

The International Comparative Legal Guide to:

Cartels & Leniency 2009

A practical insight to cross-border Cartels & Leniency



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Chapter 9

Cyprus



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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition e.g. is it civil and/or criminal?

The legal basis of cartel prohibition in Cyprus is formed by the following three pieces of legislation:

- The Protection of Competition Law 13(I)/2008;
- The Control of Concentrations between Enterprises Law 22(1) of 1999 (as amended); and
- European Council Regulation (EC) 139/2004.

The general nature of the prohibition is both civil and legal.

1.2 What are the specific substantive provisions for the cartel prohibition?

Competition Law

a) Section 3 provides that any agreement or enterprise practice which is capable or likely to be capable, of:

- restricting free access in the market; or
- 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.

b) Section 4 prohibits any agreement made by an enterprise which has as its object or effect the elimination, restriction or distortion of competition. It also lists examples of forms of agreement which would automatically be deemed to fall into this category. These are agreements which:

- fix, directly or indirectly, the purchase or reselling prices or other terms of transaction;
- restrict or control production, supply, technological development or investments;
- allocate (geographically or otherwise) markets or other resources of supply;
- apply different terms for identical transactions so that certain enterprises are placed at a disadvantageous position regarding competition; or
- make the entering into of contracts conditional upon the acceptance by the other parties of additional obligations which by their nature or according to commercial usage have no connection with the subject-matter of these contracts.

Agreements which are prohibited under section 4 are considered to be void *ab initio*.

Section 6 prohibits the abuse of a dominant position of an enterprise in any product market. Abuse of a dominant position is defined as any act of one or more enterprises which possess a dominant position in the aggregate or part of the domestic market of a product, if this act has as its object or effect or probable effect an infringement of competition in the market similar to the effect of agreements specifically prohibited under section 4.

Mergers between enterprises are exempt from section 6 subject to their being notified to the CPC within three months of their coming into effect. This exemption arises solely because they are subject to the Concentrations Law rather than the Competition Law.

Concentrations Law

Section 13 states that participating undertakings forming concentrations of major importance on the basis of the statistical criteria set out in section 3 of the law must notify the CPC of the concentration and seek clearance for it to proceed. The criteria are as follows:

- at least two of the undertakings merging must have a total turnover of €3,417,203 each;
- at least one of them engages in commercial activities within the Republic of Cyprus; and
- at least €3,417,203 of the aggregate turnover of all the participating undertakings derives from the supply of goods or services within Cyprus.

Even if a proposed concentration does not satisfy the criteria set out in section 3, the Minister of Commerce, Tourism and Industry may declare by a Reasoned Order that the concentration is nevertheless of major importance and should be subject to a clearance investigation. Such an order will be made when the Minister considers the concentration is of major public interest as regards the effect it may have on any of the following:

- economic and social development;
- technical progress;
- employment; or
- the supply of goods and services necessary for the public security of the Republic as a whole or of its territories.

Clearance will be given only if the concentration is compatible with the requirements of a competitive market. A concentration which strengthens or creates a dominant market position in Cyprus will not ordinarily be deemed to be compatible.

1.3 Who enforces the cartel prohibition?

The Commission for the Protection of Competition ("CPC")

The CPC has prime responsibility for the implementation and enforcement of both the Competition Law and the Concentrations

Law. It is an independent entity which was established under the Competition Law. The CPC's powers are extensive and include:

- investigating possible infringements of the Competition Law (either as a result of a complaint or on its own initiative);
- issuing injunctive measures to halt actual or suspected anti-competitive practices;
- issuing individual competition clearances for up to five years where an apparently "non-competitive" practice is viewed as being justifiable in the public interest, where the restrictions are minimal and the practice does not allow for an elimination of competition in a substantial part of the market;
- investigating proposed concentrations to ensure that they do not strengthen or create a dominant position in the Cyprus market;
- imposing of administrative fines on participants in a concentration who breach the provisions of the Concentrations Law;
- issuing of temporary approvals to proposed concentrations pending completion of investigations; and
- granting remedies to restore a competitive market including a discretionary power to order a divestment where a concentration is judged to be anti-competitive.

The Council of Ministers approves the appointment of the CPC. It also has the power to provide general category exemptions from section 4 of the Competition Law.

The Competition and Consumer Protection Service ("Service")

The Service provides administrative and investigative support to the CPC. It is an independent body, and specific duties assigned to it include:

- preliminary evaluation of and report to the CPC in respect of proposed concentrations;
- preliminary evaluation of and report to the CPC in respect of applications for leniency from cartel participants; and
- investigation of concentrations and suspected anti-competitive practices as directed by the CPC.

The Minister of Commerce, Industry and Tourism ("Minister")

The Minister has the power to initiate an investigation by the CPC as a backstop against concentrations which do not meet the statistical thresholds set out in the Concentrations law but which may still raise concerns in respect of their impact on the competitive market in Cyprus.

The Supreme Court of Cyprus ("Court")

The Court is responsible for hearing appeals against decisions made by the CPC.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

Investigations under Competition Law

On receiving a complaint the CPC will consider it and form an initial opinion as to whether or not there is a *prima facie* case of infringement worthy of further investigation. If the CPC believes that the case has merit it will instruct the Service to conduct an investigation.

The Service will inform the relevant parties that they are under investigation. It will then seek to collect all information it considers necessary for proper evaluation of the case. The Service has significant powers to gain the information that it requires. The parties concerned must be given a "reasonable" time in which to produce any information requested. The Service is under a duty to protect the rights of the parties regarding secrecy and confidentiality.

On completion of the investigation a report is submitted to the CPC for review. If the CPC finds *prima facie* that anti-competitive behaviour has taken place it will communicate a statement of objections to both parties. This will include the documents and all other information on which it intends to base its case. Only disclosed information may be used by the CPC against the party.

The right of the accused to a fair hearing is safeguarded as follows:

- All parties are given adequate time to make written submissions defending their position. They may request an extension to the initial timetable given, and, if there is justifiable cause for the delay in submission, this will be granted.
- A hearing of the case will take place after the written submissions have been considered. All parties have the right to legal representation throughout the proceedings.

There is no set procedure laid down for the hearing by the CPC. The applicable procedural rules are identical to those of a court of law. Minutes of the oral hearing are kept and made available to the parties for summation purposes. The decision reached by the CPC on the case must be fully reasoned and based on fact and law.

The reasoned decision of the CPC will be communicated to the parties and published in the *Gazette*. The decision itself is effective from the date of such communication even if the communication is defective in some manner.

Investigations under the Concentrations Law

Phase one commences when the Service is in possession of the notification of a concentration and all the supporting documents required by the law. The Service conducts a preliminary investigation of the concentration and then submits a report to the CPC in which it records its reasoned opinion as to whether or not the concentration is capable of being declared compatible with the demands of a competitive market.

The CPC is obliged to consider the report promptly and three options available to it, namely, to declare that the proposed concentration:

- does not fall within the ambit of the law and hence may proceed;
- does not raise serious doubts as to its compatibility with the competitive market. It is therefore declared "compatible" and may proceed; or
- does raise serious doubt as to its compatibility with the competitive market, and should be subject to a "phase two" investigation.

The CPC must reach its decision in time for the Service to convey it to the concentration within one month of the day on which the Service received the complete notification. If it fails to do this, the concentration is automatically deemed to be compatible with the demands of the market. If the CPC expects to be unable to meet this timetable, it must immediately inform the Service and the applicants of that fact. It may then extend the time scale by 14 days, provided that it gives notice to the parties at least seven days before the expiry of the original deadline.

Where a phase two investigation is required, the Service must complete its investigation and submit its report to the CPC within three months of the later of:

- the date when notification was originally received; or
- when all information required to support the initial notification and any other information requested was received.

During a phase two investigation the Service may invite the parties to the concentration and third parties which have a legitimate interest in the concerned market to give evidence to it.

If the phase two investigation fails to alleviate the CPC's concerns, the Service will consider which, if any, of the circumstances giving rise to the concern may be removed. It will make suggestions to the CPC and the parties concerned and undertake negotiations with them to try to resolve the outstanding issues.

The CPC must declare the concentration to be either compatible with the market or not within four months of receipt of the original notification or, if later, of the receipt of all requested information. If it fails to meet this deadline the concentration will automatically be designated as compatible. The CPC may impose specific conditions on the concentration before allowing it to proceed.

When a phase two investigation is initiated, the parties to the concentration may make a reasoned submission to the CPC that delay in the commencement of the concentration may cause them serious commercial damage. If the CPC is satisfied with the submission it may approve, in writing, all or part of the concentration on a temporary basis.

1.5 Are there any sector-specific offences or exemptions?

a) Competition Law

Section 5 allows "block" exemptions covering a category of agreements rather than one specific agreement. Block exemptions may be made only under an Order of the Council of Ministers issued by the Council on the basis of a reasoned opinion of the CPC published in the official *Gazette*. In addition, this section states that European Union block exemption regulations are applied accordingly with regard to agreements subject to this legislation, unless they conflict with orders previously issued by the Council. Block exemptions granted to date include vertical agreements and those relating to the following sectors:

- liner shipping companies and consortia;
- liner shipping conferences;
- insurance;
- road transport;
- air transport;
- agricultural products; and
- motor vehicles.

Section 7 sets out the following as being exempt from section 6:

- businesses with activities that involve the administration of services of general economic interest, or that have a financial monopoly character, to the extent that the implementation of section 6 would legally or practically prohibit the specific activity appointed to them by the Government; and
- agreements relating to wages and terms of employment and working conditions.

b) Concentrations Law

Section 5 of the Law creates several categories of exemption by declaring that the following are not deemed to give rise to a concentration and hence not subject to notification procedures:

- purchases by credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of third parties;
- an enterprise over which control is exercised by a person authorised under the legislation relating to liquidation, bankruptcy or any other similar procedure;
- the concentration of enterprises between one or more persons already controlling at least one or more enterprises where the grouping together is carried out by investment companies; and
- a situation in which property is transferred under a will or by intestate devolution due to death.

The Law does not apply to a concentration of two or more enterprises, both of which are subsidiaries of the same entity.

1.6 Is cartel conduct outside Cyprus covered by the prohibition?

Cyprus cartel regulatory controls apply only when at least one of the undertakings concerned engages in commercial activity within the Republic of Cyprus. However, there is no firm definition of this term, and in practice the CPC has treated cases as subject to its jurisdiction even though none of the parties has an active branch or subsidiary in Cyprus. It is therefore prudent to register foreign company agreements if the Cyprus turnover threshold is met. Concentrations which have a European Community dimension as per EC Regulation 139/2004 must be notified to the European Commission for assessment.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	Yes
Carry out compulsory interviews with individuals	Yes	Yes
Carry out an unannounced search of business premises	Yes	Yes
Carry out an unannounced search of residential premises	Yes*	Yes*
■ Right to 'image' computer hard drives using forensic IT tools	Yes	Yes
■ Right to retain original documents	No	No
■ Right to require an explanation of documents or information supplied	Yes	Yes
■ Right to secure premises overnight (e.g. by seal)	Yes	Yes

Please Note: * indicates that the investigatory measure requires the authorisation by a Court

2.2 Specific or unusual features of the investigatory powers referred to in the summary table.

The Law provides explicitly that during a business or residential premises search, the competent officers of the Service may:

- inspect accounting records and other business documents;
- make copies of or extracts from accounting records and business documents;
- demand on the spot oral clarifications of information received by them; and/or
- enter all and any offices, premises and transportation means of the enterprises.

2.3 Are there general surveillance powers (e.g. bugging)?

The enforcement bodies do not have general surveillance powers.

Approval of such activities is reserved to the courts and subject to strict criteria and scrutiny.

2.4 Are there any other significant powers of investigation?

The Protection of Competition Law 13(I)/2008 has given greater powers to the CPC with regard to “dawn raids” that is, for example, the ability to seal premises for the period and to the degree required for the inspection of the premises, take statements from any member of staff of the enterprise under investigation, and the ability to obtain assistance from the police for such raids.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Searches of the business or residential premises are carried out by the officers of the Service. If deemed appropriate by the CPC, other officials or civil servants may accompany them. Where appropriate, the officers will enlist persons with specific expertise to assist them. In addition the CPC is entitled to request assistance from the police in searching business premises. The enterprise under investigation is entitled to consult with legal advisers during the search, and officials will most likely allow a reasonable time for legal advisers to arrive before the search commences. During this period, the investigating officers may impose certain conditions, such as the suspension of activities, and may enter and remain in offices of their choosing. It should be noted however that the presence or absence of a legal advisor does not affect the validity of the search.

2.6 Is in-house legal advice protected by the rules of privilege?

In house legal advice is not protected by the rules of privilege.

2.7 Other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

A material limitation of the investigatory powers is the inability to search residential premises without a court order. For the court to issue such order it must be persuaded that there are reasonable grounds to believe that relevant documents, accounts or data of the business activities of the enterprise investigated are held at the residential premises.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used?

Any person who, knowingly and with intent to mislead the CPC, supplies it or the Service with false, inaccurate or incomplete information or withholds relevant information is guilty of a criminal offence. This is punishable by imprisonment of up to one year, a pecuniary penalty of up to €85,000 or both.

Under the Concentrations Law, the following sanctions on companies also exist:

- Provision of false or misleading information: a fine of up to €85,430; and
- Failure to provide information requested by the CPC or the Service: a fine of up to €1,258.

Fines have been levied on companies failing to provide requested information in a timely fashion.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

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 or, in case the infringement was terminated before the making of the decision of the CPC, to convict the infringement by a decision of reconnaissance;
- impose a fine of up to €85,000 for each day the infringement continues after the decision has been communicated; and
- impose a fine of an amount, not exceeding 10% of the combined annual revenue in the year within which the infringement took place or in the year which immediately preceded the infringement of the enterprise or of each enterprise involved in a cartel.

It should also be noted that where a criminal offence is committed by a legal person in accordance with the provisions of the law, liability for the offence may extend to all members of the board of directors of the enterprise as well as the general director or manager.

In urgent cases the CPC may also order temporary measures including injunctions and impose such terms on market participants as it deems necessary.

Concentrations which fail to comply with the provisions of the Concentrations Law may have the following administrative penalties imposed on them by the CPC:

- failure to notify: a fine of up to €85,430 plus €8,543 for each day the infringement continues;
- provision of false or misleading information: a fine of up to €85,430;
- failure to provide information requested by the CPC or the Service: a fine of up to €1,258;
- putting a concentration into effect ahead of the decision of the CPC: a fine of up to 10% of the combined turnover of the enterprises concerned based on the most recent financial statements prior to commencement of the concentration;
- failure to adhere to the specific terms and relevant commitments made by the participants in the concentration in order to obtain clearance for the period stipulated by the CPC: a fine of up to 10% of the total turnover of the participating enterprises in the financial year immediately preceding the concentration, together with an additional fine of up to €8,543 for each day the infringement persists; and
- failure to comply with a measure ordered by the CPC under section 42 to return the market to a competitive state within the prescribed timescale: a fine of up to 10% of the total turnover of the participating enterprises in the financial year immediately preceding the concentration, together with an additional fine of up to €8,543 for each day the infringement persists.

The fines so imposed are collected as fines imposed by a Court in the exercise of its criminal jurisdiction.

3.2 What are the sanctions for individuals?

Competition Law

The following sanctions can be imposed on individuals:

- failure to comply with a decision of the CPC or with an interim judgement is a criminal offence punishable by imprisonment for up to two years, a fine of up to €40,000 or both.

- an individual who intentionally and, for the purpose of gaining an unlawful benefit, contravenes the duty to keep secret information revealed during the course of an investigation or hearing of the CPC commits a criminal offence punishable by imprisonment for up to one year, a fine of up to €3,500 or both.
- withholding information or providing false information is a criminal offence punishable by imprisonment for up to one year, a fine of up to €85,000 or both.

3.3 What are the applicable limitation periods?

Limitation periods are:

- within three years in case of applications for negative clearance (under Competition Law), collection of information and orders of the Commission for the conduct of an unannounced visit; or
- within five years in the case of all other infringements of the Competition or Concentrations laws.

The time limits begin from the date the infringement took place or, where the infringement continues or is repeated, from the date the infringement ended.

3.4 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

There is no prohibition on such payments.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

For some years the CPC has published a Cartel Immunity and Reduction of a Fine Programme ("the programme") which closely mirrors the European Commission Leniency Notice. Prior to the enactment of the new Protection of Competition Legislation, the published rules and guidelines were not enshrined in legislative provisions and were therefore not binding on the CPC, but merely gave an indication of how the CPC would most likely deal with cartel and leniency issues. With the enactment of the new Protection of Competition law 13(I)/2008, section 24(a) states that the CPC has the authority to not impose or to reduce fines levied on a enterprise or a group of enterprises, depending on the criteria and circumstances to be set out in a further Regulation, if the enterprise or group of enterprises cooperates or submits of its own accord such material or information that assists the Commission in establishing a violation of the law. Thus, any leniency programme that will be put into place on the basis of this section will be legally binding, in contrast to the programme that existed prior to this legislation.

This further regulation mentioned has not yet been enacted by the relevant authorities; although, we have unofficial confirmation from the CPC that it is currently being formulated.

In the following paragraphs of this question we outline the "old" programme as an indication of the main principles followed by the CPC. However, the CPC has given no indication of how closely, if at all, the new programme will reflect earlier practice.

Full immunity

The programme provided immunity from a fine which would otherwise be levied on a party for breach of section 4 of the Competition Law if the party concerned approached the CPC and proactively provided information making a decisive contribution to

the opening of an investigation into a cartel, the finding of an infringement of competition law or both.

In order to obtain full immunity, the applicant:

- must not have acted as the instigator or played a lead role in the infringement, nor must it have coerced another undertaking to participate in the illegal activity;
- must have approached the CPC before the CPC had sufficient evidence to reach a preliminary finding that section 4 had been infringed;
- was required to take effective steps as approved by the CPC to terminate its role in the illegal activity;
- was not allowed to alert its former co-participants that it had applied for immunity under the programme; and
- was required to co-operate fully and promptly with the CPC throughout its investigation and any subsequent hearings.

Partial leniency

The partial leniency programme offered the reduction of any fine which would otherwise be levied for breach of section 4 of the Competition Law as a quid pro quo for co-operation with the CPC. The reduction was:

- linked to the quality and timing of the co-operation;
- granted only to undertakings which provided the CPC with evidence that added significant value to that already in the CPC's possession; and
- conditional on the undertaking terminating its involvement in the infringement under investigation according to the terms set by the CPC.

The amount of the reduction was determined according to the following scale:

- first undertaking to co-operate - between 50% and 70%;
- second undertaking to co-operate - between 30% and 50%; and
- subsequent undertakings to co-operate - up to 30%.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

The CPC's practice to date has been that it will not consider subsequent applications for immunity in respect of the same infringement until it has made a preliminary decision on an existing application. The relevant time marker is the time of the initial contact. It is not yet clear whether this practice will be followed under the new system when it is introduced.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

The previous programme allowed the initial approach may be made orally, in hypothetical terms and via the applicant's legal consultants, with details of identities being disclosed once the application proceeded.

4.4 To what extent will a leniency application be treated confidentially and for how long?

The previous programme included strict confidentiality provisions and information obtained by the CPC could be used only to support actions under the Competition Law.

The fact that an undertaking co-operated with the CPC was indicated in any decisions made by the CPC. This served a dual purpose: it provided an explanation for any immunity or reduction

of fines granted to participants in the cartel and protected the CPC from allegations of bias or corruption.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The applicant was required to co-operate fully, on a continuous basis, throughout the investigation and the hearing stage.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

There was no 'leniency plus' or 'penalty plus' policy under the previously published guidelines.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

There are no whistle-blowing procedures for individuals.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)?

There are no formal procedures. However, the CPC will take account of mitigating factors when deciding what level of sanction to impose.

7 Appeal Process

7.1 What is the appeal process?

Any decision made by the CPC is considered to be an administrative decision which has been issued by a public authority. Article 146 of the Constitution of the Republic of Cyprus gives an aggrieved party seeking review of a CPC decision the right to file an administrative recourse to the Supreme Court. The time limit for seeking such recourse is 75 days from the receipt of notification of the CPC decision. The Court's decision is final and, to date, it has upheld all of the decisions of the CPC.

7.2 Does the appeal process allow for the cross-examination of witnesses?

The appeal process does not allow for the cross examination of witnesses.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct?

Any person who suffers damage as consequence of cartel activity has the right to bring an action against the cartel for damages

suffered. Subject to the normal rules governing the granting of injunction orders the claimant may request the District Court to make an injunction order to halt the unlawful activities giving rise to the damages.

8.2 Do your procedural rules allow for class-action or representative claims?

Representative claims are permissible.

8.3 What are the applicable limitation periods?

Six years from the date on which the cause of action occurred.

8.4 What are the cost rules for civil damages follow-on claims in cartel cases?

There are no cost rules; civil damages are assessed on the basis of the claim made.

8.5 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct?

We are not aware of any such claims to date.

9 Miscellaneous

9.1 Provide brief details of significant recent or imminent statutory or other developments in the field of cartels and leniency.

The current legislative and regulatory regime is viewed as robust and it is well regarded internationally. Consequently, there are no immediate plans to reform it in any significant way.

9.2 Please mention any other issues of particular interest in Cyprus not covered by the above.

The Protection of Competition Law 13(I)/2008 has only recently come into effect and has repealed previous competition law legislation to bring competition law into line with EU regulations, directives and policy. The system of individual negative certification by which the CPC could permit and declare legal, on an individual basis only, an enterprise agreement or a category of agreements that would otherwise be illegal under the provisions of section 4, has now been abolished. The CPC will only examine agreements in the course of other proceedings. This effectively means that firms are now responsible for assessing their own behaviour and ensuring that it is in line with the relevant provisions of the Competition Law. The recent law has also increased the CPC's powers to search premises and allows police assistance in such cases.

In addition, it has also introduced the concept of leniency into its legislation, directly referring to the CPC's power to reduce or to not impose fines on companies that cooperate and provide important and relevant information on infringements of competition law. Prior to this legislation, leniency was only offered through regulations issued by the CPC, not through legislative provisions.



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NEOCLEOUS

Andreas Neocleous & Co. LLC is among the largest law firms in the South-East Mediterranean region, and is generally regarded as the leading law firm in Cyprus.

Headquartered in Limassol, Cyprus's commercial and shipping centre, it has offices in Nicosia and Paphos in Cyprus and overseas offices in Russia, Belgium, Hungary, Ukraine and the Czech Republic. Its network of more than 100 top lawyers and tax consultants, all of whom are fluent in English as well as at least one other language, has extensive global experience, making Andreas Neocleous & Co. a full-service firm capable of advising on all aspects of international law.

Andreas Neocleous & Co has a specialist department dealing with competition law and has successfully dealt with many applications to, and negotiations with, the Commission for the Protection of Competition on behalf of clients of the firm.