

# Merger Control

Jurisdictional comparisons

Second edition 2014

- Foreword** Jean-François Bellis & Porter Elliott, Van Bael & Bellis  
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Jean-François Bellis & Porter Elliott,  
Van Bael & Bellis

THE EUROPEAN LAWYER  
REFERENCE

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**Second edition 2014**

**General Editors:  
Jean-François Bellis & Porter Elliott,  
Van Bael & Bellis**



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# Foreword

**Jean-François Bellis & Porter Elliott, Van Bael & Bellis**

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There was a time not so long ago when very few countries in the world had merger control laws. In most jurisdictions, there was no need to notify a merger for prior approval before closing. How different the situation is today. It is estimated that upwards of 100 countries now have merger control laws, and in most of these countries, qualifying mergers, acquisitions and – in some cases – joint ventures must be notified and cleared by the local regulators before they can be implemented. Today, the need to obtain merger control approvals is often the number one factor delaying the closing of deals around the world.

Unfortunately, while more countries have merger control than ever before, there remains relatively little harmonisation, with each jurisdiction having its own rules on what types of transactions must be notified, what thresholds apply, what the procedure is and how long it takes. Even the substantive test for determining whether a notified transaction will be approved is not the same in every jurisdiction. With merger control authorities becoming tougher in their enforcement practices, the challenges facing merging companies have never been more daunting. This book aims to help.

With contributions from leading law firms covering 49 of the most important jurisdictions worldwide, this second edition of *Merger Control* endeavours to address the most common and critical questions of merging companies and their lawyers, including some which are less often addressed in other books of its kind, such as whether pre-notification consultations are customary in a given jurisdiction, whether ‘carve-out’ arrangements may be implemented to allow for closing to take place in jurisdictions where approval is still pending, whether the jurisdiction at issue has a track record of fining foreign companies for failure to file and whether it has ever issued penalties for ‘gun-jumping’ offences.

Adopting the reader-friendly Q&A format that has been used successfully in other volumes of *The European Lawyer Reference Series*, including the first edition of *Merger Control* (2011), this book sets out to answer for each jurisdiction the key questions those on the front line are most likely to have, including:

- Whether notification is mandatory (as in most jurisdictions where the thresholds are met) or voluntary (as, for example, in Australia, New Zealand, Singapore and the UK). If mandatory, is the requirement to file based purely on the parties’ turnover (as in the EU and many other jurisdictions worldwide), or are there other factors that need to be considered, such as market share (eg, in Portugal, Spain and the UK), asset value (eg, in Russia and Ukraine) or the size of the transaction (eg, in the US)?
- Is there a filing deadline and/or a requirement to suspend implementation pending receipt of an approval decision? In most jurisdictions, there is no filing deadline so long as the deal is not closed until it has been approved, but there are exceptions.

- How onerous is the filing? Most jurisdictions have detailed notification forms that must be completed (Germany being a notable exception), although some forms take far more time to complete than others. For example, although certainly not always the case, it is not unusual for notifications to the European Commission to exceed 100 pages (not counting annexes) and to include very detailed legal and economic analysis. By comparison, the US Hart-Scott-Rodino form is short and straightforward, and it can usually be completed in a matter of days (although a second request in the US can be extremely burdensome).
- What factors are likely to be considered by the relevant authorities in assessing the legality of the transaction? While it must be assumed that every authority will focus first and foremost on whether the transaction would raise competition concerns in its territory, some authorities are more likely than others to consider theories of competitive harm that go beyond traditional concerns related to high combined market shares, such as the risks of vertical foreclosure. Similarly, non-competition issues, such as industrial policy or labour policy, may be more likely to be considered in some jurisdictions than others.

Although by no means a substitute to seeking the advice of local counsel, this book aims to address these and other critical questions in a concise and practical way, and therefore to serve as a valuable resource to companies and counsel navigating their way through the twists and turns of obtaining the required merger control approvals worldwide.

Compiling the second edition of *Merger Control* has truly been a group effort. With this in mind, we would like to thank all the authors for their contributions, as well as the team of *The European Lawyer* for their diligence in bringing this book to fruition. We also wish to express our gratitude to our colleagues at Van Bael & Bellis who assisted us on this project, in particular Reign Lee for her editorial support, and Els Lagasse and Veerle Roelens for their secretarial assistance.

*Brussels, March 2014*

# Foreword

**Bernd Langeheine, Deputy Director-General,  
DG Competition, European Commission**

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Nowadays, an ever larger number of mergers need to obtain regulatory approval in several jurisdictions. The popularity of merger control is due to a general recognition that it is desirable to maintain a market structure which is conducive to effective competition and, therefore, crucial for a robust, innovative economic landscape. This is in the interest of consumers and market players at different levels alike.

As a consequence of globalisation, free trade and open markets merger control has become a key element of almost all competition law regimes around the world. Apart from problems related to costs and delays for closing the deal, multiple filings create a risk of inconsistent or even contradictory decisions. This is why all major competition authorities should cooperate closely on cases which require notification in several countries.

During 2011 and 2012, the European Commission, for example, worked together with other antitrust enforcers in about half of all cases for which an in-depth investigation was opened. The most notable example was the wide-ranging cooperation (ie with the US, Chinese, Japanese, Korean and Australian competition authorities) in the 'Hard-disk-drive cases' in 2011. Parties to a merger and their counsel generally have a keen interest in facilitating such cooperation in order to avoid conflicting decisions. This, in turn, requires knowledge about jurisdictional thresholds and other filing requirements as well as about the timelines of proceedings. This book provides a wealth of information on these and other relevant points for all important merger control systems around the world.

Competition rules and their enforcement will continue to be fragmented for lack of an international authority that would have jurisdiction over mergers and could take decisions for more than one country. There are, however, tendencies to avoid multiple filings at least at the regional level. In Europe, the situation is alleviated by the fact that, since 1990, there has been a merger control regime at the EU level under which mergers of a certain size that concern the competitive situation in several Member States are normally vetted by the European Commission. This is complemented by national rules on merger control which apply to all other relevant transactions, ie mainly those which are of a lesser size and which only concern one Member State.

In the EU, there are clear and explicit rules that lay down which (EU or national) authority has original jurisdiction over a merger. But there is also a mature system of referral mechanisms which mitigates the rigidity of the rules for case allocations and ensures that the best-placed authority deals with a particular merger. These referral provisions apply, in particular, where an operation needs to be notified in several Member States or where markets are wider than the national level and trade between Member States is affected.



The transfer of such cases from national authorities to the Commission will reduce the administrative burden for companies to the largest possible extent and avoid multiple filings. But the rules on referrals also foresee the transfer of merger cases from the EU level to a national authority in certain justified cases. A referral can take place upon the request of the parties, before an operation is notified or after notification at the request of a national competition authority. The application of these mechanisms has produced encouraging results over recent years. Between 2004 and the end of 2013, there were almost 280 referrals from national competition authorities to the EU Commission and approximately 130 in the other direction, ie to the national authority of a Member State. Nevertheless, one-stop shopping does not always work and there are still a large number of cases every year which are scrutinised by competition authorities in two or more EU countries (eg, 240 cases in 2007).

At the international level, the picture remains diverse. Intensive merger scrutiny in traditionally strong antitrust jurisdictions has been matched by new merger control regimes springing up in all parts of the world, most notably Asia and Latin America. Today, there are more than 100 merger control systems in force around the world which vary greatly not only with regard to notification requirements, but also with regard to other key elements such as timelines and filing fees.

Notifying parties and their lawyers continue to struggle with the proliferation of merger regimes and the ensuing divergences regarding procedures and substantive criteria or benchmarks. This situation is time-consuming and costly, in particular in cases where the actual impact of an operation in a given country is rather unimportant, but where low national jurisdiction thresholds nevertheless require a notification.

There are various discussion and coordination fora at the international level, such as the International Competition Network (ICN) or the Competition Committee of the Organisation for Economic Cooperation and Development which endeavour to produce more convergence of national merger control systems. Some progress has been achieved in the context of the ICN with the adoption of recommended practices on matters such as jurisdiction, procedure and even substantive assessment. Given the wide variety of underlying national circumstances (nature of the authority, administrative culture, enforcement powers) and the sensitivities often connected to issues of merger control, this remains, however, an undertaking which requires a lot of patience and which will only be crowned by success in the long term. In the meantime, the coexistence and parallel application of a large number of national merger control systems will continue.

Managing multiple filings with a variety of national competition authorities requires important skills in terms of legal knowledge, organisation and coordination. This book provides valuable insights and guidance with regard to these complicated processes and it will be of great assistance to corporations and their counsel.

*Brussels, March 2014*

# Cyprus

**Andreas Neocleous & Co LLC**  
Elias Neocleous & Ramona Livera

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## **LEGISLATION AND JURISDICTION**

### **1. What is the relevant merger control legislation? Is there any pending legislation that would affect or amend the current merger control rules described below?**

Mergers in Cyprus are currently regulated by the Control of Concentrations between Undertakings Law 22(I)/1999 as amended by Law 107(I)/1999 (Merger Law) and Law 154(1)2000.

In September 2013, the Commission for the Protection of Competition (CPC) conducted a public consultation on a draft law titled 'The Control of Concentrations between Undertakings Law of 2013'. The proposed new law reflects the provisions of Council Regulation (EC) 139/2004 and, in particular, introduces a new definition of a concentration so that one of the criteria for establishing whether there is a concentration would be the existence of two or more active participating undertakings in Cyprus. The new law was intended to be in place by the end of 2013, but the legislative timetable has slipped, and it is now anticipated that it will be enacted in January or February 2014.

Where relevant we have provided a brief summary of the proposed amendments based on the published draft law. Further changes may be introduced during the legislative process, but these are not likely to be substantial.

### **2. What are the relevant enforcement authorities, and what are their contact details?**

The body directly responsible for merger control and competition issues in Cyprus is the CPC. This body is assisted in its functions by the Service of the Commission for Protection of Competition, which is responsible for receiving notifications of concentrations of major importance and providing written assessments of such to the CPC. Both the Service of the CPC and the CPC can be contacted at the following location:

53 Strovolos Avenue,  
Victory Building,  
Strovolos, 2018  
Nicosia  
P.O. Box 23467, 1683 Nicosia  
Cyprus  
T: +357-22606600

F: +257-22304944

E: *chairman@competition.gov.cy*

### **3. What types of transactions are potentially caught by the relevant legislation?**

The legislation applies to transactions which fall under the heading of a 'concentration of major importance'. Three types of transaction qualify as a concentration:

- transactions through which two or more previously independent enterprises merge;
- transactions through which one or more persons that is already in control of at least one enterprise acquires directly or indirectly the control of the whole or parts of one or more other enterprises;
- transactions through which a joint venture is established which permanently carries out all of the functions of an autonomous economic entity.

Thus mergers, acquisitions and joint ventures all fall under the heading of a concentration, and require notification to the CPC if the participating enterprises in such concentration fulfil the thresholds which would render the concentration one of major importance under Cyprus legislation.

It should be noted that control is derived not only from the acquisition of the whole or part of the assets of the enterprise but also from any rights acquired that give rise to the possibility of a decisive influence on the composition, meetings or decisions of the organs of the enterprise.

The new draft law introduces provisions regarding the factors which are taken into account by the Service of the CPC, particularly in its assessment as to whether a concentration constitutes a joint venture, namely:

- (i) whether two or more parent companies retain to a significant extent activities in the same market or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market; and
- (ii) whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in a substantial part of the relevant products or services.

### **4. Are joint ventures caught, and if so, in what circumstances?**

Joint ventures are subject to the Merger Law provided that the joint venture is one that permanently carries out all of the functions of an autonomous economic entity. In the event that such independent entity is intended to coordinate the competitive behaviour of the enterprises which remain independent, such coordination is also examined under the scope of The Protection of Competition Law 13(I)/2008 (Competition Law) and its provisions on concerted practices.

### **5. What are the jurisdictional thresholds?**

In order for a concentration to be subject to notification to the Cyprus Competition Authority, it must fulfil all three thresholds which render it a

concentration of major importance:

- the aggregate turnover achieved by at least two of the participating enterprises exceeds, in relation to each one of them, €3,417,203 (the new draft law rounds this figure to €3,500,000);
- at least one of the participating enterprises conducts commercial activities in the Republic of Cyprus (the new draft law introduces the following amendment: ‘at least two of the participating enterprises conduct commercial activities within the Republic of Cyprus’);
- at least €3,417,203 of the aggregate turnover of all the participating enterprises relates to the disposal of goods or the supply of services within the market of the Republic of Cyprus (the new draft law rounds this figure to €3,500,000).

In addition, it provides that the minimum turnover thresholds can be varied by an Order of the Council of Ministers published in the *Official Gazette* of the Republic of Cyprus.

Alternatively, a proposed concentration may also be declared a concentration of major importance by an Order of the Minister of Commerce, Industry and Tourism where the above thresholds are not met, due to the effect it may have on economic and social development, technical progress or employment or the supply of goods and services necessary for the public security of the Republic as a whole or of territories thereof.

In determining the turnover to be considered with regard to the thresholds above it should be borne in mind that the turnover of the enterprise includes the turnover of the parent companies and subsidiary companies (the latter of which is considered any company in which the enterprise has more than half the capital or voting rights, or the power to appoint more than half of the members of the administrative board, or the right to manage the affairs of the enterprise). The aggregate turnover is the amount arising from the sale of products or provision of services by the enterprises concerned for the preceding financial year, once discounts on sales, value added tax and other taxes directly related to turnover are deducted.

In effect, the proposed amendment of the second clause relating to the thresholds, which stipulates that at least *two* of the participating enterprises must conduct commercial activities within the Republic of Cyprus, in conjunction with the third clause which provides that at least €3,500,000 of the total turnover of all the undertakings together concern the disposal of goods or supply of services within the Republic, is to be interpreted that the obligation to notify would be triggered when *both* the acquirer and the target company generate a total turnover of at least €3,500,000 derived from activities within the Republic of Cyprus.

## **6. Are these thresholds subject to regular adjustment?**

No, the thresholds are stipulated in the Merger Law and are not subject to any regulatory acts and any amendments.

The proposed new law provides for amendment of the minimum turnover thresholds by an Order of the Council of Ministers published in the *Official Gazette*.

### **7. Are there any sector-specific thresholds?**

No, the only mention made with regard to different sectors is with regard to the calculation of the aggregate turnover. For a bank or credit organisation, the turnover is considered to be the one-tenth of the balance sheet totals of the last financial year, whereas for an insurance company, it is the value of the gross premiums during the last financial year minus the same tax deductions as applied for the calculation of the turnover of other undertakings.

With regard to credit institutions, financial institutions or insurance companies, there is also a further differentiation in that a concentration is not considered to have taken place where the transaction amounts to holding securities of another enterprise on a temporary basis with the intention of reselling such securities, provided that the holder does not exercise the voting right in respect of the securities other than with a view to disposing of the securities or assets of the enterprise, and provided that the securities are disposed of within one year of the date of acquisition.

The new draft law gives the CPC power to extend this limit if the holders demonstrate that disposal was not reasonably feasible within one year.

### **8. In the event the relevant thresholds are met, is a filing mandatory or voluntary?**

The filing is mandatory.

### **9. Can a notification be avoided even where the thresholds are met, based on a 'lack of effects' argument?**

No, in the event that the thresholds are met notification is obligatory regardless of which of the parties is active in Cyprus, and regardless of whether a competition effect will result from the transaction. The rationale behind the strictness of this approach of the CPC is that the issue of whether or not there is a competition effect can only be ascertained by the CPC once it has been provided with the relevant information it requires, and not by the parties to the transaction. It is considered that if the thresholds are satisfied, there may be a possibility of a competition effect, which can only be assessed properly by the CPC.

The new draft law provides that in the event that the thresholds described above are exceeded, notification is obligatory when both parties are active in the Republic of Cyprus.

### **10. Are there special rules by which a notification of a 'foreign-to-foreign' transaction can be avoided even where the thresholds are met?**

No, if the thresholds are met notification is obligatory despite the parties having no physical presence in Cyprus or having no actual connection to Cyprus other than by generating a turnover in Cyprus that meets the thresholds. When assessing the turnover amounts the CPC refers to the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).

**11. Does the relevant authority have jurisdiction to initiate a review of transactions which do not meet the thresholds for a notification?**

The Minister of Commerce, Industry and Tourism has the authority to issue an Order declaring a concentration as one of major importance despite the three thresholds not being satisfied. Such an order would usually only be issued following advice by the CPC.

**NOTIFICATION REQUIREMENTS, TIMING AND POTENTIAL PENALTIES****12. Is there a specified deadline by which a notification must be made?**

Yes. In the case of a transaction that is required to be notified by virtue of satisfaction of the three thresholds, the notification must be filed with the Service of the CPC within one week from the date of undertaking the relevant agreement (that is, by signing or executing said agreement) or from the date of publication of the relevant offer of purchase or exchange or from the date of the acquisition of a controlling interest, whichever occurs first. In the event that notification is required by Order of the Minister, the transaction must be notified within one week from the date of the notice of such Order to the parties obligated to notify. One week is interpreted to be one calendar week and includes any public holidays and weekends. In the event that the seventh day is a public holiday and the CPC is closed, notification may be filed on the next working day of the CPC.

The new draft law abolishes the current timeframe for the filing of notifications within one week from the date of undertaking the relevant agreement and requires that transactions creating concentrations of major importance are notified in writing to the Service before these are implemented and after the execution of the agreement, announcement of the public bid or the acquisition of a controlling interest. The notification can be filed where the participating enterprises prove to the Service a good-faith intention to conclude an agreement or in the case of a public takeover bid if they have announced an intent or definitive decision of such a proposal that will result in a concentration of major importance.

**13. Can a notification be made prior to signing a definitive agreement?**

A notification must be made on the basis of an agreement that is binding on both parties and that will give rise to a concentration. Technically and in accordance with relevant provisions of the law, notification would not necessarily be accepted on the basis of a letter of intent, term sheet for negotiations, or a memorandum of understanding, but only on the basis of a binding agreement for acquisition of control. Where however, circumstances are such that it can be successfully argued that such a document is practically binding on the parties (such as in the case of an irrevocable binding offer which is to be accepted by the offeree subject to the fulfilment of certain conditions), and that due to various time constraints notification must be made on the basis of such a document, the CPC may in its discretion accept the notification prior to the signing of the definitive agreement, although this would be decided on a case-by-case basis.

The new draft law stipulates that a notification can be filed where the participating enterprises prove to the Service a good-faith intention to conclude an agreement or in the case of a public takeover bid if they have announced an intent or definitive decision of such a proposal that will result in a concentration of major importance.

**14. Who is responsible for notifying?**

The undertaking responsible for notifying in the case of an acquisition of another enterprise is the acquiring party. If the concentration arises due to two previously independent enterprises merging, or due to a joint venture, or acquisition of joint control by more than one persons, both parties are obligated to notify the concentration either jointly or separately.

**15. What are the filing fees, if any?**

There are no filing fees.

The new draft law introduces a filing fee of €1,000. If a full Phase II investigation is undertaken there is a further fee of €6,000.

**16. Where a notification is necessary, is approval needed before the transaction is closed/implemented (is there a waiting period or suspension requirement)?**

Yes, there is a suspension requirement. The transaction cannot be implemented until approval has been provided by the CPC. The CPC has one calendar month from the date of receipt of the notification, or from the date of receipt of any further information it may require, to decide either that the concentration does not raise serious doubts as to its compatibility with the competitive market, and therefore allow the transaction to be implemented, or to determine that the concentration does raise serious doubts as to its compatibility with the market, and therefore decide to proceed to a full investigation. The CPC may extend this time period of one month for a further 14 days, provided that it informs the notifying party of the extension seven days prior to the end of the one-month time limit. If this period also expires without a decision yet having been reached, the concentration is considered to have been declared compatible with the competitive market, and can be implemented. Otherwise, the parties may not implement their envisaged transaction until notice of approval by the CPC has been received.

**17. If there is a suspension requirement, is it possible to apply for a derogation in order to close before approval is granted? If so, under what circumstances?**

There is no possibility of a derogation to the suspension requirement in the first phase of the examination of the notification. This examination phase is comprised of a preliminary evaluation of the concentration and the preparation of a written report including the reasoned opinion of the Service of the CPC as to the compatibility of the concentration with the competitive market of Cyprus. Upon receiving this report, the CPC then determines

whether it will allow the concentration to be implemented, or whether the concentration does indeed raise serious doubts as to its compatibility with the competitive market and therefore warrants further investigation. In the event that a further investigation is decided, the concentration then proceeds to a Phase II examination. The results of such investigation must be provided by the CPC at the latest within four months from the date of receipt of notification by the Service or from the date of receipt of any further information that may have been required. This time period could be extended further if the participants to the concentration delay the process required for the full investigation to take place.

Derogation of the suspension effect is possible only with regard to a Phase II full investigation, where the participants can obtain temporary permission from the CPC to implement the concentration either partially or fully, with or without conditions set by the CPC prior to having obtained the final approval of the CPC. In order to obtain such derogation, the participating enterprises must show, to the satisfaction of the CPC, that they are likely to suffer serious damage as a result of further delay in the implementation of the concentration.

#### **18. Are any other exceptions (carve-outs etc) available to allow parties to close/implement prior to approval?**

Other than that mentioned above with regard to a Phase II investigation, no other exceptions exist that allow parties to close or implement prior to approval.

#### **19. What are the possible sanctions for failing to notify a transaction?**

Failure to notify a transaction according to the provisions of the law and within the timeframes required by the law could lead to the imposition of a fine on the party that is obligated to notify of up to €85,430 and a further fine of up to €8,543 for each additional day for which failure to notify continues.

The new draft law abolishes the administrative fine for failing to notify a transaction and introduces other amendments regarding administrative fines.

#### **20. What are the possible sanctions for implementing a transaction prior to receiving approval (so-called 'gun-jumping')?**

For implementing a transaction prior to receiving approval, whether partially or completely, the CPC may impose a fine of up to 10 per cent of the total turnover of the participating enterprises for the financial year preceding the year in which notification was made, and a fine of up to €8,543 for each additional day on which the concentration continues to be partially or completely put into effect.

The new draft law imposes an administrative fine of up to 10 per cent of the total turnover of the participating enterprise obligated to notify, for the financial year preceding the year in which notification was made, and a further administrative fine of €8,000 for every day the infringement continues.



**21. What are the possible sanctions for implementing a transaction despite a prohibition decision or in breach of a condition/obligation imposed by a conditional clearance decision?**

In both cases the CPC has the authority to impose a fine of up to 10 per cent of the total turnover of the participating enterprises for the financial year prior to the year in which the notification is submitted, and an additional fine of up to €8,543 for each day on which such infringement continues.

The new draft law imposes an administrative fine of up to 10 per cent of the total turnover of the participating enterprise obligated to notify, for the financial year preceding the year in which notification was made, and a further administrative fine of €8,000 for every day the infringement continues.

**22. What are the different phases of a review? Is there any way to speed up the review process?**

As mentioned above in response to question 17, review of a concentration by the CPC can be classified into two phases. Phase I begins when the Service of the CPC receives the notification, which it then reviews to ensure that the requisite information and documents are provided to ensure compliance with Schedule III of the Law. Once it has ensured that all relevant information has been provided, and on the basis of such information, the Service then prepares a written report in which it sets out its evaluation of the possible effect on the Cyprus market of the concentration in question. The CPC will then conduct a meeting in which it reviews this report and decides whether to declare the concentration compatible with the competitive market or to declare that the concentration requires further investigation. In the event that the concentration is considered to require further investigation, the review enters a Phase II investigation.

During the Phase II review, further information may be requested from the parties involved in the concentration and both the CPC and third parties who have a legitimate interest in the concentration are also given the opportunity to submit their views. In addition, negotiations with the participating enterprises can also be undertaken, with a view to determining whether any changes could be made to the proposed transaction so as to overcome the doubts of the CPC as to the compatibility of the concentration with the competitive market. Following this procedure the Service once again prepares a report to be submitted to the CPC by which it provides its findings as to the compatibility of the concentration with the competitive market and the CPC then reviews the report, and issues a decision as to whether to allow the proposed transaction to be implemented, with or without certain conditions.

There is no formal means by which to speed up the review process. The only action that may assist in limiting the time required for each phase is for the participating enterprises to provide the information required from them as soon as requested by the Service of the CPC.

**23. Is there a possibility for a ‘simplified’ procedure or shorter notification form and, if so, under what conditions would this apply?**

No, the information required by the CPC is specific and cannot be deviated from.

**24. What types of data and what level of detail is required for a notification?**

Data with regard to each participating enterprise should be provided, including the name, address and contact person of the participating enterprise, as well as details of the activities that the enterprise undertakes both in Cyprus and worldwide. The structure of ownership and control of the enterprise must be analysed and therefore information on the parent companies and subsidiary companies of the enterprise should also be provided. The number of employees of each participating enterprise, both in Cyprus and abroad, must also be provided. In addition, and most importantly, information as to the turnover of the companies involved must be provided, both worldwide and in Cyprus, as well as the activities undertaken which relate to such turnover, and details as to the profits before deduction of taxes of each participating enterprise.

The nature and scope of the concentration must be described, as well as the financial and structure details of the concentration.

In the case of an affected market, enterprises are required to provide details of any other enterprises which are active in the affected market in which they hold more than 10 per cent of the shares, or which have common directors.

A detailed description and analysis of the affected market must also be provided. An affected market is considered as any market of products or services in which two or more participating enterprises engage in business activities within the Republic of Cyprus of:

- either a horizontal nature, and the concentration of their activities leads to a combined market share of 15 per cent and above; or
- a vertical nature, and any of the market shares of the enterprises concerned amounts to 25 per cent or more, irrespective of whether there exists a supplier-customer relationship among them.

In the event that there is an affected market in accordance with the definition provided above, an extensive amount of information must also be provided such as detailed sales data of the participating enterprises, market share estimates of the parties and their main competitors as well as the contact details of their main competitors, details (including contact details) of five of the parties’ largest customers and suppliers, and contact details of main commercial contacts, a description of the structure of supply and demand and the distribution networks existing in the market, and a description of factors affecting the entry into the market, barriers to imports, importance of research and development if relevant and any other factors pertaining to the competitive structure of the market.

The new draft law introduces the following amendments:

- All notification documents must be submitted to the CPC in both written and electronic form.

- The copy of the agreement should be stamped unless the agreement was made in a country where the national legislation does not require stamping of agreements.
- The notification must include an explanation of the purpose of the concentration.
- The notification must state whether the concentration has been notified to other national competition authorities of Member States of the EEA. If so, the name of the Member State, the date of notification and any decision must be given.
- The notification must describe how the proposed concentration is expected to affect the interests of intermediate and end-consumers.
- In the event of a joint venture, the notifying party must state whether two or more parent companies retain a significant involvement in the same market or in a downstream, upstream or neighbouring market closely related to this market, and explain the reasons why. If so, the notification must include the turnover of the parent company for the preceding year, the financial significance of the activities of the joint venture in relation to the turnover and the market share of every parent company.

#### **25. In which language(s) may notifications be submitted?**

The notification can only be submitted in the Greek language. Although the Merger Law allows for notifications to be filed in the official languages of the Republic, that is in Greek and Turkish, in practice any notification filed in Turkish would need to be translated. The CPC does accept attachments such as annual reports and other corporate documents required in the English language. Documents in other languages must be translated to either English or Greek.

#### **26. Which documents may be submitted along with a notification?**

The documents that must be submitted along with the notification are:

- the binding final or most recent documents that brought about the concentration (therefore either an agreement or a public tender), duly signed and executed as the case may be.
- the most recent annual reports and audited financial reports of all the participating enterprises.
- any reports or analyses prepared with regard to the proposed transaction that provide information with regard to the affected market which pertains to that required to be included in the notification.
- a list and short description of any other analyses, reports, studies or surveys prepared for the purpose of evaluation or analysis of the concentration with regard to the conditions of competition and the market.

The above documents can be provided in copy form, in English or in Greek. Although the Merger Law provides that such documents can be filed in any of the official languages of the Republic, that is, in either Greek or Turkish, in practice any documents filed in Turkish would require translation, as the CPC only has the capacity to deal with notifications in Greek.

As noted earlier, the new draft law requires all documents to be submitted electronically and in written form, and requires the copy of the agreement to be stamped unless the agreement was made in a country where the national legislation does not require stamping of agreements.

**27. What are the possible sanctions for providing incorrect, misleading or incomplete information in a notification?**

The CPC has the power to impose a fine of up to €85,430 for the supply of false or misleading information provided by a party while fulfilling an obligation imposed by the Merger Law. In addition it has the authority to impose a fine of up to €51,258 in the event of failure of a party to provide information required pursuant to the Merger Law.

The new draft law stipulates that the CPC may impose an administrative fine of up to €50,000 for providing incorrect or misleading information while fulfilling an obligation imposed by the law.

**28. To what extent is the relevant authority available for pre-notification discussions? Are pre-notification consultations customary?**

If necessary the Service of the CPC or the CPC itself may provide pre-notification consultation, but any request for guidance will most likely be required to be submitted in writing. Pre-notification consultations are not customary although they do occur where there are certain issues to clarify with regard to the provisions of the law and their interpretation by the CPC.

**29. Where pre-notification consultations are possible, what measure does the relevant authority take to ensure that such discussions are treated confidentially?**

The Merger Law provides that any authorised officer or other civil servant who acquires knowledge with regard to a concentration as a result of the provisions of the Merger Law may not disclose it to any other person, except as necessary to so do for the execution of their duties. By extension, this obligation would also logically apply to any information provided during pre-notification consultations. Breach of this requirement is an offence punishable with a term of imprisonment of up to six months, a fine of up to €17,086, or both.

The new draft law amends the administrative fine to €1,500.

**30. At what point and in what forum does the relevant authority make public the fact that a notification has been made?**

Once the notification is received by the Service of the CPC, the fact of the notification of the concentration in question is published on the website of the CPC as well as in the *Official Gazette* of the Republic of Cyprus. A further publication takes place of the reasoned decision of the CPC with regard to the compatibility of the concentration with the competitive market, once again on the website of the CPC and in the *Official Gazette* of the Republic of Cyprus.

**31. Once the authority has issued its decision, what information about the transaction and the decision is made publicly available?**

The CPC may issue two versions of the reasoned decision, one that is confidential in nature and provides more detail and which is only given to the participating enterprises, and one that is made publicly available and that does not contain confidential information. The published reasoned decision of the CPC typically contains an overview and a definition of the relevant product market and relevant geographic market of the concentration in question. General information is provided as to whether the concentration meets the thresholds of the Merger Law and falls within the definition of a concentration, and as to the activities that each party undertakes. A summary of the structure of ownership and control is also provided as well as a summary of the main details of the concentration and of the agreement or public tender bringing about the concentration. The final decision to either proceed with a full investigation or declare the concentration compatible with the competitive market is then set out.

The CPC may redact confidential information before publishing the reasoned decision. This falls within the ambit of the discretionary powers of the Cyprus CPC and is not regulated by any provision of our Merger Control Law or any Regulation. The CPC is generally prepared to agree to redaction of business secrets, such as turnover amounts, competitors and market shares, but very rarely extends this to other information such as internal group structure or details of the transaction. The CPC has a general policy not to amend any information included in its reasoned decisions.

**SUBSTANTIVE ASSESSMENT OF THE MERGER, ROLE OF THIRD PARTIES AND REMEDIES**

**32. What is the substantive test for assessing the legality of a notified transaction?**

The legality of a notified transaction is judged on the basis of whether the concentration in question creates or strengthens a dominant position in the affected markets. If the concentration does create or strengthen a dominant position, it will be declared incompatible with the requirements of the competitive market.

The new draft law amends the criteria of compatibility with the competitive market, namely:

- If a concentration is likely to significantly impede competition within the Cyprus market or any substantial part of it, in particular as a result of the creation or strengthening of a dominant position, it is incompatible with the competitive market.
- If a concentration is not likely to significantly impede competition within the Cyprus market or any substantial part of it, in particular as a result of the creation or strengthening of a dominant position, it is compatible with the competitive market.

**33. What theories of harm are considered by the authority in assessing the transaction? How concerned are the authorities with non-horizontal**

**(eg, vertical or conglomerate) effects, and are any other theories of harm analysed (eg, coordination in the case of joint ventures)?**

In assessing the concentration, the CPC considers the structure of the affected markets, the market position and economic power of the participating enterprises (including their parent and subsidiary companies), alternative sources of supply and the supply and demand trends of products or services traded in the affected markets, the barriers to entry to the affected markets, and the interests of the intermediate and final consumers of the products and services in question.

In the case of a joint venture, the issue of coordination of competitive behaviour will also be examined to determine the extent to which the establishment of a third independent enterprise has such coordination as its object or effect.

**34. Are non-competition issues, such as industrial policy or labour policy, commonly taken into account in the assessment of the transaction?**

Not particularly. Non-competition issues are rarely taken into account in the assessment of a concentration, especially in a Phase I investigation. It is possible that they may be given some consideration with regard to a Phase II investigation, although no recent cases have made mention of them.

**35. Are economic efficiencies considered as a mitigating factor in the substantive assessment?**

In considering whether to declare a concentration as compatible with the competitive market, the interests of the intermediate and final consumers of the products or services in the affected market are taken into consideration. In addition, the CPC generally follows European Commission practice in such cases, thus to the extent that economic efficiencies have been taken into account by the European Commission, the CPC will most likely also follow such practice.

The new draft law introduces the following new factors which are taken into account as mitigating factors in the substantive assessment:

- potential competition from undertakings based in Cyprus or abroad; and
- any contribution to technical and economic progress and the improvement of economic efficiency and the extent to which this will benefit consumers and not impede competition.

**36. Does the relevant authority typically cooperate/share information with authorities in other jurisdictions?**

Yes, the CPC and the Service of the CPC cooperate and share information with other authorities, mainly the authorities of EU Member States and the European Commission, where the need arises.

The new draft law introduces a specific requirement for the CPC to cooperate with the relevant national authorities of Member States of the EEA regarding matters relating to merger control.

**37. To what extent are third parties involved in the review process?**

Third parties have the ability to actively be involved in the review process. With regard to a Phase I investigation, a summarised notice of the concentration is published as soon as the notification is received by the Service of the CPC for the purposes of allowing any third parties with a legitimate interest to submit their views. In addition, the Merger Law also clearly stipulates that where a full Phase II investigation is to be carried out, the Service must provide the opportunity for parties with a legitimate interest who do not partake in the concentration in question to submit their views regarding the concentration.

**38. Is it possible for the parties to propose remedies for potential competition issues?**

It is generally permitted for parties to propose remedies and parties are also entitled to negotiate with the CPC with regard to any remedies proposed by the CPC.

The new draft law provides that if a full Phase II investigation is undertaken, the parties are given the opportunity to amend the proposal or to undertake commitments with a view to removing any doubts as to the compatibility of the notification with the requirements of the competitive market.

**39. What types of remedies are likely to be accepted by the authority (eg, divestment remedies, other structural remedies, behavioural remedies etc)?**

There are no specific remedies that are more likely to be accepted by the authority. Generally the remedy must serve to eliminate fully the competition concerns raised by the concentration. Examples of remedies that have been utilised in the past are:

- binding commitment not to increase the price of the relevant product for a period of three years subject to certain exceptions;
- no importation of certain goods unless demand exceeds supply;
- commitment to remove certain by-products from the market once the transaction is implemented;
- commitment to keep price level for a certain period of time.

**40. What power does the relevant authority have to enforce a prohibition decision?**

The CPC is given authority to issue binding decisions on parties as an independent organisation, without the need for any court order or order by a relevant Minister.

In the event that it has revoked a decision of compatibility of a concentration with the competitive market, either due to the fact that the parties have provided misleading or false information or because they have not satisfied a condition by which such approval was obtained, the CPC has the power to order the dissolution or partial dissolution of the concentration. This dissolution can be accomplished either by the deprivation of any shares,



assets or rights acquired by the relevant participating enterprise, or by the cancellation of any agreements which created the concentration, or by both such actions in conjunction with any other action the CPC deems necessary.

Where such an order is not complied with within the time specified by the CPC, the CPC has the authority to impose a fine of up to 10 per cent of the total turnover of the participating enterprises in the financial year preceding that of the concentration, and a further fine of up to €8,543 for each additional day on which the infringement occurs.

If a transaction is put into effect without having obtained the requisite approval from the CPC, the CPC may impose a fine of up to 10 per cent of the total turnover of the participating enterprises for the financial year preceding the concentration and an additional fine of €8,543 for each additional day in which the infringement occurs. The same fine can be imposed where the parties to a concentration put it into effect without observing any conditions imposed by the CPC.

The new draft law reduces the additional fine to €8,000. It also empowers the CPC to take legal action to recover any unpaid fines as a civil debt owed to the Republic of Cyprus.

## **JUDICIAL REVIEW**

### **41. Is it possible to challenge a decision approving or prohibiting transactions? If so, before which court or tribunal?**

Yes, parties to the concentration are entitled to challenge a decision of the CPC by submitting an application for judicial review with the Supreme Court of the Republic of Cyprus. Such an application for Recourse (as it is referred to) must be submitted within 75 days of the publication of the contested decision by the CPC.

### **42. What is the typical duration of a review on appeal?**

This would depend on the particular circumstances of the case. As mentioned above the application for judicial review must be filed within 75 days of the publication of the decision of the CPC. From then on the time period in which such application would be considered could take between one and three years, depending on the workload of the court and on the timeliness of the lawyers of the parties involved in filing the relevant documents necessary.

### **43. Have there been any successful appeals?**

There have been a number of successful appeals against decisions of the CPC over the years. Such Recourse actions however have never involved a prohibitive decision involving mergers and acquisitions and Merger Law, as the CPC has not to date issued such a decision (see below question 45).

Typically, decisions that are contested in court concern the Protection of Competition Law and not the Merger Control Law.



## **STATISTICS**

### **44. Approximately how many notifications does the authority receive per year?**

In 2012, 47 notifications were notified with the Service of the CPC, 37 were approved, one notification was referred to the European Commission and two notifications did not constitute a concentration within the meaning of the Merger Control Law.

In 2013, the CPC reviewed about 38 notifications. On this basis we estimate that the CPC receives approximately 40–45 notifications per year for review.

### **45. Has the authority ever prohibited a transaction? How many prohibition decisions has the authority issued in the past five years?**

No, to date the authority has never prohibited a transaction, although it has issued decisions approving of a transaction only after obtaining binding commitments from the parties concerned.

### **46. Over the past five years, in what percentage of cases have binding commitments been required in order to obtain clearance for a transaction?**

There are only a handful of cases in which binding commitments were required in order to obtain clearance for a transaction.

In 2011, the CPC approved a proposed transaction concerning the establishment of a joint venture relating to passenger-handling services subject to conditions and commitments concerning assistance to persons with disabilities or with limited mobility.

In 2012, the CPC approved two other concentrations after the participating enterprises had complied with all the commitments which they had undertaken to the satisfaction of the Commission.

### **47. How frequently has the authority imposed fines in the past five years?**

The imposition of fines is also not a common occurrence, although it is more common than Phase II investigations. Fines have been generally imposed with regard to late notifications and partial or full implementation of a transaction prior to obtaining CPC approval.

In 2012 and 2013, the CPC imposed administrative fines in two cases for late notification and implementation of the transaction prior to approval.

The new draft law abolishes the administrative fine for late notification and the practice of the CPC will be to impose penalties only in the instance of partial or complete implementation of the transaction prior to approval by the CPC.

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# Merger Control

Provisions on merger control are a key element of almost all competition laws around the globe, from the United States to the European Union, from China to Brazil.

Today, the need to obtain merger control approvals is often the number one factor delaying the closing of M&A deals worldwide. While more countries have merger control laws than ever before, merger control regimes differ dramatically from one another, not only with regard to notification requirements, but also in other key elements such as timing and costs.

Managing multiple filings with a variety of competition authorities requires important skills in terms of knowledge, organisation and coordination.

This second edition of 'Merger Control' provides valuable insights and guidance to these complicated processes and will be of great assistance to corporations and their counsel.

