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The International Comparative Legal Guide to:

Mergers & Acquisitions 2012

A practical cross-border insight into mergers and acquisitions

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EDITORIAL

Welcome to the sixth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Six general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 40 jurisdictions.

All chapters are written by leading M&A lawyers and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Michael Hatchard of Skadden, Arps, Slate, Meagher & Flom (UK) LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

When it joined the EU in 2004, Cyprus came under the obligation to align its legislation with Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (“the Takeover Directive”). The Takeover Directive was transposed into the Cyprus legal order by the Public Takeover for the Acquisition of Shares in a Company and Related Matters Law, Law 41(I)/2007 on takeover bids (“the Takeover Bids Law”), which is complemented by four directives issued by the Cyprus Securities and Exchange Commission (“CySEC”).

Other relevant sources of legislation governing M&A transactions in Cyprus include:

- The Companies Law, Cap. 113, on various methods of acquisition, mergers, schemes of arrangement and compulsory acquisitions of minority shareholdings.
- Cyprus Stock Exchange Law (*Law 14(I)/1993*), which sets out detailed disclosure requirements in respect of certain interests in shares.
- Inside Information and Manipulation of the Market (Abuse of the Market) Law 2005 (*Law 116 I/2005*) on the rules for the prevention of insider dealing and market manipulation on both regulated and unregulated markets.
- The Transparency Requirements (Securities Admitted to Trading on a Regulated Market) Law of 2007 (*Law 190(I)/2007*) on transparency requirements in relation to information concerning issuers whose securities are admitted to trading on a regulated market.

1.2 Are there different rules for different types of public company?

Under section 4 of the Takeover Bids Law, CySEC is empowered to oversee any takeover bid in which the target company has its registered office and its shares admitted to trading on a regulated market in Cyprus. CySEC is also competent to oversee bids in relation to companies not registered in Cyprus to which any of the following apply:

- (a) the shares of the target company are admitted to trading only on a regulated market in Cyprus;
 - (b) the shares of the target company were initially admitted to trading on a regulated market in Cyprus and subsequently on a regulated market in a different Member State from that in which the registered office of the target company is situated;
- or

- (c) the shares of the target company have been admitted to trading simultaneously on a regulated market in Cyprus and another Member State, which is different from that in which the registered office of the target company is situated and the target company designated CySEC as the competent authority for the supervision of the bid, announced it to CySEC on the first transaction day and had its decision immediately published in accordance with the rules set out in section 7 of the Law.

If any of these circumstances apply, the issues pertaining to the consideration of the takeover bid and the bid process are regulated by the Takeover Bids Law.

Section 4(b)(ii) of the Takeover Bids Law provides that where the target company’s registered office is situated in Cyprus and its securities are traded only in a regulated market of another Member State, matters relating to the information to be provided to the target company’s employees and company law matters (in particular the percentage of voting rights necessary for the acquisition of control and the exceptions from the obligation to launch a bid) are regulated by the laws and the competent authority of Cyprus.

1.3 Are there special rules for foreign buyers?

Restrictions on the maximum equity participation in a company’s share capital are now relaxed, with EU and non-EU citizens being allowed to acquire up to 100% of the share capital of almost any company.

1.4 Are there any special sector-related rules?

The obtaining of competition clearance from the relevant regulatory authorities is a condition precedent to be stipulated in the public offer document. Merger Control issues in Cyprus are regulated by Law 22(I) of 1999, otherwise known as the Control of Concentrations between Enterprises Law of 1999 (“the Merger Law”).

In certain sectors, particularly banks, insurance companies and investment firms, while there is no restriction on the maximum equity participation, the approval of the relevant regulatory body is required for material shareholdings and changes in shareholdings.

1.5 Does protectionism operate in favour of local owners?

No. Cyprus law in this area complies fully with EU norms and any form of discrimination is illegal.

1.6 What are the principal sources of liability?

The Takeover Bids Law gives CySEC the power to impose administrative fines for breaches of section 5 (please refer to question 2.5 below) and imposes civil and criminal liability in relation to omissions or inaccuracies in offer documents, the provision of false or misleading information on material elements of offer documents or the concealment of a material element from an offer document (see question 4.4. below).

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Control of a public company may be acquired by any one of the following methods:

- in the case of an unlisted public company a bidder may acquire shares directly from the shareholders without the need for a public offer;
- pursuant to a scheme of arrangement under sections 198 to 200 of the Companies Law with the approval of the court;
- the merger and/or division of public companies under sections 201(A) to 201(H) of the Companies Law (transposing the third Council Directive 78/855/EEC concerning mergers of public limited liability companies and the sixth Council Directive 77/388/EC on the harmonisation of the laws relating to turnover taxes); and
- by way of a public offer.

2.2 What advisers do the parties need?

Legal advisers, financial advisers, and stockbrokers (being members of the Cyprus Stock Exchange ("CSE")).

2.3 How long does it take?

The Takeover Bids Law sets out the timetable for bids, starting with the preliminary announcement by the bidder, which may be made only if the bidder reasonably believes that it is in a position to affect a public offer. The content of the announcement is prescribed by CySEC Directive D141-2007-01 of 2011.

Within three days of announcing its intention to make a firm offer, the bidder must take steps to convene a general meeting of its shareholders, to obtain any required permits from regulatory bodies and to carry out a legal and financial due diligence on the target.

Within 12 working days of the announcement of its final decision the bidder must prepare and submit the public offer document to both CySEC and the board of the target.

Following submission, CySEC has eight working days to consider the public offer document if the consideration to be offered is exclusively cash and 12 working days if the consideration includes securities. CySEC may approve the document or request further information, which must be provided within five working days from the date of CySEC's request. CySEC then has three working days to consider the additional information. If no response is received from CySEC within the prescribed timeframe (8, 12 or 3 working days, as the case may be) the bidder may assume that the public offer document has been approved.

Following approval or deemed approval by CySEC of the public offer document, the bidder must make an announcement in accordance with section 7 of the Takeover Bids Law. It must send the public offer document as soon as practicable to the target and to

its own employees, if it has any. It must also advertise the approval of the public offer document (but not the document itself) in at least two national newspapers, giving an address from which a free copy of the public offer document may be obtained.

Within seven days of the announcement of approval of the public offer document, the bidder must send copies of the public offer document and acceptance and transfer forms to the target's shareholders and to the regulated market on which the target shares are listed. It must also post these documents on its website if it has one.

Once a public offer has been announced, the board of the target must promptly and accurately inform its shareholders and its employees as to its contents, and provide shareholders with its recommendations. It must provide CySEC and CSE with a reasoned report in relation to the public offer within 15 working days of receiving it, and mail a copy to its shareholders. If the bidder modifies its offer, a report on the changes must be posted to shareholders and submitted to CySEC and the CSE within two working days of the changes being notified to the board of the target.

The public offer document must specify the acceptance period, which may not be less than 30 days and not more than 55 days from the date on which the public offer document was posted to shareholders.

The bidder may amend the offer up to two weeks prior to the end of the public offer period. If amendments are made, the acceptance period is extended by a further 14 days, giving a maximum of 69 days on the basis of the maximum initial acceptance period of 55 days. Before amending its offer the bidder must advertise its intention to do so and obtain the approval of CySEC for the changes.

2.4 What are the main hurdles?

Obtaining the requisite regulatory approvals (see question 1.4 above), securing the necessary finances to proceed with the bid and in the case of a 100% acquisition gaining as much shareholder support in advance as possible in the form of irrevocable undertakings from the target and its major shareholders to accept the terms of the public offer.

2.5 How much flexibility is there over deal terms and price?

Section 5 of the Takeover Bids Law provides that every public offer, whether voluntary or compulsory, must be guided by the following fundamental principles:

- all holders of shares of the same class in the target must be treated equally and where a person acquires control of the target, the other shareholders must be protected;
- the shareholders in the target must be given sufficient time and information to reach a properly informed decision on the bid;
- when advising its shareholders, the board of the target must give its views on the effects of implementation of the bid on employment, terms of employment and the locations of the company's places of business;
- the board of the target must act in the best interests of all the shareholders of the company and must not deny target shareholders the right to evaluate the public offer, nor must it undertake any actions which may hamper or otherwise impede the public offer;
- there must be no fraudulent or corrupt purchases of the shares in the target company, in the bidder company, or any

other company involved in the bid in a manner which will lead to the artificial increase or fluctuation in the value of the shares and which will distort the normal functioning of the markets;

- before announcing any public offer the bidder must ensure that it has the funds to pay any cash consideration, if such consideration is being offered. Where securities are to be offered, it must take steps to obtain the approval of its shareholders in general meeting;
- the target company must not be hindered in the conduct of its business activities for more than a reasonable period as a result of the bid; and
- where the target company's share capital comprises different classes of shares or the company has issued transferable securities that can be converted to shares, separate bids must be made for each class of shares or securities (see question 2.8 below).

Any person who directly or indirectly acquires (whether solely or together with persons acting in concert with him) securities of a company which, added to his existing holdings and those of persons acting in concert with him, give him 30% or more of voting rights in that company is obliged to make a bid for the outstanding securities. Such a bid must be addressed immediately to all of the remaining shareholders for all their securities at a fair price. More specifically, the requirement for a mandatory public bid applies where the acquirer does not hold any or holds less than 30% of the voting rights in a company and proceeds to acquire 30% or more of the voting rights in such company; or where the acquirer holds more than 30% and less than 50% of the voting rights in a company and wishes to increase such holding.

"Fair price" is set by CySEC. Section 18(1) of the Takeover Bids Law stipulates that it must be not less than the highest price paid for the same securities by the bidder or by persons acting in concert with him during the 12 months before the announcement of the decision to launch the bid. CySEC may, at its full discretion, permit the payment of a lower price in case of voluntary takeover bids.

2.6 What differences are there between offering cash and other consideration?

As consideration for the bid, the bidder may offer securities, cash or a combination of both, except in the following cases where a cash alternative is obligatory:

- where the consideration offered by the bidder does not consist of liquid securities admitted to trading on a regulated market;
- where the bidder or persons acting in concert with the bidder have purchased for cash securities carrying 5% or more of the voting rights in the target company during the year ending on the final acceptance date;
- where the squeeze-out and sell-out procedures are exercised; or
- a mandatory bid.

2.7 Do the same terms have to be offered to all shareholders?

See question 2.5 above.

2.8 Are there obligations to purchase other classes of target securities?

If a target company has different classes of shares or has issued transferable securities that can be converted into shares, the offeror is required under section 5(h) of the Takeover Bids Law to make

separate bids for every class of shares and convertible securities, which must be comparably identical among themselves.

2.9 Are there any limits on agreeing terms with employees?

Generally speaking, the Takeover Bids Law requires the board of the target to consult its employees immediately after the offer has been announced. However, the employees have no rights to impose conditions.

2.10 What role do employees play?

A relevant consideration in the spin-off of any business activity (or generally in respect of the disposal or substantial changes of any business) is the protection granted to employees by the following legislation:

- Law 78(I) of 2005 on the General Framework of Information and Consultation of Employees;
- Law 68(I) of 2002 on the Creation of European Councils to Ensure Employees' Rights to Information and Consultation in Community Scale Undertakings;
- Law 28(I) of 2001 on Collective Dismissals, which applies in the event of any intended redundancies; and
- Law 104(I) of 2000 on the Preservation of Employees' Rights During Transfer of the Business.

While these are relatively new laws for Cyprus which have not yet been tested in the domestic courts, their application is predictable in the EU context. None of them expressly allows employees to take any action to prevent an intended transaction from going through simply because their provisions have not been observed.

2.11 What documentation is needed?

The following documentation is required in the case of a public offer:

- The press announcement confirming the bidder's intention to make a public offer.
- The public offer document prepared by the bidder in accordance with CySEC Directive D141-2007-03 of 2011 and sent to all shareholders of the target.
- An Acceptance and Transfer Letter in the prescribed form (Form 2), signed by both the transferor and transferee, issued by the bidder and which is sent to all target shareholders. This must be delivered to the CSE where the transferee already holds an active depository account.
- The report of the board of the target, which is posted to all shareholders, together with an independent expert's report.
- Any revised offered document (if applicable), issued by the bidder and sent to all shareholders.
- The final result announced on the website of the Cyprus Stock Exchange and in two daily newspapers.

Furthermore, where cash consideration is to be offered, the public offer document must be supported by a "certain funds" declaration from one or more credit institutions. This declaration need not be in any particular form as long as it refers to the consideration price to be offered and confirms that the funds will remain at the disposal of the credit institution until the payment date. Failure to provide this will result in rejection of the public offer document.

2.12 Are there any special disclosure requirements?

See response to question 5.2 below in relation to stakebuilding.

As to valuation, the board's report must be accompanied by the report

of an independent expert (generally a qualified auditor or member of the CSE) stating whether the proposed consideration is just and reasonable and giving the expert's opinion on the underlying basis and calculations. CySEC may disqualify an expert and appoint a replacement if it considers that there is a conflict of interest.

2.13 What are the key costs?

Aside from professional legal and financial advisory fees, the main transaction costs are:

- Transaction fees payable to the CSE in accordance with the Fees for Stock Exchange Transactions Law of 1999.
- CySEC's fees, as prescribed by CySEC Directive DI141-2007-02 of 2011. The fee for examination of a public offer document for an all-cash offer is €3,420 plus 0.01% of the value of the public offer. Where the consideration consists of securities, the examination fee is €6,840 plus 0.01% of the value of the public offer. A further €1,700 is payable for examination of a revised offer document. No element of any of the charges is refundable, irrespective of whether the document is approved or not. For the examination of an application for approval to make a partial takeover bid the charge is €855. The fees for consideration of an application for exemption from the obligation to file a bid is €170 or €430, depending on the circumstances.

2.14 What consents are needed?

Mandatory regulatory approvals (please see question 1.4 above).

2.15 What levels of approval or acceptance are needed?

Section 36(1) of the Takeover Bids Law provides that a bidder who has made an offer to all holders of the target company's securities for all of their securities has the right to require all the holders of any outstanding securities to sell him those securities if:

- he holds securities representing at least 90% of the capital carrying voting rights and at least 90% of the voting rights in the target company; or
- following acceptance of the bid, he has acquired or has firmly contracted to acquire securities representing at least 90% of the target company's capital carrying voting rights and at least 90% of the voting rights comprised in the bid.

2.16 When does cash consideration need to be committed and available?

Before the announcement of the intention to make a public offer.

The announcement of a firm's intention to make a public offer must include a report on the measures taken to ensure the payment of the consideration price where this is to be paid wholly or partly in cash. Every bid made by an offeror for cash consideration must be supported by a declaration by the board of the offeror and confirmation by an appropriate credit institution that adequate funds are available to complete the acquisition and that the funds will remain available and reserved until the expiration of the bid and the date for payment of the consideration price to target shareholders.

3 Friendly or Hostile

3.1 Is there a choice?

Yes. Generally speaking the Takeover Bids Law provides that a

bidder may still proceed with the decision to make a bid in relation to the target pursuant to section 6 of the Takeover Bids Law, even where the board of directors of the target does not recommend the bid to its shareholders.

3.2 Are there rules about an approach to the target?

No, there are not.

3.3 How relevant is the target board?

As described in question 2.3 above, once the announcement to make a public offer has been made the target board is obliged to promptly and accurately pass on information to its shareholders and employees, to assess the bid and make recommendations to shareholders.

In addition, the target board must observe the principles set out in section 5 of the Takeover Bids Law and summarised in question 2.5 above. More specifically, once it becomes aware that a bid is imminent (and until the expiration of the time allowed for acceptance or the revocation or cancellation of the bid), it may not take any action which may result in the frustration of the bid, except with the prior approval of its shareholders in general meeting.

3.4 Does the choice affect process?

Under the Takeover Bids Law the principal distinction between a bid recommended by the board of directors (friendly) and a hostile bid is that, in the case of a hostile bid, the board of the target may put in place defensive measures as long as obtains prior authorisation from a general meeting of shareholders. The defensive measures may include issuing shares in the target, buying back its own shares and taking lawful acts entailing the substantial differentiation of the assets or the obligations of the company or the entering into of *ex gratia* commitments.

The board may solicit alternative bids without the prior authorisation of shareholders.

While the board of directors of the target is not obliged to provide all information forwarded to the first bidder or potential bidder unless it receives a specified request, generally speaking, it must treat all bidders on an equal basis regarding provision of information, irrespective of its assessment of the bids.

Under the Takeover Bids Law, the information provided to any bidder or potential bidder is subject to the following conditions:

- the confidentiality of the information passed;
- prohibition from using the information to solicit third parties; and
- the obligation to use the information solely in connection with a bid or a potential bid.

The target may impose further conditions on any alternative bidder or potential bidder. However, such conditions may not be more onerous than those imposed upon any other bidder or potential bidder.

4 Information

4.1 What information is available to a buyer?

There is no mandatory requirement for due diligence to be carried out and the onus rests on the bidder to determine the extent of any potential legal and financial due diligence exercise.

The following information is publicly available:

- The target's constitutional documents (namely its memorandum and articles of association).
- Other standard corporate documents including details of directors, share capital and shareholders.
- Published accounts, together with directors' and auditors' reports.
- Previous listing particulars or prospectuses, and any market announcements.

4.2 Is negotiation confidential and is access restricted?

Yes; although a bidder is obliged to pay regard to insider trading rules and to announce its intention to proceed with a public offer before the announcement of his final decision or firm intention to do so (please see question 2.3 above in relation to the bid timetable as prescribed in the Takeover Bids Law).

The Inside Information and Manipulation of the Market Law 2005, Law 116 (I) of 2005 imposes certain obligations in relation to the disclosure of information. Within the context of a public offer, and prior to the announcement of its intention to proceed with a bid (which until such announcement remains confidential), any person possessing such information is prohibited from trading in the shares of the target company.

4.3 What will become public?

The main terms of the offer and the agreement reached between the target, its shareholders and the bidder must be disclosed in the public offer document. The public offer document must identify the bidder and persons acting in concert with the bidder, what the bidder aims to achieve by making the offer and its intentions in respect of the target, particularly in relation to the continuation of the target's business activities, the use of its assets, its restructuring or reorganisation, the composition of its board, its employees, any significant changes to the terms of employment, the bidders' intentions as to any proposed amendments to the Articles of Association of the target company, and the likely consequences on employment and the locations of the companies' places of business.

4.4 What if the information is wrong or changes?

Section 21 of the Takeover Bids Law provides that board members of the bidder are liable for the accuracy, completeness and correctness of the offer document. The board members of the bidder are liable to recipients for any damage sustained as a result of failure to discharge these duties. Providing false or misleading information on material elements of the offer document or concealing any material element from the offer document is not only an administrative violation, but also a criminal offence.

Criminal liability or the imposition of an administrative sanction does not relieve the offender from any civil liability.

As to revision of the public offer document, please see response to question 2.3 above.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

According to section 25 of the Takeover Bids Law, when a bid is contemplated, including the period prior to the announcement until

the expiration of the period for acceptance, the bidder and persons acting in concert are prohibited from:

- making any arrangements with shareholders of the target;
- entering into arrangements with persons who despite not being shareholders of the target, nevertheless acquire voting rights in it;
- dealing or entering into arrangements which involve the trading in securities of the target; and
- entering into arrangements which involve acceptance of a bid,

if there are favourable conditions attached which are not being extended to *all the shareholders* of the target.

Further, pursuant to the Code of Conduct of Directors and Related Persons Directive of 2005 issued pursuant to section 13 of the Insider Dealing and Market Manipulation (Market Abuse) Law of 2005, no director or related person or person closely associated with a director or related person may carry out transactions in an issuer's financial instruments during a "closed period" of one month preceding the end of the relevant financial year or half year and ending on the date on which the results for the period concerned are announced.

See question 5.2 below in relation to disclosure thresholds.

5.2 What are the disclosure triggers?

During the takeover bid period, any transaction of shares of the target by the bidder or any other person holding 5% of the target's voting rights must be immediately disclosed. If a person acquires 0.5% of the share capital of the bidder or the target, he must immediately disclose that transaction and all previous transactions involving the relevant shares.

Disclosure requirements can also be triggered under section 171 of the Cyprus Stock Exchange Law. A person who acquires or disposes of the voting share capital of the target which falls below, meets or exceeds 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75% must disclose this to each of the target CySEC and the Stock Exchange on the same or following day.

Similarly, the Conditions for Transparency (Securities Admitted to Trading on a Regulated Market) Law of 2007 sets out the conditions for publication of periodic and ongoing information of relevant issuers. Any shareholder who acquires or disposes of shares of an issuer whose shares are admitted to trading on a regulated market and to which voting rights are attached, must notify the issuer of the proportion of voting rights held by him or her as a result of the acquisition or disposal where that proportion reaches or exceeds 5% (being the minimum threshold).

5.3 What are the limitations and implications?

See question 5.1 above.

6 Deal Protection

6.1 Are break fees available?

Although unregulated as such, break fees or inducement fee commitments may be obtained from the target or target shareholders. In terms of the target, regard must be paid to corporate benefit issues.

6.2 Can the target agree not to shop the company or its assets?

Yes, although the board must at all times pay regard to its obligations under the Takeover Bids Law (as set out in question 3.2 above) and its general fiduciary duties to act in the best interests of the company. In the case of material asset acquisitions or disposals during the course of a public offer, shareholder approval in general meeting is required.

6.3 Can the target agree to issue shares or sell assets?

Yes, provided prior shareholder approval at a duly convened general meeting is obtained during the offer acceptance period.

6.4 What commitments are available to tie up a deal?

Please see responses to questions 2.5, 3.2 and 6.1.

7 Bidder Protection

7.1 What deal conditions are permitted?

Please see responses to questions 2.4, 2.5, 2.13 and 4.4 above.

7.2 What control does the bidder have over the target during the process?

The bidder may only exercise control during the process to the extent permitted by the terms of the offer and as may have been agreed between it, the target and the target's shareholders.

7.3 When does control pass to the bidder?

Control passes to the bidder once the success of the bid has been announced, the consideration paid to the accepting shareholders and the transfer validly effected through the CSE.

7.4 How can the bidder get 100% control?

Section 36 of the Takeover Bids Law provides a successful bidder (see question 2.13 above) with a "squeeze-out" right, which may be exercised on application to CySEC within three months from the expiry of the offer acceptance period. When CySEC verifies that the bidder has achieved the necessary control threshold, it issues a decision obliging the bidder:

- to notify the relevant shareholders in writing;
- to pay them the consideration offered forthwith; and
- to take all necessary actions to transfer the securities into its name.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

Please see response to question 3.2.

8.2 What can the target do to resist change of control?

There is a range of actions the target may take to resist change of control. These are described in question 3.3 above.

8.3 Is it a fair fight?

The provisions are relatively new and have not been extensively tested in practice, but they appear to provide a level playing field. See question 9.1 below.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

The ability of the bidder to convince the target shareholders of the value of its offer terms.

9.2 What happens if it fails?

An unsuccessful bidder (and any persons acting in concert with him) may not make a new offer for the same target within 12 months of the failed offer, except with the approval of CYSEC. Approval is only given in exceptional circumstances and in any event no sooner than three months after the withdrawal or cancellation of the original offer.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in Cyprus.

Directives are being issued to clarify the detailed implementation of the laws passed in the last few years but otherwise there have been no significant developments.

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Established in 1965, Andreas Neocleous & Co has developed into the largest law firm in Cyprus and is generally recognised as the premier firm in the South-East Mediterranean region. In addition to its principal office in Limassol, Cyprus's main commercial and shipping centre, the firm has offices in Nicosia and in Paphos in Cyprus, as well as in Moscow, Budapest, Prague, Kiev, Sevastopol and Brussels.

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