

GETTING THE DEAL THROUGH

# Merger Control

The international regulation of mergers and joint ventures in 60 jurisdictions worldwide

Consulting editor: John Davies

# 2008



Published by  
**GLOBAL COMPETITION REVIEW**

*in association with:*

A Y Chitale & Associates  
Ali Budiardjo, Nugroho, Reksodiputro  
Allens Arthur Robinson  
Andreas Neocleous & Co  
Anjarwalla & Khanna Advocates  
Azizov & Partners Advocates  
Babić & Partners  
Bae, Kim & Lee  
Benzakour & Lahbabi Law Firm  
Bowman Gilfillan  
Bugge, Arentz-Hansen & Rasmussen  
Castañeda y Asociados  
Cernejová & Hrbek, Law Firm  
D'Empaire Reyna Abogados  
Davis Polk & Wardwell  
Djingov, Gouginski, Kyutchukov & Velichkov  
ELIG Attorneys-at-Law  
Epstein, Chomsky, Osnat & Co  
Freshfields Bruckhaus Deringer  
Gatt Frendo Tufigno Advocates  
Guevara & Gutiérrez SC  
Jadek & Pensa  
Klavins & Slaidins LAWIN  
Konnov & Sozanovsky  
Kromann Reumert  
Lenz & Staehelin  
Lepik & Luhaäär LAWIN  
Lex Caribbean  
Lideika, Petrauskas, Valiūnas ir partneriai LAWIN  
Logos Legal Services  
M & M Bomchil  
Mannheimer Swartling Advokatbyrå  
Marques Mendes & Associados  
Masembe, Makubuya, Adriko, Karugaba &  
Ssekatawa Advocates (MMAKS Advocates)  
McCann FitzGerald  
McMillan Binch Mendelsohn LLP  
Mens Legis Cakmakova Advocates  
Panagopoulos, Vainanidis, Schina, Economou  
Parra, Rodríguez & Cavellier  
Rizvi, Isa, Afridi & Angell  
Roschier, Attorneys Ltd  
Rubin Meyer Doru & Trandafir Lawyers Professional Corporation  
Russell McVeagh  
Salans  
SimmonsCooper Partners  
TozziniFreire Advogados  
Wardyrński & Partners  
Yangming Partners

# Cyprus

Marinella Kilikitas and Christiana Petrou

Andreas Neocleous & Co

## Legislation and jurisdiction

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

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 Law). The Law pre-defines the legal framework for pre-merger notifications and merger control procedures.

The Commission for the Protection of Competition (CPC), established in 1990 under the Protection of Competition Law, has overall responsibility for implementation of the Law and, together with the Competition and Consumer Protection Service (the Service), constitutes the governmental watchdog for anti-competitive practices between undertakings that impinge on trade and restrict competition within the Republic.

### 2 What kinds of mergers are caught?

The Law is applicable to concentrations of major importance. Please refer to question 5.

### 3 Are joint ventures caught?

Yes. Concentrative joint ventures (being two or more undertakings whose activities are under common control) that carry out all the functions of an autonomous economic entity are caught.

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

Yes, 'control' for the purposes of the Law is defined as control stemming from any rights, contracts or other means that, either separately or in combination, and with regard to the legal or other facts of the case, confer on the enterprise the possibility of exercising decisive influence by:

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

### 5 What are the jurisdictional thresholds?

For the purposes of the Law, a concentration of enterprises is deemed to be of major importance if the aggregate turnover achieved by at least two of the participating enterprises exceeds, in relation to each one of them, 2 million Cyprus pounds (approximately €3.4 million).

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

Filing is mandatory.

However, a concentration is not deemed to arise where (in translation):

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

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

For a concentration to fall within Cypriot regulatory control, the activities of at least one of the enterprises must be carried out in Cyprus, ie, it must have a physical presence in Cypriot territory either through a subsidiary or a branch. Consequently, foreign-to-foreign mergers are not caught by the Law and do not require notification.

## Notification and clearance timetable

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

Acts of concentration of major importance must be notified to the Service within one week of the date of conclusion of the relevant merger agreement or the publication of the relevant offer for purchase or the acquisition of a controlling interest, whichever occurs soonest.

In the case of failure to notify the Service of the concentra-

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

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

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

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

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

There are no filing fees.

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

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

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

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

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

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

According to section 9 of the Law, the relevant activity giving rise to a concentration should be suspended until such activity has been officially authorised. Failure to comply with this requirement carries the same consequences as non-notification and the CPC may impose administrative penalties on the participants to the concentration who by their omission infringe the relevant provisions of the Law.

Where a concentration is either partially or completely put into effect without notice of approval from the Service, a fine of 10 per cent of the total turnover of the participating enterprises in the financial year immediately preceding the concentration will be imposed, in addition to a fine of up to 5,000 Cyprus pounds

(approximately €8,500) for each day that the infringement continues to exist. We are not aware of any reported case law to cast light on how such sanctions are applied (or indeed whether they have in fact been applied) in practice.

**12** What solutions (such as a local 'hold-separate' arrangement) might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

See question 7.

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

Not as far as we are aware.

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

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

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

The supporting documents must be submitted in Greek or Turkish (the official languages of Cyprus) or English. Where the originals of such documents are only available in a language other than these, the documents must be submitted in their original language together with a translation into Greek or Turkish.

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

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

Within one month of its being informed of the CPC's decision, the Service is required to inform the notifying party or parties of the decision (either that the case is under investigation or that further information is required); if owing to the volume of

work the CPC cannot provide a response within the time limit prescribed by Law, it must immediately inform the parties of this fact and may extend the time limit by 14 days.

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

As above.

**Substantive assessment**

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

The test is whether the concentration is compatible with the requirements of the competitive market, ie, that the concentration does not strengthen or create a dominant position in the affected markets within the Republic.

The criteria taken into account are:

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

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

Should the joint venture be one that falls within the ambit of the Law (as mentioned in question 3) then the substantive test is the same as above.

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

Other than the factors mentioned above, this remains to a large extent a policy decision and the Law is somewhat ambiguous on this issue.

However, it is worth noting that the CPC considers secret cartels between competitors that have as their goal the fixing of prices, production or sales quotas, market sharing or the restriction of imports or exports among the most serious restrictions on competition.

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

Only competition issues are relevant.

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

In making its assessment, the CPC takes into account those factors listed in question 17.

**Remedies and ancillary restraints**

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

**Temporary approval of the concentration**

In cases where the CPC proceeds with a full investigation and reasoned submissions are made to the CPC by one or more of the participants to the concentration or by any other person that further delay in the commencement of the concentration is likely

to result in serious damage, the CPC, if satisfied with such submissions, has the power to inform (in writing) the participants and those who made the relevant submissions that the whole or part of the concentration is approved temporarily either conditionally or unconditionally.

**Power to revoke**

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

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

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

**Scrutinising powers**

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

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

Finally, any authorised officer may request either orally or in writing additional information in the form of clarification or reports from the person obliged to make the notification or any participant in the concentration or any representative of any such person, regarding any matter raised for examination during an evaluation or investigation by the Service. In the event of failure to provide information pursuant to this obligation, a fine of up to 30,000 Cyprus pounds (approximately €51,300) may be imposed by the CPC in the form of an administrative penalty.

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

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

Where the CPC exercises its discretionary power it may, in the course of granting a remedy, order the dissolution or partial dissolution of the concentration concerned to secure the restoration of the competitive market. The dissolution is accomplished by the deprivation of any participation, shares, assets or rights acquired by any person participating in the concentration, or by the cancellation of any contracts which created the concentration or which arose from it, or by a combination of the two, or any other way the CPC deems necessary.

In the event that the CPC ascertains that the notified concentration falls within the scope of the law and raises doubts as to its compatibility with the competitive market, it will inform the Service of the need to conduct a full investigation. In such

an event, the Service will request further information from the participants for the purpose of completing its investigation. If, following its review of the additional information provided to it, the CPC's doubts as to compatibility have not been removed, the Service will consider which of the circumstances giving rise to its concerns may be removed and will make suggestions and subsequently undertake negotiations with the parties to resolve the issues.

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

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

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

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

Foreign-to-foreign mergers are not caught by the Law (see above).

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

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

### Involvement of other parties or authorities

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

Yes, but only if a full investigation is carried out.

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

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

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

During the course of an investigation, the CPC will inform an enterprise that it is under investigation, unless of course, the complaint is clearly unsubstantiated or the allegations are not anti-competitive. When the CPC decides that there is a prima facie infringement of the Law, it will issue a statement of objec-

### Update and trends

Based on the most recent Annual Reports published by the CPC, 11 merger notifications were made to it in 2005, all of which were declared compatible with the requirements of the competitive market. The Annual Reports for the year 2006 have not yet been released. Nonetheless, our research has not revealed the existence of any key cases, decisions, judgments or policy and legislative developments over the past year in this area.

tions setting out the alleged infringements and the documents in the file upon which it intends to base its case. The parties shall only then have access to these documents.

The CPC and the Service are under a duty to ensure confidentiality. When confidential material is provided to the Service, this must be duly marked as such and treated accordingly. Furthermore, any authorised officer of the CPC or of the Service or any other civil servant who acquires any information in relation to the concentration is bound to secrecy and is obliged not to divulge any of this knowledge except in so far as this may be required by Law.

Any potential infringement by any officer constitutes a criminal offence punishable by imprisonment of up to six months or a fine of up to 1,000 Cyprus pounds (approximately €1,700) or both.

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

The Law is silent on this issue. However, under Council Regulation 1/2003 and EC Merger Control Regulations No.139/2004 (the Regulations), cases with a community dimension cooperate on the basis of the system of the parallel competent authorities.

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

As above.

### Judicial review

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

The decision of the CPC is considered at law to be an administrative decision issued by a public authority. An aggrieved party seeking to annul a CPC decision has the right to file an administrative recourse to the Supreme Court under article 146 of the Constitution of the Republic of Cyprus.

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

The time limit for commencing an appeal is 75 days from receipt of notification of the decision.

**Enforcement practice and future developments**

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

According to the latest 2004 official statistics of the CPC, 30 complaints and five applications for individual negative certifications or individual exceptions were submitted. During the same year, there were also 38 investigations, 26 of which were concerned with possible abuses by an undertaking holding a dominant position in various sectors of the economy. The other 12 related to agreements, decisions and concerted practices between undertakings that may have potentially resulted in distortion of competition in the market.

No statistics are available in the case of foreign-to-foreign mergers as these are not recognised by the Law.

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

We are not aware of any current enforcement concerns.

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

None as yet.

## Andreas Neocleous & Co

**Contacts: Marinella Kilikitas**

**marinellak@neocleous.com**

199 Archbishop Makarios III Avenue  
Limassol 3608  
Cyprus

+357 25362818  
+357 25359262  
www.neocleous.com