Competition Law in Cyprus is changing dramatically in order to tackle the fight against cartels, possibly the most serious form of competition law violation. Alterations in Cyprus are incorporating the changes in EC Competition Law.

Written by Mr. Khamis Abulhawa – Trainee Lawyer
LLB (Hons) - LLM (International Business and Corporate law)

Mentored by Savvas Savvides - Partner/ Advocate
LLB (Hons) – LLM (European Law)
Member of the Cyprus Bar Association
Competition Law in Cyprus is changing dramatically in order to tackle the fight against cartels, possibly the most serious form of competition law violation. Alterations in Cyprus are incorporating the changes in EC Competition Law.

Introduction

Burly and hostile reactions, by competition enforcement authorities, have commenced against cartels as they are generally considered to be the most serious form of competition law violation. Even the adoption of competition laws with tough sanctions has not been sufficient to suppress cartel activity. Cartels appear to be alive and kicking throughout the world.¹ In the European Union (EU) Mario Monti, the former Commissioner for Competition, once described cartels as ‘cancers on the open market economy’ and the Supreme Court in the United States (US) has referred to cartels as ‘the supreme evil of antitrust’.² Uncovering and prosecuting cartels in Europe has become a major precedence of the European Commission (EC).

The aim of this article is to discuss the changes that have occurred to Competition Law in Cyprus in order to tackle the fight against cartels. Cyprus competition law has incorporated the changes that have taken place in the EU. It is now adequate to present a roadmap of how this article will proceed. Section 1 will give a brief analysis of the definitions that have been stated about cartels and how they harm the economy. Section 2 will discuss EC Competition Law in relation to the amendments that have taken place throughout the years and finally, section 3 will then go on to discuss Competition Law in Cyprus.

Illustrious Definitions of Cartels

To begin with, in 1776, Adam Smith famously remarked in The Wealth of Nations that cartels are when, ‘people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices’.³ In 1998 the Organisation for Economic Co-Operation and Development (OECD) adopted a Recommendation of the Council Concerning Effective Action Against Hard Core Cartels which defined a hard-core cartel as, ‘an anti-competitive agreement, anti-competitive concerted

² ibid 498
practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids, establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce’.

Cartels harm consumers and have pernicious effects on economic efficiency. A successful cartel raises prices above the competitive level and reduces output. Consumers chose either to pay the higher price for some, or all, of the cartelized product that they desire thus forgoing the product, or they pay the cartel price and thereby unknowingly transfer wealth to the cartel operators. Further, a cartel shelters its members from full exposure to market forces, reducing pressures on them to control costs and to innovate. All of these effects harm efficiency in a market economy.

The European Commission’s fight against Cartels

The European ban on cartels follows 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. However, exemption from this general ban can be granted if the requirements stated in article 83(1) are fulfilled. The enforcement of article 81 was first laid down in Council Regulation (EEC) No 17/62, but on May 2004 a new regulation on the enforcement of EC competition rules (Council Regulation No 1/2003) came into force which had been the result of the so called modernisation package by the EC in 1999. Modernisation developed from a perceived need to re-think the centralised enforcement of EC antitrust law. The Commission has described the importance of Regulation 1/2003 in the following terms, ‘an ambitious and fundamental overhaul of the antitrust rules implementing Articles 81 and 82 of the Treaty and “big bang”’.

Regulation 1/2003 introduced Copernican changes in the enforcement system of EU competition law, such as, the abandonment of the notification system, the

---

5 Jones A. and Sufrin B., (2008), op. cit., p.866, above n.5
8 ibid
10 ibid
introduction of a duty for national competition authorities to apply Articles 81 and 82, the transformation of Article 81(3) into a legal exception directly applicable by all enforcers and judges, set out mechanisms for cooperation between the Commission and national authorities, expanded the Commission’s remedial and investigation powers in competition cases and consolidated into a single piece of legislation many procedural rules. The aim of the reform as stated by the Commission in its White Paper is ‘to refocus its recourses on prosecuting the most serious restrictions on competition because the administrative overload caused by an increasing number of notifications every year started to endanger the effectiveness of cartel law enforcement by the commission’. It is evident to the observer that the Commission has substantially intensified its efforts in the fight against cartels in recent years given that between 1 May 2004 and 31 December 2007, the Commission adopted 26 decisions in cartel cases, involving a total of 160 addressees where as in the immediately preceding period of equal length there were 22 cartel decisions. Concisely, Regulation 1/2003 has freed up considerable resources for the prosecution of the most serious antitrust infringements and it was stated that, ‘this has borne some fruits, in particular in the area of cartels’.

In addition, the decentralisation of the enforcement of Community antitrust law put in place by Regulation 1/2003 envisages enforcement not only by national competition authorities, but also through litigation between private parties before the national courts. The new system not only strengthens the opportunities to seek and obtain effective relief before the national courts, but its effectiveness and thus the enforcement of the EC competition rules also depend on the possibility of taking damages actions before national courts. In simple terms, it should act as a deterrent to those who would engage in anti-competitive behaviour and allow also for the compensation of those who have suffered loss as a consequence of such behaviour. The European Court of Justice emphasised the importance of enforcement by private parties in its ruling on * Courage v Crehan*, holding that national courts must provide

---

12 *ibid*
13 *ibid*
14 *ibid* 134
16 *ibid*
17 *Courage Ltd v Crehan* (C-453/99) [2001] E.C.R. I-6297, the Court has re-emphasised the importance of effective judicial remedies in private party actions in *Manfredi v Lloyd Adriatico Assicurazioni Sp.A* (C-295/04) [2006] E.C.R. I-6619
a remedy in damages for the enforcement of the rights and obligations created by Article 81 EC.\textsuperscript{18}

The United Kingdom (UK) government in the Enterprise Act 2002, made individual participation in a cartel punishable by up to five years’ imprisonment which has been described as, ‘possibly one of the most intriguing developments in English criminal law of recent years’.\textsuperscript{19} The increase of deterrence and detection of unlawful cartels are the reasons for the introduction of the offence.\textsuperscript{20} Wouter Wils, of the European Commission Legal Service stated that, ‘the introduction of prison sanctions for the individuals responsible for their undertakings’ antitrust violations would appear to be the only way generally to achieve effective deterrence of price cartels’.\textsuperscript{21} Another reason that imprisonment as an option is important is that, ‘undertakings can pay fines, even if they are imposed upon an individual in their personal capacity, but they cannot serve time in jail in the stead of an employee or explain an extended absence from the golf club’.\textsuperscript{22} In simple terms, the threat of a jail sentence may have higher deterring value than fines because a colleague or friend being imprisoned will certainly be noticed from the social circle the affected population merges putting at risk their reputation and liberty. Furthermore, high level executives being imprisoned would attract much more press. Only five countries within the European Competition Network (ECN) provide for criminal sentences expressly, namely Austria, France, Germany, Ireland, UK and Greece, but Greece provides for criminal sanctions against individuals, but not companies.\textsuperscript{23} Hence, fear of prison is a large motivating factor in how individuals transact cartel business in which this fear can be transformed into a carrot if early confessors are rewarded with a get-out-of-jail free card.\textsuperscript{24}

\textit{Leniency Programme}

\textsuperscript{19} Furse M., \textit{Competition Law of the EC and the UK} (Oxford: Oxford University Press, 6\textsuperscript{th} ed, 2008) 256
\textsuperscript{20} MacCulloch A., ‘Honesty, Morality and the Cartel Offence’ [2007] ECLR 355
\textsuperscript{22} MacCulloch A., (2007), \textit{op. cit.}, p.355, above n.27
\textsuperscript{24} Leslie C.R., ‘Cartels, Agency Costs and Fining Virtue in Faithless Agents’ (2008) 49 \textit{William & Mary LRev} 1621, 1665
The EC first adopted a leniency programme in 1996 offering a reduction of fines (up- to 75 per cent) to cartel participants who disclosed the existence and details of their cartel activity.\(^\text{25}\) Since there was no assurance of full immunity, there was no motivation to report the cartel to the Commission. This policy was then modified and resulted in the 2002 Leniency Notice in which full immunity became available to an applicant if certain conditions were met.\(^\text{26}\) In other words, the 2002 Leniency Notice removed the previous obligation that all cartel members are punished producing an incentive to report cartel activity and improving the Commission’s capacity to identify and act against cartels. The 2002 Leniency Notice has been relatively successful were the Commission had received 167 applications for full immunity and a reduction of fine.\(^\text{27}\) Under the 2002 Notice a party not qualifying for immunity (the conditions to achieve immunity are difficult and some authors even liken it to a form of “Russian Roulette”\(^\text{28}\)) will receive a reduction of fines in the range of 30-50 per cent, providing also for reduction of fines for the second non-immunity applicant in the door in the range of 20-30 per cent and any others up to 20 per cent.\(^\text{29}\) Therefore, this induces a ‘race to the courthouse’, with the most substantial benefits being granted to the first party to blow the whistle.\(^\text{30}\)

Recently, the Commission once again has made significant revisions to its leniency policy in its 2006 Leniency Notice (EC Leniency Notice). One of the main innovations of the 2006 Leniency Notice is the marker system which gives a leniency applicant the opportunity to save a place in the queue ahead of other applicants.\(^\text{31}\) This system should add transparency, certainty and predictability to the leniency process as the Commission informs the applicant about where they stand with respect to other applicants.\(^\text{32}\)

**Imposing Fines as a Deterrent**

Commissioner Monti explained in a 2002 speech in Brussels that, ‘the high cartel fines in 2001 show that the Commission has a policy of stepping up its activity

---

\(^{26}\) European commission, “2002 Leniency Notice”, 19/02/2002  
\(^{27}\) Billiet P., ‘How lenient is the EC leniency policy? A matter of certainty and predictability’ [2009] *ECLR* 14  
\(^{28}\) *ibid* 16  
\(^{29}\) Dunphy P.J., (2007), *op. cit.*, p.20, above n.32  
\(^{30}\) *ibid* 19  
\(^{31}\) *ibid*  
against cartels and at the same time increasing the level of fines in order to achieve a genuine dissuasive effect on firms. The purpose of substantial fines of this kind is to ensure that firms have an incentive to avoid joining any kind of unlawful agreement or concerted practice.\textsuperscript{33} Fines imposed in 2001 totalled more than €1.8 billion (total fines in \textit{Vitamins}\textsuperscript{34}, \textit{Plasterboard and Carbonless Paper}\textsuperscript{35} amounted to €855.23, €478.32 and €313.69 million respectively), in 2002 fines totalled more than €944 million, in 2003 more than €404 million, in 2004 €390 million and in 2005 fines totalled more than €683 million.\textsuperscript{36} A major obstacle to the imposition of effective fines remains the legal limitation contained in Regulation 1/2003.\textsuperscript{37} By capping the maximum fine at 10 per cent of total annual global turnover the EC institutions have attempted to ensure that fines are not disproportionate in relation to the size of the undertaking.\textsuperscript{38} In simple terms, the authorities were concerned with the size of the undertaking as they do not wish to impose a fine that can not be paid.

On September 2006 the 1998 guidelines were replaced by new guidelines building on the Commission’s subsequent experience\textsuperscript{39}. This replacement was made with the aim of further developing and refining policy and to provide more effective sanctions and deterrents to the operation of cartels, not only by sanctioning those involved but also through deterrence of others and to ensure adequate punishment of repeat offenders\textsuperscript{40,41}. The total amount of the fines imposed for cartel infringements reached a record level of €3.38 billion in 2007, a massive increase compared to the €1.8 billion total of 2006.\textsuperscript{42} In 2008, fines totalled more than €2.2 billion for cartel infringements.\textsuperscript{43}

\textsuperscript{34} [2003] 4 CMLR 1030
\textsuperscript{35} [2004] OJ L15/1
\textsuperscript{36} Jones A. and Sufrin B.,(2008), \textit{op. cit.}, p.869, above n.5
\textsuperscript{38} ibid
\textsuperscript{39} Volcker S.B., ‘Rough Justice? An analysis of the European Commission’s new fining guidelines’ (2007) 44(5) \textit{CMLRev} 1285
\textsuperscript{40} \textit{Nitrine Butadiene Rubber}, Commission decision of 23 January 2008, where Bayer’s fine was increased by 50 per cent for recidivism
The legal basis of cartel prohibition in Cyprus is formed by the following three pieces of legislation, namely, the Protection of Competition Law 13(I)/2008, the Control of Concentrations between Enterprises Law 22(1) of 1999 (as amended) and the EC Regulation 139/2004.\textsuperscript{44} However, the applicable legislation in Cyprus is the Protection of Competition Law, Law 13(I)/2008 (the Competition Law), which has enacted the provisions of Council Regulation 1/2003 into domestic law and Article 81 of the EC Treaty.\textsuperscript{45} The Competition Law is enforced by the Committee for the Protection of Competition (CPC), which acts either on its own initiative or following a complaint received from a third party with a legitimate interest and by industry-specific regulators such as the Telecos Authority.\textsuperscript{46} The CPC was established in 1990, with the enactment of the Law 207/89 which is an independent administrative authority responsible for the restoration, conservation and the strengthening of competition in Cyprus.\textsuperscript{47} The main competences of the commission are the control of restrictive practices and practices of undertakings, the control of the abuse of a dominant position held by one or more undertakings and the control of concentrations between undertakings.\textsuperscript{48} In the course of exercising its competences, the commission has the power, inter alia, to carry out investigations and unannounced on-the-spot investigations, to render decisions and, where appropriate, impose sanctions.\textsuperscript{49}

Section 3 of the Competition Law provides that any agreement or enterprise practice which is capable or likely to be capable of restricting free access in the market, restricting competition to a substantial degree or prejudicing the interests of consumers is subject to control in accordance with the provisions of the Competition Law.\textsuperscript{50} Furthermore, section 4 prohibits any agreement made by an enterprise which has as its object or effect the elimination, restriction or distortion of competition and states that

\begin{itemize}
  \item \textsuperscript{46} Ibid
  \item \textsuperscript{48} Ibid
  \item \textsuperscript{49} Ibid
  \item \textsuperscript{50} Neocleous E. & Spyris E., (2009), op. cit., p.45, above n.44
\end{itemize}
“Forms of agreement which would automatically be deemed to fall into this category are agreements which fix, directly or indirectly, the purchase or reselling prices or other terms of transaction. In addition, restrict or control production, supply, technological developments or investments, moreover, allocate markets or other resources of supply and finally, apply different terms for identical transactions so that certain enterprises are placed at a disadvantageous position regarding competition”. \textsuperscript{51} Section 6 prohibits the abuse of a dominant position of an enterprise in any product market.\textsuperscript{52}

Where the CPC finds an infringement of the provisions of sections 4 or 6 of the Competition Law it has the power to, ‘order the enterprise concerned to terminate the infringement within a stipulated time limit and avoid any repetition of it in the future. Impose a fine of up to €85,000 for each day the infringement continues after the decision has been communicated and, finally, impose a fine of an amount, not exceeding 10 per cent of the combined annual revenue in the year within which the infringement took place or in the year which immediately preceded the infringement’. \textsuperscript{53} The above are sanctions imposed for companies. The CPC can also impose sanctions on individuals for failure to comply with a decision of the CPC or with an interim judgment which is a criminal offence punishable by imprisonment for up to two years, a fine of up to €340,000 or both. \textsuperscript{54} In recent times the CPC has been more willing to impose deterrent fines and not just nominal fines. This is illustrated by the recent case in Cyprus, in which, the CPC imposed a fine up to €42.9 million due to an evident cartel between fuel companies that fixed the prices of fuel sold in Cyprus.

The Competition Law 13(I)/2008 has also introduced the concept of leniency into its legislation, directly referring to the CPC’s power to reduce or impose no fines on companies that cooperate and provide important and relevant information on infringements of competition law. \textsuperscript{55} Subject to the requirements set out below, the CPC will 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 distorting competition. \textsuperscript{56} The requirements are

\textsuperscript{51} ibid  
\textsuperscript{52} ibid  
\textsuperscript{53} ibid 48  
\textsuperscript{54} ibid  
\textsuperscript{55} ibid 50  
\textsuperscript{56} Keane T.M., (2009), \textit{op. cit.}, p.3, above n.45
“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 Law. The claimant must take effective steps, to be agreed with the CPC, to terminate its participation in the illegal activity and must do nothing to alert its former associates that it has applied for immunity. 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”.57

However, if immunity conditions are not met, an undertaking may be eligible to qualify for a reduction of a fine if it provides information of significant added value which contributes significantly to the finding of an infringement.58 The reduction of a fine may amount to 50 to 70 per cent for the first applicant, 30 to 50 per cent for the second applicant and up to 30 per cent for the third and subsequent applicants.59

Conclusion

In conclusion, the struggle against cartels, arguably the most serious form of competition law violation, has moved beyond traditional model of EC law enforcement because the parties in a cartel intentionally set out to interfere with competition and act against the industrial group as a whole. Cartels harm market efficiency, lead to higher prices and deadweight loss. As stated above, cartels have appropriately been described as ‘cancers on the open market economy’. The movement beyond traditional model of EC law enforcement has occurred due to the changes that have been introduced to the leniency programme, the imposition of higher fines, criminal sanctions and private enforcement. These changes have been successful in the detection and deterrence of cartels as illustrated above. Cyprus has incorporated the changes that have occurred in the EU and is successfully tackling the fight against cartels. The Competition Law 13(I)/2008 in Cyprus has only recently come into effect consequently bringing competition law in Cyprus into line with EU regulations.

Modernisation ensures that when national authorities within the EU apply national competition law they must apply EC law. Thus the issue of having a consistent Community-wide approach to fighting cartels remains of the utmost importance in light of the penalty and leniency program. I personally believe that

57 ibid 4
58 ibid
59 ibid
leniency and punishment should go hand in hand and be integrated as one policy. The correct punishment in combination with the right probability of detection leads to an adequate level of deterrence. Thus, successful anti-cartel regimes must be capable of applying sanctions upon undertakings and individuals together with a conventional leniency policy. Leniency brings more cases (not more resources to investigate them) so the successful management of the leniency program involves resources that would not have been available without Regulation 1/2003. It can be assumed that the increased production of cartel decisions can be attributed to a large extent to the adoption of Regulation 1/2003. I personally believe that the provision of individual penalties and imposition of custodial sentences should be integrated in all Member States concerning the enforcement of competition law.
   http://www.era.int/web/en/html/nodes_main/4_2127_474/Archives/conference/s_2006/5_1796_2165.htm Last Visited: 30/12/2008


13