
THE MERGER CONTROL REVIEW

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Chapter 9

CYPRUS

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I INTRODUCTION

In Cyprus, mergers are regulated by the Control of Concentrations between Undertakings Laws 1999 to 2000 ('the Merger Law') as amended. These were 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'), 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 and in accordance with the Protection of Competition Law 13(I) of 2008. 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 affected market.

The CPC is assisted in the duties it has with regard to the examination and regulation of mergers by the Service of the CPC ('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.

The Service is responsible for:

- a* providing administrative support to the Commission;

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- b* securing all necessary information;
- c* assisting the Commission in exercising its competences, including unannounced on-the-spot investigations ('dawn raids') at the premises of undertakings under investigation;
- d* accepting and submitting complaints and proposals to the Commission;
- e* proceeding with the necessary merger notifications and publications in the Official Gazette of the Republic of Cyprus;
- f* evaluating submitted evidence of notified concentrations on the basis of the Merger Law and preparing written reports; and
- g* providing the Commission with all possible facilitations to achieve its competences, powers and duties.

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. Due to its rising workload volume, during 2012 the CPC increased the frequency of its meetings in order to issue decisions on concentrations notified as well as on other competition issues.

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: aggregate turnover (turnover outside Cyprus and within Cyprus), 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

i Operation of the Commission

The Service recently prepared proposals to reform the current Merger Law and submitted them to the Ministry of Commerce, Industry and Tourism for review. The reforms aim to update the existing Merger Law to take into account the significant changes experienced in our market economy and to maintain a healthy competitive market. We expect that these amendments will be enacted soon in order to modernise the Merger Law and align it more closely with the merger regime in the rest of the European Union. Reform of the Law will also consider the thresholds that trigger notification requirements, removing the superfluous obligation of notifying proposed mergers that have no effect in Cyprus and freeing the Commission to focus on significant cases.

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 during 2012. The Commission issued 37 decisions on concentrations and four decisions on interim measures. During 2012, the CPC also undertook several unannounced dawn raids in furtherance of its investigations against anti-competitive practices by cartels.

In Decision No. 12/2012 dated 27 April 2012, the CPC examined a concentration concerning the establishment of a joint venture, S&L Airport Services Limited, by two independent legal entities, Swissport and LGS Handling Limited. The CPC decided that the two entities had infringed Articles 9 and 13 of the Merger Law, first by failing to notify the concentration within the prescribed seven-day period from the date of signing of the transaction, and secondly by implementing the concentration despite this failure. In view of a delay of more than 15 months, the CPC imposed a fine of €1,000 on each party for the first violation and €2,500 on each party for the second violation.

In determining the penalties, the CPC took the following factors into account:

- a* the representations of the parties, and the fact that both parties were obliged to investigate whether they had to file a notification irrespective of the time available or the difficulties they would encounter;
- b* the absence of any evidence to indicate that the parties had intentionally bypassed the CPC in order to avoid its control;
- c* the fact that the failure to notify and the implementation of the transaction did not harm competition;
- d* the parties' admission that they had infringed the Law by their failure to notify the concentration and the implementation of the transaction;
- e* the parties' full cooperation once they had been made aware of their obligations;
- f* the fact that this was the first infringement by the parties.

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 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 aggregate turnover of each of at least two of the participating enterprises 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 combined turnover of all the participating enterprises derived from the sale of goods or the supply of services within the Republic of Cyprus must amount to at least €3,417,203.

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 a 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 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 Merger 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 any subsidiary companies (and the parent companies of those above them).

This definition of aggregate turnover in essence means many mergers and acquisitions satisfy 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 on 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 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 the relevant agreement bringing about the transaction that forms a concentration of major importance. There is no standard notification form as such, but Schedule III of the Merger Law sets out the information that 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. 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 falls within the scope of the Merger Law, is compatible with the competitive market or 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 of Commerce, Industry and Tourism 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 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 that 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 of 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.

V OUTLOOK AND CONCLUSIONS

Due to the ongoing economic crisis being experienced by many European countries, including Cyprus, the CPC has seen an increase in the number of mergers notified in comparison to previous years. The CPC has therefore intensified its efforts to deliver speedy decisions with a view to assisting the undertakings concerned to implement their transactions without delays and to avoid any adverse effects on their businesses. With the tightening of capital financing throughout Europe, mergers between undertakings are seen as a way to avoid closure or liquidation of undertakings.

Over 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.

Following the introduction of a leniency programme in 2011, there has been a further step towards the alignment of the Cyprus competition regime with EU competition rules and regulations. The next step in this process of alignment is likely to be reform of the Merger Law in order to afford more effective protection to consumers and promote a healthier market economy.

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 an effect on competition in Cyprus. As a result, the CPC is often burdened by notification reviews that are irrelevant to the Cyprus competition market, and that take up resources 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.

On 2 October 2012, during Cyprus's Presidency of the Council of the European Union and on the occasion of the European Competition Day, the CPC organised a conference with the participation of many representatives from national competition authorities in the EU. The conference aimed to give Member States the opportunity to review consumer protection and competition law issues. It focused on three topics of major importance for EU competition law, all based on the grounds of effective enforcement of competition rules in the EU:

- a* actions for damages – recent developments in Member States and the forthcoming EC proposal;
- b* effective competition in the food and retail markets; and
- c* enforcement of competition rules in Member States – opportunities and challenges for national competition authorities.

Speakers at the conference emphasised the importance of effective enforcement as a crucial challenge for the EC, both as the guardian of treaties and as the EU competition

law enforcer, and also for the national competition authorities of EU Member States, which have been granted important powers since the enactment of Regulation 1/2003.

The conference was a success, highlighting the CPC's role in the domestic market in combating anti-competitive behaviour and protecting consumers.

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 at 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.

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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.

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