).

1.3 Other Competition Law Provisions

Other competition law provisions may be found in (a) the Companies Law, Cap. 113 of the Cypriot Law (the ‘Companies Law’) which was amended in 2008 in order to transpose the provisions of Directive 2005/56/EC on cross-border mergers of limited liability companies and (b) in the State Aid Control Laws of 2001 to 2007 (the ‘State Aid Laws’).

Section 201(I) of the Companies Law provides that a cross-border merger of limited liability companies is the merger of limited liability companies incorporated in accordance with the legislation of a Member State, having their registered office, central

administration or main place of establishment within the Community, on the condition that at least two of these companies are regulated by the laws of different Member States. It goes on to define a merger as an operation whereby:

- (a) one or more limited liability companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company (the acquiring company) in exchange for the issue to their members of securities or shares representing the capital of that acquiring company and, if applicable, a cash payment not exceeding 10% of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares; or
- (b) two or more limited liability companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another limited liability company that they form (the new company) in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a cash payment not exceeding 10% of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares; or
- (c) a limited liability company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the limited liability company holding all the securities or shares representing its capital.

Competition law provisions can also be found in the State Aid Laws of 2001 to 2007, the objective of which is to ensure that government interventions do not distort competition and trade inside Cyprus. While it is generally accepted that Member States of the EU grant financial aid to their industries as an important means to achieve certain economic and social objectives, such aid is also susceptible to cause distortion to competition and must therefore be regulated. The State Aid Laws establish the office of the Commissioner for State Aid Control. The Commissioner is an independent official, appointed by the Council of Ministers whose competencies include the control of state aid in all economic sectors. Authorities or governmental bodies intending to grant any type of aid must follow a notification procedure to the Commissioner and obtain approval in order to grant aid. Where a draft aid measure falls within the provisions of a block exemption regulation, the Commissioner issues a legally binding decision on such a measure's compatibility with the said provisions, which is then published in the Official Gazette of the Republic of Cyprus.

2 Institutions and Organs Responsible for Enforcement

The enforcement of competition laws and particularly the Competition Law in Cyprus is principally achieved by the CPC and the Commissioner for State Aid Control is responsible for enforcement of the State Aid Laws.

2.1 The CPC

The CPC was first established in 1990 by the Protection of Competition Law, Law 207/89 and was subsequently confirmed and re-established by the Competition Law as the watchdog responsible for protecting the effective operation of competition within the internal market. The CPC is an independent administrative authority whose wide-ranging competencies are set out in the Competition Law. These competencies include the investigation of restrictive practices, abuse of a dominant position and the control of concentrations between undertakings.

Specifically, the CPC has the exclusive competence to:

- (a) investigate and take decisions on the infringement of sections 3 and/or 6 of the Competition Law and of Articles 81 and/or 82 of the EC Treaty;
- (b) decide whether all the conditions of section 4 of the Competition Law are met so that an agreement, decision and concerted practice which falls under section 3(1) of the Competition Law is valid;
- (c) decide whether all the conditions of Articles 81(3) of the Treaty are met so that an agreement, decision and concerted practice which falls under Article 81 of the Treaty is valid;
- (d) decide whether the concerted practice for which an Order has been requested pursuant to section 5(1) of the Competition Law, falls within the category of the concerted practices provided for in the Order, thus rendering inapplicable section 3 of the Competition Law;
- (e) decide whether the concerted practice for which there is an invocation of the Community Regulation, pursuant to section 5(2) of the Competition Law, falls within the category of the concerted practices provided for in the Community Regulation;
- (f) impose administrative fines and other sanctions;
- (g) decide on interim measures;
- (h) recall the benefit of the application of the Community Exemption issued by the European Commission with respect to the specific concerted practice, where it concerns the geographical market of Cyprus;
- (i) issue press releases to inform anyone who is interested on its competencies; and
- (j) issue informal, non-binding guidance to public bodies about its competencies and powers.

Investigations may be initiated either following receipt of a complaint or on the own initiative of the CPC. While exercising its investigative competencies, the CPC has an array of powers under sections 31 and 32 of the Competition Law including the following:

- (a) to collect all necessary information, documents or other material by a written request, from the undertakings or other natural or legal persons;
- (b) to enter business premises, land and means of transport of the undertakings (no court order required);
- (c) to examine the books and other records related to the business, irrespective of the medium on which they are stored during unannounced raids;
- (d) to take or obtain in any form copies from such books or records during unannounced raids;
- (e) to seal any business premises and books or records for the period and to the extent necessary for the unannounced raid;
- (f) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers; and
- (g) to enter any premise or means of transport other than those mentioned in section 31 above or residence after obtaining a Court Order.

The CPC for every infringement of sections 3 and/or 6 of the Competition Law and of Articles 81 and/or 82 of the EC Treaty, has the power to impose the following measures:

- (a) impose an administrative fine according to the gravity and duration of the infringement, not exceeding 10% of the combined annual revenue of the undertaking, or not exceeding 10% 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;
- (b) require that the undertakings or association of undertakings bring the infringement to an end within a set time period and avoid repetition in the future;
- (c) impose terms and behaviour and /or structural remedies, as relevant to the infringement;

- (d) where the infringement continues by the participated undertakings or association of undertakings, the CPC may impose and administrate fine up to EUR 85,000 for every day the infringement continues;
- (e) where the CNC intends to adopt a decision requiring that the infringement is brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the CPC in its preliminary assessment, the CPC may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specific period and may conclude that action is no longer required by the CPC;
- (f) where an undertaking refuses to comply with the measures set by the CPC pursuant to subsections (b) or (e) above, the CPC may impose an administrative fine of up to EUR 85,000 for every day the infringement continues.

The CPC has the power to reduce or retract fines for cooperating companies. The CPC may also grant immunity where an applicant submits evidence which in the CPC's view enables it to uncover an infringement of the Competition Law. The immunity conditions are that the applicant must come forward before the CPC has gathered sufficient evidence to reach a preliminary finding that there has been an infringement of section 3 of the Competition Law, the claimant must take effective steps to terminate its participation in the illegal activity and must do nothing to alert its former associates that it has applied for immunity. Moreover, the claimant must not have acted as the instigator or have played the lead role in the illegal activity and finally, must provide complete and timely cooperation.

The CPC is composed of a Chairman and four members and is assisted by the Service of the CPC, which on the basis of the CPC's instructions is competent to investigate cases and determine whether there has been an infringement of the Competition Law. The Service is responsible for carrying out duties of secretariat to the CPC, collecting all the necessary information in order for the CPC to exercise its competencies, holding unannounced, on-the-spot investigations in the premises of undertakings under investigation, submitting complaints and proposals to the CPC, proceeding with the necessary notifications and publications, evaluating notified concentrations on the basis of the Control of Concentrations of Enterprises of Laws 1999 and 2000 and preparing written reports and generally providing the CPC with all the means to effectively achieve its competencies, powers and duties.

The Service consists of the Senior Officer and the Officers, Administrative Officer, Accountant, the Secretarial and Auxiliary Personnel. All of the members of personnel of the Service are members of the public service and they are appointed pursuant to the Public Service Law. One from the members of the CPC Service acts as Secretary to the Commission.

The decisions of the CPC may be appealed to the Supreme Court of Justice pursuant to section 146(1) of the Constitution of the Republic of Cyprus which provides that the Supreme Court has exclusive jurisdiction to review decisions, acts, or omissions of any organ, authority, or person, exercising any executive or administrative authority as being contrary to any of the provisions of the Constitution or of any law or made in excess of, or in abuse of powers vested in such organ, authority or person.

The CPC cooperates with a number of national and supranational authorities in order to effectively perform its duties including the Office of the Regulator of Telecommunications and Postal Services, the Energy Regulatory Authority and the Association for the Protection of Consumers. On a supranational level, the CNC works closely with the competition authorities of all the EU Member States as well as the Directorate-General of Competition of the European Commission.

The commission is an active member of the European Competition Network. Representatives of the commission participate in meetings of the plenary of the European Competition Network and in meetings of various working groups. The commission is a member of the European Competition Authorities, which constitutes an informal network of cooperation of national competition authorities of the single economic area.

On a European level, the CPC works closely with all the competition authorities in the European Union as foreseen in Regulation 1/2003. The framework for such cooperation, the network of European competition authorities was established to agree on working arrangements and cooperation methods, and to provide an efficient and uniform EU framework for competition law enforcement; ensuring thus that the same rules are applied consistently throughout the EU. Cyprus also cooperates with the European Competition Authorities which is a forum for discussion of the competition authorities of the European Economic Area and is particularly resourceful where multi-jurisdictional mergers (i.e., mergers which must be notified in more than one Member State) are concerned.

On an international level, the CPC has been a member of the International Competition Network ('ICN') since 2002. The ICN was established in October 2001 and its principal aim is to provide antitrust agencies with a focused network for addressing practical antitrust enforcement and policy issues of common concern.

2.2 The Commissioner for State Aid Control

The office for the Commissioner for State Aid Control was established in 2001 following the enactment of the Public Aid Control Law of 2001 with a view to monitoring the effective implementation of state aid rules in Cyprus and providing a framework for the ex-ante control of state aid.

The Commissioner for State Aid Control is an independent government official who is appointed by the Council of Ministers in consultation with the Parliamentary Committee on European Affairs, and his tenure of office is six years. The Commissioner's role in state aid policy is provided for in the State Aid Laws. More specifically, the competencies and powers of the Commissioner in accordance with the State Aid Laws are as follows:

- (a) to examine and issue legally binding decisions on the compatibility with state aid rules of draft aid measures granted on the basis of the block exemption regulations; that is, aid for small and medium-sized enterprises, employment and training programs;
- (b) to carry out a preliminary assessment and issue non-binding reasoned opinions on the compatibility with state aid rules of all other draft aid measures;
- (c) to apply the provisions of Council Regulation (EC) No. 659/1999 and the implementing provisions adopted by the European Commission according to Article 27 of the Regulation;
- (d) to monitor the implementation and the final impact of all aid granted;
- (e) to collect progress reports from all aid granting authorities in order to monitor the implementation and the final impact of all aid granted;
- (f) to submit to the European Commission all information required including information regarding state aid granted in Cyprus;
- (g) to collect, compile and monitor all information concerning state aid;
- (h) to prepare and keep an up-to-date inventory of all state aid schemes/ad hoc measures, as well as an up-to-date central inventory on de minimis aid;
- (i) to train all aid granting authorities and other parties involved on state aid matters;
- (j) to prepare and submit to the President of Cyprus an annual report on the exercise of the Commissioner's duties and responsibilities, with recommendations, as well as an Annual Statistical Survey regarding all state aid granted in Cyprus; and
- (k) to represent 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 Commissioner works closely with the European Institute of Public Administration in Maastricht, a European think tank and resource centre providing relevant services to develop the capacities of public officials in dealing with EU affairs, as well as with the Directorate-General of Competition of the European Commission.

As with the CPC, the decisions of the Commissioner for State Aid Control may be appealed to the Supreme Court of Justice.

3 Anticompetitive Agreements, Decisions and Concerted Practices

Section 3(1) of the Competition Law, is the counterpart of Article 81 EC and reflects its provisions by providing for the prohibition of agreements between undertakings, decisions or concerted practices which have as an object or effect the prevention, restriction or distortion of competition in Cyprus. Specifically, section 3(1) of the Competition Law provides that all agreements between undertakings, decisions by associations of undertakings and concerted practices that have as an object or effect the prevention, restriction or distortion of competition within Cyprus are prohibited and particularly those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, market, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by other parties, of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Section 4(1) of the Competition Law allows for a proviso that an agreement, decision and concerted practice caught by section 3(1) may nevertheless be permissible if it satisfies the following conditions:

- (a) it contributes, with the reasonable participation of the consumers, in the resulting benefit, in the development of production or distribution of goods or in the promotion of technical or financial development;
- (b) it does not impose restrictions on the undertakings concerned unless they are absolutely necessary for the achievement of the above-mentioned purposes; and
- (c) it does not afford the undertakings, to which the agreement relates, the possibility to eliminate competition from a substantial part of the market product concerned.

Where the CPC decides that an agreement, decision and/or concerted practice does not fulfil the conditions set in section 4(1), above, then the agreement, decision and/or concerted practice is illegal and void pursuant to section 3 of the Competition Law.

4 Abuse of Dominant Position

The first paragraph of Article 82 EC sets out the prohibition of abuse of a dominant position within the common market affecting trade between Member States. Section 6 of the Competition Law is the corresponding provision of Article 82 EC regulating ‘*Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.*’ The second paragraph contains a list of examples of abusive practices which are:

- (a) directly or indirectly imposing unfair selling prices or unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;

- (c) applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage; and/or
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of such contracts.

It is clear that it is not market dominance as such that is prohibited, but its abuse. The abuse of dominant position may be of a single company or a collective dominant position, held by several companies.

The fine imposed by the CPC depends on the magnitude of the violation under section 3 or section 6 and length of the violation¹ with a maximum fine of up to 10% of the infringer's total turnover in the last fiscal year.² Prior to the imposition of any fines, the CPC will notify the enterprises of its intention to impose a fine together with its reasons, while giving the enterprises thirty days from the date of notice to submit their objections to the claims of the CPC and the fine.³

In 2000,⁴ upon publication of its financial statements, the CPC instructed its Service to initiate an investigation into the Cyprus Telecommunication Authority ('CYTA'), a monopolist in the telecommunications sector at the time, in relation to a possible infringement of section 6 of the Competition Law. The CPC examined the following:

- (a) whether the pricing practice and policy that CYTA followed during the period from July 2000 until the initiation of the investigation contradicted the provision of section 6 of the Competition Law; and
- (b) if so, whether the CPC had jurisdiction to examine the practice of CYTA which was granted special and exclusive rights contrary to the rules of competition, by virtue of Law 87(I)/2000.

The CPC ruled that CYTA had accumulated excessive profits for the year 2001 due to its excessive pricing practices while it could have fulfilled the task it was assigned without violating section 6 of the Competition Law. The CPC in its decision illustrated the importance of the competition rules and principles over other laws of Cyprus by expressing that it was immaterial that CYTA's pricing policy had received approval from parliament by virtue of Law 87(I)/2000 and it should have submitted proposals to amend the charges and do everything necessary to comply with the competition rules and principles.

Following public consultations and public hearings, Cyprus undertook all necessary initiatives in order to complete the liberalization process in the telecommunications sector and the harmonization with the *acquis communautaire* within the period of 2002 and 2003. Primarily, the procedure was instituted by the establishment of the Office of the Commissioner of Telecommunications and Postal Regulation (the 'OCTPR') in 2002 under Act 19(I)/2002. This was followed by the issuance of legislative regulations and orders leading to full harmonization with the applicable regulatory framework regarding telecommunications

In 2004,⁵ CYTA was once again in the spotlight when the OCTPR notified the CPC of a possible infringement by CYTA of section 6 of the Competition Law. The OCTPR claimed that CYTA was liable for price squeezing in the market in providing for internet services and CYTA's action placed the company TelePassport Telecommunications Limited at a disadvantageous position with regards to competition. Around the same time as the above investigation, Callsat Telecom Limited filed a complaint against CYTA for abuse of dominant position. The CPC, after examining the complaint decided it raised similar issues and queries to that of TelePassport Telecommunications Limited.

1. The turnover calculated within the year the violation took place or within the previous year.

2. Section 24 of the Competition Law.

3. Section 42(2) of the Competition Law.

4. Case No. 8/20022-27.8.2002.

5. Case No. 11.17.25/2004.

The CPC invited CYTA to attend a meeting with the CPC, together with TelePassport Telecommunications Limited and Callsat Telecom Limited as interested parties.

The CPC instructed its Service to conduct an in-depth investigation on the legal aspects of the case. In a meeting held after its Service issued a report and upon taking into account all written and oral views of CYTA and the interested parties, the CPC decided that CYTA was liable for price squeezing as it provided its competitors a product at a high price and in contrast provided its customers the final product in the retail market at a lower price. Further, the CPC concluded that the price CYTA charged its competitors was excessive, resulting in a violation of section 6(2)(a) of the Competition Law. This case will be examined further under the heading of Leniency Policy in this article.

5 Mergers and Joint Ventures

5.1 Merger Control

Joint ventures, mergers and acquisitions may be caught by the Control of Concentrations Law when two elements exist:

- (i) a concentration of enterprises; and
- (ii) the concentration is of major importance.

A concentration⁶ exists upon:

- (a) the merger of two or more previously independent undertakings; or
- (b) the acquisition of direct or indirect control whether by the share capital or assets by contract or other arrangement of the whole or parts of one or more other undertakings; or
- (c) the establishment of a joint venture fulfilling all the functions of an autonomous economic entity on a permanent basis.

The CPC must be notified within one week from the date of conclusion of the agreement or the publication of the relevant offer or the purchase or exchange of the controlling interest, whichever occurs first. If the concentration is declared to be of major importance by a ministerial order the concentration must be notified from the date the relevant order is notified.

5.2 Joint Ventures

A concentrative joint venture will arise if the following conditions are met, expanded by the CPC in Decision 12/2008 on the concentration between Alenia Aeronautical S.p.A., OAO Sukhoi Company and Sukhoi Design Bureau ('Decision 12/2008'):

- (a) There is *joint control* from the parent companies of the joint venture company with each exercising decisive influence. Joint Control⁷ does not mean a situation of two parent company shareholders, each having sole control of over 50% of the share capital of the joint venture company but rather each of them having joint control over the entire share capital of the joint venture company with any change to this meaning that the joint venture no longer exists. The CPC established the expanded notion of joint control in Decision 12/2008 by determining that the minority shareholder of the joint venture company had an effective veto on decisions (or enhanced voting right).

6. Section 4(1) of the Law.

7. Control is defined by s. 4(3) of the Law.

- (b) The joint venture company is *autonomous*. In Decision 12/2008 the CPC concluded that due to the joint venture company having its own management staff, production staff, trading staff and sales staff it was an autonomous entity. On this point the CPC sought guidance from European Commission announcement.⁸ In this announcement the European Commission determined that in order for a joint venture to be autonomous *'it must operate on a market, performing the functions normally carried out by undertakings operating in the same market. In order to do so the joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff and assets (tangible and intangible) in order to conduct on a lasting basis its business activities within the area provided for in the joint venture agreement.'*
- (c) The joint venture company must be established on a *permanent basis*. The CPC looked at the vast operations that were being entrusted to the joint venture company by the parent companies such as the design, development production, selling of the goods and provision of services after the sale of the goods and concluded that the joint venture company formed for a permanent basis.

It must be noted that if the joint control in the joint venture company shifts to a structure of sole control by the acquisition of all of the shares from one of the parent companies, a concentration under the Control of Concentrations Law could exist. It may be concluded that a concentration does not exist at the time the entity is under joint control but may be found to exist upon a shift from joint control to sole control as in decision 134/2008. In this case the CPC established the existence of a concentration after the acquisition of Sony Optiarc by Sony Corporation which was previously under the joint control with NEC Corporation.

5.3 Mergers and Acquisitions

The Companies Law permits two or more companies registered in Cyprus to merge. In determining whether a concentration of major importance exists in the case of a merger of two previously independent undertakings, it is the merging companies that will be under examination by the CPC and not the new entity formed as a result of the merger.

Law 186(I)/2007 inserted in the Companies Law facilitates cross-border mergers with Cypriot companies bringing the same in line with the provisions of Directive 2005/56/EC on cross-border mergers of limited liability companies. Further, Law 98(I)/2006 also inserted in the Companies Law now gives the option to public companies to convert into a *Societas Europaea* (SE) with merger being one of the four ways to achieve this. The rules and procedures under the Control of Concentrations Law also apply to cross-border mergers and *Societas Europaea*, since no special rules or notification periods apply to these new types of mergers.

Acquisitions can take place either by the acquisition of sole control or the acquisition of joint control. The most common types of acquisitions which may be caught by the Control of Concentrations Law are:

- (a) Acquiring sole control of a whole company. In this instance in order to determine whether the concentration is of major importance, the CPC will investigate both the acquiring and acquired company.
- (b) Acquiring sole control of part of a company. This usually takes place when one company acquires sole control of some of the subsidiaries of another company. The acquiring company and only the parts of the company (subsidiaries) being acquired will be investigated by the CPC.

8. Commission Notice of 2 Mar. 1998 on the concept of full-function joint ventures under Council Regulation 4064/89 on the control of concentrations between undertakings ([1998] O.J. C66/1).

(c) Acquiring joint control of a pre-existing company which will include two or more acquiring companies being investigated as well as the acquired company. Public take over bids, now possible in accordance with Law 44(I)/2007 are also captured by the notification requirement under the Control of Concentrations Law with no special rules or different notification periods applicable.

5.4 Concentrations of Major Importance

A concentration will be deemed to be of major importance under the Control of Concentrations Law, thus requiring notification and approval by the CPC prior to being implemented if all of the following thresholds have been satisfied:⁹

- (a) the worldwide aggregate turnover¹⁰ achieved by at least two of the enterprises exceeds, in relation to each one of them, approximately EUR 3,417,200;
- (b) at least one of the enterprises engages in commercial activities within the Republic of Cyprus; and
- (c) at least EUR 3,417,200 of the aggregate turnover of all the participating enterprises concerns the disposal of goods or the supply of services within the Republic of Cyprus.

Therefore, if in conjunction with (a) above, at least one of the enterprises conducts activities (the disposal of goods or the supply of services) in Cyprus with a turnover in excess of EUR 3,417,200, the concentration is deemed to be of major importance and is subject to notification to the CPC.

According to schedule II of the Control of Concentrations Law, the thresholds apply to:

- (a) the enterprises participating in the concentration;
- (b) enterprises in which the enterprises participating in the concentration hold, directly or indirectly:
 - (i) more than half of the capital or business assets; or
 - (ii) more than half of the voting rights; or
 - (iii) the power to appoint more than half of the members of the supervisory or administrative board or the bodies which legally represent the enterprise concerned; or
 - (iv) the right to manage the affairs of the enterprise;
- (c) the enterprises which hold in a participating enterprise the right or powers referred to in subparagraph (b) of this paragraph;
- (d) the enterprises in which an enterprise referred to in subparagraph (c) of this paragraph holds the rights or powers referred to in subparagraph (b) of this paragraph; and
- (e) the enterprises in which more than one enterprise as referred to in subparagraphs (a) to (d) of this paragraph holds jointly the rights or powers referred to in subparagraph (b) of this paragraph.

According to section 4(5) of the Control of Concentrations Law the following are not classified as concentrations, therefore no notification requirement exists:

- (a) the holding on a temporary basis of securities acquired for resale, by credit institutions, financial institutions or insurance companies, the normal activities of which include transactions and dealings in securities either for their own account or on behalf of a third party. This is subject to the condition that such institutions do not exercise voting rights in respect of the securities held, with the intention of determining the competitive behaviour of the said enterprise and that any rights held are

9. Section 3 of the Law. It should be noted that the Council of Ministers may rule that a concentration is of major importance without the elements of 'major importance' existing.

10. The aggregate turnover is based on the preceding financial year and relates to the ordinary business of each enterprise after deducting discounts, VAT and other taxes.

exercised only with the intention of disposing of all or part of the enterprise in question, or of its assets or its securities. The disposal of such securities must take place within a year of the date of the acquisition;

- (b) the same actions referred to above, as undertaken by investment companies;
- (c) control exercised by a liquidator, trustee in bankruptcy or similar office-holder appointed under relevant legislation;
- (d) property transferred in accordance with a will or intestate devolution;
- (e) a concentration that takes place between two or more enterprises, each of which is a subsidiary of the same enterprise; and
- (f) an acquisition of control of an enterprise from another, which takes place by stages over a period exceeding four years.

The CPC may impose a fine of up to EUR 85,000 for failing to file the relevant notification plus an additional fine of up to EUR 8,543 for each day that the violation continues. Failure to provide information to the CPC is punishable with a fine of up to EUR 51,260 and a fine of up to EUR 85,430 for providing misleading information to the CPC.

In Decision 9/2008 relating to the concentration of Netmed NV and Intervision Services B.V, the CPC required guidance on how the geographic region of turnover should be determined and received such guidance from an announcement¹¹ of the European Commission. The European Commission in its announcement concluded that in order to trace the geographic region of the turnover, the place where the customer was at the time the transaction took place, was the key.

6 Enforcement & Judicial Review

6.1 Control of Concentrations Law

As mentioned above, a concentration captured by the Control of Concentrations Law must be notified within one week from the conclusion of the relevant agreement or the publication of the relevant offer of purchase or exchange or the acquisition of a controlling interest, whichever occurs first.

According to schedule III of the Control of Concentrations Law, the parties must submit:

- (a) a copy of all final or most recent documents which brought about the concentration;
- (b) in the case of a public tender, such documents;
- (c) copies of the most recent annual reports and audited financial reports of all enterprises participating in the concentration; and
- (d) copies of reports or analyses prepared for the purpose of the concentration.

Once the Service has received the above information it will proceed to prepare a report for its consideration by the CPC. The CPC may, within one month from the date of receipt of the notification or from the date on which the Service receives the additional information necessary to secure compliance with the requirements of schedule III, decide that the notified concentration does not fall within the scope of the Control of Concentrations Law or, despite falling within the scope does not raise serious doubts as to its compatibility with the competitive market. The time-limit of this first phase may be extended by fourteen days due to exceptional volume or complexity of the information forwarded to the Service.¹² If the CPC ascertains that the particular concentration falls within the scope of the Control of Concentrations Law and raises serious doubts as to its

11. OJ C 66, 02.03.1998 P25.

12. Section 21 of the Control of Concentrations Law.

compatibility with the competitive market, the CPC will proceed to lodge a full-fledged investigation.

The full investigation must be completed within three months from the date of compliance with the requirements of schedule III of the Control of Concentrations Law. The CPC has one month thereafter to declare either that the concentration is compatible with the competitive market or that the concentration is incompatible with the competitive market. If any delays are caused during this second phase due to an omission on behalf of any of the participants in the concentration or any representative of theirs, then the CPC shall be entitled to extend the time-limit in order to fulfil its obligations under this second phase.¹³

The concentration cannot be completed until the CPC has provided clearance that the concentration is compatible with the competitive market. However, section 33 of the Control of Concentrations Law enables the CPC to grant temporary approval if the applicants can prove to the CPC that they will suffer serious loss from any further delays caused in implementing the concentration. In accordance with this section 33, the CPC has the right to grant such temporary approval subject to any conditions which the CPC may deem necessary.

In cases of acquisitions, the acquiring entity, that is, the person or enterprise acquiring control is responsible to notify the Service. In cases of joint ventures or a merger of two or more companies which were previously independent, the notification must be submitted either solely by either party or jointly. After the Service of the CPC receives notification of a concentration, a relevant announcement is made in the Official Gazette of Cyprus indicating the names of the participants, the nature of the concentration and the economic sectors involved. The Service will not include information in its notice which may detrimentally affect the business secrets of the affected enterprises. If the notifying parties have marked documents or information included in the notification as confidential and the reasons justifying such confidentiality, the Service must, upon confirming that the reasons are justifiable treat the documents or information as confidential.¹⁴

The notifying parties are not permitted to access the CPC's files or evidence collected on the matter. Permission will be granted to the notifying parties, if and once an application for annulment of the CPC's decision is filed with the Supreme Court of Cyprus. Here, the notifying parties will apply to the Attorney-General of Cyprus requesting that the documents and evidence held by the CPC be released and the department of the Attorney-General will then proceed to request the documents from the CPC. The CPC will not release information or documents relating to the competitive effect of the concentration furnished on a confidential basis by third parties with a legitimate interest and will aim at protecting business or trade secrets of any interested party prior to releasing documents to the notifying parties.

The officers of the Service and other public servants are bound by a strict duty of confidentiality in relation to information concerning the concentration received directly or indirectly in accordance with the Control of Concentrations Law with any such breach of duty being punishable by a maximum of six months imprisonment or a fine of EUR 1,710 or a combination of both penalties.¹⁵

6.2 Competition Law

Investigations for violations under the Competition Law commence either on the basis of complaints made by a natural or legal person with a legitimate interest submitted to the

13. Section 39 of the Control of Concentrations Law.

14. Schedule III of the Control of Concentrations Law.

15. Section 51 of the Control of Concentrations Law. Information and documents may only be released to persons by such officers if deemed necessary for the due execution of service duties.

CPC or ex-officio. Complaints submitted to the CPC must be in writing and contain all necessary information¹⁶ duly executed by the complainant, the complainant's lawyer or an authorized representative of the complainant. The CPC will instruct the Service to conduct a preliminary investigation of the suspected infringement referred to in the complaint. In cases where the CPC decides not to proceed with an investigation due to the fact that the complaint lodged does not fall within the scope of the Competition Law and/ or there is no reasonable ground for suspected infringement of the Competition Law based on the information furnished to it, then the CPC must issue a relevant decision including its reasoning for reaching such decision.

Under the Competition Law, the officers of the Service and of the CPC have an obligation to communicate any information to the CPC which comes to their knowledge during performance of their official duties, and any omission shall constitute a disciplinary offence.

The CPC is granted the power to properly investigate complaints either by enforcing harsh measures or soft measures. The CPC has the power in exercising its functions under the Competition Law to conduct all necessary inspections of undertakings or associations of undertakings without a reasoned judicial warrant by:¹⁷

- (a) entering any office, premises, land and means of transport of undertakings and association of undertakings, with the exemption of residence;
- (b) examining the records, books, accounts and other records related to the business, irrespective of the medium on which they are stored;
- (c) copying and photocopying records, books, accounts and other records related to the business, irrespective of the medium on which they are stored, and receiving copies and photocopies;
- (d) sealing any business premises and records, books, accounts and other business records, for the period and to the extent necessary for the inspection; and/or
- (e) asking any representative or member of staff of the undertaking or association of the undertakings, for explanations on facts or documents relating to the subject matter and purpose of inspection and record the answers.

The inspections mentioned above are conducted without prior notification or warning to the undertaking or association of undertakings concerned, however, if the CPC deems that notification will assist the inquiry then it shall proceed to do so. The CPC may request the assistance of the police in order to exercise the above listed powers, which may accompany the officers at the locations undergoing investigations.

The CPC may impose a fine of up to EUR 85,000 where an undertaking or association of undertakings has either intentionally or negligently produced records, books, accounts or other business records in an incomplete or falsified manner or in cases where the undertaking or association of undertakings refuses to comply with the CPC's request for inspection. In addition to the above-mentioned fine, the CPC may additionally impose a fine up to EUR 17,000 for each day the undertaking or association of undertakings omits to comply with the inspection order of the CPC.

An officer of an undertaking or association of undertakings may be guilty of a criminal offence punishable by a maximum of one year or a fine of EUR 85,000 or a combination of both fines if he/she does not answer questions submitted to it or provide explanations requested by the CPC. Any concealment or destruction or falsification of information, records, books or accounts or the provision of false, incomplete, inaccurate, misleading information shall be punishable as above. Importantly, in cases where companies are found to be guilty of a criminal offence under the Competition Law, all members of the managerial or administrative board or committee arranging the affairs of the company including the general manager or director or managing director of the company may be prosecuted under the offence, in addition to the company, with the above penalties also applicable to each or some of the above-mentioned individuals.

16. Annex of Competition Law.

17. Section 31(1) of the Competition Law.

If the CPC would like to proceed to conduct an on the spot investigation of premises, land and means of transport other than as provided in the list above, it shall proceed to do so only if a judicial warrant is issued. The application to obtain the judicial warrant shall be made to the Supreme Court of Cyprus accompanied by an affidavit of an authorized officer in support of the application.

Under the Competition Law, the limitation period for the CPC to impose administrative fines for infringements is:

- (a) three years in the case of infringements for the collection of evidence and information or to conduct inspections; and
- (b) five years in the cases of all other infringements such as a violation of section 3 or 6 of the Competition Law.¹⁸ For the purposes of assessing the limitation period, time shall begin to run from the day on which the infringement is committed, whereas in the case of continuing or repeated infringement, time shall begin to run from the day on which the infringement ceases, and after the above periods expire, the CPC shall not be entitled to exercise its powers under the Competition Law.

The undertaking or association of undertakings has a right to access the documents in the file of the CPC. The CPC may select the documents to be accessed, granting access to documents which it relied upon when issuing its decision. The CPC is not permitted to base its decision on a document not disclosed to the undertaking or association of undertakings. Any undertaking has the right to legal representation, to be heard orally and to respond to the case in writing.

The officers of the Service and the CPC are under a strict duty of confidentiality not to communicate or publicise business secrets and information of a confidential nature except insofar as it is necessary to prove an infringement of section 3 and/ or 6 of the Competition Law or to implement the provisions of the Competition Law. A breach of this duty shall constitute a criminal offence punishable with imprisonment not exceeding 1 year or with a fine of EUR 3,500 or a combination of both penalties.

6.3 Judicial Review

A decision of the CPC is an administrative decision. The competent court for hearing administrative disputes is the Supreme Court of Cyprus which since 1964 has the function of the Supreme Constitutional Court of Cyprus and of the High Court of Cyprus.

Article 146 of the Constitution of Cyprus provides:

The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, act or omission of any organ, authority, or person exercising any executive or administrative authority is contrary to any of the provisions of the Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.

An application for annulment of an administrative decision is a remedy at first instance before a single judge of the Supreme Court of Cyprus. The proceedings must be instituted within seventy-five days from the date the decision of the CPC was notified to it. If the application has not been filed within this time-limit, the application for judicial review shall fail as being filed out of time.

An application for annulment may be made for one of the following reasons:

- (1) lack of competence of the CPC;
- (2) infringement of an essential procedural requirement by the CPC;
- (3) substantive violation of the Control of Concentrations Law or Competition Law; or
- (4) abuse of discretionary power by the CPC.

¹⁸. Section 41(1) of the Competition Law.

If an application is well founded for any of the above reasons, the decision of the CPC will be null and void. The procedure begins with the filing of the application for annulment which includes the remedy sought, the legal grounds for the application, and the facts supporting the claim. The application will be served on the CPC whereby the CPC will be obliged to file an opposition and the case will be heard before a single judge.

The decision of the Supreme Court at first instance may be appealed before five or more judges of the Supreme Court.

7 Leniency Policy

The European Union first adopted a leniency programme in 1996, giving the opportunity to cartel participants who disclosed the existence and details of their cartel activity to receive reduced fines. The programme was adopted following on the experience of the United States in this field. Initially, the programme did not offer full immunity, making cartel participants reluctant to report cartel activity to the competent authority of the European Union. In 2002 the programme was modified, giving full immunity to an applicant if conditions were met, removing the previous obligation that all cartel members are punishable. Under the new rules of the 2002 Leniency Notice, the European Commission grants total immunity from fines:

- (a) to the member of the cartel to inform the European Commission of an undetected cartel by providing sufficient information to allow the European Commission to launch an inspection on the premises of the suspected companies; or
- (b) to the first member of the cartel to provide evidence that enables the European Commission to establish an infringement, when the Commission is already in possession of enough information to launch an investigation, but cannot establish an infringement.

Further to the above, in order to receive full immunity, the company is required to cooperate fully, and on a continuous basis, provide the European Commission with all evidence in its possession, put an end immediately to the infringement, and should not have taken steps to coerce other undertakings to participate in the cartel.

Contrary to the 1996 programme, the 2002 Leniency Notice has created an incentive to report cartel activity thus improving the European Commission's capacity to identify and act against cartels.

In Cyprus, the policy and procedures involved in applying for immunity from fines or reduction of fines in cartel cases were contained in the 'Cartel Immunity Programme and Reduction of a Fine' that came into force on the 1 February 2003. The programme set out the basis of the leniency policy in situations where an undertaking that was part of an illegal cartel could obtain total immunity or reduction of fines. The programme was withdrawn on the understanding that a new programme would come into force in accordance with the 2008 amendments to the Competition Law. The 2008 amendments make express provisions for leniency in section 46, enabling the Council of Ministers to formulate regulations to be published in the Official Gazette of the Republic, prescribing for any matter such as the determination of the way to impose administrative fines, to be released from and/or to reduce administrative fines.

The CPC has recently submitted a new leniency programme to the law office of the Republic of Cyprus, currently under review, which if implemented shall be secondary legislation to the Competition Law.

Although there is currently no leniency programme in place, section 50 of the Competition Law could be raised by a respondent requesting leniency to a fine in a case before the CPC or the Supreme Court, as the Community competition law may be applied to matters not specifically regulated (as is leniency) by the Competition Law. It is not certain

that if an application be made under the 2002 Leniency Notice of the EU by following the procedures contained therein, the CPC would grant leniency to the particular applicant.

Over the years, even during the years when a leniency policy was not in place in Cyprus, the CPC showed leniency towards respondents who were co-operative with the CPC and made efforts to rectify the alleged breach(es). In 2002, the CPC decided to proceed with an ex-officio investigation on certain commercial banks in Cyprus for possible price fixing of interest rates (the case shall be expanded below under the heading of Special Sectors). Although the CPC unanimously concluded that the banks had engaged in price fixing and that the infringements called for the imposition of a fine, it did not impose the maximum fine of 10% of the aggregate annual revenue of each of the banks but instead was lenient, applying a fine of approximately 0.5% of the aggregate annual revenue of each bank.

Case No. 11.17.25/2004 examined above, is a good example of the CPC's application of leniency. In the case, CYTA'S lawyer had stated many reasons for mitigation of the penalty including that CYTA had changed its fees retrospectively and it began charging lower prices to its competitors and further that CYTA would return to its competitors the extra amount that it charged its competitors based on the previous pricing policy. The penalty imposed to CYTA was the equivalent of EUR 85,500 which was considered lenient.

In recent cases¹⁹ concluded by the CPC against certain petroleum companies in Cyprus for price fixing, leniency was applied when determining the fine against one of the companies, Petrolina (Holdings) Public Limited. The CPC expressed the reason for applying leniency was that the particular company had never been under investigation for infringements in the past.

While total immunity is not granted by the CPC, it is clear that leniency is and has been applied in cases with mitigating circumstances.

8 Special Sectors

The sectors constantly under examination by the CPC in the past decade have been the telecommunication sector, oil industry and banking sector. Certain important cases are examined below.

8.1 Telecommunication Sector

An application for interim measures by CYTA against Hermes *Airports* Ltd (Case number 11.17.008.30)

In 2008 an application for interim measures was initiated by CYTA against Hermes *Airports* Ltd ('Hermes'). The CPC by virtue of section 28 of the Competition Law may order the taking of interim measures and impose such terms which it deems necessary. Such measures whether mandatory or prohibitory must be temporary and must not exceed what is absolutely necessary under the circumstances. The following circumstances must concur:

- (a) a reasonably strong prima facie case of infringement under section 3 and/ or 6 of the Competition Law and/ or Article 81 EC and/or Article 82 EC is set;
- (b) it is a matter of urgency; and
- (c) there is serious risk of an irreparable damage to the interests of the person making the application or to the public interest.

19. 11.17.79/2005.

The complaint by CYTA concerned a so-called prevention of entering the airports under Hermes' control in order to install equipment required to provide CYTA's telecommunications services. CYTA alleged that Hermes had been pursuing to divert telecommunications' services demand towards a parent entity affiliated with Hermes and additionally, CYTA claimed that Hermes had been adamant and was pressuring CYTA to accept an agreement providing the former with a percentage over the latter's gross income which would be incurred by the provision of telecommunications services within the Hermes' airports. In this respect, CYTA sought to prohibit Hermes from preventing CYTA's way of access to the airports and to issue interim orders that would compel Hermes to allow CYTA the sought after right of entry and to enter into negotiations to install CYTA's equipment in the Hermes' airports.

CYTA's allegations for violations of sections 3 and/or section 6 of the Competition Law as well as of Articles 81 and/or 82 EC, were dismissed by the CPC for lack of certainty of whether the conditions on the taking of interim measures laid by section 28 of the Competition Law existed, which was imperative to reach a final and concrete judgment.

Areeba Ltd against the Commission for the Protection of Competition 2/8/2008 (Case number: 634/2006)

In the case of *Areeba LTD v. 1. Republic of Cyprus through the Commission for the Protection of Competition and 2. Commission for the Protection of Competition*, the Supreme Court reversed the decision of the CPC that dismissed a complaint by Areeba against CYTA, its mobile telephone competitor and the national telecommunications carrier, for price squeezing. Areeba's complaint succeeded on the basis that the margin squeeze of profit caused by CYTA's consumer mobile telephone rates and CYTA's denial to lower the national roaming rates it charged to Areeba, qualified as an abuse of CYTA's dominant position in the market.

Ex-officio investigation relating to a co-operation agreement between CYTA and the company VODAFONE Marketing Sarl ('VODAFONE') in violation of section 4 of Law 207/89 (Case number: 104/2008)

The CPC commenced an ad hoc investigation in view of an agreement for cooperation signed in February 2004 between CYTA and Vodafone Marketing Sarl ('Vodafone'). The decision of the CPC was that although the two undertakings hold a significant share of the market, no foreseeable effect could be detected by their agreement. Having reviewed the aforementioned agreement under investigation, the CPC noted there was an exclusivity clause for only a number of products or services of the subsidiary of Vodafone, VGPSL, as well as an undertaking of the parties not to enter into similar cooperation agreements with third parties dealing with advertising and marketing of similar products or services. *Inter alia*, it was also noted that the agreement provided the possibility to third parties to apply for access to some of the products under agreement.

Amongst other things, it was distinguished that the agreement under examination advanced the provision of mobile telephone services owing to the introduction of new technologies in the Cypriot market, reduction of costs, and that the agreement did not impose any unnecessary restrictions.

Complaint by Thunderworx Ltd against CYTA (case number 11.17.64/2005)

When, Thunderworx Ltd filed a complaint against CYTA for failure to make available to it (being a competitor) the necessary facilities in CYTA's telecommunications network, for over three years, it had as a result the prevention of Thunderworx to offer similar SMS services to consumers, as CYTA was offering. Following CPC's

decision, CYTA was fined EUR 75,000 on the 21 November 2008 for breaching Article 6(1)(b) of the Competition Law (restricting production, supply or technological development).

It is notable that Thunderworx's complaint was filed with the CPC on 6 April 2004, and while the investigative procedure was completed and a decision of the CPC was pending, due to administrative recourse proceedings against a decision of the CPC, on the account of the illegality of participation of a town mayor (of one of the country's municipalities) as a member of the CPC, the decision was issued four years and seven months after the original filing of the complaint. Another complaint was filed in an identical case by Golden Telemedia Ltd, another competitor of CYTA, in the same industry on related facts, on 1 September 2003 and a decision was issued on 19 December 2006 which imposed a fine of approximately EUR 37,500 on CYTA.

Cyprus Telecommunications Authority (CYTA) v. 1. Republic of Cyprus through the Commission for the Protection of Competition and 2. Commission for the Protection of Competition

In this case the Supreme Court overturned a decision of the CPC which fined CYTA approximately EUR 42,700 plus EUR 8,500 per day of non-compliance, when its Managing Director refused to comply with the request for access to his corporate computer by the investigating officers of the CPC, in the process of carrying out an ad hoc investigation of television and broadband services. The Managing Director of CYTA stated that he would allow access to his corporate computer only if he was permitted to monitor the investigation by audio-visual means, and if the CPC ensured that his email correspondence would not be accessed. Following CPC's refusal to go along with these conditions, CYTA was fined for failure to comply.

8.2 Oil Industry

Decisions regarding the ex-officio investigation against the four leading oil companies in Cyprus for violation of section 4 of Law 207/89 (section 3 of Law 13(1)/2008).

Four important decisions were issued by the CPC in 2009, namely its findings against the four market leaders in the oil industry of Cyprus following a sudden ex-officio investigation it carried out into the retail fuel market of Cyprus. ExxonMobil Cyprus Ltd, Petrolina (Holdings) Public Ltd, Hellenic Petroleum Cyprus Ltd and Lukoil Cyprus Ltd (hereinafter collectively called the 'Oil Companies'), the four main Cypriot oil companies were the object of investigations concerning national competition violations.

The Oil Companies were alleged to have infringed section 3(1)(a) of the Competition Law by virtue of the adoption of a concerted practice that indirectly fixed the Oil Companies retail fuel prices (between 1/10/2004 and 22/12/2006) and an agreement and/or collusion on behalf of the Oil Companies and their retail sellers which directly or indirectly fixed the fuel prices (between 1/10/2004 and 22/12/2006). The Oil Companies anticompetitive conducts had as its object or effect the prevention, restriction or distortion of competition in Cyprus and gave rise to stringent investigations by the CPC.

To begin with, the CPC analysed the meaning and perception of a 'concerted practice', and followed the Community Courts in stressing that the criteria of coordination and cooperation, are indispensable for determining that a concerted practice exists, but does not demand the formation and operation of an actual 'plan'. These criteria should merely be taken into consideration along with the principles laid down by the EC Treaty on competition.

The CPC relied on several cases from the European Court of Justice (ECJ) noting, *inter alia*, the case of *John Deere Ltd v. Commission of the European Communities*,²⁰ in which it was stated that the liberty of each trader, should be examined, to the extent that the policies the trader intends to implement in the market, and the terms he recommends to his customer ensure to rule out any direct or indirect contact between traders that may have an object or effect to distort competition within the market.

After Cyprus' accession in the European Union on 1 May 2004, the CPC is especially inclined and willing to consult the principles developed in the case law of the ECJ and by the European Commission, when delivering a decision for competition issues arising under Cypriot cases.

The judgment in *Cement*²¹ was one of the ratios of ECJ, which was relied on by the CPC for instances where an undertaking fails or refuses to disengage itself from illegal conduct irrespective of whether it has knowledge of the illegality taking place, predominantly when it is clear that such conduct shall have an unwanted, anticompetitive effect. On this note, the judgments in *Belasco*²² and *Verband*²³ were also stated which clearly denoted that even if there was no anticompetitive intention or knowledge of the violation, if the result of the cartel led to an unwanted, anticompetitive effect that would distort competition, it would, and should be prohibited.

However the danger of analysing a market which is particularly oligopolistic was highlighted in the *Wood Pulp*²⁴ case; in which the practice of advanced price announcements created a transparent market and thus a parallel shift in wood pulp prices. At first instance the EU Commission found that this parallel shift was due to concerted practices brought about by the artificial nature of the transparency of the market, however on appeal the decision was reversed on the basis that advanced price announcements were not in itself anticompetitive and that concerted practices were not the only plausible excuse for the parallel price conduct. In conclusion, as long as the parties can establish a conceivable explanation for the parallelism (such as the high degree of transparency in an oligopolistic market, as in this case) a breach of Article 81 can not be found.

In contrast, the existence of artificial transparency was established in the *Oil Companies* case. In this case, artificial transparency conditions were created with respect to the relevant market, mainly through the constant dissemination of prices on behalf of the undertakings concerned. The broadcasting of the prices, took place through the media, aimed at informing their competitors for future pricing conditions. The public broadcasting of confidential information such as the undertakings' pricing policies through the mass media could not be held to relieve the concerned undertakings.

The practice of artificial transparency, disguised as information to the consumers, facilitated the undertakings to reach commonly accepted terms in relation to each other's future behaviour and price fluctuations and supported the implementation of the concerted practice. It is worth mentioning that the CPC held that the practice of the undertakings was offending to the ideal of free competition and restricted the freedom of market participants to independently and autonomously set their prices.

Extensive examination of the undertakings' pricing policies led the CPC to rule that fuel prices in the relevant product market were parallel, and undeniably these undertakings attuned their products' prices correspondingly to each other's and at a rate which signified that it was a coordinated activity and not intellectual business activity; explicitly a concerted practice.

The CPC, taking into account the size and number of undertakings active in the said market, determined that the whole behaviour of the Oil Companies had created market

20. [1998] ECR I-3111.

21. *Cement v. Commission* [1995] ECR.

22. *Belasco v. Commission* [1989] ECR 2117.

23. *Verband der Sachversicherer v. Commission* [1987] ECR 405.

24. *Ahlstrom Osakeyhtio and Others v. Commission* [1988] ECR 5193.

conditions that do not correspond to the natural conditions that should exist in the relevant market. The CPC assessed that the parallel adjustment of pricing and the simultaneous announcement of the prices to the public were undeniably indicating to the existence of a concerted practice among the Oil Companies.

The CPC, having reviewed all evidence before it, found that the four undertakings were indisputably engaged in a concerted practice with an object the fixing of prices and which ensued to the distortion of competition. The CPC, in alignment with Community, national legislation and case law, was not under any further obligation to establish the effect of the said behaviour.

The Oil Companies, exclusive of any express agreement, achieved the fixing of artificially stable fuel prices in the relevant market through their concerted practice resulting in the deliberate substitution of the risks of competition and accordingly the intra-brand and inter-brand elimination of competition between them.

With the said decision of the CPC, it was evident that the four undertakings had violated competition law and in particular section 3(1)(a) of the Competition Law over both the engagement in a concerted practice between them having as their object the fixing of fuel prices, and the concluding of agreements with their resellers (gas stations) on the same basis and with the identical object.

The CPC harmonizing its decision with the Competition Law, which states that such violation constitutes a serious infringement of competition rules and for that reason carries monetary fines, ensured to impose the following stringent fines, EUR 14.5 million for Hellenic Petroleum, EUR 13 million for Exxon Mobil, EUR 12.5 million for Petrolina and EUR 2.7 million for Lukoil. Appeals against the CPC's decision have been filed by each respective undertaking at the Supreme Court of Cyprus.

8.3 Banking Sector

With regard to the Ex-Officio investigation of the Commission for the Protection of Competition for infringement of section 4 of the Protection of Competition Law of 1989, by the Commercial Banks in Cyprus.

On 19 February 2002 the CPC decided to proceed with an ex-officio investigation of the Commercial Banks in Cyprus for the existence of a possible cartel in Cyprus (in relation to uniformity of banking charges), contrary to section 4 of the Protection of Competition of Law 207/89, as amended.

The sector is dominated by three Cypriot banks, namely Bank of Cyprus Ltd, Cyprus Popular Bank Ltd and Laiki Bank Ltd, (collectively called the 'Three Banks') and Hellenic Bank Ltd and has very strict barriers of entry for new competitors which exist in the market. The penetration of the market by new commercial banks is rendered very difficult, due to the traditional predominance of the three major Cypriot banks.

The extensive investigation of the Service of the CPC, over the period extending from March 2002 to April 2003 led to the conclusion that, not only were the interest rates offered on deposits accounts, loan accounts, Hire-Purchase/Leasing and credit cards very similar and in some cases exactly the same, but that these changes occurred at the same time and were of the same magnitude. All these changes complied fully with the contents of the documents found at the Hellenic Bank Ltd's premises in particular regarding the Three Banks.

The investigations were based on several documents obtained by the CPC upon inspection at the Three Banks' premises in accordance with the authorities given to the CPC under the Competition Law, such as minutes of committee meetings and internal

correspondence of the Three Banks. The most important document collected by the CPC in its investigations at the premises of the Hellenic Bank Limited was an internal memo advising of a possible announcement for interest rate changes by the Bank of Cyprus and the Cyprus Popular Bank and a recommendation for the Hellenic Bank Limited to follow suit and exercise pressure on the Alpha Bank and other banks to issue a similar announcement. The CPC followed the daily press and discovered that the said announcements were made by the Cyprus Popular Bank, the Bank of Cyprus and the Hellenic Bank Limited just days apart. The CPC conducted further investigations by sending questionnaires requesting detailed information on interest rates for loans, deposit accounts, hire-purchase / leasing and credit cards.

Having reviewed all the above, the CPC held that the Three Banks at first sight, infringed section 4(1)(a) and (b) of the Competition Law, in particular due to the following:

- (a) An agreement or concerted practice between the Bank of Cyprus Ltd, Cyprus Popular Bank Ltd and Hellenic Bank Ltd on the fixing and/or the uniform amendment of interest-rates for Hire-Purchase/ Leasing, which had as its object or effect, the, elimination, restriction or distortion of competition, during the period between 4 November 2001 until 31 December 2002.
- (b) An agreement or concerted practice between the Bank of Cyprus Ltd, Cyprus Popular Bank Ltd and Hellenic Bank Ltd on the fixing and/or the uniform amendment of interest rates of Credit Cards, that had as its object or effect, the elimination, restriction or distortion of competition, during the period between 1 October 2001 until 31 December 2002.
- (c) An agreement or concerted practice between the Bank of Cyprus Ltd, Cyprus Popular Bank Ltd and Hellenic Bank Ltd on the simultaneous amendment and/or fixing of interest rates for deposit and notice accounts, that had as its object and/or effect, the, elimination, restriction or distortion of competition, during the period between 15 February 2002 until 31 December 2002.

The lawyers of the Three Banks, *inter alia*, did not contest or raise any objections to the infringements and the facts set out in the above statement of objections. However, they argued that although there was some collusive behaviour and consultations between the Three Banks, the purpose of those were not to fix prices but to avoid price wars and ultimately to ensure a smooth transition to an environment where interest rates were to be set freely and independently by each bank, following the abolition of the law fixing the maximum interest rate. They further claimed that, although the intention of the banks during the various contacts in question and/or agreements was not the distortion of competition, nevertheless there existed the possibility to err and thus turn these consultations into collusive type of contacts. It was also stated by their lawyers, that the behaviour of the Three Banks was the result of negligence on their part and not of conscious intention for collusive behaviour so as to restrict competition.

The lawyers of the Three Banks claimed further, that the consultations and/or agreements that took place were of a short duration and took place during the transitional period into the new liberalized environment. They also claimed that any agreements that took place in the past had been terminated.

The CPC, unanimously decided that the behaviour and acts of the Three Banks during the material period, infringed section 4(1)(a) and (b) of the Law. The CPC also held that the said infringements called for the imposition of a fine and ordered as follows:

- (a) the immediate termination of all infringements of section 4(1) of the Law by the Bank of Cyprus Ltd, the Cyprus Popular Bank Ltd and Hellenic Bank Ltd and the avoidance of any such repetition in the future; and
- (b) the imposition of a fine to each of the Three Banks as follows:
 - (i) Bank of Cyprus Ltd EUR 4,232,250.
 - (ii) Cyprus Popular Bank Ltd EUR 2,898,450
 - (iii) Hellenic Bank Ltd EUR 1,419,300

9 Recent Developments and Conclusion

As of 2008, competition law in Cyprus went through significant transformations and with the enactment of the improved Law 13(I)/2008, competition law in Cyprus is now fully aligned with the provisions of Council Regulation (EC) No. 1/2003, which as a result increased the competencies and powers of the CPC in line with Article 5 of Council Regulation 1/2003.

The CPC is re-established as the national competition authority of Cyprus through the Competition Law for the purpose of applying Articles 81 and 82 EC and Council Regulation (EC) No. 1/2003. The CPC is a well-respected organ in Cyprus, whose importance in regulating the market in terms of competition cannot be disputed. Its presence is apparent from the frequency of notifications made in the Official Gazette of Cyprus, as well as the commentary made on cases and notifications in the daily press. The importance of the Supreme Court is also evident in its function as a court, providing for judicial recourse and for appeals of first instance decisions. The combating of cartels in Cyprus capable of obstructing the maintenance of an effective competition in the market has been the focus of the CPC in recent years.

With the substitution of the entire Law 2007/89, it is hoped that the controversy and uncertainty that caused the resignation of three Chairmen of the CPC will come to an end and the significant improvement of the vague provisions of the preceding legislation will assist the CPC to conduct its mission more efficiently. It is now clear from section 12 of the Competition Law that the Chairman and the four other members of the CPC are not permitted to practice any profession or occupation or to employ themselves in a business of any nature or to accept payment for any kind of employment besides their duties.

A difficult challenge for the members comprising the staff of the CPC and its supporting Service is its attempt to bring together the need for faster decisions of the pending cases with the requirement to continue with the needs of the undertakings and the consumers on a daily basis.

The Competition Law completely mirrors the EC Treaty's provisions in relation to the forms of cooperation caught by competition rules but which, as per Article 81(3) EC, may nevertheless be allowed on the basis of their role towards improving and contributing into the production and/or distribution of goods or the technical or economic progress. Competition Law (Law 13(I)/2008), however, does not provide for 'individual exemptions'. Moreover it is worth mentioning that block exemptions, if so decided by the CPC, may be granted pursuant to section 5(1), which may lead to an Order being issued by the Council of Ministers.

The Control of Concentrations Law implemented over a decade ago is outdated and in need of amendment. The financial threshold for triggering a notification of a concentration of undertakings to the CPC is considered as too low (i.e., at least two participants have an aggregate turnover in excess of approximately EUR 3,417,200, it requires at least one of the participants to engage in commercial activities in Cyprus and necessitates that at least approximately EUR 3,417,200 of the aggregate turnover of all the participants relates to the provision of goods or the supply of services within Cyprus). As a result of the low thresholds, the CPC is engaged on a permanent basis, in the examination of numerous concentrations to the detriment of objectively more important potential areas of concern. Further, amendments to the Control of Concentrations Law are due since it predates the recent amendments made to the Companies Law such as the possibility of cross-border mergers, *societas europaeae* and the recent enactment of the law enabling public take over bids in Cyprus.

In 2011 the much anticipated secondary legislation on Cyprus' leniency policy is expected to be enacted. Applicants will be in a position to apply for leniency by following the clear procedures contained in the secondary legislation, which will be in line with the Competition Law.