The Merger Control Review

Second Edition

Editor
Ilene Knable Gotts

Law Business Research

THE MERGER CONTROL REVIEW

SECOND EDITION

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EDITOR'S PREFACE

Perhaps one of the most successful exports from the United States has been the adoption of mandatory pre-merger competition notification regimes in jurisdictions throughout the world. Although adoption of pre-merger notification requirements was initially slow – with a 13-year gap between the enactment of the United States' Hart-Scott-Rodino Act in 1976 and the adoption of the European Community's merger regulation in 1989 – such laws were implemented at a rapid pace in the 1990s, and many more were adopted and amended during the past decade. China and India have just implemented comprehensive pre-merger review laws, and although their entry into this forum is recent, it is likely that they will become significant constituencies for transaction parties to deal with when trying to close their transactions. Indonesia also finally issued the government regulation that was needed to implement the merger control provisions of its Antimonopoly Law. This book provides an overview of the process in jurisdictions as well as an indication of recent decisions, strategic considerations and likely upcoming developments in each of these. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

As shown in further detail in the chapters, some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions either already vest exclusive authority to transactions in one agency or are moving in that direction (e.g., Brazil, France and the UK). The US and China may end up being the outliers in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany also provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are a few jurisdictions, however, that still use 'market share' indicia (e.g., Colombia, Lithuania, Portugal, Spain, the United Kingdom). Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom, Venezuela), the vast majority impose mandatory notification requirements. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory

regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Some jurisdictions impose strict time frames by which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Brazil requires that the notification be made within 15 business days of execution of the agreements; and Hungary and Romania have a 30-calendar-day time limit from entering into the agreement for filing the notification. Many jurisdictions have the ability to impose significant fines for failure to notify (e.g., the Netherlands, Spain and Turkey). Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Serbia) for mandatory pre-merger review by federal antitrust authorities. Very little has changed in the US process in the three decades since its implementation, but some aspects of the US process have been adopted by other jurisdictions. For instance, Canada has recently transformed its procedure to resemble the US style of review, with a simplified initial filing, a 30-day period to issue a detailed information request and the waiting period tolled until the parties comply with the request. Germany and Canada have adopted a procedure, similar to the US, under which parties can 'reset the clock' by withdrawing and refiling the notification. Offers to resolve competitive concerns are only considered by the US after the more detailed investigation has been carried out. The US, Canadian and (although in other respects following the EU model) Swedish authorities must go to court to block a transaction's completion. Both jurisdictions can seek to challenge a completed merger, even if that transaction has already been reviewed pre-merger by the relevant authority, although in Canada, such challenges must be brought within one year of closing, while in the US there is no statute of limitations.

Most jurisdictions more closely resemble the European Union model. In these jurisdictions, pre-filing consultations are more common, parties can offer undertakings during the initial stage to resolve competitive concerns, and there is a set period during the second phase for providing additional information and the agency reaching a decision. In Japan, however, the JFTC announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review.

The permissible role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan) there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees are even to be provided with a redacted copy of the merger notification and have the right to participate in Tribunal merger hearings and the Tribunal will typically permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EU and Germany), third parties may file an objection against a clearance.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. Other jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU, however, that differ procedurally from the EU model. For instance, in Austria the obligation to file can be triggered if only one of the involved

undertakings has sales in Austria as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

It is becoming the norm in large cross-border transactions raising competition concerns for the US, EU and Canadian authorities to work closely with one another during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with that in Brazil, and Brazil's CADE has worked with Chile and with Portugal. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Serbia, Montenegro and Slovenia similarly maintain close ties and cooperate on transactions. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and EU on some mergers and entered into a cooperation agreement with the US authorities in 2011, and the US has also announced plans to enter into a cooperation agreement with India.

Minority holdings and concern over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, seem to be gaining increased attention in many jurisdictions, such as Australia. Some jurisdictions will consider as reviewable acquisitions in which only 10 per cent interest or less is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise 20 per cent of a target; and Russia, at any amount exceeding 20 per cent of the target). Jurisdictions will often require some measure of negative (e.g., veto) control rights, to the extent that it may give rise to *de jure* or *de facto* control (e.g., Turkey).

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the merger worldwide even though less than 10 per cent of each of the undertakings was attributable to Germany. Thus, it is critical from the outset for counsel to develop a comprehensive plan to determine how to navigate the jurisdictions requiring notification, even if the companies operate primarily outside some of the jurisdictions. This book should provide a useful starting point in this important aspect of any cross-border transaction being contemplated in the current enforcement environment.

Ilene Knable Gotts
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Chapter 13

CYPRUS

*Elias Neocleous and Ramona Livera**

I INTRODUCTION

In Cyprus, mergers are regulated by the Control of Concentrations between Enterprises Law of 1999 ('the Merger Law') as amended. This law was enacted to regulate and promote the competitive market in Cyprus, and to bring Cyprus into line with the merger regime in the EU. The Merger Law is implemented alongside the Protection of Competition Law 13(I) of 2008 ('the Competition Law'), which replaces the Protection of Competition Law 207/1989 ('the 1989 Competition Law') and harmonises Cyprus competition law with the *acquis communautaire*. These statutes reflect EU law in relation to competition; in the event of differences EU law prevails over national law.

The Commission for the Protection of Competition ('the CPC' or 'the Commission') is an independent body established by the 1989 Competition Law. The CPC is responsible for examining and ruling upon conduct that is deemed anti-competitive and in violation of the Competition Law. In addition, by virtue of merger legislation, the CPC is provided with a regulatory framework by which it can control mergers and takeovers that are classified as being 'of major importance', thereby ensuring that no concentration between parties that have economic strength in Cyprus will create or reinforce a dominant position in the market affected.

The CPC is assisted in the duties it has with regard to the examination and regulation of mergers by the Competition and Consumer Protection Service ('the Service'). The Service is a department of the Ministry of Commerce, Industry and Tourism and its members are civil servants appointed under the Civil Service Law. Under the Merger Law the Service must be given prior notification of concentrations of major importance, and will then conduct a preliminary evaluation of the proposed concentration and prepare a report for the CPC. The report will include the Service's reasoned opinion regarding the compatibility of the concentration with the requirements of a competitive market. In

* Elias Neocleous is head of the corporate and commercial department and Ramona Livera is an advocate at Andreas Neocleous & Co LLC.

practice the Service rarely assumes the active role prescribed by the Merger Law, and is not normally involved in the examination proceedings. Thus in practice, the notification is submitted to the CPC and it is officials of the CPC who prepare the necessary report for a decision to be taken by the members of the board of the CPC on the compatibility of the concentration with the market.

The CPC meets regularly to issue decisions on concentrations notified and other competition issues. At the time of writing, the CPC has four members. The post of chairman is vacant (see *infra*).

A merger or acquisition is classified as a concentration of major importance, and must therefore be notified to the CPC, on the basis of three criteria set out in the Merger Law, namely worldwide turnover, turnover in Cyprus and activities in Cyprus.

The Merger Law also allows for a concentration to be classified as being of major importance if it is declared as such by an Order of the Minister of Commerce, Industry and Tourism. Further details of notification requirements, time frames and so forth are provided in Section III, *infra*.

II YEAR IN REVIEW

The CPC has experienced many upheavals in the past few years concerning its structure and its composition. This has led to significant changes both with regard to internal policies of the CPC and in terms of workload undertaken by the CPC. The Chairman of the Commission changed three times within two years, and following a decision by the Supreme Court of Cyprus,[1] two Commission members resigned in mid-December 2007, leading to a short hiatus in its activities until 3 January 2008 as it was no longer lawfully constituted. The court proceedings also led to a review of many of the decisions taken by the CPC during the period in which it was held to have been illegally structured, although decisions issued during this period with regard to mergers and acquisitions were not re-examined.

A new chairman was appointed on 2 April 2008, and new personnel were recruited to deal with the substantial workload facing the CPC, due in part to the instability brought about from the structural changes in personnel, and also due to the decision of the Supreme Court requiring the CPC to re-examine all its previous decisions in a specific time period. Under the new chairman, significant internal policy changes have also been implemented, allowing for the enhancement of the advisory role of the CPC, and implementing a more direct and efficient approach in the merger review process.

A further recent significant development was the enactment and implementation of the Competition Law, which was passed on 18 April 2008, and which repealed and replaced the existing law in the area of competition protection. The new Competition Law allowed for the application of competition rules embodied in Articles 101 and 102 of the Treaty on the Functioning of the European Union[2] ('the TFEU') within the Republic of Cyprus, so that the CPC is now the competent authority for investigating

1 Administrative Recourse No. 3902, dated 4 December 2007.

2 Formerly Articles 81 and 82 of the EC Treaty.

and issuing decisions in relation to an infringement of Articles 101 and 102 TFEU. The new Competition Law further broadened and added to the powers of the CPC with regard to on-the-spot investigations of enterprises, and information that can be obtained, in addition to increasing the penalties that the CPC can impose in the event of an infringement of the law.

The Competition Law complements the Merger Law, and clearly defines the roles and functions of the Service and the CPC, as well as the competition rules by which mergers are examined. Its enactment brought about significant changes to the competition regime in Cyprus, although its impact with regard to merger reviews has not yet been significant.

The number of proposed concentrations notified to the CPC increased significantly between 2004 and 2007, when it reached 29. In 2008, the number of proposed concentrations between enterprises notified to the CPC was again 29, of which only one concentration, which pertained to the pharmaceutical sector, required a full investigation. However, after this levelling out, 2009 saw a substantial increase in the number of notifications to 36. This was partly due to the global economic environment of 2009, which led to the merger of many firms for the purposes of surviving the economic crisis, and also partly due to a policy change on the part of the CPC with regard to its advisory role. With the provision of further guidance by the CPC on the interpretation of merger legislation, parties to a concentration are in a better position to know if their concentration falls within the scope of the Merger Law.

However, the operations of the CPC have been thrown into confusion by a ruling of the Supreme Court issued late in May 2011. In an administrative recourse case,[3] in which it was asked to review a decision of the CPC against four petrol distributors, the Supreme Court examined a preliminary point of law raised by the applicants regarding the appointment of the chairman of the CPC. In interpreting Article 9(8) of the Competition Law, the Supreme Court decided that the appointment of the then chairman of the CPC was invalid because it had been made without the required consideration of the qualifications, experience, career or knowledge of the individual concerned. The Supreme Court decided further that 'a vacant position of a chairperson or member of the Commission does not affect the validity of its legal composition and the fulfilment of its powers and duties'. However in this case the chairman had participated in the decision-making process and the Supreme Court annulled the CPC's decision in respect of which the administrative recourse had been sought. At this stage it is not clear what the implications will be for other cases determined since the invalid appointment, or for the current pending caseload. The appointment of a new chairperson is yet to be decided by the Council of Ministers.

In view of this development it is likely that the appointment of the next chairperson will be very thoroughly considered, and that significant internal policy changes will be

3 *Exxon Mobil Cyprus Limited, Hellenic Petroleum Cyprus Limited, Lukoil Cyprus Limited, Petrolina Petroleum Public Company Limited v. Commission for the Protection of Competition* – Administrative Recourses Nos. 1544/2009, 1545/2009,1596/2009 and 1601/2009.

implemented, enhancing the advisory role of the CPC and applying a more direct and efficient approach to the merger review process.

III THE MERGER CONTROL REGIME

i Obligation to notify

All concentrations of major importance must be notified to the CPC within one week of the date of entering into or signing of the relevant agreement that will bring about the merger or acquisition, or the publication of the relevant offer of purchase or exchange or the acquisition of a controlling interest, whichever occurs first. If the concentration is declared to be of major importance by a ministerial order, the concentration must be notified from the date of notification of the relevant order.

A concentration takes place when either two or more previously independent enterprises merge, or where one or more persons already controlling at least one enterprise, or one or more enterprises acquire, directly or indirectly, whether by purchase of securities or assets, by agreement or otherwise, control of the whole or parts of one or more other enterprises. A concentration is also deemed to take place where a joint venture is established that permanently carries out all the functions of an autonomous economic entity. However, where such a third independent enterprise has as its object or effect the coordination of the competitive behaviour of enterprises that remain independent, the concentration is examined in accordance with the Competition Law.

The concept of control is defined as control that comprises rights, contracts or any other means that either separately or in combination confer the possibility of exercising a decisive influence on an enterprise, either by ownership or enjoyment rights over the whole or part of the assets of the enterprise concerned, or through rights or contracts that confer the possibility of decisive influence on the composition, meetings or decisions of the organs of an enterprise.

For a concentration to be deemed as being of major importance (other than by ministerial order) and therefore require notification and approval by the CPC prior to being implemented, the following thresholds must all be satisfied:

a the worldwide aggregate turnover of at least two of the participating enterprises in relation to each of these parties, must exceed €3,417,203;

b at least one of the parties to the concentration must engage in commercial activities within the Republic of Cyprus; and

c the aggregate turnover of all the participating enterprises relating to the disposal of goods or the supply of services within the Republic of Cyprus must amount to at least €3,417,203 collectively.

As can be seen from the above, the thresholds are wide in scope, meaning that in conjunction with the first threshold, if at least one participating enterprise conducts activities in the Republic of Cyprus with turnover in excess of €3,417,203, the concentration is deemed of major importance and subject to the requirement of notification. This interpretation given to the thresholds by the CPC (discussed *infra* in Section IV) essentially renders the second threshold academic, because where at least one of the parties to the concentration registers a turnover in excess of €3,417,203 from the sale of goods or supply of services

in Cyprus, then it can be taken as a given that the enterprise is engaging in commercial activities in Cyprus. The concept of 'engaging in commercial activities' within the Republic of Cyprus has never been properly interpreted in relevant case law, and therefore remains unclear as to its relevance as a threshold in determining a concentration to be of major importance.

The term 'aggregate turnover' of the participating enterprises set out in the thresholds is defined by Schedule II of the Law as comprising the amounts that derive from the sale of products and the provision of services by the enterprises concerned during the preceding financial year and that correspond to the ordinary activities of the enterprises, after deducting discounts on sales, value added tax and other taxes directly related to turnover. The turnover of enterprises in which the enterprises participating in the concentration hold, directly or indirectly, more than half of the capital, business assets or voting rights, or have the power to appoint more than half of the members of the supervisory or administrative board, is also included in the calculation. Additionally included in this sum is the turnover of the parent companies of the parties to the transaction (and the parent companies of those above them).

This definition of aggregate turnover in essence renders many mergers and acquisitions as satisfying the notification thresholds, as only the parent company, or parent group of one of the participating enterprises that supplies goods or services within the Republic of Cyprus in excess of €3,417,203, could satisfy the third threshold and trigger the notification requirement.

It should be noted that the following are not classified as concentrations, and therefore are exempt from the obligation to obtain approval:

a the holding on a temporary basis of securities acquired for resale, by credit institutions, financial institutions or insurance companies, the normal activities of which include transactions and dealings in securities either for their own account or on behalf of a third party. This is subject to the condition that such institutions do not exercise voting rights in respect of the securities held, with the intention of determining the competitive behaviour of the said enterprise and that any rights held are exercised only with the intention of disposing of all or part of the enterprise in question, or of its assets or its securities. The disposal of such securities must take place within a year of the date of acquisition;

b the same actions referred to above, as undertaken by investment companies;

c control exercised by a liquidator, trustee in bankruptcy or similar office-holder appointed under relevant legislation;

d property transferred in accordance with a will or intestate devolution;

e a concentration that takes place between two or more enterprises, each of which is a subsidiary of the same enterprise; and

f an acquisition of control of an enterprise from another, which takes place by stages over a period exceeding four years.

The party obligated to notify the proposed transaction is the enterprise acquiring control, or in the event of a joint venture, both parties either jointly or separately.

Failure to notify a concentration of major importance within the time limit specified in the Merger Law can result in a fine of up to €85,430 and an additional fine of up to €8,543 for each day on which the infringement continues. Failure to provide

information required by the Merger Law is punishable by a fine of up to €51,258 and the penalty for providing false or misleading information is a fine of up to €85,430.

ii Time frame and procedure for notification

As mentioned earlier, any concentration for which the three thresholds set out above are satisfied must be notified to the CPC within one week of the date of entering into of the relevant agreement bringing about the transaction that forms a concentration of a major importance. There is no standard notification form as such, but Schedule III of the Merger Law sets out the information which must be submitted to the CPC for review of the transaction. The CPC will review such notification and may request any further information required under Schedule III.

The examination of a notification falls into two phases, a preliminary review and, if further investigation is warranted, a more detailed investigation.

In the preliminary phase the Service (in practice the CPC) receives the notification, conducts a desktop review to ascertain whether it falls within the scope of application of the Merger Law, and if so publishes a brief notice of the concentration (including names of participants, nature of the concentration and economic sectors involved) in the Official Gazette of the Republic of Cyprus. The notification is then examined to ensure that it contains all the information required by Schedule III of the Law. If any information is missing, the Service will request the necessary additional information to secure compliance with the provisions of the Merger Law. The Service then carries out an initial evaluation of the concentration and submits a written report to the CPC. As noted above, in practice this review and report are undertaken by officials of the CPC rather than the Service. The report must include a reasoned opinion as to whether the proposed concentration can be declared compatible with the requirements of the market in that it does not create or strengthen a dominant position in the affected markets within the Republic of Cyprus.

Once the report is drafted and submitted, the CPC will review it in a meeting convened for the purpose and will decide whether the proposed concentration:

a falls within the scope of the Merger Law;
b is compatible with the competitive market; or
c raises serious doubts as to its compatibility with the competitive market.

If the proposed concentration falls within the scope of the Merger Law and there are serious doubts regarding its compatibility with the competitive market, the CPC will initiate a full investigation.

In either case the CPC will inform the notifying parties of the outcome of the preliminary review.

The CPC must issue its decision within one month of the date of submission of the notification or within one month from the date by which any additional information requested by the CPC in compliance with Schedule III of the Law is submitted. If the material submitted is exceptionally voluminous or complex the CPC may extend the time limit by up to 14 days, provided it notifies the participants of its intention to extend the time limit no later than seven days before the expiry of the initial one-month period. Failure to do so or failure to provide a notice of a decision within the prescribed

time results in the proposed concentration being deemed to be compatible with the requirements of the competitive market.

In the event of a full investigation the Service informs the parties of the requirement for a full investigation and obtains from them any additional information deemed necessary for conducting the investigation. Negotiations take place with the parties for the possible differentiation of the circumstances giving rise to the concentration, in addition to possible hearings and a report is prepared setting out the findings of the investigation for consideration by the CPC, which will declare the proposed concentration either compatible or incompatible with the requirements of the competitive market.

The report must be submitted to the CPC no later than three months after the date of receipt of the notification or from the date of receipt of any additional information required under Schedule III of the Merger Law. The CPC's decision must be communicated to the parties within a further one-month period. However, these time limits may be extended by the CPC to give it the necessary time to fulfil its obligations, in the event that delay has arisen due to an omission of the participating enterprises or their representatives. In any other case, and provided the CPC has not submitted its decision to the minister for examination, failure by the CPC to adhere to the time frame set out in the Merger Law results in the concentration being considered compatible with the requirements of the competitive market.

iii Non-implementation of transaction prior to obtaining approval

A concentration of major importance requiring notification under the Merger Law cannot be put into effect until a notice of approval has been issued following either a preliminary or detailed examination or an Order of the Council of Ministers.

There is no provision with regard to 'hold-separate' arrangements, and under Cyprus law a concentration of major importance as defined under the Merger Law cannot lawfully be put into effect anywhere in the world prior to approval by the CPC.

If a concentration is partially or completely put into effect before approval by the CPC a fine may be imposed on the participating enterprise or enterprises responsible for notification, amounting to up to 10 per cent of the total turnover in the financial year immediately preceding the concentration, together with a fine of up to €8,543 for each day on which the infringement continues.

During a detailed 'Phase II' investigation one or more of the participants in the proposed concentration may make a reasoned submission to the CPC that further delay in consummating the concentration is likely to cause serious damage and that the concentration should be allowed to be implemented pending the decision of the CPC. In such a case the CPC, if it accepts the submission, will inform the participants in writing that the whole or part of the concentration is approved temporarily without conditions or under conditions determined by the CPC. Temporary approval does not preclude the CPC from subsequently deciding that the proposed concentration is inconsistent with the functioning of the market and prohibiting it.

There is no accelerated review process or temporary approval provision with regard to the preliminary review procedure.

iv Third-party access to the file and rights to challenge mergers

The publication of particulars of the proposed concentration in the Official Gazette is intended to facilitate provision of relevant information relating to the competitive effect of the concentration in question by any third party with a legitimate interest. Thus interested parties, such as competitors in the same market, may contribute their viewpoints or arguments as to how a proposed concentration would affect the market, for consideration by the CPC in its deliberations on the compatibility or otherwise of the proposed concentration with the competitive market in Cyprus.

In the case of a Phase II investigation, the CPC provides persons having a legitimate interest who do not participate in the concentration with an opportunity to submit their views regarding the concentration, upon application, in such a manner and at such time as is in keeping with the relevant time frames that must be adhered to for the Phase II evaluation.

Further to the information published in the original notice, the CPC takes into account the legitimate interest of the affected enterprises in the protection of their business secrets. Where the parties to a concentration wish certain documents to remain confidential, such documents must be marked as such and reasons justifying their confidentiality must be given. The CPC and the Service are under a duty to ensure confidentiality and any authorised officer of the CPC or of the Service or any other civil servant who acquires any information in relation to a concentration is bound to secrecy, infringement of which constitutes a criminal offence punishable by both a fine and imprisonment.

v Appeals and judicial review

The decisions of the CPC with respect to concentrations of major importance are considered to be administrative decisions issued by a public body, and therefore subject to judicial review by virtue of Article 146 of the Constitution of the Republic of Cyprus. An aggrieved party seeking to annul a decision of the CPC therefore has a right to file an administrative recourse with the Supreme Court of Cyprus, within 75 days from receipt of notification of the decision. The CPC may issue two versions of the reasoned decision: a published version, which does not contain any confidential information and a more detailed analysis and is only given to the notifying enterprises. The published version includes:

a an overview and a definition of the relevant product market and relevant geographical market of the proposed concentration in question;

b an analysis of the activities that each party undertakes and whether the proposed concentration falls within the definition set out in the Merger Law;

c an analysis of whether the proposed concentration meets the thresholds set out in the Merger Law;

d a summary of the structure of ownership and control;

e a summary of the main details of the concentration and of the agreement or public tender bringing about the concentration; and

f the CPC's decision to either proceed with a full investigation or declare the concentration compatible with the competitive market.

Parties to the concentration are entitled to challenge the CPC's decision by submitting a recourse for judicial review with the Supreme Court of Cyprus. Such recourse must be submitted within 75 days from the date of publication of the contested decision by the CPC.

The Supreme Court may take up to three years to reach its decision. If the parties are dissatisfied with the decision they may appeal to the Supreme Court in its second revisionary jurisdiction. Notice of appeal must be filed within 42 days of the date of publication of the first-instance decision.

vi Concurrent review by other bodies

Since the CPC is the only administrative body that regulates mergers in Cyprus and the Supreme Court is the only body competent to review its decisions, concurrent review of mergers by more than one body does not take place.

IV OTHER STRATEGIC CONSIDERATIONS

On the basis of Council Regulation 1/2003 and EC Merger Control Regulation No. 139/2004, cases with a Community dimension are dealt with on a collaborative basis by the parallel competent authorities. Although the Merger Law predates Cyprus's membership of the EU, and so does not make specific reference to cooperation between the CPC and other relevant authorities within the EU, it is noted that the CPC does work in a spirit of cooperation where required and is trying to raise public awareness of EU competition laws and policies. In addition, the CPC often refers to EU competition case law for guidance, and does implement such case law in its decisions with regard to merger reviews.

Two current cases in which the CPC has ordered a full investigation illustrate its key areas of focus. The first is a notification submitted by Swissport Cyprus Limited and LGS Holding Limited for the establishment of a common enterprise, S&L Airport Services Limited, which, if approved, will result in the creation of a 100 per cent combined share in both Paphos and Larnaca airports, which are the only commercial airports in Cyprus. Another aspect of concern for the CPC is the possibility of secondary results (spill-over effects); the proposed merger envisages increased coordination between the parent companies of LGS and Swissport, which are also competing companies in the field of passenger services at Paphos and Larnaca airports.

The second case relates to the proposed acquisition of certain divisions of the Hellenic Mining Public Company Limited by Latomia Pharmacas Limited and Charilaos Apostolides Public Limited. The CPC is concerned that the proposed transaction may lead to major construction companies controlling all the sources of stone and aggregate used in construction, thereby excluding smaller competitors from the market.

V OUTLOOK AND CONCLUSIONS

Government policy on competition has changed enormously since the mid-1970s when, in the aftermath of the Turkish invasion, a rigid strategy of protecting and promoting domestic businesses was followed in order to stabilise prices and employment levels.

With entry into the EU in 2004 the national market has been opened up to foreign competition, promoting efficiency and choice. Now, in the straitened economic circumstances being experienced worldwide, mergers are on the increase as a means of reducing costs. With this heightened merger activity the role of the CPC is increasingly important in safeguarding fair competition and consumer choice. Over the course of the past few years, the CPC has seen great changes in its structure, its way of working and the functions and duties it must now fulfil. The Service has also been given more authority by recent ministerial orders to carry out further functions and duties complementary to the role of the CPC.

Although the new Competition Law has brought Cyprus into line with EU competition rules and regulations, the regulatory regime with regard to mergers and acquisitions is sorely deficient and outdated. The thresholds in place that trigger notification requirements are too wide in scope, forcing many parties to notify a transaction to the CPC that has absolutely no competition effect in Cyprus whatsoever, and that would not bring about any horizontal or vertical overlap between the market activities of the parties involved. A notification requirement could merely be triggered by the fact that one party to the concentration, such as the seller, has sales in Cyprus in excess of the low sum of €3.417 million. The Merger Law was enacted over 10 years ago, and does not take into account the economic realities of our time, nor does it include thresholds that better limit the scope of the law to concentrations that are likely to have a competition effect in Cyprus. As a result, the workload of the CPC is often burdened by notification reviews that are irrelevant to the Cyprus competition market, and that take up time that would be better spent on considering concentrations that raise genuine market concerns. The cumbersome time frames in place could be reduced in the event of stricter thresholds, as fewer notifications would then be submitted and reviewed.

This concern is recognised by the government and it is generally expected that new merger legislation will be enacted shortly.

However, the more immediately pressing issue at the time of writing is the Supreme Court judgment invalidating the appointment of the chairman of the CPC. A new chairman will have to be appointed and the implications of the Supreme Court's ruling will need to be assessed.

Appendix 1

ABOUT THE AUTHORS

ELIAS NEOCLEOUS

Andreas Neocleous & Co LLC

Elias Neocleous graduated in law from Oxford University in 1991 and is a barrister of the Inner Temple. He was admitted to the Cyprus Bar in 1993 and became a partner in Andreas Neocleous & Co in 1995. He currently heads the firm's corporate and commercial department as well as the specialist banking and finance, tax and company management groups. In addition to his native Greek, he is fluent in English and Spanish.

RAMONA LIVERA

Andreas Neocleous & Co LLC

Ramona Livera is based at the Nicosia office of Andreas Neocleous & Co LLC and specialises in competition and intellectual property law. She graduated in law from the University of Kent at Canterbury in 1985 and was admitted to the Cyprus Bar in 1988. As well as her native Greek, Ms Livera is fluent in English, French and Spanish.

ANDREAS NEOCLEOUS & CO LLC

Neocleous House
195 Archbishop Makarios III Avenue
3608 Limassol
Cyprus
Tel: +357 2511 0000
Fax: +357 2511 0001
info@neocleous.com
www.neocleous.com