

Cyprus Welcomes Article 90 EC



Monica P Sophocleous

Nicosia

A new section 7(b) in Cyprus's Competition Protection Law appears to go beyond the European Commission's expectations. This article describes how.

Before the recent amendment of Cyprus's Competition Protection Law (the 'Law'),¹ 'agreements or acts of state' and 'agreements or practices of enterprises where activities are specially regulated by law' were exempted from the competition rules. Consequently, the European Commission had urged² Cyprus to adopt, by the end of 2000, rules similar to Article 86 (ex-90) EC which subjects public undertakings and undertakings with special or exclusive rights to the application of competition law,³ albeit with an exception for those entrusted with services of general economic interest or revenue-producing monopolies.⁴

Unlike most of the Member States, Cyprus, a non-EU member, has reproduced⁵ the wording of Article 86(2) (ex-90(2)) EC as a commitment to accession to the European Union. Since the Law's new section 7 has not yet been substantially put to the test in the courtroom, the following discussion will largely be based on speculations which build on experience from Europe.

The author can be contacted by e-mail at,
monicaps@cytanet.com.cy

Public undertakings and the competition rules

It is now clear that public undertakings are *prima facie* subject to the Cyprus competition rules, in particular to sections 4 and 6 of the Law. This is because the extension of the term 'undertakings' is an exact reproduction of the definition of the term provided by the European Commission in Article 2 of Directive 80/723.⁶ It is also clear that, as at the Community level, bodies entrusted with the operation of services of general economic interest, as well as revenue-producing monopolies, are subject to the competition rules, although in these cases a limited exception is provided where the rules would obstruct the performance of particular tasks for which those bodies are responsible. The automatic application of Cyprus's domestic competition rules to those undertakings and the exemption provision are not precluded from difficulties, as the new law in Cyprus goes beyond what is necessary to bring the law into line with the Article 86 (ex-90) EC *acquis*.

In Cyprus, an undertaking that enjoys such rights without being public – in that the State does not place any influence on it under section 2⁷ – is

unlikely to be precluded from competition. It is therefore assumed that bodies entrusted with the operation of services of general economic interest are equally subject to the competition rules, like any other undertaking, provided that their assigned task is not obstructed by the discipline of competition.⁸ The undertaking seeking escape must first be entrusted to operate services of general economic interest and, secondly, those services will be obstructed if competition law is imposed on it.

New section 7(b)

From the Community's standpoint, Article 86(2) must be construed as narrowly as possible given the provision's nature of derogation from the Treaty rules. From Cyprus's standpoint, however, the new section 7(b) is simply another statutory provision which provides an exemption from other equally levelled provisions. Taking the Cyprus Supreme Court's attitude towards old section 7(1)(a) and (b) that it should be interpreted as strictly as possible,⁹ the assumption appears to be that the new section 7(b) will be used more restrictively. Furthermore, the new Law has not yet been wholly excluded from application by other law. Whether any later law is construed as overriding the new section 7(b) or as triggering its application by classifying the undertaking as one entrusted remains to be seen. No doubt if this happens, the effect of the new reform on the *acquis* will be seriously harmed. However, using the other legislation as a determinant for classifying the relevant undertaking as one falling under a section 7(b) type is preferable.

The aim of the derogation is to reconcile Member States' interest as an instrument of economic or fiscal policy with the Community's interest. In earlier times, the Commission stated as a possibility of obstruction where the undertaking 'had no other technically and economically feasible means of performing its particular task'.¹⁰ It was therefore unlikely, if not impossible, for an undertaking to plead obstruction given the stringent attitude towards Article 86(1). The recent amendment to the Cyprus Law added to new section 7(b) a presumption of obstruction which is based on these old European lines. This is unfortunate since the European Court of Justice's case law has, since then, evolved to a 'softening' approach.¹¹ It now appears that the European Court is willing to include in its balancing process economic and other considerations.¹²

The Law's new section 7(b) appears to go beyond the European Commission's expectations. Not only have public undertakings and undertakings with special or exclusive rights been automatically subjected to the competition rules, but the new section adopts a presumption of obstruction which

mirrors the Community's long-curtailed incompatibility test. According to the then European model, the derogation was hard, if not impossible, to achieve. One immediately expects that the obstruction presumption in the new Cyprus section will bring the same results: that is, mere availability of other technical and economic means of performing the general interest task would suffice to condemn an entrusted undertaking.

A stricter derogative rule means suppressing national interests other than purely economic ones. That was the consequence of using the old European 'incompatibility' test of obstruction a decade ago. Although the 'obstruction' presumption in the new section 7(b) reproduces the exact wording of that old test, the function of the new section is not comparable to that of the old Article 86(2) test. In fact, the function of the services of general economic interest is the Community's new toy.¹³ In view of EU membership, when conducting a balancing of interests, the Cyprus authorities will place the weight on Community interests as their own by means of judicial interpretation.

Cyprus has adopted the *acquis communautaire* as regards Article 86.¹⁴ The 'discrepancies' identified should rectify inconsistencies in accordance with the *acquis*, which were left intact in the Cyprus legislation, other than in the ambit of competition law. Nevertheless, whether this positive effect will actually appear depends solely on the 'goodwill' of the judiciary. ■

Notes

- 1 Cap 207.
- 2 1998 Report on Cyprus, at 21.
- 3 Article 86(1)(ex-90(1)) EC.
- 4 Article 86(2)(ex-90(2)) EC.
- 5 Competition Protection (Amendment) Law 2000, (L 87(1)/2000).
- 6 As amended by Directive 85/413, OJ 1985 L 229/20.
- 7 The General Press Distribution Agency in Cyprus which is responsible by statute for the distribution of newspapers qualifies as would bodies with a right to supervise activities in particular sectors (such as the Cyprus Tourist Development Agency) and bodies such as the Cyprus Bar Association responsible by statute for regulating legal professions.
- 8 New section 7(b) of the 1989 Law affords the same regulatory level.
- 9 Appeal no 1863, SCJ of 28 November 1997 by the dissenting judge.
- 10 *The Community v Association Nationale des Services d'Eau (ANSEU-NAVEWA)* [1982] 2 CMLR 193 at 209.
- 11 Case C-67/96, *Albany International BV v Stichting Bedrijfspensionenfonds Textielindustrie*, judgment 21 September 1999.
- 12 Case C-393/92, *Almelo v Energiebedrijf Ijsselmij* [1994] ECR I-1477.
- 13 This is confirmed by Article 16 (ex-7d) EC which does not have direct effect.
- 14 2000 Commission Report on Cyprus at 47.