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## Merger Control in Cyprus

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### **Trends and climate**

#### *Trends*

#### **How would you describe the current merger control climate, including any trends in particular industry sectors?**

The relatively low jurisdictional thresholds of the Cypriot merger control framework result in a substantial number of foreign-to-foreign mergers, acquisitions and joint ventures being required to file in Cyprus.

Transacting parties are also increasingly becoming aware of the high levels of administrative fines that the Cypriot Commission for the Protection of Competition can impose for gun-jumping and other infringements under Cyprus merger control law.

At the same time, the economic growth of Cyprus and the rise in foreign investment, have resulted in a number of acquisitions and joint ventures and have contributed to an increase in merger control activity.

#### *Reform*

#### **Are there any proposals to reform or amend the existing merger control regime?**

An overhaul to Cyprus's merger control regime took place in 2014 through the enactment of the Control of Concentrations between Undertakings Law (83(I)/2014). Following the 2014 reform, the Cypriot merger control regime is considered fully updated.

### **Legislation, triggers and thresholds**

#### *Legislation and authority*

#### **What legislation applies to the control of mergers?**

The Control of Concentrations between Undertakings Law (L 83(I)/2014) regulates the control of concentrations in Cyprus.

#### **What is the relevant authority?**

Enforcement of the applicable legislation rests with the Commission for the Protection of Competition (CPC).

The CPC is responsible for implementing the Control of Concentrations between Undertakings Law and is the competent independent authority for the control of concentrations.

#### *Transactions caught and thresholds*

#### **Under what circumstances is a transaction caught by the legislation?**

The Control of Concentrations between Undertakings Law applies to transactions that result in a permanent change of control and meet the applicable thresholds, including:

- mergers of two previously independent undertakings or parts thereof; and
- direct or indirect acquisitions by one or more persons already controlling at least one undertaking (or by one or more undertakings) over one or more other undertakings, whether by purchasing securities or assets, agreements or otherwise.

Joint ventures performing all functions of an autonomous economic entity in a permanent manner also fall under the law.

### **Do thresholds apply to determine when a transaction is caught by the legislation?**

Only concentrations of major importance must be notified to the Commission for the Protection of Competition. For the purposes of the law, a concentration of undertakings is deemed to be of major importance and thus meet the jurisdictional thresholds if:

- the aggregate worldwide turnover achieved by at least two of the undertakings concerned (in relation to each undertaking and taking the groups to which they belong into account) exceeds €3.5 million;
- at least two of the undertakings concerned achieve a turnover in Cyprus; and
- at least €3.5 million of the aggregate turnover of all undertakings concerned is achieved in Cyprus.

### *Informed guidance*

### **Is it possible to seek informal guidance from the authority on a possible merger from either a jurisdictional or a substantive perspective?**

No procedure for seeking informal guidance is provided under the applicable legislation.

### *Foreign-to-foreign*

### **Are foreign-to-foreign mergers caught by the regime? Is a ‘local impact’ test applicable under the legislation?**

Foreign-to-foreign mergers are not treated differently to local concentrations. Mergers, acquisitions and fully functional joint ventures will be caught as long as the jurisdictional thresholds are met, without additional local nexus requirements.

In relation to ‘local impact’, the thresholds require at least two of the undertakings concerned must achieve a turnover in Cyprus and the Cyprus-achieved turnover of all undertakings concerned must be at least €3.5 million.

### *Joint ventures*

### **What types of joint venture are caught by the legislation?**

Joint ventures that perform all functions of an autonomous economic entity in a permanent manner are caught by the applicable legislation.

In alignment with the European Court of Justice judgment (Case C-248/16, 7 September 2017) *Austria Asphalt GmbH & Co OG v Bundeskartellamt*, Cyprus law requires that a joint venture perform on a lasting basis all the functions of an autonomous economic entity for it to be considered a concentration.

A joint venture that is genuinely fully functional must be able to operate independently of its parents in an identifiable market. In order to do so, the joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff and assets (tangible and intangible) to be able to conduct its business activities on a lasting basis.

## **Notification**

### *Process and timing*

#### **Is the notification process voluntary or mandatory?**

Concentrations of major importance must be filed. However, notification is not required in the following cases as, pursuant to Section 6(4)(a) of the Control of Concentrations between Undertakings Law, a concentration is not deemed to arise:

- A credit or financial institution or an insurer whose normal activities include transactions and dealing in securities on its own account or on behalf of third parties temporarily holds 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 voting rights only in order to facilitate the disposal of all or part of the undertaking, its assets or the securities; and
  - any such disposal takes place within one year of the date of acquisition – a period which can be extended with the leave of the CPC.
- Control is exercised by a person authorised under the legislation relating to liquidation, bankruptcy or similar procedures.
- Investment companies carry out the concentration of undertakings between one or more persons already controlling at least one or more undertakings.
- Property is transferred due to death by a will or intestate devolution.
- The concentration is between two or more undertakings, each of which is a subsidiary of the same entity.

#### **What timing requirements apply when filing a notification?**

Although no deadline exists for filing a notification of a concentration of major importance, concentrations must be notified before their implementation, following the conclusion of the relevant agreement or the publication of the takeover or acquisition of a controlling interest.

Notification can take place before the conclusion of the act giving rise to the concentration, as long as the undertakings concerned have provided the Commission for the Protection of Competition with their good-faith intention:

- to conclude an agreement; or
  - make an offer for a takeover or the acquisition of a controlling interest, following a public announcement of the intention or final decision to make such offer.

#### **What form should the notification take? What content is required?**

The notification of a concentration of major importance should include the information prescribed in the law. The notification must be made in Greek and be accompanied by various supporting documents and other information which can be in English, including:

- a copy of all 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 of the undertakings 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 analyses, reports, studies and surveys that were prepared by or for any of the persons responsible for the notification, in order to evaluate or analyse the proposed concentration in relation to the market and competition conditions;
- details of the concentration (eg, the nature and scope of the concentration, the financial and structural details of the concentration and each undertaking's turnover in Cyprus and worldwide);
- details of relationships of ownership and control between each participant in the concentration and the undertakings to which they are connected;
- personal and economic ties between each group of undertakings and any other undertaking operating within the affected market in which the group holds, among other things, at least 10% of the voting rights or shares; and
- a description and analysis of the affected relevant markets.

**Is there a pre-notification process before formal notification, and if so, what does this involve?**

No pre-notification process exists under applicable law.

*Pre-clearance implementation*

**Can a merger be implemented before clearance is obtained?**

The Control of Concentrations between Undertakings Law expressly prohibits the partial or entire implementation of a concentration before clearance. Failure to clear a merger will result in administrative fines. In addition, the Commission for the Protection of Competition (CPC) can partially or wholly dissolve a concentration of major importance which has been implemented in violation of the undertakings' obligation to notify the CPC of the concentration.

Where a notification is subject to a full investigation (Phase II), the undertakings concerned may apply to the CPC for temporary approval of the concentration, provided that the conditions laid down by the law are satisfied.

*Guidance from authorities*

**What guidance is available from the authorities?**

The Commission for the Protection of Competition (CPC) can be contacted for guidance regarding the application of the merger control legislation. However, no part of the guidance, where provided, is binding on or can prejudice the CPC in its assessment of a notified concentration.

*Fees*

**What fees are payable to the authority for filing a notification?**

Filing fees are fixed at €1,000. Where a concentration becomes subject to a full investigation (Phase II), the undertakings concerned must pay a €6,000 fee to the Commission for the Protection of Competition.

## *Publicity and confidentiality*

### **What provisions apply regarding publicity and confidentiality?**

The Commission for the Protection of Competition (CPC) will publish a description of all notifications in the Cyprus *Official Gazette* and on its website, indicating:

- the names of the participants;
- the nature of the concentration; and
- the economic sectors involved.

In so doing, the CPC will consider the legitimate interests of the affected undertakings and the protection of their business secrets, as far as possible. The CPC will also publish a non-confidential version of its decision in the *Official Gazette* and on its website. Undertakings may request that any part of the decision remain confidential and the CPC will decide whether the information should be treated as such.

The CPC, its board members and civil servants are all under a statutory duty of confidentiality. Pursuant to Section 48 of the Control of Concentrations between Undertakings Law, any person contravening the duty of confidentiality commits an offence punishable by up to six months' imprisonment, a fine up to €1,500 or both.

Participants should indicate which information is confidential in their notification.

## *Penalties*

### **Are there any penalties for failing to notify a merger?**

A concentration of major importance cannot be implemented unless previously notified to and cleared by the CPC.

The CPC may impose administrative penalties on undertakings if a concentration of major importance is partially or entirely implemented before receiving CPC clearance (gun jumping)..

An administrative fine of up to 10% of the aggregate turnover achieved by the notifying undertaking during the preceding financial year may be imposed for infringement. Additional administrative fines of €8,000 for each day that the infringement persists may also be applied.

## **Procedure and test**

### *Procedure and timetable*

### **What procedures are followed by the authority? What is the timetable for the merger investigation?**

The Commission for the Protection of Competition (CPC) must inform the undertakings of its decision regarding whether a concentration is cleared or requires a full investigation within one month of receipt of the notification and filing fees or the date on which it receives the additional information necessary to meet the requirements outlined in the Control of Concentrations between Undertakings Law.

If, owing to the volume of work or the complexity of the information contained in the notification, the CPC cannot meet the aforementioned timeline, it must inform the undertaking that its investigation will be extended by 14 days within seven days of the one-month period elapsing.

The Control of Concentrations between Undertakings Law (83(I)/2014)) prohibits the partial or entire implementation of a concentration before clearance. Failure to comply with this requirement can result in administrative fines and the dissolution of the transaction.

### **What obligations are imposed on the parties during the process?**

Undertakings are prohibited from partially or wholly implementing a concentration without clearance from the Commission for the Protection of Competition.

### **What role can third parties play in the process?**

When the Commission for the Protection of Competition (CPC) fully investigates a concentration (Phase II), third parties which may be directly affected by the concentration can apply in writing to the CPC in order to be heard. In addition, before reaching a decision on a concentration, the CPC can enter into discussions with interested parties or request their attendance during hearings.

Non-participating parties with a legitimate interest in a concentration and which may be directly affected by the concentration can be heard by the CPC. They will also be given access to non-confidential documents in the context of the investigation.

### *Substantive test*

### **What is the substantive test applied by the authority?**

The substantive test for determining the compatibility of a concentration with competition in the market is whether the concentration substantially hinders competition in Cyprus, particularly as a result of the creation or strengthening of a dominant position.

In assessing the compatibility of a concentration, the Commission for the Protection of Competition will consider the following criteria:

- the need to maintain and develop effective competition in the relevant markets, considering the structure of the affected markets, other markets in which the concentration may have significant effects and the potential effect on competition on behalf of undertakings within and outside Cyprus;
- the position of the undertakings concerned and connected to the concentration in the market, as outlined in Annex II to the Control of Concentrations between Undertakings Law;
- the financial power of the undertakings;
- alternative sources of products or services in the affected markets and other markets in which the concentration may have significant effects;
- any entry barriers into the affected markets and other markets in which the concentration may have significant effects;
- the interests of intermediate and end consumers of the relevant products and services;
- the contribution to technical and economic progress and the possibility that the contribution will be in consumers' interests and not hinder competition; and
- supply and demand trends in the relevant markets.

### *Carve-outs*

### **Does the legislation allow carve-out agreements in order to avoid delaying the global closing?**

No.

### *Test for joint ventures*

### **Is a special substantive test applied for joint ventures?**

The extent to which a joint venture that constitutes a concentration seeks to coordinate the competitive conduct of independent undertakings will be examined according to applicable competition law. In assessing a joint venture, the Commission for the Protection of Competition will consider whether:

- two or more parent companies substantially carry out activities in the same, similar, next-level or closely linked markets to that of the joint venture; and
- the coordination that directly emanates from the creation of the joint venture enables the undertakings concerned to eliminate competition in a large part of the relevant product or service.

## **Remedies**

### *Potential outcomes*

#### **What are the potential outcomes of the merger investigation?**

After assessing a notified concentration, the Commission for the Protection of Competition (CPC) will decide as follows:

- The notified transaction does not fall within the ambit of the Control of Concentrations between Undertakings Law.
- The concentration is cleared and considered compatible with the operations of the competitive market.
- A full Phase II investigation of the concentration is required.

Within the context of a Phase II investigation, the CPC will notify the undertakings that they may proceed with modifications to the concentration. Further, the undertakings may suggest additional commitments in order to remove any doubts as to the compatibility of the concentration within the competitive market.

Following further investigation and suggestions, if the CPC's doubts regarding the compatibility of the concentration are not satisfactorily addressed, it will consider which of the circumstances causing its concerns may be removed, and will make suggestions and negotiate with the parties in order to resolve the outstanding issues.

After reviewing a report, the CPC may declare that the concentration is compatible with the requirements of the competitive markets, subject to any specific terms and commitments made by the relevant participants. Typically, the structure of the transaction is amended or the undertakings offer commitments and remedies (eg, divestments).

## **Appeals**

### *Right of appeal*

#### **Is there a right of appeal?**

Commission for the Protection of Competition (CPC) decisions are administrative executive acts issued by a public authority. As such, an aggrieved party with a legitimate interest that seeks to annul a CPC decision can file for administrative recourse with the competent Administrative Court under Article 146 of the Constitution.

#### **Do third parties have a right of appeal?**

An aggrieved party with a legitimate interest can seek to annul a Commission for the Protection of Competition (CPC) decision. It would be exceptional under Cyprus law for a party other than the undertakings concerned to evidence a legitimate interest and thus be allowed to appeal a CPC decision.

### *Time limit*

## **What is the time limit for any appeal?**

Aggrieved parties must file recourses against CPC decisions within 75 days of receipt of the Commission for the Protection of Competition's final decision or publication of the decision in the *Official Gazette*.

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