THE MERGER CONTROL REVIEW

NINTH EDITION

Editor
Ilene Knable Gotts

THE LAWREVIEWS

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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, most recently in South America, have added pre-merger notification regimes. In our endeavour to keep our readers well informed, we have expanded the jurisdictions covered by this book to include the newer regimes as well. Also, the book now includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals, and high technology and media in key jurisdictions to provide a more in-depth discussion of recent developments. Finally, the book includes a chapter on the economic analysis applied to merger review.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for such a transaction develops a comprehensive plan prior to, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 36 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving media, pharma and high-technology companies, we have included chapters that focus on the enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter that discusses the various economic tools used to analyse transactions. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency

this year. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany has recently amended its law to ensure that it has the opportunity to review transactions in which the parties' turnover do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). Please note that the actual monetary threshold levels can vary in specific jurisdictions over time. There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there similarly is no 'local' effects required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa this year have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, the competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings

within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia, and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

In addition, other jurisdictions have joined the European Commission (EC) and the United States in focusing on interim conduct of the transaction parties, commonly referred to as 'gun jumping'. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information prior to approval appears to be considered an element of gun jumping. And the fines that are being imposed has increased. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japan Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Some jurisdictions even within the EC remain that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose

to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm in large cross-border transactions raising competition concerns for the United States, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia, and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the European Commission in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including most recently Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation was very evident this year. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction due to the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United

States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico).

Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata*, and France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

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Wachtell, Lipton, Rosen & Katz
New York
July 2018

Chapter 16

CYPRUS

Anastasios A Antoniou and Christina McCollum[1]

I INTRODUCTION

The Control of Concentrations Between Undertakings, Law 83(I) of 2014 (the Law), is the legislative instrument governing the control of concentrations between undertakings in Cyprus.

Enforcement of the legislation rests with the Commission for the Protection of Competition (CPC), initially established in 1990 and re-established pursuant to the provisions of the Protection of Competition Law No. 13(I) of 2008, as amended by Law No. 4(I) of 2014.

The CPC has overall responsibility for implementing the Law and is the competent independent authority for the control of concentrations. On assessing a report prepared by its civil service (the Service), the CPC declares that a concentration is compatible or incompatible with the functioning of competition in the market.

II YEAR IN REVIEW

A number of important issues have been considered by the CPC over the past year, which have shed more light on its decision-making practice.

Specifically, the CPC dealt with the first non-performing loans servicing transaction in Cyprus, which essentially created the relevant market. In the *APS/Hellenic Bank* case,[2] the CPC defined the relevant product market as being (1) the management of immovable property acquired by credit institutions through enforcement proceedings or payment of credit rights derived from mortgages and (2) the management of non-performing loans granted by credit institutions or other persons.

In the *VLPG* case,[3] in which the CPC carried out a full investigation, clearance was granted subject to commitments by the undertakings concerned. The case concerned the creation of a joint venture by Hellenic Petroleum Cyprus Ltd, Petrolina (Holdings) Public Ltd, Intergaz Ltd and Synergkaz Ltd, in which the said undertakings shifted part of their activities relating to the storage and handling of liquefied petroleum gas to the joint venture. The joint venture was held to potentially have the ability and motivation to exploit its dominant

1 Anastasios A Antoniou and Christina McCollum are partners at Antoniou McCollum & Co. This chapter is based on the Cyprus chapter published in GTDT Merger Control 2017.

2 CPC Decision No. 19/2017, *APS Holding AS/Hellenic Bank Public Company Ltd*, 18 May 2017.

3 CPC Decision No. 35/2017, *Hellenic Petroleum Cyprus Ltd, Petrolina (Holdings) Public Ltd, Intergaz Ltd and Synergkaz Ltd*, 27 July 2017.

position and to hinder the expansion of other companies and potential competitors. The CPC also highlighted the potential for significant obstruction of competition as a result of the creation of the joint venture's dominant position.

The transaction was cleared subject to a number of remedies, including the exclusion of members of the boards of the parent undertakings from sitting on the board of the joint venture, confidentiality undertakings by the joint venture in relation to the parent undertakings, the appointment of a trustee and the introduction of criteria for the assessment of storage capacity requests from third parties, together with providing any new entrant that constructs LPG storage facilities in the area, access to the anchor and unloading pipes, to the extent that it will be under the control of the joint venture.

III THE MERGER CONTROL REGIME

i Ambit

Transactions that result in a permanent change of control and satisfy the jurisdictional thresholds fall under the ambit of the Law. Pursuant to Section 6(2) of the Law, 'control' is defined as control stemming from any rights, agreements or other means which, either severally or jointly, confer the possibility of exercising decisive influence over an undertaking through:

a ownership or enjoyment rights over the whole or part of the assets of the undertaking; or

b rights or contracts that confer the possibility of decisive influence on the composition, meetings or decisions of the bodies of an undertaking.

As such, the Law applies to mergers of two previously independent undertakings or parts thereof, and acquisitions by one or more persons already controlling at least one undertaking, or by one or more undertakings, directly or indirectly, whether by purchase of securities or assets, by agreement or otherwise, of control of one or more other undertakings.

Joint ventures performing all functions of an autonomous economic entity in a permanent manner are caught under the Law.

ii Thresholds

For the purposes of the Law, a concentration of undertakings is deemed to be of major importance and therefore meets the jurisdictional thresholds if:

a the aggregate turnover achieved by at least two of the undertakings concerned exceeds, in relation to each one of them, €3.5 million;

b at least two of the undertakings concerned achieve a turnover in Cyprus; and

c at least €3.5 million of the aggregate turnover of all undertakings concerned is achieved in Cyprus.

Foreign-to-foreign mergers are caught under the Law. The test as to whether a foreign-to-foreign merger is caught as a concentration of major importance is satisfied where the jurisdictional thresholds are met, with the local effects dimension being the achievement of a turnover of at least two undertakings concerned in Cyprus and the Cyprus-achieved turnover of all undertakings concerned being at least €3.5 million.

The Law vests the Minister of Energy, Commerce, Industry and Tourism with the power to declare a concentration as being of major importance even where the thresholds are not met.

iii Filing

Filing of concentrations of major importance is mandatory. However, notification is not required in the following cases where, pursuant to Section 6(4)(a) of the Law, a concentration between undertakings is not deemed to arise:

a where 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 undertaking 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 undertaking or provided that it exercises such voting rights only with a view to facilitating the disposal of all or part of that undertaking 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 – a period that can be extended by the CPC on request, where it can be shown that the disposal was not reasonably possible within the period set;

b where control is exercised by a person authorised under legislation relating to liquidation, bankruptcy or any other similar procedure;

c where the concentration of undertakings between one or more persons already controlling at least one or more undertakings is carried out by investment companies;

d where property is transferred due to death by a will or by intestate devolution; or

e where it is a concentration between two or more undertakings, each of which is a subsidiary undertaking of the same entity.

Notification can also take place where the undertakings concerned prove to the Service their *bona fide* intention to conclude an agreement or, in the case of a takeover offer or of an offer for the acquisition of a controlling interest, following a public announcement of an intention or final decision to make such offer.

Concentrations of major importance must be notified to the Service in writing, either jointly or separately by the undertakings participating in a merger or in the joint acquisition of control of another undertaking. In all other cases, the party responsible for notification is the undertaking acquiring control.

Filing fees are fixed by the Law at €1,000. Where a concentration becomes subject to a full investigation (Phase II), the undertakings concerned are required to pay a fee of €6,000 to the CPC.

iv Timetable

Concentrations of major importance must be notified to the Service prior to their implementation, following the conclusion of the relevant agreement or the publication of the relevant takeover or the acquisition of a controlling interest.

The Service shall, within one month from the date of receipt of the notification and the filing fees or from the date on which the Service receives additional information necessary

towards achieving conformity of the notification to the requirements of the Law, inform the notifying undertakings regarding the decision of the CPC of whether the concentration is cleared or whether it will proceed to a full investigation of the concentration.

If, owing to the volume of work or the complexity of the information contained in the notification, the Service is unable to comply with the aforementioned time frame, it shall, within seven days prior to the lapse of the one-month period, inform the notifying undertaking of an extension to the said period by a further period of 14 days.

The Law does not provide for a fast-track procedure of clearance of concentrations.

The Law expressly prohibits the partial or entire implementation of the concentration prior to clearance, infringement of which prohibition entails administrative fines.

Upon becoming aware of a concentration of major importance that ought to be notified but the undertakings concerned have failed to do so, the Service immediately notifies the undertakings concerned of their obligation to proceed with notifying such concentration in accordance with the provisions of the Law. The time limit for the assessment of the concentration would then commence at the time of the Service receiving such notification.

v Sanctions

Although failure to notify a concentration does not by itself give rise to sanctions, where the concentration has been partially or entirely implemented in the absence of clearance by the CPC, administrative fines may be imposed.

The CPC has the power to order the partial or total dissolution of a concentration of major importance in order to secure the restoration of the functioning of competition in the market, provided that the requirements of the Law are met.

Where a concentration is either partially or entirely implemented prior to the clearance by the CPC or prior to the lapse of the time frame within which the Service ought to inform the notifying undertaking of whether the concentration is cleared or is to be fully investigated but the Service has not so informed, administrative sanctions may be imposed by the CPC.

An administrative fine of up to 10 per cent of the aggregate turnover achieved by the notifying undertaking during the immediately preceding financial year may be imposed on the notifying undertaking for the aforementioned infringement, which may be followed by additional administrative fines of €8,000 for each day the infringement persists.

There have been no cases where the undertakings concerned implemented a concentration prior to clearance by the CPC under the new regime. Nevertheless, taking into account the approach followed under the previous framework, the CPC is likely to exercise its powers in relation to the implementation of concentrations in violation of the statutory provisions in a rigorous manner.

Moreover, the CPC has the power to order the partial or total dissolution of a concentration that has been implemented prior to obtaining clearance by the CPC.

Implementation of a concentration prior to clearance is not possible unless the Service fails to inform the notifying undertaking of whether the concentration is cleared or whether a Phase II investigation will be carried out within one month, in which case the concentration is deemed as cleared.

Nevertheless, a temporary approval of a concentration is possible pursuant to the provisions of Section 31 of the Law, in the case where a full (Phase II) investigation is deemed to be required by the CPC, where the undertakings concerned can establish, upon a relevant application to the CPC, that they shall suffer substantial damage as a result of any additional

delay to the concentration. Such temporary approval may be accompanied by conditions imposed on the undertakings decided at the CPC's discretion and it does not affect the final decision of the CPC.

A fine of up to €50,000 may be imposed for a failure to provide requested information or clarifications, or for providing misleading or inaccurate information.

vi Substantive assessment

The substantive test for compatibility of a concentration with competition in the market is that such concentration does not significantly impede effective competition in Cyprus or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

In assessing the compatibility of a concentration, there are no special circumstances that would be taken into account. The CPC takes into consideration the following criteria:

a the need to maintain and develop conditions of effective competition in the relevant markets, taking into account, *inter alia*, the structure of the affected markets, other markets upon which the concentration may have significant effects and the potential competition on behalf of undertakings within or outside Cyprus;

b the position in the market of the undertakings concerned and undertakings connected to it in a manner prescribed under Annex II to the Law;

c the financial power of such undertakings;

d the alternative sources of supply of products or services in the affected markets or other markets upon which the concentration may have significant effects;

e any barriers to entry to the affected markets or other markets upon which the concentration may have significant effects;

f the interests of the intermediate and end consumers of the relevant products and services;

g the contribution to technical and economic progress and the possibility of such contribution being in the interest of consumers and not obstructing competition; and

h the supply and demand trends for the relevant markets.

To the extent a joint venture that constitutes a concentration has as its object or effect the coordination of competitive conduct of undertakings that remain independent, this coordination is examined in accordance with the provisions of Sections 3 and 4 of the Protection of Competition Law No. 13(I) of 2008, as amended by Law No. 4(I) of 2014.

In assessing a joint venture, the Service shall particularly take into account:

a whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market that is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market; and

b whether the coordination that directly emanates from the creation of the joint venture provides the undertakings concerned the ability to eliminate competition for a substantial part of the relevant products or services.

The European Court of Justice (ECJ) ruled in *Austria Asphalt*[4] that when there is a change in the type of control over an existing undertaking from sole to joint control, the criterion of

4 Case C-248/16, *Austria Asphalt GmbH & Co OG v. Bundeskartellanwalt*, Judgment of 7 September 2017, ECLI:EU:C:2017:643.

a concentration within the meaning of the EU Merger Regulation (EUMR) is only fulfilled when the arising joint venture performs on a lasting basis all the functions of an autonomous economic entity. The said judgment of the ECJ has been adopted in the CPC's practice.

vii Remedies and ancillary restraints

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, the CPC has wide investigative powers when assessing a concentration, including access to any premises, property, means of transport, books or records in the possession of the undertakings concerned or third parties.

In declaring a concentration compatible with the operation of competition in the market, the CPC may impose conditions or remedies in relation to the implementation of the transaction, thus having the ability to interfere with the essence of the transaction.

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:

a its initial decision was based on false or misleading information or that necessary information relating to the concentration at hand was withheld by the notifying party or by any other undertaking concerned or by any interested person; or

b 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 partial or complete dissolution of the concentration to secure the restoration of the competitive market. It may do this either in the course of exercising its powers of revocation of a previous decision of clearing a concentration or upon establishing that a concentration has been implemented in violation of an obligation to notify such concentration to the CPC or is duly notified but implemented prior to clearance by the CPC. The CPC also has the power to prohibit a concentration by declaring it incompatible with the operation of competition in the market.

Competition issues can be remedied through the CPC exercising its discretionary power. In the course of remedying competition issues, the CPC may order the dissolution or partial dissolution of the concentration concerned in order to secure the restoration of the functioning of competition in the market, through the deprivation of any participation, shares, assets or rights acquired by any person participating in the concentration, or by the cancellation of any contracts that created the concentration or that arose from it, or by a combination of the two, or any other way the CPC deems necessary.

If 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 as well as other entities involved in the specific sector for the purpose of completing its investigation. The Service also notifies the participants that they may make suggestions to undertake remedies that will remove the CPC's concerns regarding the compatibility of the transaction within the time limit defined by the Service.

The CPC accepts both divestiture and behaviour remedies. If, following its review of the additional information provided to it, the CPC's doubts as to compatibility remain,

the Service will commence negotiations with the participating undertakings if it finds any differentiations or modifications in the circumstances under which the concentration was established that could result in the removal of such doubts.

The CPC is required to provide written notification to the undertakings concerned of any remedies as part of its decision, which it is bound to issue within four months from the date of receiving the notification of the concentration and payment of the filing fees. Should the merger be cross-border, the CPC may liaise with the relevant foreign authority in relation to applicable remedies. Any remedies must be limited to those that are reasonably necessary for the protection of the competitive market.

viii Involvement of other parties or authorities

Parties having a legitimate interest may be invited to comment, but only in the event of a full investigation. Parties having a legitimate interest may on a voluntary basis submit views at any phase of the evaluation of a concentration or they may be asked to supply information by the Service of the CPC. In the case of a full investigation, 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 at the second phase of the investigation.

The undertakings concerned may request that any part of the decision remains confidential and the CPC will decide whether such information should be treated as confidential. The party to which the CPC addresses a written request for information should identify documents, statements and any material it considers to contain confidential information or business secrets, justifying its opinion, and provide a separate, non-confidential version within the time limit set by the CPC for the notification of its opinion.

The CPC and the Service are under a statutory duty of confidentiality, infringement of which is a criminal offence punishable with imprisonment of up to six months or a fine of up to €1,500 or both.

ix Judicial review

The decisions of the CPC are administrative executive acts issued by a public authority. As such, an aggrieved party having legitimate interest and seeking to annul a CPC decision has the right to file for administrative recourse to the Administrative Courts under Article 146 of the Constitution of the Republic of Cyprus.

IV OTHER STRATEGIC CONSIDERATIONS

A regular misconception about the Cypriot merger control regime is that a strong local market nexus is required to trigger a filing. The only test determining whether a foreign-to-foreign merger is caught as a concentration of major importance is the jurisdictional threshold test. The local effects dimension is the achievement of a turnover of at least two undertakings concerned in Cyprus and the Cyprus-achieved turnover of all undertakings concerned being at least €3.5 million.

Cyprus is increasingly on the radar of transacting parties and their counsel, given the relatively low thresholds that are easily met across a range of different types of transactions even where the transaction is entirely unrelated to Cyprus.

Global transactions are increasingly assessed as to whether they require filing and clearance in Cyprus, particularly given the level of sanctions that the CPC is able to impose, as well as the CPC's power to order the partial or total dissolution of a concentration that has been implemented prior to obtaining clearance.

The CPC cooperates with other national competition authorities in the EU and the European Commission on the basis of the system of parallel competences and the exchange of views and information between them via the European Competition Network. It is, therefore, inevitable that transactions filed in other EU member states are visible to the CPC.

V OUTLOOK & CONCLUSIONS

An issue that has preoccupied the CPC on more than one occasion is the exchange of information in joint ventures in cases where directors are appointed on the joint venture's management body by the parent undertakings. This has proved to be an issue where the CPC is keen to explore commitments from the parties.

The CPC is demonstrating increased activity and filings are on the rise. Phase II investigations are also becoming more regular, particularly in respect of local transactions between dominant market players.

Appendix 1

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Anastasios A Antoniou is an advocate of the Supreme Court of Cyprus. He established his law practice in 2009, having qualified and practised at a major Limassol law firm. Prior to co-founding Antoniou McCollum & Co., he was the Cyprus law leader of an international law practice. He holds graduate and research degrees in law from Kingston University and the London School of Economics. He is a member of the European Competition Lawyers Forum.

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