

Regulation and enforcement. Complainants and the Regulator: friends or foes?

Risks and pitfalls in filing a complaint

10th April 2024

In carrying out its regulatory role of monitoring and controlling anticompetitive practices, be it cases of agreements between competitors or abusive practices of a dominant undertaking, the Cyprus Commission for the Protection of Competition ('CPC' / 'Commission') is assisted in fulfilling its mission by a statutory provision in the Law¹ which entitles any party who has a **legitimate interest** to file a complaint with the Commission so far as the complaint concerns an alleged **demonstrable violation** of article 3 and/ or 6 of the Law and/ or a demonstrable violation of Article 101 and/ or 102 of the Treaty on the Functioning of the EU (the 'Treaty').

Such complaints are an important source of information for the Commission and this right is intended, amongst others, to dissuade perpetrators from violating the Law in view of the wider scope of informants around them.

It is important to understand the rationale of this provision in order to correctly interpret its scope as well as the tantamount discretion that the Commission has in pronouncing a complaint admissible or not.

The language of the relevant provision, article 44 of the Law, as well as of Annex I to the Law (which is the relevant section in the Law setting out in detail the type of information, the level of detail as well as the supporting documentation which must be submitted in order to substantiate a complaint that the CPC would consider as 'complete' for the purposes of the Law) clearly stipulate that in order for a complaint to be considered admissible, it must conform to a quite detailed checklist and must meet a high standard of proof, which in all cases must satisfy the following:

- (1) It must demonstrate that the complainant has a **'legitimate interest'** in filing the complaint. The Law defines 'legitimate interest' as proof that the complainant has suffered or there exists a serious or probable risk that the complainant shall suffer substantial economic damage or that there is a probability or a serious or probable risk that the complainant shall be put in a disadvantageous competitive position, as a direct result of the alleged violation (article 44(1) of the Law).

¹ Law on the Protection of Competition, Law 13(I)/2022 (the 'Law')

(2) Per article 44(3) of the Law, a complaint would be admissible only if (amongst others) it contains **all the elements set out in Annex I²** of the Law. This requirement suggests that anything less may justify the Commission pronouncing any complaint inadmissible on the grounds that it is incomplete³, be it on the type of information provided, on the level of detail/ specifications provided on any aspect of the complaint, on any supporting documentation which is missing, etc.

Decisions issued by the Commission⁴ as well as by the Administrative Court and the Supreme Administrative Court (Second Instance)⁵ provide helpful and clear guidance about the quality of the complaint in order for it to be deemed admissible. The guidance offered suggests that in order for a complaint to be admissible, it must meet a high standard of proof, it must contain specific information and it must be substantiated.

In all cases the complaint must reveal (i) a legitimate interest of the complainant and (ii) a demonstrable violation of the relevant provisions of the Law and/ or of the Treaty. Anything less which would amount to an unsubstantiated, fuzzy or incomplete complaint, would most probably lead to a dismissal of the complaint. This would be the most likely outcome, despite the Commission having the discretion to consider a complaint as admissible even in cases where not all requisite information and details are duly filed.

Complaints may be incomplete for a number of reasons. It may be the case that a complaint is frivolous or vexatious, intended to intimidate the Regulator or harass a competitor. On the other hand, incompleteness may be attributed to a genuine inability of a complainant to get its hands on documentary evidence due to a so-called 'informational disadvantage' arising from its position.

It is these latter border-line cases that spark one's interest as one may easily think of cases where a complainant, practically, may not be in a position to possess all documentary evidence to substantiate all and any allegations made. For example, a complainant may be aware of discussions and/ or decisions taken by undertakings during meetings but may not possess actual minutes of such meetings which would prove these allegations. Or, a

² https://www.cylaw.org/nomoi/enop/ind/2022_1_13/appendix-ap303f138a-87e4-f4ea-976d-20b4ba9ca546.html

³ Subject to first requesting additional clarifications and/ or details within a period of not less than 20 days (section 44(4)(b) of the Law).

⁴ Decision of the CPC, 18.11.2013

⁵ <https://www.cylaw.org/cgi-bin/open.pl?file=/supremeAdministrative/2024/202404-92-18ASD.html>

complainant may be aware of specific agreements between parties but may not have copies of such agreements to furnish the Commission.

Would it be reasonable and/ or legitimate and/ or fair for the Commission to insist on the submission of actual documentary evidence proving such allegations in order for it to consider a complaint complete and thus admissible or should it be taking a pragmatic view whereby it would consider the probative value of the allegations made, recognise the practical difficulties and/ or indeed, the inability of a complainant to obtain possession itself of any such documentary evidence and consider a complaint admissible in spite of any such deficiencies?

Afterall, the Commission has quite extensive powers in obtaining evidence itself⁶ either in the course of investigating a complaint or any matter acting *ex officio*. Indeed, this would be a fair position to take, facilitating all concerned: the interest of the complainant in furthering the investigation of an alleged competition violation, the interest of the Commission in fulfilling its role as an economic regulator, as well as the public interest of having a duly regulated market which does not operate under conditions of distorted competition. When considering whether to admit an incomplete complaint, the Commission should weigh these interests against its ability to proceed with the examination of a complaint despite any missing information (whichever form this would take). Indeed, the burden imposed upon the complainant per Annex I, is to file with the Commission all those agreements *which are in the possession of the complainant* (as opposed to an obligation to file *all existing* relevant agreements).

In exercising its discretion in this regard, the CPC may take inspiration and guidance from the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (the 'Notice')⁷. Despite the fact that the Notice concerns guidance on how the European Commission exercises its discretion when assessing the admissibility of complaints filed pursuant to allegations of violations of EU competition law, the CPC may nevertheless find the guidance to be relevant by analogy in cases where it assesses the admissibility of complaints.

In particular, the Notice states that 'complainants [are] to submit comprehensive information in relation to their complaint. They should also provide copies of relevant supporting documentation *reasonably available to them*

⁶ See article 36 of the Law

⁷ [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52004XC0427\(04\)](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52004XC0427(04))

and, *to the extent possible*, provide indications *as to where relevant information* and documents that are unavailable to them could be obtained by the Commission. In particular cases, the Commission *may dispense with the obligation to provide information* in relation to part of the information required by Form C (Article 5(1) of Regulation 773/2004).’

Importantly, the Commission points out that the right to file a complaint which is not entirely complete can play a role to ‘facilitate complaints by consumer associations where they, in the context of an otherwise substantiated complaint, do not have access to specific pieces of information from the sphere of the undertakings complained of.’

More guidance may be borrowed from the Notice and the caselaw of the Court of First Instance on whether an ‘association of undertakings’ may legitimately claim to hold a legitimate interest in lodging a complaint regarding conduct concerning its members, despite the fact that it itself is not directly concerned in the same way that an undertaking operating in the relevant market would.

Indeed, this is the take of the European Commission and of the Court of First Instance provided that the association in question is authorized/ entitled to represent the interests of its members and that the conduct complained of, is liable to adversely affect the interests of its members. Conversely, where it had been proven that the members of the association of undertakings were not involved in the type of business transactions complained of, this adversely impacted the entitlement of the complainant to pursue a complaint.

In the case of the complaint filed by the Association of Cyprus Travel Agents against the Legal Service of the Republic, the Cyprus Tourism Organisation and the Minister of Commerce, Industry and Tourism, the Commission rejected the complaint as it considered that the complaint as originally filed was not duly substantiated.

In particular, it had asked the complainant to:

- (i) lodge a detailed account of all the facts on the basis of which the alleged violation of the relevant sections of the Law and/ or of the Treaty was demonstrable. In this regard, it required of the complainant to specify the exact provisions in the Law which in its opinion had been violated and to apply the said provisions on the relevant facts in such a way as to substantiate the alleged violation(s);

- (ii) duly substantiate the legitimate interest of the complainant which entitled it to file a complaint, by filing relevant evidence proving the reasons which in the complainant's view, gave rise to its legitimate interest;
- (iii) confirm whether it insisted on its original position to turn the complaint against all the initial respondents and if so, to explain, in each particular case, how each respondent was involved.

In spite of the repeated opportunities that had been given to the complainant to provide the missing information, the complainant chose to reiterate the original complaint and refrain from providing additional information/ evidence.

In its decision dismissing the complaint, the CPC pointed out the obligation of a complainant to demonstrate each time how a particular legal provision is applied to the specific facts of the case in relation to which the complaint is filed and to specify how a violation thereof came about. A mere general citation of all the relevant provisions of the Law would simply not suffice for the purposes of the Law.

The Administrative Court considered that the CPC had duly exercised its discretionary powers in dismissing the complaint, after having first requested specific pieces of additional information/ evidence to be submitted to it. In particular, it had considered that the general reference made by the complainant to the fact that various governmental services/ ministries/ quasi-governmental organisations had benefited from the government budget whilst at the same time they had also benefited from a specific government grant for the organization of conferences in Cyprus (an allegedly regulated activity to be carried out only by travel agents), did not meet the requirements set down by the Law. It considered this reference as lacking in specific details and as one which did not demonstrate a basic violation of the relevant sections of the law. Rather, the complainant should have specified the particular cases where each respondent had acted in this manner and should have provided evidence proving any such allegations in each case.

The Court considered that the complaint contained 'general allegations, lacking the requisite clarity, specificity and detail'. It pointed out that the complaint did not contain the specific facts which would enable one to conclude that the allegation of a violation of a provision of the Law had any merits.

For example, the complaint in its submitted form, did not enable one to conclude that there was a case of an abuse of a dominant position, or that the members of Cyprus Travel Agents Association were at a disadvantageous position as a result of the conduct complained of.

The Court pointed out that the complaint should contain evidence of the relevant market, of a dominant position held by the respondents and how their benefiting from the government grant would constitute an abuse of a dominant position. In view of these deficiencies, the Court dismissed the administrative recourse filed against the Commission's decision. The Supreme Administrative Court concurred with this finding and in its respective judgement it included a substantial extract from the lower Court's decision, thereby endorsing the said conclusions and guidance.

It would appear that the obligation upon the Commission when assessing the admissibility of a complaint is to consider the factual and legal issues brought to its attention by the complaint in order to assess itself whether the issues substantiated constitute a violation of the relevant provisions of the Law and/ or of the Treaty. The obligation of the Commission at this stage does not extend to it being required to carry out an investigation of each complaint to decide whether a violation has taken place; rather, the Commission has to determine whether the complaint is admissible for further investigation or not (due to incompleteness or lack of competence).

It is within these parameters that the Commission should exercise its discretionary powers and in all cases, it should be mindful of the valuable assistance provided to it by complainants in identifying anticompetitive practices and of the disadvantageous position that complainants often find themselves in when attempting to substantiate a complaint. Indeed, any discretion exercised by the CPC must not be exercised sternly nor rigidly, but with a heavy dose of pragmatism, always being wary of any frivolous complaints which complainants with ulterior motives not connected with the proper functioning of the market, may attempt to pursue. Complainants acting in good faith and the Commission should be playing on the same side (always within the confines set down by the Law), ultimately working towards the creation and maintenance of a market where competition is not distorted.