

THE PROTECTION OF COMPETITION LAW, 2008

(Law N. 13(I)/2008)

**Complaint by NETSMART (CYRPUS) LTD against the Cyprus
Telecommunications Authority**

Commission for the Protection of Competition:

Mrs. Loukia Christodoulou	Chairperson
Mr. Leontios Vryonides,	Member
Mrs. Eleni Karaoli,	Member
Mr. Demetris Pitsillides,	Member
Mr. Costas Melanides	Member

Date of decision: 11 September 2012

SUMMARY OF THE DECISION

The case concerned a complaint filed by a provider of electronic communications, NETSMART (CYRPUS) LTD ("Netsmart"), against the Cyprus Telecommunication Authority ("CYTA"), for an alleged infringement of Section 6 of the Protection of Competition Law 13(I)/2008 ("Law"). In particular, the complaint concerned the fact that, while Netsmart was affiliated with the SMS Center of CYTA as from June 2005 and provided to users services with Premium SMS **mobile origination**, it was unable to provide services to users with Premium SMS **mobile termination**.

The case was a review of the complaint filed by Netsmart against CYTA, for which a decision (No. 42/2010) had been previously issued and consequently annulled by the Supreme Court, as a result of the decision of the Supreme Court in appeal No. 1544/09, 1545/09, 1596/09 and 1601/09 (ExxonMobil Cyprus Ltd etc. and the Commission for the Protection of Competition).

CYTA is a public organization, established under the Telecommunications Service Law, Chapter 302, and it has the statutory obligation to provide public communications networks and electronic communications services throughout the

territory of the Republic of Cyprus. As a vertically integrated organization, CYTA provides electronic communications services in both the retail and wholesale markets. At the retail level, CYTA provides fixed and mobile telephone services to consumers. At the wholesale level, CYTA offers, among other things, interconnection, unbundled access to the local loop, broadband access (Bitstream), etc.

Netsmart is an electronic communications services provider, which provides communication services and content for mobile phones, as well as premium services (premium sms) through the systems of CYTA.

The Commission for the Protection of Competition (“Commission”) taking into account all the information in the administrative file and the relevant case law, defined, the direct access to the SMS Center of CYTA and all related services that are necessary for a provider to be able to provide Premium SMS, as the relevant product market.

Regarding the relevant geographic market, the Commission decided that this extends throughout the territory of the Republic of Cyprus, since the conditions of competition are homogeneous throughout the country.

The Commission, after considering the relevant factors also, concluded that CYTA holds a dominant position in its own network, the SMS Center of CYTA.

The Commission noted that, for a provider of electronic communications services to be able to provide services of premium sms, it must first acquire access to the mobile network of CYTA, and particularly to the SMS Center of CYTA, along with some other facilities, with the approval of CYTA.

CYTA already has made arrangements with providers of electronic communications services such as Netsmart, giving them the ability to provide services of Premium SMS Mobile Origination to users, based on the so-called model of independent providers. Netsmart applied to CYTA, to be granted the facilities for providing Premium SMS services by charging their clients at the termination of their messages (Mobile Termination), using the same model of cooperation. It is this request that CYTA failed to satisfy, justifying its decision by claiming technical difficulties.

CYTA claimed that Netsmart had an alternative way to provide Premium SMS-MT through the Cybee model. The Commission, after thorough examination of both the

possibility for Netsmart to use the model of independent providers and the possibility to use Cybee in order to provide services of Premium SMS – MT, concluded that the two are not substitutes.

The Commission held that the infrastructure for the provision of services of Premium SMS-MT was essential to the development of competition in this area, and thus, CYTA ought to provide it and take the necessary actions that would help them overcome any obstacles, technical or of any other nature.

The period that elapsed between November 2005 (the date on which the provision of this facility was specifically requested) up until April 2010 (the date on which CYTA found the solutions to the previously claimed technical problems), was held by the Commission to be unreasonably long. The Commission's decision was based on the mere fact that CYTA had began the implementation of the necessary software in 2009 and completed it within 2010. The Commission considered that the fact that the required software was not in hand and could neither be bought cannot constitute an objective justification for the time that elapsed from 2005 to 2010.

The Commission, at its meeting convened on 11 September 2012, having evaluated all the evidence before it, unanimously concluded that the actions and/or omissions of CYTA, and particularly its refusal to provide direct access to its SMS Centre and to all related services that are essential to a provider of electronic communications to be able to provide Premium SMS charged at the termination of the message (mobile terminations) to the subscribers of CYTA, constitutes an abuse of its dominant position in the relevant market, in violation of Section 6(1)(b) and 6(1)(c) of the Law.

The Commission in its decision held that CYTA, as dominant in the relevant market concerned, failed to respond to its special responsibility to provide the necessary means to the complainant company Netsmart, so that the latter could be able to provide Premium SMS - MT, directly to the mobile users of CYTA.

Taking into account the nature, duration and severity of the infringement procedures, under Section 24 (a) (i) and 42 (1) of the Law, the turnover of CYTA, which in 2005 amounted to €398.194.555, as well as the need to prevent repetition of offenses, the Commission unanimously decided, acting on the basis of Section 24 (a) (i) of the Law, the following:

(A) In respect of the infringement of Section 6 (1) (b) of the Law, to impose a fine on CYTA amounting to €318.556 (three hundred eighteen thousand five hundred and fifty six Euros), and

(B) In respect of the infringement of Section 6 (1) (c) of the Law, to impose a fine on CYTA amounting to €318.556 (three hundred eighteen thousand five hundred and fifty six Euros).

Loukia Christodoulou
Chairperson
Commission for the Protection of Competition