

# Merger Control

The international regulation of mergers and joint ventures in 69 jurisdictions worldwide

Consulting editor: John Davies

# 2012



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# Cyprus

## Anastasios A Antoniou

Anastasios Antoniou LLC

### Legislation and jurisdiction

#### 1 What is the relevant legislation and who enforces it?

The Control of Concentrations Between Undertakings No. 22(I) of 1999 (the Law) is the legislative instrument regulating concentrations in Cyprus. The Law provides the legal framework for pre-merger notifications and merger control procedures.

Enforcement of the legislation rests with the Commission for the Protection of Competition (CPC), initially established in 1990 and re-established pursuant to the provisions of the Protection of Competition Law No. 13(I) of 2008 (the 2008 Law). The CPC has overall responsibility for implementing the Law and is the competent independent authority for the control of concentrations.

#### 2 What kinds of mergers are caught?

The Law is applicable to concentrations of major importance. Question 5 defines such concentrations.

#### 3 Are joint ventures caught?

Concentrative joint ventures (consisting of two or more undertakings, the activities of which are under common control) that carry out all the functions of an autonomous economic entity are caught under the Law.

#### 4 Is there a definition of 'control' and are minority and other interests less than control caught?

Pursuant to section 4(3) of the Law, 'control' is defined as control stemming from any rights, contracts or other means that, either severally or conjunctively with others, and with regard to the legal or other facts of the case, confers the possibility of exercising decisive influence over an undertaking through:

- ownership or enjoyment rights over the whole or part of the assets of the undertaking; or
- rights or contracts that confer the possibility of decisive influence on the composition, meetings or decisions of the bodies of an undertaking.

#### 5 What are the jurisdictional thresholds?

For the purposes of the Law, a concentration of undertakings is deemed to be of major importance and therefore meet the jurisdictional thresholds if:

- the aggregate turnover achieved by at least two of the participating undertakings exceeds, in relation to each one of them, the amount of €3.42 million; and
- at least €3.42 million of the aggregate turnover of all concerned undertakings relates to the sale of goods or the provision of services within the Republic; and

- at least one of these undertakings is engaged in commercial activities within the Republic of Cyprus.

#### 6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing of concentrations of major importance is mandatory.

However, notification is not required in the following cases, where, pursuant to section 4(5) of the Law a concentration is not deemed to arise (in translation):

- a credit or financial institution or an insurance company, the normal activities of which include transactions and dealing in securities on its own account or for the account of third parties, holds on a temporary basis securities that it has acquired in an undertaking with a view to reselling them, provided that the institution does not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that it exercises such voting rights only with a view to facilitating the disposal of all or part of that undertaking or of its assets or the disposal of those securities, and that any such disposal takes place within one year of the date of acquisition;
- control is exercised by a person authorised under the legislation relating to liquidation, bankruptcy or any other similar procedure;
- the concentration of undertakings between one or more persons already controlling at least one or more undertakings is carried out by investment companies;
- property is transferred due to death by a will or by intestate devolution; or
- it is a concentration between two or more undertakings, each of which is a subsidiary undertaking of the same entity.

#### 7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

As per question 5, in addition to the turnover thresholds at least one of the participating undertakings must be engaged in commercial activities in Cyprus for the concentration to fall within Cypriot regulatory control and for a notification obligation to arise. Taking into consideration that there is no case law definitively defining the legislative provision of 'engaged in commercial activities in Cyprus', it can be said that in its wider interpretation the said provision could catch foreign-to-foreign mergers. Such subjection of foreign-to-foreign concentrations under the Cypriot regulatory regime would largely depend on the exact nature of the participating undertakings' activity in Cyprus and the means by which their products or services are sold or provided in Cyprus and should be evaluated on a case-by-case basis.

### Notification and clearance timetable

- 8** What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Concentrations of major importance must be notified to the CPC's Service within one week from the date of conclusion of the relevant agreement or the publication of the relevant offer for the purchase or the acquisition of a controlling interest, whichever occurs first.

Failure to file a concentration of major importance results in administrative fines; there is a fixed fine of up to €85,430 and a daily fine of up to €8,543 per day of infringement.

There are a number of cases in which the fines have been enforced in practice.

In the case of failure to notify the Service of the concentration (which is brought to the attention of the Service in a way other than by notification by the undertakings concerned), the Service is required to inform those obliged to notify of their obligation to notify and, on receipt of the said notification, to proceed as if the above time frame had been met from the outset.

- 9** Who is responsible for filing and are filing fees required?

Concentrations of major importance must be notified to the Service in writing, either jointly or separately:

- by the persons party to a merger agreement or who acquire a controlling interest;
- if two or more previously independent undertakings merge; or
- where a concentration occurs between one or more persons already controlling at least one or more undertakings.

In all other cases, the person responsible for notification is the person or undertaking acquiring control.

There are no fees for the filing of a notification.

- 10** What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

In respect of the timing implications, provided that the notification and supporting documentation are in conformity with the requirements of the Law, the Service proceeds to prepare a preliminary evaluation and report for submission to the CPC regarding the compatibility of the proposed concentration with the requirements of the competitive market (ie, that the concentration does not strengthen or create a dominant position in the relevant market within the Republic).

The CPC is required to consider the report as soon as it is submitted to it by its Service and proceed immediately with its decision.

Within one month of being informed of the CPC's decision, the Service is required to inform the notifying party or parties of the decision (either that the case is under investigation or that further information is required); if owing to the volume of work the CPC cannot provide a response within the time limit prescribed by Law, it shall inform the parties of this fact at least seven days before the expiry of the deadline and may extend the time limit by a further 14 days.

Subject to the foregoing, the notifying party or parties must be informed of the CPC's decision no later than four months from the date of receipt by the Service of the original notification application or, in the event that additional information is requested by the Service, within four months of receipt by it of the additional information requested, as the case may be.

- 11** What are the possible sanctions involved in closing before clearance and are they applied in practice?

According to section 9 of the Law and subject to the provisions of section 33 relating to temporary approval of concentrations, the relevant activity giving rise to a concentration should be suspended

until such activity has been officially cleared. Failure to comply with this requirement carries the same consequences as non-notification and the CPC may impose administrative fines on the participants in the concentration, which, by their omission, infringe the relevant provisions of the Law.

Where a concentration is either partially or completely put into effect without notice of approval from the Service, a fine of 10 per cent of the total turnover of the participating undertakings in the financial year immediately preceding the concentration will be imposed, in addition to a fine of up to €8,500 for each day that the infringement continues to exist.

- 12** What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Please refer to question 7.

- 13** Are there any special merger control rules applicable to public takeover bids?

The Public Takeover Bids Law No. 41(I) of 2007, which transposes the relevant Directive 2004/25/EC of the European parliament and of the Council of 21 April 2004 on takeover bids, is applicable to public takeover bids. There are no special merger control rules applicable to public takeover bids.

- 14** What is the level of detail required in the preparation of a filing?

The notification application should reflect the form set out in appendix III to the Law. The application must be made in Greek and must be accompanied by various supporting documents and other information, including but not limited to the following:

- a copy of all final or most recent documents that brought about the concentration either by agreement or following a public bid;
- in the case of a public bid, a copy of the public bid document;
- copies of the most recent annual reports and audited financial statements of all the undertakings participating in the concentration;
- copies of reports or analyses prepared for the purposes of the concentration;
- a list and short description of the contents of all analyses, reports, studies and surveys that were prepared by or for any of persons responsible for notification for the purpose of evaluating or analysing the proposed concentration in relation to the market and competition conditions;
- details of the concentration (including the nature and scope of the concentration, the financial and structural details of the concentration, and details regarding the turnover in Cyprus and worldwide of each undertaking);
- details of relationships of ownership and control as between each participant in the concentration and the undertakings connected with it;
- personal and economic ties as between each group of undertakings and any other undertaking operating within the affected market in which such group holds, inter alia, at least 10 per cent of the voting rights or shares; and
- a description and analysis of the affected relevant markets.

- 15** What is the timetable for clearance and can it be speeded up?

The CPC is required to consider the report of its Service as soon as such report is submitted and then proceed immediately with issuing a decision.

Within a month following the CPC's decision, the Service is required to inform the notifying party or parties of the decision (either that the case is under investigation or that further

information is required). If, due to the volume of work, the CPC cannot provide a response within the time limit prescribed by Law, it must immediately inform the parties of such inability and may extend the time limit by 14 days.

**16** What are the typical steps and different phases of the investigation?

See questions 10 and 15.

### Substantive assessment

**17** What is the substantive test for clearance?

The substantive test for clearance of concentrations is whether the concentration complies with the requirements of the relevant market, namely, that the concentration does not strengthen or create a dominant position in the relevant markets within the Republic.

The criteria taken into account when considering the substantive test are as follows:

- the structure of the affected markets;
- the market position of the undertakings participating in the concentration;
- the economic power of all undertakings in the market; and
- the alternative sources of supply of the products and services that are traded in the affected markets and of their substitutes.

**18** Is there a special substantive test for joint ventures?

Joint ventures that are caught under the substantive test for concentrations are defined as two or more undertakings with activities under common control and that carry out all functions of an autonomous economic entity.

**19** What are the 'theories of harm' that the authorities will investigate?

While the Law is silent in this regard, it can be inferred that the CPC's approach and analysis of harm is substantially aligned with the respective approach of the European Commission. Besides high market shares, the assessment usually takes into account the anti-competitive effects that could potentially arise out of a concentration, such as coordinated effects as well as unilateral effects. The burden of proof is on the participating enterprises.

Nevertheless, it should also be noted that the CPC holds cartels that have as their object price fixing, sales quotas, market sharing or the restriction of imports or exports to be among the most severe infringements of competition rules and implements a stringent approach over such instances.

**20** To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

The CPC only takes competition issues into account when considering the Service's report and issuing its decision. However, the minister of commerce, tourism and industry can, by issuing a justified order pursuant to section 36 of the Law, declare a concentration as being of major public interest with respect to the effects it might have on economic and social progress, technological development, employment or the sale of goods or the provision of services essential for the public security of the Republic.

**21** To what extent does the authority take into account economic efficiencies in the review process?

When making its assessment, the CPC takes into account the following:

- the structure of the affected markets;
- the market position of the participants;

- the economic power of all the undertakings in the market; and
- the alternative sources of supply of the products and services that are traded in the affected markets and of their substitutes.

### Remedies and ancillary restraints

**22** What powers do the authorities have to prohibit or otherwise interfere with a transaction?

#### Temporary approval of the concentration

In cases where the CPC proceeds with a full investigation and reasoned submissions are made to the CPC by one or more of the participants to the concentration or by any other person who might suffer damage owing to further delay in the commencement of the concentration, the CPC, if satisfied with such submissions, has the power to inform (in writing) the participants and those who made the relevant submissions that the whole or part of the concentration is approved temporarily either conditionally or unconditionally.

#### Power to revoke

The CPC has at any given time the power to revoke decisions related to the compatibility of any concentration and to amend any of the terms of its decision if it determines that:

- its initial decision was based on false or misleading information or that necessary information relating to the concentration at hand was withheld by the notifier or by any other participant in the concentration or by any interested person; or
- any condition attached to the decision and imposed on the participants to the concentration has not been satisfied or has ceased to be satisfied.

Where the CPC exercises its power of revocation, it may, following a study of the Service's report, order either a full or a partial dissolution of the concentration to secure the restoration of the competitive market.

#### Scrutinising powers

Before reaching its final decision and subject to the time limits provided by the Law, the CPC may, if it considers it expedient to do so, carry out negotiations, hearings or discussions with any of the interested parties or other persons.

Furthermore, within the powers conferred on the CPC and the Service respectively, the authorised government officers have the right to examine each undertaking participating in the concentration or any person involved, by having access to any immovable property, means of transport, books or records that they possess as the officers may think fit.

Finally, any authorised officer may request, either orally or in writing, additional information in the form of clarification or reports from the person obliged to make the notification or any participant in the concentration or any representative of any such person, regarding any matter raised for examination during an evaluation or investigation by the Service. In the event of failure to provide information pursuant to this obligation, a fine of €51,300 may be imposed by the CPC in the form of an administrative penalty.

**23** Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Law grants discretionary powers to the CPC by giving it the right to impose any measures it thinks fit.

Where the CPC exercises its discretionary power it may, in the course of granting a remedy, order the dissolution or partial dissolution of the concentration concerned to secure the restoration of the competitive market. The dissolution is accomplished by the deprivation of any participation, shares, assets or rights acquired by any person participating in the concentration, or by the cancellation of

### Update and trends

The CPC has in recent years seen growth in the volume of concentrations being notified pursuant to the legislative provisions. In May 2011, the CPC decided to fully investigate two notified concentrations due to serious doubts as to the respective concentrations' compatibility with the market. This development may be an indication of the CPC raising its scrutiny levels within the context of its investigative functions and competence and will remain to be seen whether the concerned full investigations will lead to findings of incompatibility of these concentrations with the market and the consequential imposition of fines.

Also, in May 2011, the Supreme Court of Cyprus in exercising its administrative review jurisdiction, ruled that the appointment of the incumbent chairman of the CPC was irregular and null, leading to the chairman's removal. The validity of the decisions of the CPC as of 2008, when the chairman had been appointed, are left in doubt following this judgment of the Supreme Court and it may mean that all or some of the concentrations notified to the CPC as of 2008 may require re-investigation or re-examination.

any contracts that created the concentration or that arose from it, or by a combination of the two, or any other way the CPC deems necessary.

If the CPC ascertains that the notified concentration falls within the scope of the law and raises doubts as to its compatibility with the competitive market, it will inform the Service of the need to conduct a full investigation. In such an event, the Service will request further information from the participants for the purpose of completing its investigation. If, following its review of the additional information provided to it, the CPC's doubts as to compatibility have not been removed, the Service will consider which of the circumstances giving rise to its concerns may be removed and will make suggestions and subsequently undertake negotiations with the parties to resolve the issues.

The Service is required to report to the CPC explaining whether the issues have been satisfactorily resolved (or the manner in which they may be resolved) through the negotiation process. On its examination of the Service's report, the CPC may declare the concentration compatible with the requirements of the competitive markets, subject to any specific terms and commitments made by the relevant participants to comply with such terms.

**24** What are the basic conditions and timing issues applicable to a divestment or other remedy?

The CPC is required to provide written notification to the participating undertakings and any other person involved in the concentration. Should the merger be cross border, the CPC is also required to liaise with the relevant foreign authorities. Furthermore, there is no limitation with respect to the means that the CPC will use to secure the competitive market; however, the measures have to be limited to those that are reasonably necessary for the protection of the competitive market.

**25** What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Foreign-to-foreign mergers are not caught by the Law.

**26** In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The clearance decision issued by the CPC covers related agreements if such agreements are related to, and are necessary for, the implementation of the merger.

### Involvement of other parties or authorities

**27** Are customers and competitors involved in the review process and what rights do complainants have?

Yes, such parties having a legitimate interest may be involved only within the context of a full investigation over the concerned concentration.

In such cases, the Service is required to provide any person having a legitimate interest but who is not a participant in the concentration with an appropriate opportunity to submit their views regarding the concentration in such manner and at such time so as not to violate the time limit for three weeks.

The European Commission has published 'Best Practice Guidelines' regarding the relationship between parties to the case and third parties during the procedure.

**28** What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The CPC does not maintain an open policy on filed complaints.

During the course of an investigation, the CPC will inform an undertaking that it is under investigation, unless of course, the complaint is clearly unsubstantiated or the allegations are not anti-competitive. When the CPC decides that there is a prima facie infringement of the Law, it will issue a statement of objections setting out the alleged infringements and the documents in the file upon which it intends to base its case. The parties shall only then have access to these documents.

The CPC and the Service are under a duty to ensure confidentiality. When confidential material is provided to the Service, this must be duly marked as such and treated accordingly. Furthermore, any authorised officer of the CPC or of the Service or any other civil servant who acquires any information in relation to the concentration is bound to secrecy and is under an obligation not to divulge any of his knowledge except in so far as this may be required by Law. Any potential infringement by any officer constitutes a criminal offence punishable by imprisonment of up to six months or a fine up to €1,700, or both.

**29** Do the authorities cooperate with antitrust authorities in other jurisdictions?

Pursuant to the relevant provisions of the EC Merger Control Regulation No. 139/2004 (the Regulation) and in relation to cases with a community dimension, national competition authorities cooperate on the basis of the system of the parallel competent authorities.

**30** Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no specific competition rules on foreign investments, special sectors or other approvals.

### Judicial review

**31** What are the opportunities for appeal or judicial review?

The decision of the CPC is an administrative decision issued by a public authority. As such, an aggrieved party seeking to annul a CPC decision has the right to file an administrative appeal to the Supreme Court under article 146 of the Constitution of the Republic of Cyprus.

**32** What is the usual time frame for appeal or judicial review?

The time limit for commencing an administrative appeal is 75 days from receipt of notification of the CPC's final decision.

**Enforcement practice and future developments**

**33** What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

According to the most recent annual report published by the CPC in 2009, 36 proposed concentrations were notified to the Service of the CPC in 2009. Between 2005 and 2008, the number of notified concentrations increased year-on-year (2008: 29 notifications; 2007: 29 notifications; 2006: 25 notifications; 2005: 11 notifications; and 2004: five notifications).

In one case, the CPC decided not to impose a fine on concentrations on the basis that there was prima facie evidence of an alleged infringement of the provisions of the Law, and decided to accept the explanations submitted by the concerned undertakings that they had acted bona fide in their relevant omissions to fully comply with the applicable legislation.

**34** What are the current enforcement concerns of the authorities?

Concentrations notified to the CPC are reviewed under the legislative and policy rules in place and described above. Nevertheless, the economic crisis, with its slow impact on the Cypriot economy, which is becoming worse according to economic data in 2011, might create concerns and varied approaches over the examination of concentrations that were not present in previous years. Nevertheless, no such indication has emerged from the practice of the CPC or from its recent decisions.

**35** Are there current proposals to change the legislation?

No proposals exist for any change to the applicable legislation at the time of writing.



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