

# Competition Law in Cyprus

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Free competition plays a significant role not only in national legal orders but also in the European Union as a crucial factor for the achievement of an integrated common European market.<sup>24</sup> The present book by Professor Achilles C. Emilianides and Mr Anastasios A. Antoniou is a concise treatise about Cypriot Free Competition Law. In this respect, it should be pointed out at the outset that this study has an honourable purpose not to deepen its analysis of EU legal instruments on Competition Law but to introduce academics working on laws of EU Member States to a reflected perspective of the Cypriot legal order in an area which is fully harmonised. This is important, since a reciprocal influence between national and European competition policies known as the ‘Europeanisation process’ is today beyond doubt.<sup>25</sup>

At first, Professor Emilianides introduces the reader to the geographical, historical, and political background of Cyprus. It is important for the reader to fully understand the political idiosyncrasies of Cyprus, namely the principle of bi-communality, as well as the doctrine of necessity arising from the Cyprus Problem due to the Turkish invasion and the illegal pseudo-state. On that basis, the author furthermore attempts to approach the process of Cyprus’ Europeanisation in relation to the aforementioned political problem.

Subsequently, the author focuses on the Cypriot legal system in general. Emphasis is given to the constitutionally protected fundamental rights and liberties, which may be subject to limitations or restrictions that should be interpreted strictly. Other instruments are EU Law, International Treaties, and, finally, common legislation. This Section concludes by reference to the judicial power, thereby elucidating in full spectrum the legal system where Cypriot competition law is produced and enforced.

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<sup>24</sup> George D. Triantafyllakis, *Free Competition Law* (Athens: Nomiki Vivliothiki, 2019) 15, 191. (in Greek)

<sup>25</sup> See also Adrian Kuenzler, Laurent Warlouzet, *National Traditions of Competition Law: A Belated Europeanization through Convergence?* in Kiran Klaus. Patel, Heike Schweitzer (eds), *The Historical Foundations of EU Competition Law* (OUP, 2013) 89.

The last Section of the General Introduction plays a transitional role, connecting the general legal background with the Antitrust Law through a historical analysis of the latter's background, especially focusing on the institution of the Commission for the Protection of Competition (CPC).

The parts of the book following the preliminary General Introduction refer to the core of the competition law in Cyprus. The book serves its elucidating role through an analysis of basic notions and provisions of Antitrust Law. It is then insightfully specified in appropriately structured thematic chapters for restrictive Agreements, Dominant Undertakings' Prohibited Practices further divided into exploitative and exclusionary ones, and Concentrations. As is expressly stated, however, State Aid Law is not in the main objectives of the monograph (par. 137).

Part I, written by Professor Emilianides, is titled 'Structure of Antitrust Law and Its Enforcement'. After having referred to the legal sources in general, Professor Emilianides specifically examines the sources of Antitrust Law in detail (Ch. 1). The author's goal is not just to string together laws and other institutional instruments, but to engage in a more transparent and systematic analysis, while being mindful of the normative hierarchy of the legal sources. Here, the author's constitutional sensitivity is all too evident; we should here take due account of the basic conflict between competition policy, aiming to prevent private firms from distorting a competitive environment,<sup>26</sup> and property rights.<sup>27</sup> As the author aptly puts it, the imposition of restrictions and limitations to freedom of contract through the antitrust instruments is based on Article 26 of the Constitution of Cyprus, while noting the superior hierarchical status of the main legislative sources of Cypriot competition law is consequent upon the EU legislation's normative radiance.

The Cyprus Problem is highlighted once more in the author's analysis about the territorial scope of application of Antitrust Law (Ch. 2). The occupied-by-Turks northern territory of Cyprus, as well as the British Bases in Cyprus (SBAs), are topics of concern to the author who unfolds their dynamics through case-law of Cyprus, EU, and ECtHR.<sup>28</sup> After that, the author embarks upon a detailed analysis of special

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<sup>26</sup> Anestis S. Papadopoulos, *The International Dimension of EU Competition Law and Policy* (Cambridge University Press, 2010) 37.

<sup>27</sup> See also Rudolph J. R. Peritz, *Competition Policy in America, 1888-1992* (OUP, 1996) 4, 9 *et seq.*, analysing the public debate around the Sherman Act (1888-1890) on free competition and freedom of contract.

<sup>28</sup> See, *inter alia*, *Cyprus v. Turkey* Appl. No 25781/94 (ECtHR, May 2001); *Orams v. Apostolides* Case C-420/07 (CJEU, April 2009).

sectors such as Electronic Communications and Energy, while also examining the definition of an ‘undertaking’ under CPC Law, as well as the ‘De Minimis’ rule. Of particular interest is the *Stylianou* case, where the Supreme Court of Cyprus held that the Ministry of Labour (a public entity) and its autonomous economic behaviour remain subject to the competition rules, but without prejudice towards the Ministry’s public task.<sup>29</sup>

Chapters 3 and 4 of Part I of the book are devoted to a vivid overview of substantive elements of Antitrust Law, thereby fulfilling the book’s illustrative objective. Besides pointing to basic legislative provisions of Cypriot Law, Professor Emilianides insightfully provides clarity as to the purpose of the above provisions by focusing, amongst other things, on the principle of proportionality (Ch. 3).<sup>30</sup> For example, on anti-competitive practices capable of exemptions, the writer observes that ‘[t]he existence of the ‘public interest’ objectives does not suffice, unless it is also shown that the restrictions to competition are absolutely necessary and that the negative consequences do not outweigh the positive, on the basis of the statutory criteria’ (par. 94). A crucial consideration is worth recalling in this regard: the American ‘rule of reason’ shall be clearly perceptible from the European criteria used to examine if restraints already illegal should be authorised nonetheless. As Justice Stevens puts it, the inquiry under the rule of reason is confined to a consideration of the impact of the challenged conduct on competition and does not inquire whether a policy favouring competition is in the public interest.<sup>31</sup>

Chapter 4 is a core element of the Book. Building on a body of case-law, Professor Emilianides manages in just a few pages to summarise the most important academic information on Cypriot Antitrust Law concerning main notions, such as Undertaking, Relevant Market, Dominant Position, Agreements and Concerted Practices, Restriction of Competition, Monopolisation and Abuse of Dominance, and Concentrations and Joint Ventures, which is a concept that is exclusively found in Competition Law.<sup>32</sup> In this way, the reader gets a solid view of the issues addressed in the whole Book.

<sup>29</sup> *Stylianou v. CPC* Case 1782/12 (30 June 2014) (in Greek).

<sup>30</sup> Cf. also Justice Brandeis’s opinion in *International News Service (1918)*, defining property rights as a balancing of public and private interests; Peritz (no 4) 302.

<sup>31</sup> *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978) 690, 692. See also Spencer W. Waller, *Book Review: EEC Competition Law: Business Issues and Legal Principles in Common Market Antitrust Cases by U.P. Toepke*, 5 Nw. J. Int’l L. & Bus. 951 (1983-1984), 955-956.

<sup>32</sup> See Triantafyllakis (no 1) 261.

However, the legal research would not be complete without reference to competition law enforcement bodies, procedures, and consequences;<sup>33</sup> Chapter 5 pursues that objective. Indeed, without a possibility to effectively challenge anti-competitive practices, the relevant legislation would remain a dead letter. The study acknowledges that, thereby focusing mainly on the CPC's structure, functioning and powers, particularly its administrative competences. The relevant issues are analysed in breadth and depth. For instance, the author: (i) examines the qualifications of the members of the CPC and cites interesting case-law of the Supreme Court of Cyprus, such as a series of cases holding that any decision made with the participation of an unlawfully appointed member of the CPC is void (§ 123); (ii) handles the question regarding the application of the principle of *non bis in idem* in the context of administrative fine proceedings (par.149); (iii) analyses the principle of proportionality in relation to the procedural obligation of disclosing confidential information that may be imposed on the defendant undertaking (paras 164 *et seq*), etc.

Part II, written by Anastasios A. Antoniou, is titled 'Application of the Prohibitions' and provides a comprehensive analysis of the three basic areas of competition law, i.e., restrictive agreements and practices (Ch. 1), abuse of a dominant position (Ch. 2), and mergers (Ch. 3). State Aid Law is expressly excluded from the main book's scope and objectives. Articles 101 and 102 TFEU (as implemented in CPC Law) establish different standards in judging agreements between undertakings on the one hand, and the conduct of dominant undertakings on the other. This two-fold division in modern antitrust law (multilateral and unilateral conduct, respectively) is also found in the United States<sup>34</sup> and is rightly reflected in the author's study linking law to examples drawn from case studies.

The *Cypriot Oil Companies* case<sup>35</sup> is an example of how the author attempts, through case editing, to illustrate a legal problem, such as that of price-fixing and parallel behaviours. Cartels have been defined as 'the supreme evil of antitrust'<sup>36</sup> and, for that reason, it is no coincidence that the book reserves an important place for

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<sup>33</sup> For an interesting view on criminalisation of antitrust enforcement in the EU Member States, see Wouter P. J. Wils, *Is Criminalization of EU Competition Law the Answer?* (2005) 28(2) *World Competition* 117, paras 63 *et seq*.

<sup>34</sup> Richard A. Epstein, *Monopolization Follies: The Dangers of Structural Remedies under Section 2 of the Sherman Act*, (2009-2010) 76(1) *Antitrust L.J.*205.

<sup>35</sup> *ExxonMobil Cyprus Ltd, Petrolina (Holdings) Public Ltd, Hellenic Petroleum Cyprus Ltd and Lukoil Cyprus Ltd v Commission for the Protection of Competition* (2011) 3 CLR 449 (in Greek).

<sup>36</sup> *Sic Verizon Communications v Law Offices of Curtis V. Trinko* (2004) 540 U.S. 398, 408. *See also* Papadopoulos (no 3) 40.

them. Other examples illustrating different legal issues are: the *Ready-mix concrete* case<sup>37</sup> on safeguarding free competition to the public works market; the *Cattle farmers* case<sup>38</sup> on anti-competitive exclusivity clauses and non-compete obligations; the *Kapodistriasis/Kyros/Daimler/CIC* case<sup>39</sup> on the assessment of a selective distribution scheme leaving only one player on the relevant market of spare parts of vehicles; the *Thunderworx/Cyta* case<sup>40</sup> on the objective character of ‘abuse of dominance’; the *Great Minds Marketing* case<sup>41</sup> as well as the *Alpha Electic/Fissler* case<sup>42</sup> on the abuse of a relationship of economic dependence, which is distinguishable from the abuse of dominance and forms a special characteristic of Cypriot legal order; the *Hertz/Hermes* case<sup>43</sup> on exploitative pricing in the field of airport operators; the *K.A.C./Henkel* case<sup>44</sup> on exploitative practices aiming at preventing parallel imports; the *Wyeth and Phadisco* case<sup>45</sup> on abusive rebates schemes in the pharmaceutical domain; the *Kapnisis/Misos/LLPA/Cyprus Ports Authority* case<sup>46</sup> on abusive refusal to deal; the *Pittas Diaries/POCF* case<sup>47</sup> on assessing abusive margin squeezes; the *Acquisition of Blue Circle Engineering Ltd by Hellenic Petroleum Cyprus Holding Ltd* case<sup>48</sup> on mergers; the *V LPG* case<sup>49</sup> on joint ventures, and so on.

Part III, written by Professor Emilianides, is titled ‘Administrative Procedure’ and focuses on the relationship between subjects of competition (undertakings) and Administrative Antitrust Authorities in Cyprus. This relationship is characterised by the fact that the CPC, just like the European Commission, has powers of investigation in competition matters (Ch. 1). The detection of infringements is growing ever more difficult and for that reason the CPC’s powers of investigation are extended. The full spectrum of these powers takes shape with clarity in the author’s attempt to present CPC’s modus operandi. The investigation of an infringement may finally lead,

<sup>37</sup> CPC Decision 29/2018, 18 July 2018.

<sup>38</sup> CPC Decision 42/2014, 17 October 2014.

<sup>39</sup> CPC Decision 11/2015, 23 April 2015 (in Greek).

<sup>40</sup> CPC Decision 48/2012, 8 October 2012 (in Greek).

<sup>41</sup> CPC Decision 38/2014, 4 September 2014 (in Greek).

<sup>42</sup> CPC Decision 22/2018, 22 June 2018 (in Greek).

<sup>43</sup> CPC Decision 20/2015, 23 June 2015 (in Greek).

<sup>44</sup> CPC Decision 53/2019 (in Greek).

<sup>45</sup> CPC Decision 36/2013, 12 April 2013 (in Greek).

<sup>46</sup> CPC Decision 54/2012, 10 October 2012 (in Greek).

<sup>47</sup> CPC Decision 32/2018, 24 July 2018 (in Greek).

<sup>48</sup> CPC Decision 26/2019, 22 April 2019.

<sup>49</sup> CPC Decision 35/2017, 27 July 2017 (in Greek).

through hearings and other proceedings, to a decision by CPC, as explained in the study.

Subsequently, the book turns to the special field of Mergers, analysing, *inter alia*, notification matters and other similar investigative procedures pursuant to the Concentrations Law (Ch. 2). In this respect, the study also examines how the CPC of Cyprus coordinates with the European Commission and other Merger Control Authorities (par. 4).

The last Chapter of the Book tackles both procedural as well as material substantive issues concerning the undertaking's right to effective legal protection against administrative action, which is a fundamental right guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union as well as in Article 6 of the ECHR. After analysing issues on the jurisdiction of the administrative courts, Professor Emilianides embarks upon a detailed analysis of the scope of the judicial review in the light of the considerable volume of Supreme Court case law. From a dogmatic point of view, examining how the general Principles of Administrative Law, such as the principle of legality of administrative action, the principle that administrative decisions must be duly reasoned, etc., shall be applied for effective judicial protection is of particular interest.

To conclude, the present study should be welcomed as giving a balanced and nuanced picture of the basic elements, as well as the peculiarities of the antitrust legal environment in Cyprus. Its methodology is based on a thorough analysis of case-law, first and foremost of that of Cyprus, thereby making this publication an important contribution to the study and implementation of Cypriot competition law and policies.

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